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Dear Sam

Review of ORR's Criteria and Procedures for the Approval of Track Access Contracts

Thank you for the consultation document, and for the workshop held in London on 27 April 2007. This response makes reference where appropriate, to the relevant paragraph numbers of the document.

Northern supports the proposal that the industry should take back more responsibility for its own contractual arrangements, but believes that there should be safeguards in place to assure the integrity and fairness of any new processes, together with an ability for either party to seek advice from ORR on how a particular difficulty could be overcome.

ORR proposes (2.8) to reduce the level of regulatory scrutiny in general and not to scrutinise or advise on proposals that have been agreed by the parties (2.9), or to ensure that draft contracts are fit for purpose. Network Rail legal advisors currently draft some of the agreements, with the remainder drafted by non-legal staff. Can ORR confirm the extent to which legal input to draft agreements and/or supplementals is included within Network Rail's funding.

Northern supports the intention of ORR to apply a proportionate response (2.11), especially when substantial allocations of network capacity are being made for considerable periods. Would it be ORR's intention that applications from Northern would always be well scrutinised because of the stakeholder role of the PTEs in the Northern Franchise? ORR should continue to scrutinise in principle all departures from the Model Contract (2.11), even if the detail is not scrutinised. Whilst submissions made under S17 or S22A are clearly not agreed by the parties, there are often issues in S18 and/or S22 initial applications which the parties have not fully resolved and which would benefit from regulatory scrutiny. Should the application forms be re-drafted to highlight such issues?

The proposal to increase the use made of General Approvals (2.16) is supported to cover the following situations:

- Amendments to Schedule 2 routes to include routes not currently listed, although ORR should consider whether a model clause Schedule 2 should be formulated against which a General Approval may more easily be defined.
- Amendments to the quantum of Schedule 5 access rights where the paths were allocated priority under Network Code D 3.2.3(c) or D3.2.3(d) and have been

included in the First Working Timetable by Network Rail, for a period between successive Change Dates (6 months), and Network Rail consultation has been successfully concluded

- Amendments to Schedule 5 Specified Equipment where the amendment is non-material or the Part F process has reached the stage where route clearance has been obtained
- Amendments to Schedule 7 Part 5 to allow the payment of additional charges and Appendix 7c involving changes to service codes, but the proposed use of a general approval will lose the test of the reasonableness that the previous ORR scrutiny of charges provided. How could this be retained?

Northern supports the view that the consultation process (2.19) should also apply to certain general approvals and especially material changes to the quantum of services in Schedule 5. Northern does not support the proposal for a franchised operator to run for the first year of a franchise under a general approval (2.20). In these circumstances, it is likely that a previous incumbent franchisee will have bid at the Priority Date for the first year timetable under the terms of the existing TAC that is normally transferred to the new franchisee at franchise commencement date. An incoming franchisee that expects to make service changes in the second year would aim to negotiate new rights to secure top priority at the appropriate Priority Date. Failing that a lower priority would apply depending on the precise circumstances. The holding of the rights and the operation of the services could be approved by a GA but the TOC would surely want to make an application under S17/18 or S22/22A to have certainty that the rights held can be allocated top priority in accordance with Part D 3.2.3(a) to deliver the SLC. The suggested extension of the general approval duration to a timetable year is of no real value and would risk creating a peak of general approval consultation, similar to ORR's recent experience (2.22).

The proposed alignment of processes (2.25) is welcomed. There are no clear links between the Part D processes and the processes used to amend the track access contracts, and decisions taken at a working level to optimise the timetable plan can often result in the need to amend the TAC, but this can only be identified much later by analysis of the validated timetable.

Northern is currently engaged with Network Rail to secure capacity for an additional hourly service between Leeds and Nottingham in the December 2008 timetable. It is the first time that Northern has attempted to secure rights in advance of the production of the actual timetable. If ORR is encouraging early submission of applications (2.26) both TOC and Network Rail internal processes must be able to deliver this objective.

The proposed changes to consultation (2.30–2.35) will mean that Network Rail will undertake consultation on some applications and that ORR will consult on the more significant applications (2.31/2.32). There must be absolute clarity to identify the applications that are being dealt with by ORR, and those being dealt with by Network Rail to avoid the risk of applications being lost or delayed. If the aim is to remove duplication, the method and outputs of Network Rail's initial consultation must be sufficiently regulated (2.33) and well documented (2.34) to apply to all applications and for ORR then to agree with Network Rail and the applicants which applications will be the subject of further ORR scrutiny as a second stage and to use the outputs from the initial consultation as a starting point. Northern's Franchise Agreement requires that any amendment to the Access Contract (TAC) must have prior approval from DfT before signing. It is essential that DfT are included in the formal consultation process.

The success or otherwise of the proposed pre-application consultation by Network Rail will rely heavily on the ability of Network Rail to resolve issues raised by consultees before involving ORR, especially relating to timetable information and performance modelling. It is not clear at what stage Network Rail are able to provide performance-modelling outputs to answer questions raised in pre-application consultation.

The proposal to introduce deadlines for applications (2.37) must have adequate safeguards to ensure that once the S17/22A application deadlines are passed, the S18/22 deadlines are not used in a way that results in a TOC accepting a sub-optimal solution because otherwise the application would be timed out. It is also important that stakeholders and funders understand the industry timescales that will apply to the delivery of service changes and service enhancements. There must also be a mechanism that continues to allow amendments at short notice where both Network Rail and TOC can demonstrate a valid reason to short-cut the "normal" deadlines and when a suitable general approval is not available.

Northern supports the proposed web based "one stop shop" approach and the creation of an overarching regulatory framework document. Should the document make reference to the interaction between track access and the PSR/SLC elements of the Franchise Agreement? ORR should consider whether a Model Clause Schedule 2 should be developed as part of this review (2.46), and whether the non-template Schedule 5 specials provisions approved by ORR in the Northern TAC should be included in the Model Contract to reduce to a minimum the number of supplemental agreements requiring ORR approval under a general approval or S22 for one-off special trains.

At the workshop, it was suggested that the new arrangements would apply from September 2007, but Network Rail will need to set up the processes and recruit the staff to carry out the envisaged pre-application consultation. The transfer date should be agreed between ORR and Network Rail, and Northern proposes that all December 2007 changes should be dealt with by ORR, as now and the new consultation process introduced in early 2008 for the intervening period leading up to the Summer 2008 change date.

Please do not hesitate to contact me for any clarification of the above.

Yours sincerely

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