

Sam Gibbins
Executive, Track Access
Office of Rail Regulation
1 Kemble Street
London WC2B 4AN

310 Goswell Road
London EC1V 7LW

Tel : +44 (0)870 1407010
Fax : +44 (0)20 7713 2310

14 May 2007

Dear Sam,

REVIEW OF ORR'S CRITERIA AND PROCEDURES FOR THE APPROVAL OF TRACK ACCESS CONTRACTS - A CONSULTATION DOCUMENT

This letter constitutes the response of English Welsh & Scottish Railway Limited ("EWS") to the above consultation document. The following representations are intended to reinforce or supplement those already made by EWS at the ORR's Workshop held on 27 April 2007.

Introduction

1.1. EWS supports ORR's initiative to update its Criteria and Procedures for the approval of track access contracts ('C&Ps') with the aim of reducing the reliance placed on ORR by the industry to identify and pick up on any issues of concern. However, that said, EWS considers that in revising its C&Ps, ORR must still maintain an appropriate balance between the level of regulatory scrutiny and placing the onus on the industry to resolve any issues arising.

1.2. In the past, EWS has had to rely heavily on ORR's consultation process and follow up assistance in order to protect its existing services and future aspirations from a number of proposed track access contracts and supplemental agreements agreed between Network Rail and other Train Operators. As a result it is clear to EWS that, currently, its interests are not always properly taken into account by Network Rail in its own consultation and internal consideration processes. EWS is, therefore, concerned to ensure that this regulatory protection is not lost.

ORR's questions

You are invited to comment on the issues set out above and in particular, whether you have other issues/areas of concern or comments on the relative priorities we should give them.

2.1. Although, quite rightly, the consultation document focuses on the track access contracts entered into between Network Rail and Train Operators for access to the national railway network, EWS considers that ORR should not forget that freight operators, in particular, are required to enter into track access contracts with a range of different facility owners such as other freight operators,

<http://www.ews-railway.co.uk>

continued ...

passenger operators, port owners, third party terminal operators and heritage railways. As in the case of the national railway network, it is crucial that C&Ps are developed to ensure that all freight operators using the same facility are treated in a fair and non-discriminatory manner by the relevant facility owner. As the terms and conditions for access to such facilities, including the charges, are not as transparent as those that apply for access to Network Rail's network, each freight operator will be relying on appropriate regulatory scrutiny to ensure fair and equal treatment.

Do consultees agree the principle of ORR providing a more selective and proportionate response to applications and that the focus of our consideration should be on the areas set out in paragraph 2.11 above?

2.2. EWS agrees that the degree to which ORR scrutinises applications should become more proportionate to the four areas listed in paragraph 2.11 of the consultation document. EWS also supports ORR's intention to focus increasingly on the issues listed in paragraph 2.8 of the consultation document.

2.3. EWS concurs that ORR should not be relied upon as a 'proof reader' to pick up non-material errors and omissions in the application that should have been addressed by the parties prior to submission. However, following on from its comments in paragraph 2.1 above, EWS considers that regulatory scrutiny of the charges and other commercial terms remains crucial, particularly in the competitive rail freight market and for non-Network Rail access contracts where such commercial terms are not so transparent. This will continue to ensure the facility owner concerned is pricing access in a fair and consistent way to avoid creating commercial advantage for one freight operator over another.

We would welcome consultees' views on these proposals, and in particular:

- (a) do you agree the proposed timescales and scope for general approvals?*
- (b) do you agree the revocation of STAGA?*
- (c) do you think that there is scope for even wider use of general approvals?*

2.4. EWS has no objections to extending the passenger general approval from 90 days to one timetable period (6 months) which, in effect, is the timescale currently enjoyed by freight operators through certain provisions set out in Schedule 5 of the freight model contract. EWS also approves of the proposal to issue a general approval to cover certain changes that have already been through a formal industry process such as Part F of the Network Code.

2.5. EWS would be concerned, however, if a general approval were extended to allow new passenger operators to run services for the first year of their franchise to see whether any problems arose. This could have serious implications for freight operators, particularly in respect of understanding in advance the effects of

continued ...

the new services on existing rights let alone 'white space' capacity which could be sterilised for up to a year. It would be extremely difficult both politically and practically to stop passenger trains once they commence operation, irrespective of the damage they may be causing to freight services which are likely to be expected to step aside as a consequence.

2.6. EWS considers that such a general approval should not be necessary in any case as there should be ample time for a new franchisee in parallel to acquiring its licence and/or franchise agreement to apply for and be granted firm rights in a track access contract reflecting its franchise.

2.7. In principle, the provisions in Schedule 5 of the freight model contract enabling freight operators to run services under Spot Bids for up to six months should make STAGA redundant. However, EWS wishes to understand what would happen if Network Rail, unfortunately, took longer than 6 months to consider and agree the necessary Section 22 amendments for a particular new flow of traffic for example. In such cases it would be unacceptable for new traffic to have to stop operating after 6 months solely because the proper process had not been completed in time. EWS would, therefore, suggest consideration should be given to a revised STAGA that could apply in such circumstances.

2.8. EWS considers that ORR should also reissue a general approval covering non-material factual issues in freight access agreements such as Stanoxes, Contract Miles and typographical errors or corrections/updates to place names.

Consultees are invited to comment on our proposals for achieving greater alignment with industry processes and to say whether there are any additional industry processes which we should consider.

2.9. EWS supports ORR's current policy of taking account of established RUSs when considering access applications and ensuring that RUSs under development take account of existing contractual arrangements. EWS also approves of ORR's initiative to pre-consult on any new franchise remapping exercises with the aim of achieving the benefits outlined in paragraph 2.41 of the consultation document.

2.10. EWS considers that the granting to passenger operators of a general approval to allow operation of services for up to 6 months would avoid the situation that currently gives rise to a peak workload for ORR prior to each timetable change date. This is because it would no longer be imperative for late notice applications to be considered and approved before the relevant timetable commences.

Consultees' views are invited on our proposals to place more onus on the industry to resolve areas of disagreement at an earlier stage through a pre-application consultation and to reduce ORR's involvement in that process.

continued ...

2.11. As a national operator, EWS should be consulted by Network Rail on all proposed track access applications. However, in reality, the first time EWS is alerted to the existence of such applications is usually by ORR when it carries out its own consultation process. Therefore, it is not surprising that EWS is concerned over the proposal to remove ORR's consultation process and instead rely on Network Rail to consult and resolve any areas of disagreement. EWS considers that Network Rail is not structured or geared up to take on this role and this is evident from the lack of pre-consultation EWS currently receives.

2.12. For ORR's proposal to be acceptable to EWS it would need to be satisfied that Network Rail had robust and transparent formal processes in place that would give confidence to freight operators that their concerns would receive due consideration and require Network Rail to work proactively with freight operators to resolve them. At present, EWS considers that such processes do not exist and remains sceptical as to whether any could be established, agreed and made to work in any case to provide an adequate replacement for ORR's current process. EWS, therefore, expects to continue to rely on ORR to ensure its concerns are adequately taken into account.

Consultees' views are invited on the principle of establishing a process for setting deadlines and parameters for the submission of applications.

2.13. EWS is uncertain of the value of establishing deadlines and parameters for the submission of applications and has not considered this to be an issue in the past. EWS considers that any proposals in this area should not create the perverse incentive of discouraging applications for access, particularly as new or revised freight traffic can materialise at any time.

Consultees' are invited to comment on our proposals to adopt a 'one stop shop' approach, including the development of an overarching regulatory framework document.

2.14. EWS supports the principle of ORR adopting a 'one stop shop' approach including the development of an overarching regulatory framework document. EWS looks forward to receiving further detail and commenting on these proposals as they develop.

Consultees are invited to comment on the issues set out above and in particular let us know whether there are any other related issues/areas that they believe we should be looking at.

2.15. EWS agrees that the revised C&Ps should reflect the majority of issues set out in paragraph 2.50 of the consultation document and in particular the issue of network capability which ORR quite rightly remarks is important to freight operators. EWS also looks forward to the long-awaited review of charter passenger access arrangements, including working with Network Rail to develop an appropriate model contract for such services.

continued ...

2.16. EWS is uncertain, however, of the benefit of whether and how safety issues should be considered as part of the track access process other than by ensuring that the operator concerned has an appropriate safety certificate and the necessary vehicle and route acceptances for its specified equipment. Currently, safety issues are considered separately and in parallel with track access issues. Combining the two may cause duplication and create uncertainty. EWS will, therefore, reserve its position on this aspect until it understands more about what ORR has in mind.

2.17. In respect of other areas that ORR should be looking at, EWS would again draw attention to its comments in paragraph 2.1 above relating to issues surrounding non-Network Rail track access.

Conclusion

3.1. EWS hopes the above comments are helpful and looks forward to working further with ORR, Network Rail and other industry colleagues in developing the proposals further over the coming months.

Yours sincerely

Nigel Oatway
Access Manager