



OFFICE OF RAIL REGULATION

# Connection contracts consultation – conclusions

Conclusions of our consultation on the model  
connection contract and general approval

**April 2014**

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# 1. Executive summary

1.1 This document sets out the Office of Rail Regulation's (ORR's) conclusions on our consultation on a revised model connection contract (the model) and a new General Approval. Connection contracts cover the rights and obligations of the parties in respect of the ongoing maintenance of a connection between two rail networks. Typically the parties are Network Rail and train operators, terminal owners, heritage railways or other rail companies.

1.2 Connection contracts fall within the access provisions in the Railways Act 1993. Such agreements need to be approved by us before they can take effect. We first developed a model connection contract in 2005 and the General Approval in 2009. We started an industry consultation on updating them in October 2013. This document sets out the changes we have made.

1.3 The main changes include:

(a) Extending the scope of the General Approval so that it covers contracts where the:

(i) annual payment is not more than £50,000, an increase from £20,000; and

(ii) liabilities are over £500,000 but less than £1.3M, an increase from £1M.

(b) Updating the model so that:

(i) there is a standard method of indexation for reflecting inflation and Network Rail's efficiency targets;

(ii) renewal provisions may be incorporated within the contract where they are not accounted for as part of the annual payment;

(iii) it reflects updated dispute resolution procedures, as well as other necessary revisions; and

(iv) notice periods for termination may be increased beyond three months and notices may be delivered by email, if desired.

(c) The introduction of an application form for agreements not covered by the General Approval.

1.4 There is a separate model for contracts covered by the law in Scotland.

1.5 We are very grateful for all the responses received to this consultation. Our intention is that the new General Approval and revised model contracts will improve the way in which contracts are concluded. The model contracts should also be useful for other parties even where they propose to enter into a connection contract which is not covered by the General Approval.

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## 2. Introduction

### Purpose

2.1 This document sets out our conclusions on revisions to the model connection contract (the model) and General Approval to ensure that the documents remain fit for purpose and meet the needs of today's rail industry. Chapter 3 explains changes to the General Approval. Chapter 4 explains changes to the financial terms in the model contract. Chapter 5 explains other changes to the model contract. Chapter 6 explains certain provisions for applying for specific approval.

2.2 Our conclusions have been reached after consultation with the industry, which we started on 29 October 2013<sup>1</sup>. We received nine substantive comments, which we have posted on our website<sup>2</sup>. We also received two notifications of 'no comment'. We are grateful for the time and effort spent reading and responding to our consultation.

2.3 Alongside these conclusions, a revised model contract<sup>3</sup> and a new General Approval<sup>4</sup> will have effect from **17 April 2014**. Parties need not renegotiate or retrofit existing approved agreements, although they may of course update their agreements if they wish. Existing connection agreements covered by the previous General Approval may be updated using the new General Approval.

### Background

#### Connection contracts

2.4 A connection contract is an agreement which grants permission for a rail network to be connected to another network, and sets out the rights and obligations of the parties in relation to maintenance of that connection. These contracts are covered by the Railways Act 1993 (the Act) and are usually void unless they have been approved by ORR. Connection contracts cover all types of track connection including tracks used by both freight and passenger trains. Under the Act, we are permitted to give our general approval to contracts of a particular class or description. To that end we have updated and expanded the

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<sup>1</sup> <http://www.rail-reg.gov.uk/server/show/ConWebDoc.11285>

<sup>2</sup> <http://orr.gov.uk/consultations/policy-consultations/closed-consultations/closed-consultations-2014/consultation-on-connection-contracts>

<sup>3</sup> [http://www.orr.gov.uk/\\_data/assets/word\\_doc/0005/11597/model-connection-contract.doc](http://www.orr.gov.uk/_data/assets/word_doc/0005/11597/model-connection-contract.doc)  
and for Scotland: [http://www.orr.gov.uk/\\_data/assets/word\\_doc/0004/11596/model-connection-contract-scotland.doc](http://www.orr.gov.uk/_data/assets/word_doc/0004/11596/model-connection-contract-scotland.doc)

<sup>4</sup> [http://www.orr.gov.uk/\\_data/assets/pdf\\_file/0007/11599/connection-contract-general-approval.pdf](http://www.orr.gov.uk/_data/assets/pdf_file/0007/11599/connection-contract-general-approval.pdf)

General Approval. We do not need to individually approval contracts covered by the General Approval. Contracts where Network Rail is not a party will still need specific approval (see Chapter 6) but where terms are based on our model, this will be taken into account during the approval process.

2.5 The feedback we have received is that our model is very useful to the industry. Our experience is that some parties still wish to deviate from the model and of course they are entitled to do so. However these contracts will need our specific approval. We have developed an application form for all contracts not covered by the General Approval. We ask that reasons for deviations from the model contract be fully explained. This helps, informs and speeds up our analysis. It also assists consultees. Our recommendation is that the model contract works well as it stands, subject to the improvements described in these conclusions. In our experience, in most straightforward cases, changes to the model are not necessary.

2.6 In 2004 we consulted on our draft model connection contract and published our conclusions in 2005<sup>5</sup> (the 2005 conclusions document). The model connection contract has been in place since then. In this consultation, we did not revisit matters dealt with in our 2005 conclusions document unless there was a clear need for change. Also we have not altered the requirement for parties to undertake industry consultation in order to be fall within scope of the General Approval or when applying for specific approval under section 18 of the Act.

2.7 As connection contracts simply relate to the connection of track/networks and to the rights, obligations and costs associated with that connection, we do not regard connection contracts as ‘track access agreements’. Connection contracts confer the permission to connect to track and, unlike track access contracts which are approved in accordance with section 18(2)(a) of the Act, they are not subject to the time limits for framework agreements under the Railways Infrastructure (Access and Management) Regulations 2005. This is reflected in clearer wording for Recital C in the model and clause 4 has been retitled ‘Permission to Connect’ rather than ‘Permission to Use’.

## **ORR’s role**

2.8 Connection contracts that fall within the access provisions of the Act and amendments to such contracts need ORR approval before they can take effect.

2.9 Some people have asked us to provide more guidance on our model connection contract. However, connection contracts are standalone, legally-binding agreements between the contracting parties. Our view is that it is more useful to concentrate on producing the model template and General Approval. However we do encourage parties to discuss their plans with us at an early stage if they want to deviate from the model.

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<sup>5</sup> <http://www.rail-reg.gov.uk/upload/pdf/242.pdf>

We will also consider including a short section on connection contracts in our next version of *Criteria and procedures for the approval of track access contracts*<sup>6</sup>. We have also developed a new webpage for developers of new freight sites<sup>7</sup>.

2.10 ORR will, from now on, publish newly-approved connection contracts and ORR decision letters on our track access decisions webpages<sup>8</sup>. This will apply to specifically-approved connection contracts only. However, all contracts notified to us will be placed on our public register. Exceptionally, parties will continue to be able to apply for certain information to be redacted.

2.11 Some parties have sought to include issues within a connection contract, which are not directly related to the operation of the connection. These provisions are not always appropriate, especially where they are better accommodated elsewhere, such as in agreements not regulated by ORR. Other parties sometimes dislike the model terms and prefer to draft their own, often more complicated, contracts. It is possible, however, that in doing so, important protections within the model could be overlooked. Or they may wish to cater for exceptional circumstances which ORR should be aware of. For these reasons, we ask that all deviations from the model template are fully explained in the application form. We reserve the right, in our directions, to ask for irrelevant, unnecessary or inappropriate terms to be removed.

## Impact assessment

2.12 We received few comments on the impact the new arrangements would have on operators. However those who did comment generally welcomed the proposals as being beneficial. Exact numbers are difficult to quantify but our assessment is that the reforms will have a positive impact on the industry, saving time and money.

2.13 TfL commented that it would be seriously concerned if agreements were subject to a three month termination period. This is discussed further in Chapter 5.

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<sup>6</sup> [http://www.rail-reg.gov.uk/upload/pdf/ta\\_criteria\\_and\\_procedures.pdf](http://www.rail-reg.gov.uk/upload/pdf/ta_criteria_and_procedures.pdf)

<sup>7</sup> <http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/how-to-apply-for-track-access/freight-terminals>

<sup>8</sup> <http://www.rail-reg.gov.uk/server/show/nav.206> [Although connection contracts are not track access contracts this is the most appropriate section of our website.]

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## 3. General Approval

### Introduction

3.1 We asked specific questions on whether the range of the liability cap and the charges ceiling in the General Approval should be increased. Most respondents agreed that the scope of the General Approval should be increased. Network Rail said that there was no need to change the liability cap, while others argued it should at least be increased in line with inflation. All respondents agreed that the ceiling on charges (the amount payable) where the General Approval applies should at least be increased in line with inflation since 2005. Some argued for an increase to £50,000. Several respondents also asked for a model connection contract specifically for Scotland.

### Liability limits

3.2 Schedule 5 of the current model contract sets out the maximum liability of each party to the other. Where the agreed figure is between £500,000 and £1M, the contract falls within scope of paragraph 2(c) of the 2009 General Approval. Once in contracts, this figure may be increased in line with inflation and still be covered by the General Approval. The 'liabilities regime' was explored in detail in our 2005 conclusions document. We noted then that most people favoured reasonable limits on exposure. It was difficult to develop suitable variations to reflect the size of the connection or type of traffic. The current range of liabilities was therefore introduced.

#### The range of liability limits

3.3 Some respondents suggested that the range of liabilities should at least be increased to reflect the impact of inflation since 2005. The range is not meant to be an overly precise number. It simply reflects a range within which liability limits imposed on either party can be assumed by us to be reasonable. If the liability cap is outside this range, either unusually large or small, we would like to look at the reasons.

3.4 We understand that there have been very few cases where the liability limits are outside the range. There are relatively few, or no cases, where claims have actually exceeded the upper level (£1M). However limits in individual contracts have tended to be nearer the upper limit than the lower limit. While this suggests pressure to increase the ceiling, there is also a concern that the upper limit could just become a default limit. If it was increased too much it could increase industry costs, for example through insurance premiums. We will therefore retain the lower limit of £500,000 and increase the maximum amount in the General Approval but only to **£1.3M**. This is broadly in line with inflation.

## Asymmetry

3.5 Freightliner said that the impact of a failure of the network would impact more on the Adjacent Facility Owner (AFO) than on Network Rail. A concern is that a connected party could go out of business if trains could not access the national network. Freightliner suggested a maximum of a £250,000 payment by the AFO to Network Rail and a maximum payment of £5M by Network Rail to the AFO.

3.6 This issue was discussed in our 2005 conclusions document (at paragraphs 3.16-3.19). Our view is that there is insufficient cause to revisit the conclusion that liability caps should be the same for both parties if they are to be covered by the General Approval.

## Amount payable

3.7 At present, connection contracts where charges are under £20,000 per year are covered by the General Approval. This covers a large proportion of Network Rail connection contracts<sup>9</sup>. All respondents who expressed a view said that the amount should be increased. Some consultees suggested adjustments to reflect inflation since 2005 and Network Rail suggested it should be £50,000.

3.8 ORR wants to set a limit below which, where agreed between the parties, payments can be assumed to be reasonable. We have reviewed the level of recent payments charged by Network Rail and most fall below **£50,000**. We think it is reasonable to concentrate our efforts on sums above that level, whether those are just for maintenance or include an element for renewals. This figure will not now need to be reviewed again for some time. If Network Rail wants to charge more, the parties should seek specific approval from us. Where agreement cannot be reached, AFOs can apply to us for directions under section 17 of the Act (see Chapter 6).

## Reduction in amount

3.9 We have amended the General Approval to incorporate Freightliner's suggestion that any reduction in the amount payable can be covered by the General Approval and will not need ORR specific approval. This is even where the reduced amount is still above the £50,000 limit and no other matters have changed. This is because it is unlikely that we would ever object to a reduction in costs.

## Scotland

3.10 The model contract was originally subject to the law in England & Wales, as this version is used the most. We proposed in our consultation that modifications could be made to the model contract to make it

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<sup>9</sup> Recent Network Rail connections are listed on its webpage: <http://www.networkrail.co.uk/asp/10520.aspx>.



compliant with Scots law. However, consultees asked us to prepare a separate model contract. We have placed the new model on our website<sup>10</sup> and it is covered by the new General Approval.

## Other changes

3.11 We are also making the following changes to the version consulted on:

- (i) the new General Approval comes into force from 17 April 2014;
- (ii) it has been restructured and redesigned so it is simpler to read and understand; and
- (iii) it confirms that it replaces the previous General Approval.

3.12 We are also using this opportunity to bring the consultation requirements in the General Approval more into line with those for track access and other ORR general approvals. The previous version simply required Network Rail to have made all reasonable attempts to resolve any issues raised by consultees. This could have implied that consultees' concerns might be left unresolved. The new General Approval states that it applies only if there are no unresolved issues. If there are issues that cannot be resolved then the parties should apply to us for directions under section 17 of the Act (see chapter 6).

3.13 This will increase certainty for the parties involved and the industry. It is unlikely to lead to significantly more applications for specific approval, as connection contracts rarely result in unresolved issues. It will however mean that ORR will be able to see and review any legitimate, outstanding third party concerns as part of the specific approval application process.

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<sup>10</sup> [http://www.orr.gov.uk/\\_data/assets/word\\_doc/0004/11596/model-connection-contract-scotland.doc](http://www.orr.gov.uk/_data/assets/word_doc/0004/11596/model-connection-contract-scotland.doc)

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## 4. Charges and renewals

### Introduction

4.1 In this chapter we set out the changes to the elements in the model concerned with Network Rail's charges.

### Variation of amounts

4.2 The model provides for reviews of the amount payable under the contract at five-yearly periods. A list of criteria to be applied in determining whether any adjustment to the amount is needed is set out in clause 16.3.2 of the model contract. This ensures that charges cover the efficient cost to Network Rail of the services provided. Under Schedule 3 of the model contract, the amount is then subject to an adjustment factor which is calculated annually, to reflect inflation (indexation).

### Adjustment factor

4.3 In the previous model contract there was scope for the parties to include an efficiency factor in the formula in Schedule 3, this meant that charges could increase by inflation but be adjusted to reflect Network Rail's efficiencies, commonly known as RPI-X. However, because the level of the efficiency factor (X) was negotiated between parties, over time inconsistencies developed in the level of the efficiency factor applied in different contracts.

4.4 As part of this consultation Network Rail proposed standardising the efficiency factor in the adjustment factor formula at -0.01 (that is -1%) so the amount would fall in real terms at a set rate.

4.5 A number of respondents agreed that adjustments for efficiency should be standardised across connection contracts and applied annually to charges through an RPI-X mechanism. DBS and Freightliner contended this should be based on Network Rail's efficiency targets set at each periodic review.

4.6 We have considered the issues raised by consultees. We agree that adjustments to the indexation figure for efficiency should be standardised for all operators and that charges should be adjusted annually to reflect Network Rail's efficiency targets set at each periodic review. We have concluded that the operators' charges should be indexed annually based on the formula set out at paragraph 4.7 below.

#### 4.7 The new formula is:

The Amount shall be subject to variation as follows:

$$\text{Adjustment factor} = 1 + \frac{(\text{RPI}_{(t-1)} - \text{RPI}_{(t-2)}) - X}{\text{RPI}_{(t-2)}}$$

“X” will be a factor published separately by ORR on its website and made available to all parties on request.

4.8 As with existing contracts, different reference dates will apply, but according to whether the parties consider the connection is primarily for passenger train rolling stock or freight.

4.9 The efficiency factor for all connections contracts will be based on the maintenance cost efficiency factor determined during the most recent ORR access charges review (‘the maintenance efficiency factor’). We are in the process of confirming with Network Rail what the value of X should be. We will publish it in due course.

4.10 The efficiency factor may not be relevant for contracts between parties not including Network Rail and for which a specific approval would be needed. The parties should agree between themselves if one should apply and at what level.

4.11 Some consultees suggested that, with this new formula, clause 16.3.2(g) would be redundant and could be deleted. We have considered that suggestion but our view is that clause 16.3.2(g) should be retained. This is because it is important that when setting its charges, Network Rail reflects the conclusions of the five yearly price reviews. We expect Network Rail to set charges for connection contracts based on the efficient maintenance and renewals costs as applied to the rest of its network and assessed at each periodic review. We expect all parties will want to amend their contracts and move to this new indexation factor. The General Authority permits amendments so that it conforms with the model without the need for ORR specific approval.

#### **Interval periods**

4.12 Freightliner’s view is that a five yearly review creates uncertainty for the connected party and suggested amending the review period to ten years. It was also considered as part of the 2005 conclusions. In our view, this could just defer any uncertainty. Also, as a general principle, costs should be borne where they fall and so we favour more regular review periods. Increases in costs should be explained and justified.

## Renewals

4.13 Consultees welcomed the provision that allows for renewals to be charged as an element of the annual charge or to be charged separately. But some expressed concern that where renewal involves enhancement this would lead to increased costs for the connected party. One heritage railway emphasised this point especially. We expect Network Rail to act in a fair and transparent manner and in compliance with its network licence. We do not think it is practicable to highlight this in just one clause as one consultee suggested. However where an AFO takes issue with the works proposed by Network Rail and this remains unresolved, it should follow the dispute resolution procedures set out in the contract.

4.14 For the avoidance of doubt, the General Approval includes renewals work as well as maintenance.

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## 5. Other model terms

### Introduction

5.1 This chapter describes all the other revisions to the model. Consultees provided useful comments on some areas that need updating. There were detailed submissions on the length of the termination period. Four consultees also commented on the relationship between Part G of the Network Code and connection contracts, although this was not in scope of the original consultation.

### Revisions

#### Definitions

5.2 We have made several minor changes to the definitions in the model contract including where they relate to the access dispute resolution rules.

5.3 It has also been brought to our attention through a recent application that the provisions concerning a Directly Connected network are rarely used. We have therefore placed the 'Directly Connected' definition and clause 5.1.3(a) in brackets. This means the reference is optional and does not have to be used if both parties agree it is not relevant.

#### Default level of interest

5.4 In our consultation we asked if the default level of interest should be changed. The consensus appears to be that the current default rate of interest at 2% above Barclays base rate should stand or be increased. DBS noted the consistency with the terms in the model track access agreement. In the absence of more substantive reasons and evidence for change we will leave it at the current rate.

#### Termination

5.5 We proposed inserting a new clause into the model setting out that if Network Rail seeks to terminate a connection contract it must give at least three months' notice. Within that time the AFO would have the option to accept that or lodge an application to us under section 17 of the Act. The existing connection contract would remain in force until such time as the application was determined.

5.6 This clause already exists in the most recent connection contracts and works well. However, several respondents were concerned that a termination period of three months was not long enough and did not provide sufficient certainty; even though there was a mechanism to effectively contest termination.

5.7 We believe that three months is suitable for most cases. However if both Network Rail and the AFO agree to a longer period then we would not normally seek to reverse that. We will therefore keep the three months' notice period in the model but in square brackets. So, if the parties both agree to enter a longer period, that is a matter for them and it will still be covered by the General Approval (paragraph 2(i)).

### **Dispute resolution**

5.8 We have updated the model to take account of changes to the Access Dispute Resolution Rules as discussed in the consultation document. There were also further places in 12.4.3 where we needed to replace 'arbitral tribunal' with 'arbitrator'.

### **Email notices**

5.9 The old model (clause 18.4.3) did not include a provision for Notices to have deemed receipt if sent by email, although this is the case for other mediums (such as post or fax). We proposed including emails, unless a notice of non-delivery is bounced back. This provoked some comment from consultees. It is an important way of doing business today. However there can be issues with emails – knowing that delivery has been made from one server to another, ascertaining that the right person is sent the email and that they can receive it. Transport for London expressed concerns about the impact on its commercial and investment positions.

5.10 We have therefore inserted a clause that allows service to be effected by email if both parties agree. However it will not be mandatory and is therefore presented in brackets, meaning it can be used or deleted [and replaced with "not used"]. Where it is used, both parties must cite email addresses for notice delivery in schedule 2 of the contract and keep this up to date. Emails sent to that address will be deemed to have been delivered.

### **Schedules**

#### *Plans*

5.11 We got support from consultees that plans could generally be of a better standard than some have been in the past. It is clearly important that connection points and associated items are clearly identified and fit for purpose, especially where they are 'evergreen'. Parties are free to use photographs if they wish.

5.12 We are working with Network Rail to develop a style of plan that more clearly shows that the Connecting Network is that part used solely to support the connection point and not the normal running line.

#### *Initial condition statement*

5.13 We asked if the definition of the Initial Condition Statement (ICS) should be changed and there was little call for this in the responses. Network Rail described it as fit for purpose. Freightliner did say that the

initial condition statement should be as detailed as possible and should include “the condition of ground, earthworks and drainage, including any contamination or other known environmental risks (eg flooding)”. It should also include renewal dates and known defects and so on. The ICS is deliberately open ended and should be populated as the parties see fit. It may vary from case to case. The matters suggested by consultees can be included in the ICS and still be covered by the General Approval.

## Other changes

5.14 We have amended the model in other areas to correct typographical errors or consequential to issues discussed earlier in this document.

## Network Code

5.15 Our consultation did not specifically consider the application of the Network Code to AFOs. However, four consultees told us that AFOs are not automatically consulted on network changes under Part G of the Network Code. The Network Code is a set of rules followed by Network Rail and relevant access rights holders<sup>11</sup> and Part G, in particular, sets out provisions relating to network change. Consultees said AFOs have no formal recourse or right of participation in Network Rail's network change process, even if a particular proposal might directly or indirectly materially affect the operation of trains to/from the adjacent facility or the facility's operation. Consultees said that the protections in clause 5.2 of the model did not necessarily provide sufficient protection for all changes to the network which might affect an AFO, including participation in the consultations under Part G.

5.16 Our model does not incorporate the Network Code into the terms of the contract. This consultation did not address this issue, nor changes to the Network Code itself. It focused on updating the terms of the model, which cover the operation and maintenance of the connection point. It is possible that Network Rail and an AFO might choose to incorporate certain provisions of the Network Code in their connection contract. However, as this is not currently included in the model (and was not in scope of the current consultation), it would require specific approval from ORR.

5.17 We note also that an AFO which holds a freight-customer track access contract (in addition to a connection contract) is an access beneficiary under the Network Code and therefore would be consulted under Part G, when a network change is proposed. AFOs who are not a party to a track access contract incorporating the Network Code, may also be able to exert influence through train operators with whom they have contracts in relation to a proposed network change.

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<sup>11</sup> <http://www.networkrail.co.uk/browsedirectory.aspx?dir=%5Cnetwork%20code&root=>

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# 6. Specific approval

## Introduction

6.1 Use of the model contract is not mandatory. Parties may agree a different contract or terms as they wish, however, where connection contracts do not follow the model or are not otherwise caught by the General Approval the parties may need to apply to us for specific approval. We ask that each contract is submitted for individual consideration and that departures from the model are fully explained. The model can also be used for applications under section 17 of the Act where agreement has not been reached or where there are unresolved issues from the consultation stage. Few consultees commented on our proposed new application form.

## Application form

6.2 DBS commented that the line at Box 2.1, asking for a breakdown of costs, should be more explicit that it refers to annual charges. We have made the form clearer in this respect.

6.3 We have adjusted some of the figures in the version of the form we consulted on, to reflect the changes already discussed in this document.

## Section 17 applications

6.4 Section 17 allows a facility owner (including Network Rail) who wants the right to connect to another network, to apply to us for directions to enter into a connection contract, if they are not able (for whatever reason) to reach agreement with the other party. Because ORR intervention is needed the General Approval cannot be relied on. Applicants should apply to us using the new application form. The applicant is not required to conduct an industry consultation before making the application.



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