

Gordon Herbert  
Track Access  
Office of Rail Regulation  
1 Kemble Street,  
London WC2B 4AN

DB Schenker Rail (UK) Ltd  
2nd Floor McBeath House  
310 Goswell Road  
London EC1V 7LW

Nigel Oatway  
Access Manager

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Dear Gordon,

## CONNECTION CONTRACTS: CONSULTATION ON THE MODEL CONNECTION CONTRACT AND GENERAL APPROVAL

This letter contains the response from DB Schenker Rail (UK) Limited ("DB Schenker") to the consultation entitled "*Connection Contracts: Consultation on the Model Connection Contract and General Approval*" issued by ORR in October 2013.

### Introductory Remarks

1.1. DB Schenker owns and operates a large number of rail facilities, the vast majority of which are connected to the national network by means of connection agreements with Network Rail. It also holds connection agreements with many different third parties both in the capacity of beneficiary and grantor, the bulk of which are based on the Model Connection Contract ('MCC').

1.2. With this in mind, DB Schenker has gained extensive knowledge and experience of the process of obtaining a connection agreement from the initial discussion/negotiation with the relevant third party through to receiving final approval by ORR. There is no doubt in DB Schenker's view that the introduction firstly of the MCC in 2005 followed by the General Approval ("GA") in 2009 has significantly streamlined the process thereby reducing the amount of time and effort spent in obtaining valid connection agreements and ensuring that standard terms and conditions are adopted as far as is possible.

1.3. DB Schenker is, therefore, pleased to participate in this consultation by ORR which will hopefully result in streamlining the process yet further by updating the MCC and GA as appropriate.

### ORR's Specific Questions

*01: Is the default interest rate set at an appropriate level? If not, what should it be and why?*

2.1. DB Schenker considers that the default interest rate in the MCC should remain set at 2% above the Barclays Bank lending rate. This would then continue to reflect the default interest rate currently specified in the model track access contract which DB Schenker believes has not been proposed for change in respect of Network Rail's Control Period 5.

2.2. As mentioned in paragraph 2.15 of the consultation document, ORR reviewed the default interest rate during 2009 in connection with a facility access application at the Port of Immingham. DB Schenker understands that as part of this review, ORR sought separate and independent legal advice which reported that, notwithstanding the Legislation 'Late Payment of Commercial Debts (Interest) Act 1998', current commercial contracts continue to stipulate a range of between two and three percent above the base lending rate for default rates of interest for similar types of agreement.

2.3. Unless there is sufficient evidence to suggest that this position has changed, then DB Schenker sees no reason why the default interest rate should be altered in the MCC. In any case the default interest rate is only applicable in cases where invoices are not settled in accordance with the payment terms specified in the MCC and, therefore, should also act as some deterrent for not paying on time.

*02: Does the definition of initial condition statement need to be improved? If so, how and why?*

2.4. DB Schenker considers that the definition of 'Initial Condition Statement' ("ICS") is clear and fit for purpose. However, DB Schenker is concerned that the expression of the 'Initial Condition Statement' in Schedule 1 of the MCC is often incomplete and inadequately detailed. DB Schenker suggests that some additional explanation in ORR's Guidance Notes of the information that should be included in the ICS would be helpful.

*03: Do you agree with Network Rail's proposed standard formula for use in Schedule 3?*

2.5. DB Schenker does not agree that the proposed standard formula is suitable for inclusion as the default formula in Schedule 3. Network Rail revises, as a matter of course, its unit costs on an annual basis in accordance with the efficiency targets laid down in the ORR's determination for each Control Period. DB Schenker assumes that the inclusion of the 1% reduction on RPI in the proposed standard formula is meant to act as a proxy for this efficiency target.

2.6. However, DB Schenker understands that Network Rail's relevant efficiency target has been set within the range 3.0% to 5.3% for both CP3 and CP4, and is set to continue at a level no less than 3.3% for CPS. Therefore, DB Schenker considers that the proposed level will not likely reflect the actual target in any given year and will consequently be subject to constant revision. Terms that require constant revision should not be included in the MCC in DB Schenker's view.

2.7. Instead, DB Schenker suggests that the '0.01' in the formula should be replaced with '[x]' where x equals Network Rail's relevant annual efficiency target. DB Schenker believes that this would then be consistent with Network Rail's current costing

methodology, as demonstrated by its annual revision of its matrix costing tool used to calculate the costs of individual connections.

*Q4: Do you have any comments on the proposed new clauses and Schedules?*

2.8. DB Schenker is content with the vast majority of the proposed changes but wishes to raise the following remarks in respect of the specific changes.

2.9. *Termination*- DB Schenker supports the changes ORR proposes to make to the termination provisions to avoid the possibility of two connection agreements applying to the same connection at the same time. DB Schenker also agrees that under specific circumstances (e.g. protection of long term investment) the standard three month termination period may not be appropriate and it should therefore be possible for the parties to agree a bespoke amendment to increase (or conceivably decrease) the notice period subject of course to the specific approval of ORR.

2.10. *Dispute Resolution*- DB Schenker supports the amendments to the MCC to incorporate the new ADRR.

2.11. *Payment of Amount*- DB Schenker believes that the option to exclude or retain payment for renewals in the standard payment process would be a welcome development, recognising how the process of payment of connection charges has developed over the years. DB Schenker agrees that this should be capable of being customised according to circumstances, but suggests that the inclusion of alternative versions in the template would be helpful. DB Schenker suggests a further enhancement to Clause 15.1.2 of the MCC as follows: ".....If the parties cannot agree such costs, or the scope of the works required, the matter shall be considered a Relevant Dispute" (changes underlined). DB Schenker would also like to see Network Rail's standard matrix costing tool, which is used to calculate the costs of individual connections, incorporate an additional column to include itemised renewal costs.

2.12. *Variation of Amount*- DB Schenker agrees with ORR's view that Clause 16 already provides clarity of process and adequately covers all outcomes for the five-yearly review. However, Clause 16.3.2(g) sets out one criterion for adjusting the charges as being Network Rail's efficiency target determined by ORR for each Control Period. As noted in its answer to Question 3 above, DB Schenker believes that this requirement should be incorporated into the annual charge adjustment through a change to the formula specified in Schedule 3 of the MCC. This would ensure the charges for each year are automatically adjusted to reflect Network Rail's relevant efficiency target. If this change is made, Clause 16.3.2(g) could be removed from the MCC.

2.13. *Service of a notice*- DB Schenker supports ORR's proposal to include electronic transmission as a valid means of serving notices.

2.14. *The Plan* - DB Schenker is content with ORR's proposal to continue to allow the parties to develop the format of the Plan in each connection agreement as they see fit and not, for example, mandate the provision of a photographic record being included.

However, DB Schenker certainly concurs with ORR's expectation that the Plan in whatever format it is supplied must be clear and believes that the Plan should at least be in colour and contain a reference number and date of issue. Some Plans that DB Schenker has seen through the consultation process leave a lot to be desired in this respect.

*Q5: Is the range for which the liability cap can be generally approved - between £500,000 and £1,000,000- still appropriate? If not, please comment on what changes should be made and why.*

2.15. DB Schenker considers that the current liability cap range allowed for under the GA remains appropriate.

*Q6: Is the general approval ceiling of £20,000 still appropriate? If not, what should it be and why?*

2.16. Whilst DB Schenker would support the current general approval ceiling being updated for inflation since it was set in 2005, it considers that such ceiling should only apply to those connection agreements that are charged solely on the basis of the inspection, maintenance and repair costs. DB Schenker considers that connection agreements that incorporate a charge for future renewals should be subject to the ORR's specific approval given that the costs of renewals, which may not arise for many years, are a lot less certain than inspection, maintenance and repair costs that will arise on an ongoing basis.

*Q7: Do you have any comments on the proposed new connection contract application form (Form C)?*

2.17. It is DB Schenker's presumption that the comment relating to cost breakdown at the end of section 2.1 of Form C relates to the annual charge rather than the liability cap. If so, the sentence should be amended to read "*Please include a breakdown of costs with your application in the case of the former and the reasons why the liability range has been exceeded in the case of the latter*".

*Are there any other issues you would like to comment on?*

2.18. *Scotland*- The consultation document proposes that MCCs made under Scottish Law will need to be amended to reflect the differences in contract law north of the Border but that any such agreements could still be entered into pursuant to the GA provided only "kilting" changes were made. Instead, DB Schenker considers that it would be helpful if a Scottish version of the MCC was produced thus ensuring better uniformity of relevant terms and conditions across agreements relating to connections in Scotland.

2.19. *Definition of Adjacent Facility Owner*- DB Schenker considers that the proposed definition of 'Adjacent Facility Owner' in the MCC does not adequately encompass the definition of 'facility owner' set out in section 17(6) of the Railways Act 1993 ("the Act"). This is because the proposed definition uses the term 'owns' whereas the facility

owner may not 'own' the Adjacent Facility and could be appointed by management contract, for example. This is addressed in the Act by using the wording "*who has an estate or interest in, or right over*". DB Schenker suggests, therefore, that the definition of "Adjacent Facility Owner" could be amended to read "*means the person who owns or controls the Adjacent Facility and whose permission is needed to use that facility;*". This change would also be consistent in DB Schenker's view to the wording used in Recital A and the definition of "Premises".

2.20. *Payment of Amount*- DB Schenker considers that Clause 15.1.1 of the MCC should specifically state that charges are expected to be paid in arrears.

2.21. *Changes to the network*- DB Schenker understands that Adjacent Facility Owners, particularly those who are not also operators of trains, have no formal recourse or right of participation in Network Rail's Network Change process as set out in Part G of the Network Code. This is the case even if a particular Network Change proposal on the network may directly or indirectly materially affect the operation of trains to/from the Adjacent Facility or that facility's operation.

2.22. By way of example, an Adjacent Facility at the end of a 5 mile branch line will not necessarily have a right to be consulted if the access to the branch line (i.e. at the junction 5 miles distant from the Adjacent Facility) was being restricted permanently under Network Change to certain times of the day. However, such restriction may have a material consequential impact on the operation of the Adjacent Facility and of trains to/from that facility. Whilst relevant train operators will be consulted about the proposals under the Network Change process, the Adjacent Facility Owner will not, even though a connection contract constitutes an access contract under the Act.

2.23. Whilst it could be argued that Network Rail's obligations under Clause 5.2.1(b) and Clause 5.2.3(c) of the MCC are intended to take this issue into account, it is far from clear as the term "*impede access at the Connection Point*" (emphasis added) in Clause 5.2.3(c) could be interpreted as being related to changes that are happening adjacent to and in the vicinity of the connection itself and not remote changes that could be equally as detrimental. In any event there is no formal process that covers such consultation, equivalent to that set out in the Network Change process.

2.24. DB Schenker, therefore, believes that consideration should be given to how Adjacent Facility Owners can be given proper consultation of and afforded adequate protection from Network Change proposals on Network Rail's network that may have a material effect on the relevant Adjacent Facility.

2.25. *Definition of Connection Contract*- The definition of Connection Contract in the GA includes the words "and sets" on the second line that do not appear to make sense when taken into context with the other wording in the definition. There is also a missing opening bracket in the last line of the first paragraph of the definition which should be inserted before the word "and".

2.26. *Sub-paragraph 2(2)(b)*- DB Schenker queries whether the reference to the 2006 MCC should be updated to the 2014 MCC (when published) as it has been in sub-paragraph 2(1)(a).

2.27. *Paragraph 3*- DB Schenker queries whether there should also be a reference to paragraph 5 here in addition to paragraph 4.

2.28. *Paragraph 6*- DB Schenker queries whether there should also be a reference to paragraph 5 here in addition to paragraph 4.

*Impact assessment- how will these proposals affect you?*

2.29. DB Schenker concurs with ORR's view that the proposed changes will have an overall beneficial impact as set out in the impact assessment.

DB Schenker hopes that these comments are helpful.

Yours sincerely,



**Nigel Oatway**  
**Access Manager**