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Dear Gordon

CONNECTION AGREEMENT - RESPONSE TO CONSULTATION

This is the response of Freightliner Group Limited (representing Freightliner Limited, Freightliner Maintenance Limited and Freightliner Heavy Haul Limited) to the consultation on amending the model connection contract and replacing the associated general approval.

Freightliner has some comments on the consulted proposals and these are listed below. Where we are suggesting new or revised text this is shown in *italics*. Where we have not raised a particular issue then we have no comments on the ORR's proposals.

General approval

Freightliner supports the continuation of a general approval that reduces administrative burden on the industry.

Freightliner would support an increase to the current general approval limit of £20k to £50k or even more generally to all agreements that exclude a specified amount for renewals. We think that as a minimum the general approval ceiling should be adjusted to take into account inflation since 2005 and that it should be adjusted every year in line with inflation.

Under paragraph 5, regarding existing agreements, we suggest that any proposed amendment of an existing connection agreement to reduce the amount payable in maintenance (and renewals) costs should also fall under the general approval, regardless of whether the current amount payable exceeds the threshold stated in paragraph 2.(1)(b) of the general approval.

Model connection contract

Clause 8. - Termination

8.3.1 - it would be clearer if this paragraph stated "Any notice of termination served by Network Rail under Clause 8.2 shall not take effect if the Adjacent Facility Owner shall have applied to the Office of Rail Regulation *after the date of service of any notice of termination and before the date of that notice taking effect* under section 17 for directions to be given to"

Clause 15.1.1 - Payment

Paragraph 2.24 of the consultation refers to Network Rail's routine customisation of Clause 15.1.1. We agree with this customisation, as the existing wording of 15.1.1 (by reference to Clause 5.2) tends to imply that the "Amount" includes an annual payment for renewals, whereas in most cases

a customer will opt not to pay annually for renewals.

We therefore suggest that 15.1.1 should incorporate the optional wording in square brackets below

“.....in respect of the costs [*excluding renewals costs*] incurred by Network Rail in discharging...”

Clause 15.1.2 - renewals

We welcome this new clause but suggest the following amendments in italics:

“If the Amount excludes renewals costs then Network Rail shall inform the Adjacent Facility Owner.....”

“.....If the parties cannot agree such costs, or the scope of the works required, the matter shall be considered a Relevant Dispute....”

Clause 16 - variation of Amount

Freightliner is of the view that a 5 yearly review creates uncertainty of charges for the connected party, especially given the investment that the connected party may have had to make. We would suggest amending the review period to 10 years.

We are concerned in particular where major re-signalling projects or other major enhancement projects are undertaken (perhaps ERTMS in the future) where the existing connection equipment is fit for purpose but requires renewal solely because of the major enhancement to the adjacent route. This could have the impact of making a connection unviable for the connected party. In this situation we do not consider that the Adjacent Facility owner should have to bear the full costs of renewals to its connection or of any accelerated renewals due to the enhancement scheme.

We note that no specific suggested amendments are made to this clause. Freightliner suggests the following amendments to paragraph 16.3.2 List of Criteria:

(a) add “...assuming that these costs have been incurred in an efficient manner. The details of costs incurred will be provided to the Adjacent Facility Owner by Network Rail in a detailed and transparent manner. Only such costs that would not have occurred if the Adjacent Facility did not exist can be included. ”

add

(h) that charges should be broadly consistent with the charges raised for similar connected facilities at other locations

Schedule 1 - Initial condition statement

Freightliner is of the view that the initial condition statement should be as detailed as possible. We suggest that it should also include:

Condition of ground, earthworks and drainage, including any contamination or other known environmental risks (e.g. flooding)

In respect of each category of equipment we would expect Network Rail to provide a condition report, stating the approximate age of the equipment and when it was last renewed, an estimate of expected future renewal date, any known defects, obsolescence issues. It would be helpful if the ORR could issues some guidance notes on the information that should be included.

Schedule 3 : Adjustment Factor Formula

We note the proposal made by NR for RPI-1% in place of the current wording. This appears to be inconsistent with the efficiency targets that have been set on Network Rail for CP5 for maintenance and renewals elements of their costs. We are of the view that the charges should reflect the same % pro rata annual efficiency targets for the relevant categories for the relevant Control Period. As Network Rail move to a position where costs become more stable and efficiency gains are those of a normal efficient and mature business then this clause could be further reviewed.

We suggest that the '0.01' in the formula could be replaced with '[x]' where x equals the average yearly amount of Network Rail's relevant efficiency target over a 5 year Control Period.

Schedule 5 : liability cap

Given the relative ability to bear risk and business impact it would seem appropriate to consider asymmetric liability caps, that require higher for payments to the Adjacent Facility Owner and lower payments to Network Rail.

A connected party (who may only have 1 or a handful of connected sites) will have considerably less ability to bear a risk compared to Network Rail (who has 100s of connected sites and is able to spread the risk).

Given that the connection agreement is purely in respect of the connections and that any lease or liability as an adjacent land owner would be separate from the connection agreement, the ability for the connected party to impact on the network seems disproportionately lower than any impact on the connected party from failure of the network. A connected party could go out of business if they were disconnected from the rail network

We would therefore suggest that liability caps are set at a maximum of £250k payment to Network Rail and £5 million payment to the Adjacent Facility Owner.

Network Change

Currently, Freightliner 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.

Freightliner believes that consideration should be given to how Adjacent Facility Owners can be consulted with regarding Network Change proposals on Network Rail's network that may have a material effect on their connected site. This has come to light through discussion with some connected parties, and is a change that we would support.

Please contact me if you would like to further discuss any of the issues raised in this letter.

Yours sincerely



Lindsay Durham
Head of Rail Strategy