



OFFICE *of*  
RAIL REGULATION

**Initial Guidance on  
Appeals to ORR under the Railways  
Infrastructure (Access and Management)  
Regulations 2005**

**November 2005**



# Contents

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<b>Executive Summary</b> .....	<b>1</b>
<b>1. Introduction</b> .....	<b>3</b>
Purpose .....	3
Background .....	3
Facilities and services caught by the Regulations .....	8
Structure of this document.....	9
Consultation arrangements .....	10
<b>2. Framework for assessing appeals</b> .....	<b>11</b>
Objectives and key principles .....	11
The right of appeal.....	12
Circumstances in which access could be refused or restrictions imposed ....	13
Concept of viable alternative and interpretation of “market conditions” .....	15
What constitutes a service? .....	19
<b>3. Appeals on charging matters</b> .....	<b>21</b>
Introduction.....	21
Charges for facilities, services, ports and terminals.....	22
<b>4. Appeals Process</b> .....	<b>25</b>
<b>Annex A: Application form</b> .....	<b>29</b>
<b>Annex B: List of consultees</b> .....	<b>35</b>
<b>Annex C: Schedule 2 of the Regulations – services to be supplied to applicants</b> .....	<b>37</b>



# Executive Summary

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1. We are publishing our initial guidance to clarify the approach we will adopt in considering appeals under The Railway Infrastructure (Access and Management) Regulations 2005 (the Regulations), which came into force on 28 November 2005. The Regulations transpose part of the EU First Railway Package.
2. Our initial guidance focuses on those access provisions in the Regulations which confer additional rights and obligations on applicants and facility owners beyond those in the existing access regime created by the Railways Act 1993 as amended (the Act). We are seeking, in particular, to clarify the concept of “viable alternative” which is not a criterion presently used in our consideration of appeals for access to facilities.
3. We have not had the opportunity to publicly consult on our initial guidance because of the tight timescale for the implementation of these Regulations. We are seeking your views now and we may amend this initial guidance and publish a further version in the light of responses to this consultation.
4. The Regulations create a presumption of access and provide the right for an applicant to apply for access to a range of services and facilities for the purpose of the operation of certain types of rail services, such as freight services and international passenger services operated by international groupings. Access to services and facilities may be refused only where there is a viable alternative by rail under market conditions. We have set out the high level principles we will use, in any appeal that comes to us, to assess the physical and commercial viability and the availability of an alternative.
5. The Regulations open up access at previously exempt facilities under the Act, such as those at ports and terminals and other freight depots and networks, and give to applicants who feel aggrieved about the refusal or terms, including charges, of access the right of appeal to us.
6. The existing access regime under the Act for track, stations and regulated light maintenance depots is largely unaffected.

7. Two appeal routes are now provided for applicants. For matters relevant to sections 17 or 22A of the Act, the applicant will continue to seek directions from us under the existing application procedure under the Act. For any other matters, appeals should be lodged with us under the Regulations. The procedure for appeals under either route will be largely the same.

# 1. Introduction

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## Purpose

- 1.1 On 28 November 2005, two sets of Regulations transposing and implementing the requirements of the First Package of EU Directives<sup>1</sup> (the Directives) became law in Great Britain.
- 1.2 This initial Office of Rail Regulation (ORR) guidance sets out a number of high level principles which we will adopt in considering appeals (in particular appeals under regulations 6 and 7) under the Regulations.
- 1.3 Because of the tight timescale for implementation of the Regulations by Government, we have decided to publish this initial guidance for consultation in parallel with the Regulations coming into force. We have, however, had informal discussions with key industry stakeholders, which have helped us in developing our thoughts on how best to fulfil the purpose of the Directives (as implemented by the Regulations). We will publish a further version of the guidance in the light of consultees' responses early in 2006. Our approach will be further informed by the consideration of actual cases on appeal. We will, therefore, keep the guidance under review.
- 1.4 In this chapter we set out the background to the Regulations, explain the scope and intention of this guidance, clarify the persons most likely to be affected, provide a brief summary of this document's structure and set out the consultation arrangements.

## Background

- 1.5 On 27 June 2005 the Department for Transport ("DfT") published a consultation paper on the implementation of the Directives in Great Britain,

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<sup>1</sup> The Railway (Licensing of Railway Undertakings) Regulations, which transposed Directive 95/18/EC as amended by Directive 2001/13/EC, and the Railways Infrastructure (Access and Management) Regulations which transposed Directive 91/440/EEC, as amended by Directives 2001/12/EC and 2004/51/EC, and Directive 2001/14/EC as amended by Directive 2004/49).

seeking views on two sets of transposing Regulations: the Railway (Licensing of Railway Undertakings) Regulations and the Railways Infrastructure (Access and Management) Regulations. Full details can be found on the DfT's website<sup>2</sup>. Responses to the DfT consultation indicated a desire for greater clarity on the scope of the implementing Regulations. The DfT has therefore produced guidance on scope which can also be found on its website<sup>3</sup>. Our document is concerned only with the Railways Infrastructure (Access and Management) Regulations ("the Regulations").

- 1.6 The intention of the Regulations is to ensure that a railway undertaking, which operates a rail transport service, has full access to the rail network and to a range of services and facilities. It is recognised that in order to realise the rights of access to infrastructure provided for in the Directives, the right to use the necessary services and facilities may be as important as access to the core network. In some cases, however, this is not provided for under the existing access regime, a situation that these Regulations are designed to address.
- 1.7 The Regulations provide a right of appeal to us for any applicant that feels aggrieved and considers it has been wrongly denied access to a facility or service, or that the terms for obtaining access are unreasonable or discriminatory.
- 1.8 In transposing the Directives, the DfT's intention has been to minimise the impact on existing legislation, thus leaving the current access regime in place. As a result, the existing access regime for track, stations and light maintenance depots in sections 17 to 22A of the Act is largely unaffected<sup>4</sup>. Similarly where procedures are available under the Network Code, parties are expected to continue to use these procedures. This guidance document refers only to our appeal role in relation to those access provisions in the

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<sup>2</sup> <http://www.opsi.gov.uk/si/si2005/20053049.htm>; <http://www.opsi.gov.uk/si/si2005/20053050.htm>

<sup>3</sup> [http://www.dft.gov.uk/stellent/groups/dft\\_railways/documents/page/dft\\_railways\\_610586.hcsp](http://www.dft.gov.uk/stellent/groups/dft_railways/documents/page/dft_railways_610586.hcsp)

<sup>4</sup> There have been some minor changes which will be detailed in the revision to our Criteria and procedures documents for track access, to be published in March 2006.

Regulations which confer additional rights and obligations on industry parties and the procedures for which are not therefore covered in our existing publications. However, it is our intention, as far as is practicable to handle appeals under these Regulations in much the same way as applications under sections 17 and 22A of the Act.

- 1.9 The Regulations do not provide that agreements between the facility owner<sup>5</sup> and the applicant require our pre-approval. It is important to recognise that parties can continue, as previously, to enter into commercial arrangements in relation to those facilities and services that are within the scope of the Regulations. Any such access arrangements agreed would continue to be governed through a private law contract between the parties. ORR's role under the Regulations is as an appeals body and this only becomes applicable if an appeal is made under the Regulations. Access contracts currently subject to pre-approval under the Act will continue to be subject to pre-approval.

## Terminology

- 1.10 We have adopted a uniform terminology in this document to avoid confusion.

### *Facility owner/service provider*

- 1.11 The Regulations introduce the concept of "service provider" which overlaps to a certain extent with the concept of "facility owner" under the Act. The term "service provider" is defined in the Regulations and refers to a body or undertaking that supplies any of the services to which access is granted by virtue of regulations 6 or 7, or services listed in paragraphs 2, 3 or 4 of Schedule 2 (see Annex C) which are detailed in the paragraph below under "services".
- 1.12 In the context of this guidance document, ORR has used the term "facility owner" to mean the body or the person responsible for granting access to facilities or services. The facility owner is thus a provider of track access

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<sup>5</sup> As defined in paragraph 1.11

facilities and/or services within terminals and ports under regulation 6 and an infrastructure manager or service provider in respect of regulation 7. It therefore does not have the same meaning as in the Act. However, anyone affected must look at the Regulations themselves to establish their legal rights and obligations.

### *Services*

- 1.13 The term “services” in the Regulations describes a variety of things and, depending on the context in which it is used, has different meanings in different parts of the Regulations (this reflects the wording in the Directives).
- 1.14 Paragraph (a) of the definition of service provider refers to services to which access is granted by virtue of regulations 6 or 7. Regulation 6 provides a right of track access to and the supply of services in ports and terminals, whilst regulation 7 provides a right of access to:
- (a) a minimum access package;
  - (b) service facilities; and
  - (c) services listed in Schedule 2 of the Regulations (see Annex C).

The minimum access package relates to access to the core Network Rail network and Channel Tunnel Rail Link (CTRL) and is not described as a service within this document.

- 1.15 In relation to regulation 7, the “service facilities” are:
- (a) the use of electrical supply equipment for traction current;
  - (b) refuelling facilities;
  - (c) passenger stations, including buildings and other facilities;
  - (d) freight terminals;
  - (e) marshalling yards;
  - (f) train formation facilities;

- (g) storage sidings; and
  - (h) maintenance and other technical facilities.
- 1.16 “Additional services”, which in some cases can be requested within the service facilities listed above are:
- (a) traction current;
  - (b) pre-heating of passenger trains;
  - (c) the supply of fuel, shunting and all other services provided at the access services facilities referred to in paragraph 2 of Schedule 2 (see Annex C); and
  - (d) tailor-made contracts for (i) control of the transport of dangerous goods and (ii) assistance in running abnormal trains.
- 1.17 “Ancillary services” provided entirely at the discretion of the infrastructure manager or service provider are:
- (a) access to the telecommunication network;
  - (b) provision of supplementary information; and
  - (c) technical inspection of rolling stock.
- 1.18 The circumstances when the provider of any of the above services or service facilities will be required to grant access is explained in Chapter 2 of this document.
- 1.19 “Service facilities and the supply of services” listed in paragraph 2 of Schedule 2 are referred to in this document simply as “service facilities”, reflecting the fact that they are all physical facilities or pieces of infrastructure. The other types of services referred to in regulation 7 are those actual services which are provided within the service facility. These are the “additional services” and “ancillary services” (not to be confused with the definition of ancillary services in section 83 of the Act).

- 1.20 Regulation 6 refers to the supply of “services” in terminals and ports; in this context we consider “services” to be a general term with a broader meaning, to include all the “service facilities”, “additional services” and “ancillary services” listed in Schedule 2 of the Regulations (see Annex C).

### *Applicant*

- 1.21 The Regulations contain a definition of applicant, which is used in certain circumstances, such as Regulations 7 and 29. For the purpose of this document, we have used the term “applicant” to describe all access seekers. However it should be noted that specific regulations refer to specific categories of access seekers such as railway undertakings, international groupings or applicants.

## **Facilities and services caught by the Regulations**

- 1.22 The Regulations provide an appeal route for access to a much broader range of rail connected facilities (including the use of equipment), previously exempt from regulatory intervention either by virtue of The Railways (Class and Miscellaneous Exemptions) Order) 1994 (CMEO)<sup>6</sup>, or by being outside of the scope of the Act.
- 1.23 For example goods terminals may fall within the scope of the Regulations, unless they meet the criteria for exclusion specified in regulation 4(4). For more details on the types of facilities likely to be exempt under the Regulations, see the DfT’s guidance on the scope of the First Rail Package Transposition Regulations.

## **The parties affected by the Regulations**

### *Who can make an appeal to us under the Regulations?*

- 1.24 An applicant can appeal to us if it believes it has been unfairly treated, discriminated against or is in any other way aggrieved regarding arrangements in connection with the entitlements to access granted under the Regulations. As noted above, there are a number of different categories of applicants including railway undertakings or international grouping under Regulations 6 and 7, and any party with a public service or commercial

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<sup>6</sup> SI 1994 No 606.

interest in procuring infrastructure capacity including domestic passenger operators or the final customer of a freight operator, under Regulation 7.

- 1.25 Where there is an issue of access, an appeal to us can be made at any stage. There is no requirement in the Regulations to provide evidence of a contractual commitment from the final customer before access can be requested. For example, we recognise that in order for a freight operator credibly to bid for a new customer it may need to be able to provide some assurance that it will be able to gain access to all of the facilities and services it needs to run the service.

*Who is obliged to grant access?*

- 1.26 The Regulations place an obligation on a facility owner to provide track access to and the supply of services in its port, terminal or service facility, unless there is a viable alternative by rail under market conditions. The obligations are applicable regardless of the management arrangements at a particular facility. Even where the facility is not owned and operated by the same party, for example if operated by a third party under management contract or on lease, the access entitlements in the Regulations still apply and the party responsible for managing access must use all reasonable endeavours to facilitate that access.

## **Structure of this document**

- 1.27 Chapter 2 outlines our framework for assessing appeals on access to facilities and services. It explains our objectives and approach to issues such as “viable alternatives” and the rights of a facility owner. In Chapter 3 we consider the level of charges for access to services. In Chapter 4 we explain the procedure for making an appeal and set out the information that we will require from appellants and parties subject to appeals. Annex A reproduces the application form for making appeals.

## Consultation arrangements

1.28 We would welcome your views and comments on any aspect of the approach outlined in our initial guidance. Consultation responses should be sent by 19 February 2006 to:

Bill Hammill  
Manager Track Access  
Office of Rail Regulation  
1 Waterhouse Square  
138-142 Holborn  
London  
EC21N 2TQ  
Email to: [Bill.Hammill@orr.gsi.gov.uk](mailto:Bill.Hammill@orr.gsi.gov.uk)

- 1.29 The consultation period runs for twelve weeks. We will continue to liaise closely with the industry during the consultation. We will consider carefully the views of consultees to identify any areas of concern or which require clarification and, as necessary, publish revised guidance early in 2006. Any appeals made to us in the meantime will be treated on a case-by-case basis having regard to this initial guidance document.
- 1.30 You should indicate clearly if you wish all or part of your response to remain confidential. Otherwise you should expect that your response will be placed in our library and on our website and may be quoted from.
- 1.31 If you wish all or part of your response to remain confidential you should send an accompanying statement summarising the submission, but excluding your confidential information, which may then be used as above.
- 1.32 We may also publish your names in future documents or on our website unless you indicate that you wish your name to be withheld.
- 1.33 A copy of this document has been made available to all those listed at Annex B and is available from our website and library.

## 2. Framework for assessing appeals

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### Objectives and key principles

- 2.1 The Regulations provide that an applicant is entitled to track access and the supply of services in service facilities, terminals and ports linked to the rail network. Access at ports and terminals may be subject to restrictions only if **“viable alternatives by rail under market conditions exist”** and access to service facilities may only be refused if a **“viable alternative means of the service being provided under market conditions”** exists.
- 2.2 Our guidance is focused on freight services, but we consider it could be similarly applied in the case of an appeal made by a passenger operator or party that is not a railway undertaking, such as a freight logistics company.
- 2.3 It is important that parties involved in an access issue understand the overarching framework within which we would make a determination of any appeal lodged with us. We recognise there are a number of complexities in the Regulations and where possible we have explained how we interpret the provisions. We would welcome your views on our interpretation of the obligations and rights established by the Regulations and our proposed approach to how these matters will be assessed on appeal.

#### *The overall objective*

- 2.4 The overall objective is to open up infrastructure bottlenecks in order to facilitate competition between railway undertakings, thus improving efficiency, resulting in lower prices, providing a better level of services and encouraging a greater use of the rail network. Allowing access to facilities or services for which there is no viable alternative provides an important mechanism for achieving this.
- 2.5 We recognise there is a balance to be struck between opening up existing available capacity to fair competition and deterring investment in new capacity

which would otherwise be created to provide legitimate competitive advantage/and or commercial advantage for the investor. We have recently developed an investment framework<sup>7</sup> to encourage efficient investment in the rail network, including investment in rail infrastructure such as stations and depots. As part of our goal of creating a seamless regulatory regime, we intend that the access framework under the Regulations should work consistently with the investment framework.

- 2.6 Whilst the Regulations create a presumption of access, we are required to have regard to our section 4 duties under the Act. Section 4 of the Act requires us to balance a number of public interest duties. We will consider these duties, to the extent those duties are relevant and consistent with the Directives, in making a determination on appeal.
- 2.7 Our approach is, therefore, designed to strike a balance between the interests of applicants and facility owners. Our aim is to facilitate reasonable requests for access, whilst protecting the legitimate commercial interests of the facility owner. We expect each facility owner to determine its access criteria based purely on the legitimate commercial interest of that facility. A facility owner must not take into account any competitive advantage that could be maintained in a downstream market if access is restricted.

## **The right of appeal**

- 2.8 An applicant for access can appeal to us if it believes it has been unfairly treated, discriminated against or is in any other way aggrieved regarding arrangements in connection with its entitlements to access.
- 2.9 The Regulations establish a number of rights of access for applicants and impose parallel obligations on facility owners<sup>8</sup>. This guidance focuses on the rights and obligations provided for in:

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<sup>7</sup> ORR Policy Framework for Investments – Conclusions, ORR, London, 7 October 2005.

<sup>8</sup> This covers service providers who comprise any body or undertaking that supplies any of the services to which access is granted by virtue of regulations 6 or 7, or any of the services listed in paragraphs 2,3 or 4 of Schedule 2.

- Regulation 6, which entitles an applicant to track access to and the supply of services in terminals and ports linked to the rail network, and stipulates that access can only be subject to restrictions where viable alternatives **by rail** under market conditions exist; and
- Regulation 7, which entitles an applicant to track access to and the supply of services within the service facilities listed in paragraph 2 of Schedule 2 of the Regulations (see Annex C) and stipulates that such access can only be refused if a viable alternative means of the service being provided under market conditions exists.

2.10 In relation to services at ports and terminals we intend to consider appeals in relation to such services under regulation 6 and not regulation 7, even where the service is specified in regulation 7 or in Schedule 2. Regulation 6 provides specifically for access to services in terminals and ports. Access to services other than in terminals and ports will be considered under Regulation 7.

2.11 The following paragraphs set out:

- the circumstances in which we consider that the facility owner can provide objective justification for refusing access or imposing restrictions;
- how we intend to interpret the term “viable alternative”; and
- how we intend to interpret “services” and the various obligations arising depending upon the service sought.

### **Circumstances in which access could be refused or restrictions imposed**

2.12 Access to terminals and ports and the services within them under Regulation 6, may be subject to restrictions only if viable alternatives by rail under market conditions exist. We will interpret these provisions as meaning that where a facility owner has an obligation to grant access it should not impose restrictions on that access unless these restrictions can be objectively justified. That is, when a facility owner does seek to impose restrictions, these must be fair, reasonable and proportionate.

- 2.13 Similarly, access to service facilities under Regulation 7 may only be refused if a viable alternative means of the service being provided under market conditions exists. We will expect such a refusal to be fair and reasonable and based on objectively justified criteria. Although Regulation 7 suggests that restrictions can be imposed in relation to that access, we consider that restrictions that are not objectively justified could constitute a constructive refusal to grant access, and may lead to a successful appeal.
- 2.14 Given the presumption for access (where there is no viable alternative), we would expect any arguments by a facility owner for refusal of or restrictions on access to be fully reasoned and objectively justified. We would also expect the applicant to detail precisely the requirements for seeking access as outlined in Chapter 4 of this document.
- 2.15 We will consider arguments made in this context on a case-by-case basis, but examples of the type of objective justification which might justify restricting access or a refusal to grant access could include:
- non-availability of capacity;
  - refusing to deal with applicants of poor repute (on financial or safety grounds);
  - imposing restrictions or refusing access on the basis of sound, non-discriminatory safety and security requirements;
  - imposing reasonable restrictions designed to ensure efficient utilisation of the facility or improve performance; and/or
  - imposing restrictions reflecting the technical limitations of the site or approaches to the site (e.g. capacity constraints on railway network approaching a port or terminal).
- 2.16 We have a duty to strike a balance between the applicant's right of access, the legitimate commercial interests of the facility owner and the maintenance of a long-term investment incentive. We would, therefore, be unlikely to

determine that access should be granted in circumstances where the facility owner justifies why access has been refused or made subject to restrictions, particularly where there is no evidence that the facility owner had an incentive to restrict access in order to restrict competition in downstream markets where it is, or is potentially, active.

### *Constrained capacity*

2.17 Where capacity is constrained, a facility owner could reasonably refuse to grant, or impose restrictions on, access. We do not consider that the Regulations create an obligation on the facility owner to substitute the applicant's services for his own or for those of an existing or planned future user. However, where a facility owner argues that it has reached full capacity, we would expect it to provide a reasoned case explaining the nature of the capacity constraints and demonstrating that it has examined all options for accommodating the applicant's request. Capacity at a facility is a function of a number of different constraints and we recognise that all of these will contribute to the overall limitations at the site.

### **Concept of viable alternative and interpretation of "market conditions"**

2.18 The access rights to ports, terminals and service facilities only arise where there are no viable alternatives under "market conditions".

### *Defining a viable alternative*

2.19 The Directives, recognise that there may be barriers to access or entry that have a significant impact on applicants and potentially the number of competitors able to thrive in or enter rail markets, but which may have little or no economic effect on downstream markets, particularly where goods or passengers are able to travel by another mode.

2.20 The normal rules in relation to competition and pricing apply to rail service facilities as they do to other sectors of the economy. If access is being denied, or restricted, to a facility or service that is essential in competition law terms,

then the prohibitions contained in Chapter II of the Competition Act 1998 and Article 82 of the EC Treaty (abuse of dominant position) may apply.

- 2.21 We consider that the only relevant “viable alternative” under the Regulations is that which is available to rail and our consideration of market conditions will be confined to railways. Accordingly, even where a party making an application is not a railway undertaking, in deciding if any viable alternatives under market conditions exist, the relevant criterion is whether the railway undertaking selected by the applicant to carry its traffic would be capable of using an alternative rail facility.
- 2.22 We will interpret the reference to “market conditions” as referring to the commercial viability of a particular alternative as well as simply the operational capabilities of the site. We will, therefore, consider whether access to the particular facility is required, not simply to supply the applicant, but to allow the applicant to supply its customers on competitive terms.
- 2.23 We will expect the facility owner to have provided an objectively argued case as to the existence of a viable alternative to the applicant prior to refusing access or imposing restrictions. We will also expect the applicant in making request for access to have specified precisely its requirements for access into a particular facility (see Chapter 4). This information would enable the facility owner to take a view on the relevant downstream service against which alternative facilities can be tested. If the applicant cannot switch to another facility without a material increase in its costs, or if other rail facilities that potentially could meet its requirements are not available, then the burden of proof on the facility owner will become more onerous. We will expect to see this information as a key element of the documentation for any appeal.

#### *Assessing a viable alternative - physical viability*

- 2.24 An important starting point for a facility owner making the case for a viable alternative will be for it to consider whether any alternative sites are operationally or logistically capable of replicating the amenity offered by the

facility to which access is being refused. This requires applicants for access to have explained:

- the precise operational characteristics it seeks, for example if specialist handling equipment is required or if access for road vehicles for loading and unloading is needed; and
- the geographical requirements of the facility, for example a terminal's proximity to a particular port where the customer's cargo is being unloaded, or the requirement of a customer that a terminal is located in a particular region for its final distribution.

2.25 We will expect the facility owner to have explained to the applicant why it considers that a viable alternative exists by identifying those viable alternative(s), and providing a detailed explanation on the extent to which those alternative(s) meet the applicant's requirements and match the characteristics of the facility, for which access is required, in terms of operational capabilities and geography.

2.26 We will also expect the applicant to have considered the potential alternative sites put forward by the facility owner against its requirements to assess whether they are viable alternatives.

2.27 In any appeal, we will review all this information and arguments. Appeals will be treated on a case-by-case basis having regard to this initial guidance.

#### *Assessing a viable alternative - commercial viability*

2.28 An alternative facility as well as being operationally compatible with the requirements of the applicant must also be commercially viable. We consider that if using another facility was certain to impose a material increase in the applicant's costs, such that the rail undertaking could no longer operate the traffic at a competitive price, that facility would not be a viable alternative.

2.29 This commercial assessment needs to include consideration of all relevant costs, not simply the price for accessing the alternative facility. For example

an alternative location might, due to the distances involved, incur additional track access charges. Or there may be route availability issues which require modification to the equipment used (e.g. certain routes may require sub-optimal use of wagon capacity) or an alternative facility might impose additional handling costs on the customer, making the rail undertaking's proposed service uncompetitive. We would expect an applicant challenging an alternative proposed by the facility owner to have supplied details showing the source of such costs and demonstrating that they would make the proposed service unviable.

#### *Assessing a viable alternative – availability*

2.30 We recognise that there may be instances where there are a number of alternative facilities that meet all the criteria required by the applicant but where the relevant facility owners have refused access either successively or simultaneously. This would create an unsatisfactory position for the applicant and could introduce significant delay in the resolution of the access request. In each case, the respective facility owner could take previous refusals of access as an indication that this option may not be a viable alternative. If, in these circumstances, the applicant appeals to us then it should nominate his preferred facility.

#### *Assessing a viable alternative - self supply*

2.31 Under some circumstances self-supply could be regarded as a viable alternative. This would need to be considered relative to the scale of the access rights requested. In most cases access requests will be at the margin of a facility's capacity, and so could never justify the construction of a new facility. In addition, the scarcity of suitable land for rail-related facilities might make this unfeasible. However where either the capital costs for self-supply were low or the scale of access requested represented a significant proportion of the total capacity at the facility in question, the facility owner may make the case that the applicant could itself invest in new capacity.

## What constitutes a service?

2.32 Regulation 6 establishes entitlements for applicants to access ports and terminals linked to the rail network and the provision of services within them. The types of services to be provided are not defined but we agree with the DfT, in its guidance on the Scope of the First Rail Package Transposition Regulations, that it would be reasonable to expect those services to be the same as the service facilities and services provided for in the minimum access package and other services listed in Schedule 2 of the Regulations (see Annex C). Therefore, where a port or terminal provides any of the service facilities or additional services listed in Schedule 2 they should, in principle, make these available to the applicant.

### *Service facilities*

2.33 Regulation 7 establishes the right to access service facilities, which are described in paragraph 2 of Schedule 2 of the Regulations. Service facilities and any additional services within the service facility will be provided by a “service provider”. In this guidance we have used the term “facility owner” to include “service provider”. The Regulations make the provision of some service facilities mandatory as part of the minimum access package for applicants. The services listed in paragraphs 3 and 4 of Schedule 2 (see Annex C) are classified as being additional or ancillary services (not to be confused with ancillary services under the Act).

### *Additional services*

2.34 Regulation 7 provides that a facility owner offering to supply any of the additional services described in paragraph 3 of Schedule 2 (see Annex C), must, in response to a request from the applicant, supply the service to the applicant. We will interpret this as meaning that where those service facilities also offer additional services to any party, including to the facility owner himself, those services should also be made available to the applicant.

2.35 There is a broad obligation in respect of additional services to supply “fuel, shunting and all other services provided at the access services facilities

referred to in paragraph (2) of Schedule 2". We will interpret this in a broad sense and consider that the right of access could, for example, include the right to access handling equipment such as cranes and the obligation, on the part of the facility owner, to permit access for road vehicles should the consignment require arrival or departure by road. In a practical sense, we will interpret this in the same way as the requirement to provide all services under regulation 6, meaning that any additional service that is currently available should be provided. However, there is no obligation on the facility owner to provide a service which does not already exist and/or which would impose a disproportionate cost on the facility owner.

### *Ancillary services*

2.36 These are services that can be provided entirely at the discretion of the facility owner and are listed at paragraph 4 of Schedule 2 (see Annex C). They may comprise:

- (a) access to the telecommunication network;
- (b) provision of supplementary information; and
- (c) technical inspection of rolling stock.

## 3. Appeals on charging matters

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### Introduction

- 3.1 Under the Regulations, appeals can now be brought against an infrastructure manager's charging scheme, or charging matters associated with access to unregulated facilities/services.
- 3.2 The Regulations oblige us to establish the charging framework and specific charging rules for Network Rail (the DfT establishes the charging framework and rules for the CTRL). We do not have any role under the Regulations in respect of the charging framework or rules for other network operator's facilities.
- 3.3 We have published criteria setting out the charges that we would expect to approve in track access contracts for timetabled passenger services and freight services on Network Rail's network. These documents are available on our website<sup>9</sup>.
- 3.4 The charging framework established for access to the Network Rail network will be examined in conjunction with the ongoing review of the track access in the *Criteria and procedures* documents<sup>10</sup> and, if the Regulations require any adjustments to be made to the framework or criteria, this will be the subject of a separate consultation. The existing charging framework will apply in relation to access to other network operators' facilities where these fall within the scope of the domestic access regime in sections 17 to 22A of the Act. We consider that the existing framework is consistent with the Regulations and do not envisage material revisions to the existing charging rules.

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<sup>9</sup> See <http://www.rail-reg.gov.uk/upload/pdf/173.pdf> (June 03) and <http://www.rail-reg.gov.uk/upload/pdf/192.pdf> (March 04)

<sup>10</sup> Available on ORR website at <http://www.rail-reg.gov.uk/upload/pdf/258.pdf> and <http://www.rail-reg.gov.uk/upload/pdf/257.pdf>

## **Charges for facilities, services, ports and terminals**

- 3.5 We consider that the general principles for access charges, set out in Schedule 3 of the Regulations, do not apply to access under regulations 6 and 7.
- 3.6 Nevertheless we consider that the access objective would be confounded if facility owners or service providers charged exploitative high prices. Furthermore, a facility owner that sets its access price at a deliberately high level could exclude an operator as effectively as if it were to refuse access outright. For this reason it is important that parties trying to secure access to a particular facility can appeal to us against the charges as well as simply the terms and conditions for access.
- 3.7 Whilst the basis for reviewing charges relating to access under regulation 6 and under regulation 7 is slightly different, in practice we would expect to apply the same criteria when considering an appeal about the charges levied under either.
- 3.8 In an appeal we would examine the charges for access to or services provided at ports and terminals and service facilities. We would consider whether the charges are discriminatory between similar operations or users of services (recognising cost differences). We would expect prices to be set transparently (e.g. any volume discount should be available by all potential access beneficiaries or service users) and all elements of the charges to be set on a non-discriminatory basis.
- 3.9 For access to services specified in paragraph 2 of Schedule 2, “account must be taken of the competitive situation of rail transport” when setting the charge. We will expect to be able to make fair comparisons with the charges levied across a range of similar facilities in other parts of the country where available, and to other operators at the same facility.
- 3.10 Where the rates provided at a particular facility or service, following a request for access, diverge significantly from the apparent market rate, we would

expect the facility owner to have justified this divergence with clear reference to the cost of providing the service or facility in question.

- 3.11 In considering the reasonableness of such charges we will need to understand the costs directly incurred by the facility owner as a result of access/services provided and the appropriate contribution to the overall facility owners' fixed costs.
- 3.12 We will apply the same approach when considering appeals on charging matters relating to additional and ancillary services.



## 4. Appeals Process

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- 4.1 The Regulations provide that where agreement cannot be reached on access or more extensive access to services or facilities that fall within the scope of sections 17 or 22A of the Act, applicants should continue to seek directions from us under the terms of the Act.
- 4.2 Guidance on the general processes that we follow in respect of section 17 or 22A applications, including details of how an application should be made, can be found in our *Criteria and procedures* documents for passenger contracts and freight contracts that were published in June 2003 and March 2004 respectively<sup>11</sup>.
- 4.3 Any disputed application, which falls outside the scope of the sections 17 or 22A provisions, should be dealt with as an appeal under the new Regulations. There may, however, be cases where the services sought fall partly under both the Act and the Regulations, and then we will consider, on a case-by-case basis, whether to deal with the applications as a whole or separately.
- 4.4 As such disputes will arise solely as a result of a disagreement between the applicant and a facility owner, we have decided that all appeals will be dealt with using the same process as set out for sections 17 or 22A applications. In summary, this will involve the following stages.
- An application is made using the form attached at Annex A. As we intend to base our determination only upon information presented by the parties, it is, therefore, very important that the application contains all the relevant details and supporting information.

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<sup>11</sup> *Criteria and procedures for the approval of passenger track access contracts: third edition*, ORR, London, June 2003. *Criteria and procedures for the approval of freight track access contracts: second edition*, ORR, London, March 2004. (ORR is currently consulting on updated versions of these documents, which are due to be published in March 2006).

- We will send the application to the facility owner<sup>12</sup> for both its representations on the application and for it to provide a list of any interested persons whose consent is required by that facility owner before it may enter into an agreement with the applicant. This gives any interested persons identified will then be given an opportunity to comment on the application.
- We will then publish the application and invite representations from any other industry body who may have an interest in it.
- Once these processes are complete we will make our decision within two months of the receipt of all relevant information (in accordance with the requirements of the Regulations).

4.5 As part of this process we will require from the applicant:

- the name of the terminal, port or service facility to which it is seeking access, the party from which such access is being sought, the grounds on which the appeal is being made (e.g. a restriction was imposed by the facility owner or the access requested was refused) details of the commercial negotiations that have been undertaken; or details of how the applicant considers that it has been unfairly treated or discriminated against;
- a detailed list of the access requirements it is seeking (e.g. the train slots and timings, the ancillary services required, the commercial terms proposed and the duration of the proposed agreement) and those, if any, that have been agreed between the parties;
- documentary evidence of the dispute;

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<sup>12</sup> “Facility owner”, in this context, means the provider of track access and services within terminals and ports under regulation 6, and the infrastructure manager or service provider in respect of regulation 7.

- confirmation that the applicant can obtain/or already holds access rights on the connecting network – which may be Network Rail or CTRL network – to access the terminal or port to which it is seeking access; and
- an explanation of why, in the applicant’s opinion, the other party is competent to supply the level of access or type of services that are being sought.

4.6 Generally our role will be limited to making a decision on a particular aspect of a dispute, which the parties should then take into account in their subsequent contractual negotiations. However, we would encourage the applicant to submit, alongside its application form, a draft agreement which it would like to enter into with the facility owner.

4.7 In order to assist our consideration of the existence of any possible viable alternatives, the applicant should also explain why the terminal, port or services facilities, that are the subject of the appeal, are best suited to meeting its particular needs. Specifically, it must provide details of:

- the purpose for which it requires access to the facility, and a detailed explanation of the corresponding service that it is supplying to its customer(s) or the service it intends to supply to its customers;
- a description of the specific characteristics that make it necessary to use the facility in question in order to supply the rail service specified, e.g. customer specific requirements, physical characteristics of the facility or proximity to final destination;
- an explanation of why self-supply would not be viable; and
- a description of any alternative sites that could provide similar services and an explanation of why the applicant considers that these do not represent viable options, including detailed explanation of the level and impact of the switching costs involved.

- 4.8 In responding to such an application the facility owner would be required, as well as responding to the specific arguments stated by the applicant in its application form, to:
- comment on any capacity issues that it considers might impact upon its ability to provide the services being sought, including known capacity constraints on its connecting network;
  - detail any alternative sites that could be used to supply the required services, and provide an explanation of why they are considered suitable;
  - provide evidence establishing the viability and availability of such alternative sites or, alternatively, explain why it has not been possible to provide this information;
  - explain why any restrictions that it considers should be placed on such access arrangements are, in its opinion, fair, reasonable, proportionate and objectively justified;
  - provide evidence to reject any claim that it has treated the applicant in an unfair or discriminatory manner; and
  - list any other affected parties.
- 4.9 We may require either or both parties to provide further information in order to inform our decision making process.
- 4.10 We view our appeal function under the Regulations as one of an arbiter, not an investigator. We intend to rely on the information provided by the parties themselves in making our determination. It is, therefore, important that the parties provide as much realistic information as possible and concisely answer the questions set out above. This will greatly assist us in making our determination.
- 4.11 The Regulations provide that if any person makes a false statement knowingly or recklessly, this will be regarded as an offence and may result in a fine.

# Annex A: Application form

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# Form R29

## Application to ORR on appeal under regulation 29 of the Railway Infrastructure (Access and Management) Regulations 2005

### 1. Introduction

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This form should be used to apply to ORR (as the appointed regulatory body) for the determination of an appeal under regulation 29 of the Railway Infrastructure (Access and Management) Regulations 2005 in respect of access to a terminal or port (as defined in regulation 6) or services (as defined in regulation 7). This form sets out our standard information requirements for considering appeals under regulation 29. Applicants are strongly encouraged to read the ORR's guidance document setting out how it intends to assess such appeals<sup>1</sup> before making an application.

Where the level of access or service provision sought falls entirely within the scope of section 17 or 22A of the Railways Act 1993 (the Act) an applicant must, in accordance with regulation 29(3), lodge the appeal under the relevant section. Where the matter of the appeal falls outside the scope of directions which may be sought under sections 17 or 22A of the Act, the applicant seeking the right to use a railway facility or procure a service must lodge an appeal by using this form.

As ORR intends to limit itself, as far as possible, to making a determination based only upon the information presented by the parties rather than undertaking any extensive research of its own, it is very important that this application contains as many relevant details as possible.

ORR will be happy to discuss prospective applications, and applicants are strongly encouraged to contact the Office at an early stage, preferably before making an application, to discuss their likely requirements. Contact details are shown at the foot of this form.

A copy of this form, and of our guidance note on the appeals process, can be accessed electronically and downloaded via the ORR website at [www.rail-reg.gov.uk](http://www.rail-reg.gov.uk), or on disc or CD-Rom from ORR.

<sup>1</sup> *Initial guidance on appeals to ORR under the railways infrastructure (access and management) regulations 2005*, Office of Rail Regulation, November 2005

## **2. The proposed agreement**

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### **2.1 Title of agreement**

### **2.2 Contact details (Company and named individual for queries):**

**Company:**

**Contact individual:**

**Job title:**

**Address:**

**Telephone number:**

**Fax number:**

**E-mail address:**

### **2.3 Licence and railway safety case**

Please state whether the applicant intends to operate the services itself or have them operated on its behalf. Please state whether the proposed operator of the services:

- (a) holds a valid train operating licence under section 8 of the Act or an exemption under section 7; and
- (b) has an accepted railway safety case under the Railways (Safety Case) Regulations 2000.

If the answer to (a) or (b) is no, please state the point which that person has reached in their obtaining of the licence, exemption or railway safety case (as the case may be).

### 3. The proposed agreement

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#### 3.1 Details of facility or service to which access is requested:

Name of facility or service:

Facility owner1:

Contact individual:

Job title:

Address:

Telephone number:

Fax number:

E-mail address:

#### 3.2 Executive summary

Please provide an executive summary of the proposed appeal. This should cover the type and level of rail access required (including number of train slots and timings if relevant) or any services that are required to be provided by the facility owner, the commercial terms and the applicant's reasons for seeking the contract in the terms proposed. Where possible this application form should be accompanied by a draft agreement setting out the contractual terms that the applicant wishes to enter into with the facility owner. This section should also include an explanation of the extent to which the applicant has evaluated available capacity at the named facility in order to satisfy itself that the level and type of services being sought can be accommodated.

#### 3.3 Grounds for making this appeal

Please set out here those specific reasons for making this appeal under the Regulations (e.g. has a restriction been imposed by the facility owner, has access been refused or does the applicant consider that it has been unfairly treated or discriminated against?). Please provide copies of correspondence between the applicant and facility owner that supports any argument.

### 3.4 Suitability of preferred facility

Please explain why you consider that this particular facility is competent to supply the access or service required, together with the purpose for which the access or service is required including:

- a detailed explanation of any corresponding services that the applicant is providing to a third party customer (including details of any commercial arrangements that are in place in this respect);
- a detailed description of the characteristics of the facility specifically required which makes it necessary to use the proposed facility;
- an explanation of why it is considered that no other facility is capable of providing these services (including comments regarding the commercial viability of any possible alternative arrangements);
- an explanation of why the services required cannot be provided by the applicant; and
- a description of any other facilities that provide similar access or services to that required, and an explanation of why these are not considered to be viable in this particular instance (either from an operational or commercial point of view).

## 4. Other

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### 4.1 Associated applications to ORR

Please provide details of any other applications that are being made to ORR in parallel with this application (e.g. under sections 17, 18 or 22 of the Act).

## 4.2 Supporting information

Please indicate here any further justification or relevant information in support of the application, including a list and explanation of any other material being submitted (and supply copies with the application).

## 4.3 Side letters and collateral agreements

Please confirm here that, where applicable, the whole of the proposed agreement between the parties has been submitted with this application and that there are no side letters or other documents which qualify or otherwise affect the proposed application.

## 4.4 Confidentiality exclusions

Please indicate clearly any elements in the application and the proposed agreement that the parties would wish to exclude from wider consultation on the grounds of confidentiality specified in section 71(2) of the Act, and provide a full justification for each instance by reference to those statutory grounds. Subject to our decision on such exclusions, it is our intention to publish this application and the proposed agreement on the ORR website.

## 5. Certification

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**Warning:** Under section 146 of the Act, any person who, in giving any information or making any application under or for the purposes of any provision of the Act (including section 17), makes any statement which they know to be false in a material particular, or recklessly makes any statement which is false in a material particular, is guilty of an offence and so liable to criminal prosecution.

I certify that the information provided in this form is true and complete to the best of my knowledge and that [*insert name of applicant*] is willing to enter into the attached agreement as submitted.

Signed: .....

Date: .....

Name (in caps): .....

Job title: .....

For (company): .....

## 6. Submission

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### 6.1 What to send

Please supply, in hard copy, the signed top copy of this application form, three copies of the proposed draft agreement (where appropriate), copies of any documents incorporated by reference (other than established standard industry codes or other instruments) and any other attachments, supporting documents or information.

Please also supply the application, the proposed agreement and, insofar as it is possible, any other supporting information, in electronic form, by E-mail or on disc, in plain Microsoft Word format (i.e. excluding any macros, auto-paragraph or page numbering, or other auto-formatting).

### 6.2 Where to send it

Manager, Track Access Team  
Directorate of Rail Markets, Passengers & Freight  
Office of Rail Regulation  
1 Waterhouse Square  
138-142 Holborn  
London  
EC1N 2TQ

## Annex B: List of consultees

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Alstom Transport Ltd	First Scotrail
Arriva plc	Freight Transport Association
Arriva Trains Wales	Freightliner Ltd
Associated British Ports	Gatwick Express Ltd
ATOC	GB Railfreight Ltd
Balfour Beatty Rail Infrastructure Services Ltd	GE Rail Services
Bombardier Transportation	GNER Holdings Ltd
Bristol Port Company	Go Ahead Group plc
British International Freight Association	Heathrow Express
British Nuclear Fuels Ltd	Hull Trains Company Ltd
British Ports Association	Hutchinson Ports (UK) Ltd
C2C	Island Line Ltd
Central Railway PLC	London & Continental Railways
Chamber of Shipping	London Gateway Port
Chiltern Railways	London Underground Ltd (LUL)
Crossrail	LTS Rail Ltd
Direct Rail Services Ltd	Maersk UK Ops Management
Europe Rail Consultancy Ltd	Mendip Rail
European Commission	Mersey Docks and Harbour Company
Eurostar (UK) Ltd	Merseyrail
Eurotunnel PLC	Midland Mainline Ltd
EWS	MT Services Ltd
Federation of European Private Port Operators	National Express Group plc
First Great Western	Network Rail
First Great Western Link	New Southern Railway Ltd
First Group PLC	Northern Rail
	'One' Railway

P&O

P&O Ports

Port of London Authority

Rail Freight Group

Railway Forum Scottish Executive

Serco Group/Ned Railways

Siemens

Silverlink Train Services

South Eastern Trains

South West Trains

Stagecoach Group

Stenna Lines

Thames Trains

Thameslink Rail Limited

Transpennine Express

Transport for London

UK Major Ports Group

Union Railways (North)

Unions Railways (South) Ltd

Virgin Crosscountry

Virgin West Coast

Welsh Assembly Government

Wessex Trains

West Coast Railways

# **Annex C: Schedule 2 of the Regulations – services to be supplied to applicants**

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## **REGULATION 7 - SCHEDULE 2**

### **SERVICES TO BE SUPPLIED TO APPLICANTS**

1. The minimum access package referred to in regulation 7(1) shall comprise—
  - (a) handling of requests for infrastructure capacity; and
  - (b) the right to utilise such capacity as is granted and, in particular—
    - (i) the right to use such running track points and junctions as are necessary to utilise that capacity
    - (ii) train control, including signalling, train regulation, dispatching and the communication and provision of information on train movements; and
    - (iii) all other information as is necessary to implement or to operate the service for which capacity has been granted.
2. Track access to services facilities and the supply of services referred to in regulation 7(1) and (4) shall comprise—
  - (a) where available, the use of electrical supply equipment for traction current;
  - (b) refuelling facilities;
  - (c) passenger stations, including buildings and other facilities;
  - (d) freight terminals;
  - (e) marshalling yards;
  - (f) train formation facilities;
  - (g) storage sidings; and
  - (h) maintenance and other technical facilities.
3. The additional services referred to in regulation 7(5) may comprise—
  - (a) traction current;
  - (b) pre-heating of passenger trains;

(c) the supply of fuel, shunting and all other services provided at the access services facilities referred to in paragraph (2); and

(d) tailor-made contracts for—

(i) control of the transport of dangerous goods; and

(ii) assistance in running abnormal trains.

**4.** The ancillary services referred to in regulation 7(6) may comprise—

(a) access to the telecommunication network;

(b) the provision of supplementary information; and

(c) technical inspection of rolling stock.

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