

CONNECTION CONTRACTS: CONSULTATION ON THE MODEL CONNECTION CONTRACT AND GENERAL APPROVAL - DRAFT RESPONSE BY W H MALCOLM LIMITED (WHM)

Question 1: Is the default interest rate set at an appropriate level? If not, what should it be and why?

There is benefit in having a long term industry standard relating to all rail industry contracts – one that is not adjusted to take account of short term market vagaries. Base Rate + 2% is standard in most contracts since rail privatisation. Some of our rail industry suppliers now insist upon base rate +3 / 4% in contracts. It is difficult to argue against such provisions filtering through to regulated agreements. A common industry standard would assist.

Question 2. Does the definition of initial condition statement need to be improved? If so, how and why?

Consider existing arrangement to be satisfactory.

Question 3: Do you agree with Network Rail's proposed standard formula for use in schedule 3?

Agree with the RPI – 1% formula for Network Rail sites where costs are based on a standard formula.

Question 4: Do you have any comments on the proposed new clauses and schedules?

Consider the added protection within 15.1.3.2 Emergency renewals - “responsibility and/or the amount” should also be in 15.1.3.1 for reasons of consistency.

There are overall issues in respect of how connection renewals are dealt with in respect of Network Rail sites occupied in terms of commercial leases. These are addressed as part of Question 8.

Variation of amount, Service of a notice and Plan

Your comments are supported.

Question 5: 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 and why.

Current figures should remain constant or increase in line with RPI.

A question related to consequential losses is asked later (condition 10.4). Confirmation / clarification of the position would be useful.

Question 6: Is the general approval ceiling of £20,000 still appropriate? If not what should it be and why?

The approval ceiling should be higher. Details of new connection agreements found on the Network Rail web-site indicates almost 1 in 5 are subject to checks. This seems excessive. No more than 5 – 10% should be subject to checks.

The introduction of the Network Rail charging formula in respect of connections has been a positive development. Publication of the formula on Network Rail's web-site would enable connected parties to check charging levels and provide confidence in a system where fewer agreements are checked.

Question 7: Do you have any comments on the proposed new connection contract application Form (Form C)?

Form C will be used by parties not necessarily familiar with rail industry practices. A hypothetical example of a completed form would be beneficial.

Question 8 – Are there any other issues you would like to comment on?

Yes, as follows:

REVIEW OF DRAFT CONNECTION CONTRACT TERMS

Part A – ‘Adjacent Facility Owner’

The party entering the Connection Contract is identified as the owner or controller of the premises and placed in the role of ‘Facility Owner’ of the facility concerned. The extent to which the responsibilities of the ‘Facility Owner’ are understood by those entering Connection Contracts is unclear. The publication of a guidance note explaining the role and responsibilities would assist.

Clause 5.2.1(a) and 5.2.2

Network Rail is entitled in emergency to temporarily sever the rail connection.

It is unclear if the Liability Cap applies to this situation and what compensation (if any) is payable by Network Rail. Can this be clarified?

Network Rail owned sites occupied by tenants in terms of commercial property leases often include termination provisions relating to failure to operate sufficient number of train services with no account taken of emergency disconnection. To ensure tenant’s cannot be in breach of their lease conditions as a result of temporary disconnection there should be a maximum period of, say, 1 week before the site must be re-connected. The period could be extended subject to compensatory arrangements.

Clause 5.2.3(f)

The responsibility to place and maintain markers at the Connection Point rests with Network Rail.

Propose this clause should be strengthened and include provisions relating to the following:

1. ensure the connection point is commonly agreed
 - avoid maintenance gaps at commencement
2. prevent later relocation of boundary plates without both parties agreement
 - avoid future maintenance gaps -particularly when there are infrastructure changes

Clause 7. RIGHT OF ENTRY

There is reference within 7.1 to Network Rail’s reserved right to modify the Connecting Network subject to 7.2. There is no reference to modifications in 7.2. Does Network Rail have sufficient rights to carry out modifications? Does this clause need strengthening?

In situations where modifications occur for the benefit of the main network, including complete relocation of connection point the contract template does not include any obvious means of changing the connection drawing, its condition, details of connecting infrastructure etc. How should this be dealt with? Is it the case that the connection charges are updated at the 5 year review to take

account of the changes? In such circumstances WHM considers the connection charges should never be higher than what would have been the case with the original infrastructure.

The terms relating to modifications are lacking in detail and clearer arrangements or a guidance note would assist.

Clause 8. TERMINATION

8.2 Notice to Terminate

Consider Network Rail should not be entitled to serve a termination notice if any of the following is the case:

- An access contract relating to the location concerned is in place with any party; or,
- A minimum of 4 train services (including Network Rail services) have visited the location in the preceding 12 months; or,
- The connected party has indicated an intention to re-commence services in the subsequent 2 years.

Welcome comment that termination period can be extended from 3 months. The termination clauses in commercial property leases granted by Network Rail to WHM of rail freight sites are different. A consistent approach shared by commercial property leases and connection contracts would be beneficial.

Clause 8.3.1. There is reference to Adjacent Facility Owner only applying to enter an access contract. This should be widened to include other beneficiaries using “open access” at the facility concerned.

8.4 Effect of Termination

The Adjacent Facility Owner is responsible for cost of disconnection. Option to remove this responsibility should be available in the following situations:

- (1) 3rd party rail connected sites on non-Network Rail networks
Owner leasing rail connected premises may wish to ensure property is still rail connected at lease / connection contract expiry.
- (2) Existing rail connected sites belonging to Network Rail leased to 3rd parties in terms of commercial property leases.
Unless the rental level and property lease terms clearly reflect this liability, the responsibility should be retained by Network Rail. They would have this responsibility without the tenant.

10.4 Restriction on Claims by both parties

Any claim for indemnity shall exclude Relevant Losses which “do not arise naturally from the breach” and “were not..... within the contemplation of the parties” when making this contract.

It is understood from this that Consequential Losses are excluded. Confirmation this understanding is correct would be appreciated.

11 GOVERNING LAW

If the connection is in Scotland, Scots law should be followed. A suitable template should be prepared.

15.1.2 Renewals

There is no option of making an annual renewals contribution – is this an omission or deliberate act?

The current treatment of renewals in respect of existing rail connected sites occupied by tenants in terms of commercial property leases is effective in limited circumstances.

Works well

1. Tenant occupies in terms of long term lease without Landlord break options
 - Tenant is incentivised to invest capital in the site
 - Tenant can budget for renewals over the long term
 - The available payment options all work well
 - Pay renewals annually
 - Pay renewals as and when they arise
 - Pay renewals over 5 year periods

Problems

2. Tenant occupies in terms of lease with Landlord break options, no compensation provisions related to capital investment should tenant lose site
 - Little incentive to invest capital in rail freight sites
 - Tenant cannot budget for connection renewals over long term due to lack of secure tenure
 - Only practical payment option is for tenant to pay renewals annually
 - Network owner (normally Network Rail) in practice has to maintain / re-new such connections even if the facility has no tenant – is this acceptable?
 - If connection is “moth-balled” during period when facility un-let there may be capital costs to bring connection back to necessary standard. Will this be covered through the annual renewals payments the network owner previously received?

Clarification of how renewals will be treated in the 2nd scenario would be helpful.

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