

**EDINBURGH TRAM NETWORK
CEC LIABILITY UNDER UTILITY AGREEMENTS**

This note responds to the discussion and instruction at **tie's** offices on 30 May 2007 attended by **tie** ETN, CEC officers and DLA Piper.

As explained at the meeting, Scottish Power (SP) and Telwest utilities diversion agreements are in the category of non objecting statutory undertakers. **tie's** approach was therefore to conclude these agreements if possible, without CEC's engagement as a contracting party or an underwriter. This has not proved possible in these cases. Both organisations wish to see **tie's** covenant supported by CEC. As CEC is aware, SP are also asking that CEC and **tie** be jointly and severally liable for their respective obligations to SP under and pursuant to the utility agreement.

A. OBJECTIVES

To provide CEC with an overview in relation to **tie's** assumption of risk and liability under the SP and Telewest utility diversion agreements.

B. INDEMNITIES UNDER THE PROPOSED UTILITY AGREEMENTS

It should be understood that the process of negotiating with the utilities (especially on indemnities) has been a laborious one, with each utility taking different positions, in some cases disproportionate to the scope and volume of the actual diversion works.

SP UTILITY AGREEMENT

The SP liability provision differs from the liability provision drafted and negotiated in the other utility agreements. SP has insisted on SP standard liability wording (drafted in all its commercial contracts) and as such, SP offered no flexibility to negotiate this clause with **tie**.

In summary, the drafted liability provision provides that where any damage caused to SP's apparatus or other property of SP, or any interruption in the supply of the service by SP which results from the wrongful act or breach of the utility agreement, **tie** or CEC shall:

(i) bear and pay the cost reasonably incurred by SP in making good such damage or restoring such supply;

*(ii) compensate SP in respect of any statutory compensation SP requires to pay as a result of any timescale or unreasonable delays caused by either the Authorised Undertaker (**tie**) or MUDFA affecting SP's apparatus; and*

(iii) indemnify SP against all claims, demands, proceedings, costs, damages and expenses which may be made against, or recovered from, or incurred by it,

by reason or in consequence of any such damage, or interruption.

tie and CEC shall *not* be liable under the utility agreement for:

(a) any damage or interruption caused by the act, negligence or default of SP;

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- (b) any breach caused by matters beyond its reasonable control; or
- (c) for any loss of profits, business, contracts, revenues, or anticipated savings; or for any special, indirect or consequential loss or damage of any nature whatsoever, that may arise, be suffered or incurred by SP.

SP's liability in contract, delict (including negligence or breach of statutory duty) or otherwise (except in relation to death or personal injury caused by the wilful act or negligence of SP or its employees while acting in the course of their employment) shall be limited to £1,000,000 of physical damage and £50,000 in any other type of claim.

TELEWEST UTILITY AGREEMENT

Telewest desires the following to be drafted in the utility agreement:

tie shall be acting as agent for CEC under this Agreement and therefore any obligation under this agreement on tie shall be deemed to be an obligation on CEC.

Effectively, this would put CEC in the same position as it would be if tie and CEC were jointly and severally liable under the agreement.

At the time that the Telewest utility agreement was being drafted, NTL was in the process of acquiring Telewest. As the apparatus was to remain in the name of Telewest however, a separate utility diversion agreement was still required. In order to achieve a timely negotiation with Telewest, the agreement was drafted using the executed NTL utility agreement as a starting basis. The liability provision in the Telewest Agreement was drafted originally using the liability provision already negotiated with NTL.

In summary, the liability clause provides that neither tie nor Telewest shall be liable:

- (a) *with respect to any damage, cost, expense or loss attributable to a breach of the agreement by, or the negligent act or omission of the other party or any person in their employment, or of their contractors or agents; or*
- (b) *to any other party in relation to Indirect Losses (meaning any damage, cost, third party claim, expense or loss incurred by a party as a consequence of a breach of the agreement or a negligent act or omission of a party which related to the loss of profits or revenue, loss of use, loss of production or output, interruption or loss of business or business opportunity or other consequential or indirect loss).*

In respect to loss under a customer contract, a liability clause was negotiated into the NTL Agreement and follows the style of several other utility agreements. In summary:

In the event that Telewest demonstrates:

- (a) *that it has properly incurred a loss or suffered any damage arising as a result of a claim under an existing contract with a customer;*
- (b) *such loss is not covered by (or falls within a deductible to be paid by Telewest to the insurer) appropriate insurances which are in place or which ought reasonably to have been put in place by Telewest;*

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- (c) *such loss arises as a result of interruption or loss of service due to the breach of contract or the negligent act or omission of MUDFA,*

Telewest shall have recourse to the extent of MUDFA's indemnity to tie, which shall be on terms equivalent to standard in the industry.

Telewest wish to delete reference to the insurance carve out and wish to have sight of the indemnity cap of MUDFA.

C. RESPONSIBILITIES UNDER THE UTILITIES DIVERSION AGREEMENTS

CEC has requested an overview of the types of responsibilities it would be responsible for as a party to the utility agreements, beyond any potential financial exposure. The following is a non-exhaustive list of different obligations imposed on the Authorised Undertaker / tie / CEC under the agreements:

- co-ordinating the overall planning, supervision and execution of the authorised works in accordance with the terms of the agreements and ensure the utilities are fully informed of all material matters concerning the diversion works;
- obtain consent from the utilities prior to deviating to a vertical depth beyond what is agreed in the detailed design;
- ensure the designer and any party carrying out the authorised works will ensure that the design, installation and operation of the authorised works complies with industry standards such as the Distribution Code and certain European Industry Standards for electromagnetic compatibility;
- rectify any non-compliance of the utilities apparatus and provide adequate protection;
- engage the Designer to develop the scope, design, technical specification, method statement and overall programme for the diversion works in accordance with the utilities design guidelines and technical requirements and submit section specifications to the utilities for approval prior to carrying out any works;
- procure that the design and the works are carried out by a properly qualified and competent designer or contractor and in accordance with the utilities requirements and industry standards;
- carry out any necessary surveys to determine whether the apparatus has been compromised;
- procure that MUDFA shall: carry out the works in accordance with the utility agreement, minimise disruption to the utilities apparatus, suspend all action reasonably required by the utilities;
- assist the utilities in any inspection and removal of defective works and comply with any rectification plan processes; and

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- make proper payments (and receive contributions) in accordance with the New Roads and Street Works Act and pay for any costs incurred by the utilities in developing the technical specification and scope of the diversion works.

D. MUDFA'S INDEMNITY TO TIE AND CEC

In summary, under MUDFA, the MUDFA Contractor indemnifies **tie** and CEC for:

- (a) *any claims, suits, losses, liabilities, damages, penalties, fines, forfeitures and costs and expenses which **tie** or CEC may incur as a result of MUDFA's (or any of MUDFA's contracting parties') breach of agreement or any negligent or wilful acts or omissions in the performance of the agreement (excepting out the death or injury to persons or damage to property resulting from any act or breach by **tie**) and includes for example death or injury to any person, any loss or damage to any property or to any part of the MUDFA works, causing **tie** or CEC to be in breach of any law, any damage to any apparatus caused by MUDFA, and causing **tie** or CEC to be in breach of any agreement with the utilities;*
- (b) *any interruption or loss of service suffered by a utility as a result of MUDFA's breach or negligent act or omission, including any applicable customer charter requirements or under any contract with a customer for interruption or loss of service as a result of breach of agreement or any negligent act or omission by MUDFA or a MUDFA contracting party,*
- (c) *any Indirect Losses (any damage, cost, third party claim, expense or loss incurred by a party as a consequence of a breach of agreement or negligent act or omission which related to loss of profits or revenue, loss of use, loss of production or output, interruption or loss of business or business opportunity or other consequential or indirect loss) incurred by a utility as a result of any liability under any applicable customer charter requirements and / or any contract with a customer; and*
- (c) *any loss suffered by a utility as a result of any claim made under law which may be applicable to MUDFA's works or the rules and regulations of public bodies as a result of MUDFA's breach of agreement or negligent act or omission.*

Neither party is entitled to claim damages for Indirect Loss, except in respect of a claim against the other party by a third party in connection with any Indirect Loss suffered. Such claim for Indirect Loss shall include any claim received by **tie** and / or CEC from any utilities for any breach under the utility agreements.

MUDFA's overall liability is capped at the greater of £3,500,000 or 7% of the final account.

E. INSURANCE

tie is currently insuring the MUDFA contract works through Alfred McAlpine Infrastructure Services Group Policies, comprising third party liability insurance to a limit of £100m and construction all risks cover to the value of the contract.

tie has developed a strategy for procuring an Owner Controlled Insurance Programme (OCIP) for the Construction Phase of the Edinburgh Tram Network. The main benefits of this are that all contractors and stakeholders are insured partners in the project specific insurance

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programme, have the required same level of cover and deductibles, follow the same claims procedure and avoid costly recovery action with the existence of waiver of subrogation between the insured parties. It allows **tie** control of the insurance programme and to have a directly managed claims recovery process.

The OCIP will cover damage or loss of the contract works (Limit will be the Contract Value) and third party liabilities (Limit £200m), both will be subject to policy terms and conditions. This type of project specific insurance is generally cheaper than contractor's charges for insuring the risks themselves. OCIPs have a proven record with numerous transport projects and generally meet the approval of capital providers. The OCIP approach has been used on major construction projects, such as UK Light Rail Schemes, DLR plus all extensions, Jubilee Line, Heathrow Terminal 4 Piccadilly Line Extension, Heathrow Terminal 5, West Coast Mainline upgrades and Eurotunnel.

Each of the main contractor's and their sub-contractors are also required to procure other insurances during the design and construction phases and for certain periods after completion, to levels specified, for example, professional indemnity and employer's liability. These have been and will be identified and catered for in the contracts.

tie currently has the appropriate scope of industry standard office insurance covers in place covering its liabilities, which is reviewed on an on-going basis. The covers and limits purchased are briefly:-

- Employers Liability - £10m
- Public and Products Liability - £5m
- Professional Indemnity - £5m
- Office & Computers - (Replacement Values)
- Personal Accident & Travel – Various limits
- Directors' and Officers' Liability - £2m
- Crime - £500,000

All covers are subject to policy terms and conditions. There are a number of "single person" contractors / advisors working directly for **tie**. Depending on their contract terms and conditions they may be insured under **tie**'s office insurance policies.