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1 Kemble Street
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Dear Sam,

**Re; Review of ORR's criteria and procedures for the approval of track access contracts**

Thank you for inviting comment on the above document and hosting the useful workshop. Comments follow below.

## SUMMARY

The thrust of the ORR proposals is to reduce the overall amount of regulatory scrutiny of track access agreements and amendments. This is most welcome as it will start to reduce costs and allow focus on more material issues.

However, it should be possible to reduce the workload of the industry outside of ORR as well. In particular, the burden of drafting and submitting applications by Network Rail and Operators could be reduced as well.

This reduction can best be achieved by adjusting the model clauses so as to improve the amount of flexibility permitted within the TACs, thus reducing the requirement for s22 applications. This will reduce the industry workload by cutting minor issues out of the regulatory arena at source.

Whilst the proposal to increase the use of General Approvals is very welcome, this still retains the need for the s22 or 18 applications. The drafting of these is very time consuming.

The following chart illustrates a suggested "stepped" approach to sifting the material issues and reducing the workloads.

| Step | Initiative | Workload Saved | Benefits Felt By |
|---|---|---|---|
| 1 | Introduce some flexibility into the Model Clauses. | Minor service changes do not require s22. | Entire industry |
| 2 | More General Approvals | Less industry scrutiny of s22 | ORR + consultees (but not applicants) |
| 3 | Materiality test for non GA s22 "de minimis" applications. | Less scrutiny of minor s22 | ORR |
| 4 | Remaining applications receive full scrutiny | As now | As now |

## FLEXING THE MODEL CLAUSES

Analysis of the Wessex Trains Supplemental Agreements shows a material increase in number following the introduction of model clauses. Even prior to their introduction, there were Supplementals relating to minor matters that could have been dealt with satisfactorily with no contractual risks to any party if the TAA had been slightly more accommodating i.e. the rights already existed. For example, extra branch line trains arising out of the Summer Change Date disconnect, Santa specials and test running class 31s to Weymouth.

Virgin, for instance, suffered excessive problems applying for class 67s to run to Paignton for a few days. Needless operational scrutiny of the s22 pushed the application beyond planning timescales. Network Rail understandably did not wish to progress the bid whilst the questions on the s22 were still being processed. The s22 was finally cleared after most paths in the timetable had been fixed and the result was very poor paths for the Virgin services with consequent detriment for the travelling public. The class was already fully cleared and the operation would have been robust. It should have been possible for the parties to "just do it" if the TAC had been slightly differently drafted.

A major contractual exercise resulted from the simple need to run a handful of Sunday trains to Newquay. This was despite the fact that it had the full support and encouragement of the incumbent TOC (Wessex Trains), affected nobody else and was agreeable to Network Rail. The Model Clause Contract could and should have been able to allow this temporary minor change without recourse to s22.

The model clause passenger TAC could allow, for instance, without recourse to s22 :-

- use of non specified diversionary routes for engineering if necessary or expedient
- use of non specified equipment for short periods subject to appropriate conditions
- bidding into white space for a small number of services for a short period
- non material flexibility to quantum rights. For example in a hub & spoke operation, two rights from A to B and C to D should allow operation (via the hub) from A to D and B to C without a s22 being essential. These tend to be the sorts of non material changes that happen at the end of the TT development process from diagram changes or the validation of platform working. Nevertheless, they give rise to a proliferation of s22 work just before the Change Date.
- Other examples suggested by attendees at the ORR workshop.

**ORR QUESTIONS**

**ISSUES FOR CONSIDERATION**

You said that ORR would welcome the views of consultees on the following specific questions / issues:

"……….*we believe that there are a number of main issues on which the review should focus and it is on these that we would welcome the industry's views:*
*(a) the* ***level of regulatory scrutiny****, including:*
*(i) the adoption of a more* ***proportionate response*** *to applications;*
*(ii) allowing the industry more* ***flexibility on the more straightforward and minor service changes*** *through the wider use of definitely need more general approvals,* ***general approvals****, for section 18 and 22 applications; and*
*(iii) the better* ***alignment and integration of track access processes*** *with other industry processes;*
*(b) the principle of setting* ***deadlines for applications****;*
*(c) a* ***restructuring of the C&Ps*** *to make them more user friendly; and*
*(d) completion of those* ***policy changes*** *that were not possible as part of the recent C&P update project.*
*Each of these issues is discussed in more detail below.*

***- 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 (paragraph 2.6).*** *……..*"

COMMENTS:-
(a) the level of regulatory scrutiny is indeed too high. The industry is, for the most part, mature enough to manage adequately on less scrutiny thus releasing ORR and other resources to work on more productive areas such as possessions work.

(i) a more proportionate response is needed with a materiality threshold to weed out "de minimis" applications that need the bare minimum scrutiny

(ii) the industry should be allowed flexibility through the wider use of general approvals. However, General Approvals do not remove the need for the parties to go through the demanding process of drafting the applications and the agreements in the first place.

(iii) deadlines for applications are appropriate **provided** that the processes have been cleared of the minor applications and deadlines are thus meaningful, or indeed, essential.

(iv) **in addition:** the model clauses track access contract needs to be adjusted in order to incorporate or reinstate some of the beneficial flexibility that would keep many minor issues right outside the regulatory arena. i.e. a number of changes would become (or revert to) non material status and covered by the contract (principally schedule 5) thus avoiding the need for a s22 application at all.

**PROPORTIONATE RESPONSE**

*"…………………2.11 As part of this changing focus, we believe that there is considerable scope for providing a more selective and proportionate response to applications.*
*Accordingly, we propose that the degree to which we scrutinise applications should become more proportionate to:*
*(a) the nature and complexity of the application;*
*(b) the impact that the contract is likely to have, particularly on other stakeholders;*
*(c) the quantum and nature of the rights being sought; and*
*(d) any departures from the model contract.*
*Add –*

***- 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? (paragraph 2.14)……………"***

COMMENTS
1. To the above list of four materiality criteria should be added:-
- the duration of the rights. Are they only for a 5 – 7 month TT period (or indeed one week, one day or one train) and
- has a timetable been agreed that contains the trains required under the proposed rights?
- Is the application in support of a Community Rail initiative?

2. The use of ORR lawyers to scrutinise all agreements line by line should be restricted to material contracts where there are material contractual risks. Railway work, by its very nature is a haven for lawyers to pick detail. There are many cases where the pursuit of non material legal infelicities has resulted in disproportionate correspondence, delays and damage to timescales and thus business. The parties should be allowed more responsibility for their own businesses. Having said this, we would not wish ORR to stand too far back from the issues or withhold material observations. There was much welcome comfort on this point from the ORR assurances at the workshop.

**FLEXIBILITY ON MINOR SERVICE CHANGES**

***"…………- We would welcome consultees' views on these proposals, and in particular:***
***(a) do you agree the proposed timescales and scope for GAs?***
***(b) do you agree the revocation of STAGA? and***
***(c) do you think that there is scope for even wider use of General Approvals? (paragraph 2.22)…………."***

COMMENTS
(a) Yes. The timescales and scope are good but don't forget that the Summer and Winter TTs are now approximately 7 months and 5 months respectively following the use of the device in the EU regulations to allow the alignment of the start of the Summer TT to the Spring Bank Holiday.

(b) the freight operators seem relaxed about the revoking of STAGA.

(c) Yes. Wider use of General Approvals would be very welcome but they do not remove the need for the parties to draft the applications and the proposed s22 applications in the first place. It is true, there would be welcome benefits in reduced consultation and shorter timescales for changes coming at the end of the TT development process. But, whilst a reduction in ORR workload would be welcome, this should not be seen as a soft alternative to easing the Model Clauses and thus enabling a reduction in everybody's workload by removing issues from the ORR arena.

In the case of s22 for consequential changes being submitted at the end of the timetable process, anything other than a General Approval would be almost unthinkable. The alternative could be to remove trains from TSDB which would almost look like an ORR initiated failure of "T-12".

(d) A set of materiality criteria need to be developed to sift "de minimis" applications that have not been eliminated by the adjustment to the Model Clauses. Some of these are contained in your document and others were suggested at the workshop. A further workshop could be used to develop:-

- a list of flexibility devices for insertion in the Model Clauses and
- a list of materiality criteria for "de minimis" applications

**ALIGNMENT OF PROCESSES**

***"…………. - 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 (paragraph 2.28)………."***

COMMENTS
The proposals could distinguish more between different tiers of issue vis.:-

1. a new entrant
2. an existing operator or new franchise requiring major changes to structure and / or quantum of access rights prior to the start of the bidding process or the Base Timetable process.
3. subsequent "sweep up"changes to 2. resulting from the progress or completion of the timetabling process
4. an existing operator requiring pre determined minor or non material changes to an existing operation
5. consequential changes to rights needed as a result of the validation of the timetable where the trains are now "on the graph" and de facto "consulted" with interested parties.
6. other minor issues
7. any issues that can be eliminated by allowing some service flexibility within the Model Clauses.

Instances like 1. and 2. require existing scrutiny to be maintained or increased. For example, the Midlands exercise was useful, informative and an excellent model for future use.

Examples like 3. and 5. would certainly benefit from the General Approval approach if they couldn't be eliminated by flexibility in the Model Clauses.

Examples like 4. and 6. which are "de minimis" would benefit from a materiality test before setting upon full scrutiny if it was not possible to eliminate them by flexibility in the Model Clauses

Key questions are:-

a) are the changes pre arranged and known in advance of timetable processes? or
b) are they consequential upon the timetable process?

And:-

c) are they major or material? or
d) are they minor or non material?

**CONSULTATION ARRANGEMENTS**

***"…………. - 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 preapplication consultation and to reduce ORR's involvement in that process (paragraph 2.35)……….."***

COMMENTS
Whilst noting the valid reservations of some parties at the workshop, ORR should make explicit the unwritten requirement for all industry parties to communicate and cooperate. Demonstrable material failure to do this should be made to weigh heavily against the (minority of) unhelpful or uncommunicative parties.

Whilst also noting Network Rail's valid concerns over process and resource levels, ORR need strong support in their desire to reduce or eliminate the duplicate and time wasting consultations. The proposals look good.

**DEADLINES FOR APPLICATIONS**

***"……………… - Consultees' views are invited on the principle of establishing a process for setting deadlines and parameters for the submission of applications
(paragraph 2.38)………………"***

COMMENTS
Realistic deadlines are an essential part of a smooth and effective process. However, they will only work once ORR has succeeded in moving all the minor applications into General Approvals, streamlining the de minimis applications and moving minor issues out of the regulatory arena by easing the Model Clauses.

Once this is done, then realistic deadlines can and should be applied to the remaining material applications where it is essential that adequate time is given. In general, these applications will tend towards those pre determined proposals of operators, DfT, Wales, Scotland etc which are entering the process at business planning timescales.

We should seek to avoid deadlines that are meaningless to minor issues or ones that have arisen consequential to the industry timetable or resource planning processes. These should be dealt with by other devices.

In the case of consequential service changes, these can be regularised for one TT 5 or 7 month period by the use of General Approvals. If they are to be perpetuated, then a full application may be appropriate and can be progressed within set deadlines.

**AN OVERARCHING REGULATORY FRAMEWORK DOCUMENT**

***"…………….. - Consultees are invited to comment on our proposals to adopt a 'one-stop shop' approach, including the development of an overarching regulatory framework document (paragraph 2.48)………."***

COMMENTS
Excellent idea.

***"……........... - 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 (paragraph 2.50)…………"***

COMMENTS
Early implementation of any "quick wins" should be seen as a priority.

For example, changes to the Network Code for consultation obligations, for instance, will take time and would need to be part of a later tranche of changes.

However, introduction and application of a set of "de minimis" criteria could be implemented relatively quickly as they would not necessarily cut across any presently defined regulatory procedures.

It should not take too long to devise an initial list of changes to the Model Clauses and then make these available to operators via a General Approval.

1st October has been suggested as a key date in the process for change and a set of "de minimis" criteria could be implemented from that date and benefit the December 2007 timetable applications.

An initial General Approval relaxing the model clause contracts ought to be able to be available at the same time. There is a golden opportunity to make some easy changes available in time for the new Midlands franchises to be able to incorporate them into their new TACs

Yours sincerely,

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