

Foreword

1. This consultation document is about the ways in which passenger and freight track access agreements can and should be improved.

2. In 1993-97, the railway industry was reorganised and privatised in circumstances which, in some respects, were hostile to the establishment of contracts of quality. Once standard form or 'template' track access agreements had been drawn up, Railtrack and train operators were given little or no scope to improve them. Administered contracts were put in place for the lives of passenger franchises, and freight track access agreements were established for several years ahead.

3. In the years since then, Railtrack and the train operators - and those who use, fund or depend on their services - have seen that poorly-defined contractual obligations, or the absence of any obligations in some important respects (particularly in relation to the quality and capability of the network), have hindered the industry's development and progress. When parties to a contract have a sound, clear, mutual understanding of what is expected of them in the relationship, they can best plan the futures of their businesses with a reasonable degree of assurance. Without it, they cannot fully realise their potential.

4. Access contracts are not matters of purely private commercial significance. If they were, Parliament would not have required that, to be valid, they must first have the approval of an independent regulator applying public interest criteria in making his decision. Access contracts provide for the consumption of the capacity of railway facilities which, in many areas, is in short supply and getting shorter. It is important that that capacity is used efficiently and well. Some also provide for the improvement of railway facilities - including the expansion of their capacity - and this will be a significant feature of the new access contracts which will be put in place in association with the franchise replacement programme.

5. As Regulator, I believe that the contracts for access to Railtrack's network should be improved.

6. It is important that long-term contracts in a mutually dependent relationship are well-balanced, fair and contain provisions which benefit both parties. The rights and

obligations of the parties should also be well-understood. That means simplicity and clarity of specification and remedies. These things are important in the commercial interests of the parties. They are also important in the public interest because the performance of these contracts will be matters of regional and sometimes national importance.

7. The franchise replacement programme being carried out by the Shadow Strategic Rail Authority could mean access contracts lasting for ten or twenty years (although there would generally be provision for a periodic review of charges by the Regulator). I do not believe that it is in the public interest for the shortcomings of the first generation of contracts to be perpetuated for so long, especially when there is now an opportunity to put them right.

8. A significant proportion of the new generation of access contracts will also provide for train operators and Railtrack to invest considerable sums in the railway facilities to which they relate. Establishing the conditions for strong, sustained and sound investment in the railway industry is important. Well-managed companies and their shareholders require clarity and strength in their relationships with their suppliers and customers. Lenders and other investors demand it as a condition of finance at fair and affordable rates. Passengers, freight users and others who depend on the railway being operated and developed competently and to high standards deserve it.

9. Model clauses for access contracts were contemplated in section 21 of the Railways Act 1993. Six years later, none has been established. The significant growth in the demand for railway services, the investment which the railway industry needs to put in and the commencement of the franchise replacement programme create a need for better contracts between empowered parties. The process of negotiating these contracts - and of knowing when it is necessary to consider invoking regulatory remedies if agreement is unlikely to be reached in time - can be streamlined, accelerated and made less costly in terms of management, legal and other resources by the establishment of model clauses.

10. Model clauses for access contracts can and should provide a framework for sound, strong and timely investment by Railtrack and train operators. By doing so, they can facilitate the achievement of the objectives of the franchise replacement programme and the public interest in several ways. They can promote the use and development of the railway. They can promote efficiency and economy on the parts of railway operators. They can minimise regulatory burdens. And they can enable infrastructure and train operators to plan their businesses.

11. I wish to encourage Railtrack, train operators and others who are affected by, or otherwise interested in, the quality of the Railtrack-train operator access relationship to respond fully and constructively to this consultation. Its success is in all of their interests.

TOM WINSOR
Rail Regulator

January 2000

Chapter 1: Introduction and process

Purpose

12. This document is the first of two consultation documents which will lead to the establishment by the Regulator of model causes for new track access contracts between Railtrack and train operators.

13. Its purpose is to invite views from the railway industry and others in relation to the sufficiency of the first generation of track access contracts in the light of several major factors which were not present when they were designed. These new factors are:

- ! the presence in the industry of companies with significant private sector commercial experience;
- ! the considerable growth in volumes of traffic on the railway;
- ! the intention of Railtrack and train operators to put into the industry significant capital investment to expand the capacity and improve the quality of the railway;
- ! the intention of the Shadow Strategic Rail Authority to replace most of the existing franchises with significantly longer contracts involving greater obligations on the parts of the franchisees and the franchise operators;
- ! the last five years' experience of the workings of the contracts.

14. This consultation document also asks how these contracts could and should be improved to meet these challenges and to establish sound and fair contractual relationships between Railtrack and train operators in the future.

Scope

15. This consultation is a limited one. But its importance is nevertheless great.

16. It is concerned only with track access agreements. Access contracts for stations and light maintenance depots are considered to be a lower priority for improvement, although the Regulator wishes to know if any person believes that their review should be given a greater priority. The Regulator will shortly be publishing his conclusions on his earlier consultation on the effectiveness of station access arrangements.

17. This consultation does not cover all aspects of the standard or 'template' track access agreement which Railtrack has chosen to use since 1994 (and which train operators have generally not challenged, although the document is not a mandatory model and certainly does not have any degree of prior regulatory approval). It does not cover Schedules 4 (possessions), 7 (charging and charges review) or 8 (performance regime), since those parts of the access contracts are covered by the periodic review of Railtrack's access charges. The Regulator expects to announce his conclusions on those parts of the access contracts in July 2000, when he proposes to publish appropriate model clauses for consultation. In relation to Schedule 8, some train operators have indicated a preference for developing their own performance regimes. If the parties to a proposed contract are able to make a case for the approval of bespoke performance regimes, it will of course be considered on its merits. This consultation does not cover Schedule 10 (moderation of competition).

18. This document is not concerned with the Track Access Conditions except Part G (network change). Parts B and H of the Track Access Conditions (operational performance) are also covered by the periodic review. The Regulator intends to consult the Class Representative Committee and the industry on the reform of Part C (amendment of the Track Access Conditions) at a later date. Part C is largely a self-contained section of the Track Access Conditions. Part D (timetable development) has been heavily amended several times by the Class Representative Committee, and the attention which it has received from the industry in that forum appears to be appropriately close. Part E (environmental obligations) is not considered to be in need of immediate review, although consultees may wish to propose its reform in the context of the liability regime in the standard access contract. Part F (vehicle change) will be the subject of separate consultation by the Regulator as part of his review of the sufficiency of the industry arrangements for vehicle and route acceptance.

19. This means that the consultation is concerned with the principal parts of the standard access contract other than Schedules 4, 7, 8 and 10 and Parts B, C, D, E, F and H of the Track Access Conditions. The subject of this consultation is the principal bilateral

part of the access relationship between Railtrack and the train operator. Subject to the exceptions mentioned, this includes:

- ! the access and other rights which the train operator buys from Railtrack;
- ! the obligations which the train operator assumes;
- ! Railtrack's rights in the relationship; and
- ! what happens if the contract is not honoured.

20. These are highly important matters. They materially affect the quality of railway services in Great Britain.

21. Subject to the exclusions mentioned earlier, the remaining parts of this document deal with the specific aspects of the standard access contract which the Regulator regards as most likely to need improvement. It does not deal with every question which might arise. If consultees consider that there are other aspects of the contract which could and should be improved (including matters which are not dealt with in the contract but ought to be), they should say so, and they should say how.

22. The primary focus of this document is on passenger track access agreements. However, the main freight track access agreements need to be replaced over the next 15 months. The Regulator considers that the points made in this document also apply to track access agreements for freight train operators. He presently intends to publish model clauses for freight track access agreements based on the ones for passenger, but wants to hear the views of Railtrack and freight train operators on freight-specific considerations.

Background

23. All industries in the private sector - regulated and unregulated - operate within rules established in the main by commercial contracts. Some are simple and some are complex. Circumstances differ and the contracts are tailored to the requirements of the case. But they are all contracts.

24. In its essentials, the railway industry should be - and is - no different. Railway companies contract with their suppliers and their customers. It is up to the managers of

these companies to ensure that their commercial contracts meet the requirements of the business. This includes making sure that the company is in a position to discharge its obligations to its customers, on whom the business depends, by ensuring that its contracts with its suppliers are sufficient. If in some material respects they are not, the management of the company will have exposed the company to risks which, if they materialise, may cause the company considerable difficulties and could even jeopardise its ability to succeed. In severe cases, they could lead to the company's insolvent failure.

25. Of course the railway has its own industry-specific features. But they are not as great or as numerous as some may believe. Other industries, such as electricity, gas and water, have significant safety responsibilities which, as in railways, must be discharged before any other obligation. A number of other industries are regulated in one way or another, and some face regulation which is at least as intense as the railways. All the principal privatised utilities include dominant or monopoly elements, including monopoly infrastructure operators from whom access on fair terms is essential for dependent customers. In its relevant essentials, the railway industry is no different.

26. However, one notable feature of the way in which the railway industry deals with contracts for use of the essential infrastructure is the legal requirement that each of them - unless exempt - requires the approval of the industry regulator. That is unusual and is not found in other privatised industries. It is a reflection of two things. The first is the relatively small number of dependent customers of the monopoly infrastructure owner. This means that it is more practicable to have individual approvals. However, the second is considerably more important. It is the fact that the consumption of what is often scarce capacity - frequently complex and very expensive to enlarge - can be done wastefully or in other ways which are contrary to the public interest.

27. This is why the Railways Act 1993 requires that each access contract which satisfies certain defined statutory tests is void unless approved by the Rail Regulator. In giving his approval of access contracts, the Regulator must discharge his statutory duties. This process requires him to decide that the contract is in the public interest.

28. If the Regulator is dissatisfied with the contract, he can either refuse his approval or propose amendments as a condition of his approval. If the parties do not accept the Regulator's proposed amendments, the Regulator cannot insist that the parties accept them. Instead, the Regulator would refuse his approval of the contract and it would then

be for the parties to try again, or for the dependent customer to apply to the Regulator for a new contract under the alternative procedure of section 17 of the Railways Act 1993.

29. Section 17 deals with the case where a railway facility owner either unreasonably denies access to a dependent customer, or demands unreasonable terms. In such cases, the Regulator is empowered to direct the facility owner to grant access on terms which the Regulator, not the facility owner, decides. However, the Regulator may only do this if an application is made to him. He may not act until then.

30. If parties wish to amend an existing access contract, that amendment also requires the Regulator's approval under section 22 of the Railways Act 1993. The Regulator has the power to give general approvals to the amendment of access contracts, and has done so on many occasions. However, significant amendments have required specific approvals.

31. Since 1 April 1994, when the access provisions of the Railways Act 1993 came into effect, all access agreements have been ones which have been approved under section 18. The section 17 procedure has never been used.

32. The procedure for the approval of access contracts is now familiar to the railway industry. But it has not been all plain sailing. In 1995 the first Regulator published his criteria for the approval of passenger and freight track access agreements, and these have been applied ever since. The present Regulator has been disappointed to see that even now too many access contracts are submitted for regulatory approval without the parties having had appropriate regard to those criteria. This has sometimes led to the period for regulatory consideration being longer than would otherwise have been the case, and to the Regulator having to require sometimes quite significant amendments before giving his approval. The Regulator is reviewing those criteria in the light of the new circumstances of the industry and will shortly issue a consultation document on new criteria.

33. The transaction costs - in management time and the costs of legal and other professional advice - associated with the establishment or amendment of access contracts are high. The Regulator believes that there is now a strong case for the greater standardisation of better quality access contracts through the use of his powers under section 21 of the Railways Act 1993.

34. Section 21 provides:

“Model clauses for access contracts

21.—(1) The Regulator may prepare and publish model clauses for inclusion in access contracts.

(2) Different model clauses may be prepared and published in relation to different classes or descriptions of railway facility.

(3) The Regulator may from time to time revise any model clauses published under this section and may publish those clauses as so revised.

(4) In preparing or revising any model clauses under this section, the Regulator may consult such persons as he thinks fit.

(5) The Regulator shall encourage, and may require, the use of any model clauses of his in access contracts wherever he considers it appropriate.”

35. Model clauses are standard clauses. They are used in all cases for which they were designed unless there is a sound reason to disregard or depart from them. They are not straitjackets. Nor are they optional extras. They are the bases on which the industry should expect to contract in ordinary cases. If parties wish to enter contracts with different provisions, they should be prepared to explain why their case warrants such an alternative approach. Every case will of course be decided on its individual merits. But the starting point should always be the model clauses.

36. Model clauses are not new. The upstream oil and gas industries have had model clauses for petroleum licences since the passage of the Petroleum (Production) Act 1934. They have been kept up to date and very rarely departed from. The Transport and Works Act 1992 provides for the making of model clauses for use in orders made under that Act, and the Secretary of State has used his power to devise and publish them.

37. Model clauses for access contracts in the railway industry could do a great deal to achieve a number of desirable objectives, including:

- ! providing a sound framework for strong, sustained and timely investment on conditions which are fair and economic;
- ! enabling parties to understand in advance what is expected of them and what the consequences of breach will be through clarity and simplicity of expression and proper specification of their rights and obligations;
- ! empowering the parties to access contracts themselves to assert their rights and, where necessary, enforce them;
- ! streamlining, simplifying and accelerating the process of establishing new access rights at lower cost in terms of management, legal and other resources;
- ! facilitating the franchise replacement programme.

38. Since the establishment of the first generation of access contracts, opportunities have been lost through poor understanding on the parts of Railtrack and the train operators of their rights and their obligations. The rate at which the new railway companies have come to terms with operating in a contract-based regulated environment instead of the management command culture of the British Railways Board has been slow. Managers have sometimes reverted to the old ways of doing things with imperfect appreciation of the legal and regulatory consequences. All former state-owned industries mature after privatisation, and the railway industry is still in that transitional phase. However, there is an urgency about the rate of change, and it is not yet clear how well the industry will be able to meet the challenges it faces now and will shortly face. Those challenges come from the pressing need of the industry for significant amounts of capital investment.

39. The money for the expansion of the capacity of the railway - both the infrastructure and the rolling stock - is likely to come in very large measure from private sector lenders. Before lending, and before deciding on the price of that money, they will subject the commercial contracts which support the borrowing to the same degree of commercial scrutiny as they do in other industries. What may be acceptable to a manager or even a shareholder is often not acceptable to a lender who is not prepared to take equity risks for debt returns. Ambiguity of rights and obligations, specifications and remedies, constitute risk in lenders' eyes. Lenders will assess and price risks in traditional ways. Some risks may put up the price of the borrowed money. Others may deter lenders altogether. In cases where all or a major part of the security for a loan is the underlying

matrix of contracts and regulatory rules and instruments - and often it will be - railway companies raising money will be well-advised to ensure that the quality of the security is as good as they can make it.

40. Train operators have often complained that their contracts with Railtrack give them insufficient rights to require the timely delivery of commitments, or that they fail properly to document the commitments which they believe Railtrack has made in exchange for the access charges they receive. The Regulator and the Chairman of the Shadow Strategic Rail Authority have called upon train operators to assert their rights and enforce their contracts. However, when the contracts are weak, there is little if anything to enforce.

41. A train operator's track access agreement is its most important contract, and the contract under which by far the greatest amount of money is paid. It is the vehicle for the train operator to obtain essential services, and it is the contract more than any other which is at the heart of Railtrack's business.

42. The general case for improvement of the contracts has been advanced by others too. The task now is to establish how they can and should be improved.

43. Chapters 2 and 3 of this consultation document deal with:

! what the contract provides for Railtrack to deliver and the train operator to do (Chapter 2); and

! what happens if the contract is not honoured (Chapter 3).

44. Each chapter outlines the present position and briefly discusses matters which the Regulator regards as particularly relevant. Consultees are asked to respond to the questions which follow each item. These questions do not preclude consultees expressing views on matters not raised in these chapters. Such views will be welcome and consultees should not consider themselves constrained in what they say.

Timetable for consultation

45. The Regulator intends to establish model clauses in time for parties to take advantage of them in their negotiations of replacement long-term access contracts which will run in parallel with replacement franchises. In the case of freight train operators, he

wishes to provide model clauses in time for the replacement of the rights to the most significant freight flows. The model clauses will also generally be used in cases where existing access contracts are materially amended or extended.

46. The following is the timetable and procedure which the Regulator presently expects to adhere to:

Deadline for responses to this consultation document	31 January 2000
Regulator's consideration of responses and drafting of model clauses	1 - 29 February 2000
Industry consultation on draft model clauses	1 - 31 March 2000
Regulator's finalisation of draft model clauses	April 2000

47. Responses to this consultation document should be addressed to Sunil Gupta, Head of Network Policy Development, Office of the Rail Regulator, 1 Waterhouse Square, 138-142 Holborn, London EC1N 2TQ. Additional copies of this statement may be obtained from the ORR library or from ORR's website: <http://www.rail-reg.gov.uk>.

48. The closing date for receipt of comments is **31 January 2000**. Earlier responses will be appreciated.

49. It is anticipated that copies of all submissions will be placed in the ORR library. In addition, the Regulator may quote or publish extracts from the submissions.

50. If respondents wish to make submissions in confidence, these will be accepted but should be marked clearly as such. Where a submission is made in confidence, it should be accompanied by statement that a confidential submission has been made, giving reasons why the submission was made in confidence and summarising the submission excluding the confidential information. This statement may be placed in the ORR library and the Regulator may quote or publish extracts from the statement.

Chapter 2: What the operator is buying, and what are his and Railtrack's obligations

General

51. Under a track access contract, the train operator acquires the right to run trains on Railtrack's network. In return, the train operator pays access charges to Railtrack.

52. The successful exercise of a train operator's right to run trains has several other dimensions. The train should of course run, and it must run safely. It should run to its timetabled path, which means it ought not to be delayed, cancelled or break down.

53. The basic right of an operator to run a safe, reliable and punctual train service is buttressed by a range of other obligations assumed by Railtrack. These could include the provision of information to the train operator. They may provide for the carrying out of capital works. In the same way, the train operator's basic obligation to pay access charges may be supplemented. For example, it may assume obligations to ensure its trains are well maintained, and that information which it is required to provide to Railtrack will be timely and accurate.

54. This chapter discusses the rights which Railtrack and the train operator assume under a track access contract under normal circumstances. In other words, it deals with what is supposed to happen in the relationship.

55. The essence of the relationship between Railtrack and the train operator is one of the supply of infrastructure services to a buyer of those services. It is important that the scope of the relationship is clearly defined and that each party knows what it has to do and what it is entitled to receive.

56. Chapter 3 deals with the case when things have gone wrong and the contract has been broken or is alleged to have been broken.

Commercial purpose

57. In complex commercial contracts, there will always be some scope for different interpretations to be asserted (although it is of course a different matter how successful those assertions may be). However, if a dispute about the interpretation of part of a contract has arisen, the objective of the relevant tribunal - which may be a judge, an arbitrator or another person chosen by the parties - is to establish the intention of the parties from the contract which they have made. In doing so, as a general rule the tribunal will not look outside the written contract (for example, to the surrounding circumstances or the evidence of the people who negotiated it) if it is able to resolve the question by a proper examination of the contract alone. It is therefore important that the parties have expressed themselves in the contract as clearly and unambiguously as possible. They should not assume that they will be permitted to provide any other evidence of what they intended at the time.

58. Since the tribunal's objective is to establish what the parties intended to achieve by the contract, it can be very useful if, in general or specific terms, the parties have stated that intention in the contract. This is one of the functions of the clause which is sometimes known as the 'commercial purpose clause' or simply the 'commercial purpose'. It provides a succinct and accurate statement of intentions of the parties against which the other obligations of the parties can be assessed.

59. However, commercial purpose provisions can go much further than that. They may be part of an important operative clause in the contract which commits the parties not only to carry out the specific obligations established in the contract, but to do whatever else is necessary or expedient to achieve the contract's overall objective.

60. The standard form access contracts which were established for the railway industry in 1994 did not have commercial purpose provisions. By contrast, the contract made in June 1998 between West Coast Trains (a subsidiary of Virgin Rail Group) and Railtrack in relation to the upgrade of the West Coast main line and the replacement of West Coast Trains' portfolio of access rights does contain such a clause. In that case, the commercial purpose clause serves three purposes. It is an operative provision in its own right - that is, it creates rights and obligations which would not otherwise have existed. It is an aid to interpretation. And it is an objective which other provisions of the contract expressly refer to as a reference point for deciding how certain other matters - such as under change procedures - are to be dealt with.

61. In order to illustrate the point, Appendix 1 to this consultation document contains the text of the commercial purpose provision from the West Coast contract.

Is it desirable that standard access contracts contain commercial purpose provisions? Should they be in standard form?

If so, what should the standard provision contain?

Are commercial purpose provisions appropriate only in contracts which provide for carrying out of major investment in the network or in rolling stock?

Standard of performance of obligations

62. The greater the degree of detail and sophistication of a commercial contract, the more unlikely it is that the common law will imply into it provisions which the parties have not expressly agreed upon. By contrast, the Supply of Goods and Services Act 1982 provides that, in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill. However, if a higher standard is required, it needs to be expressly provided for.

63. Commercial contracts usually specify the appropriate standards of work or conduct. A typical provision in a commercial contract might provide that:

“In carrying out its obligations under this contract, each party shall act with due efficiency and economy and in a timely manner, including in all respects with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced—

- (a) network owner and operator (in the case of the infrastructure provider); and
- (b) operator (in the case of the operator).”

64. However, the standard access contracts established in 1994 are weak in this respect.

Is it appropriate that, in carrying out the obligations under the contract, one or both of the parties should be expressly required to meet certain minimum standards of competence?

Are the standards implied by the Supply of Goods and Services Act 1982 sufficient, or is more needed?

Should the standards be the same? If not, what should be the standards for (a) Railtrack and (b) the train operator?

Basic access rights

65. Schedule 5 of each track access contract contains a specification of the access rights which the train operator has. These rights are expressed in a number of ways, including as rights to numbers of trains over given periods, frequency at certain times of the day, patterns of services, rights to use specified types of rolling stock, station stopping patterns, maximum journey times, pathing allowances, turnaround times, first and last trains, dedicated platforming rights and differences for weekends and public holidays.

66. These rights may be subject to other contingencies. In addition, in order to obtain paths in the working timetable, the train operator must bid for them under Part D of the Track Access Conditions.

67. With certain exceptions, Schedule 5 access rights are always expressed to be subject to the applicable Rules of the Route and the Rules of the Plan which regulate timetable development. These rules are under the control of Railtrack and, in some instances, are capable of being amended unilaterally and without the agreement of the train operator (albeit in some cases with rights of appeal).

68. In order to ensure that the operator has some degree of certainty, Schedule 5 access rights and other rights in the contract by their very nature create constraints on what other operators can do on the network. With longer access contracts, it will be more difficult to foresee the effect of these constraints on the use and development of the network during the period of the contract. In extreme cases, these constraints may create public interest detriments. (The definition of what is covered by access agreements was discussed in Chapters 12 and 13 of the December 1999 periodic review document.)

Are there circumstances in which access rights should be absolute and not expressed to be subject to the Rules of the Route and the Rules of the Plan?

If access rights are to continue to be subject to these rules, is there a need for additional protections for train operators against their amendment without the agreement of the affected parties?

Are there specific circumstances (for example, new safety obligations or abuse of a dominant position by an operator) in which elements of access rights should be subject to review or 'use it or lose it' provisions?

Are there elements of access rights which should be subject to more general review over the life of the contract and, if so, how often and in what circumstances?

If access rights are to be reviewed, what should be the nature of the review? For example, should change only be in cases where the parties have agreed on it (with the approval of the Regulator)? Or should there be cases where a change is possible without all concerned being in agreement and, if so, what are they?

Should the journey times to which a train operator is entitled be subject to any entitlement of Railtrack to add pathing time or other allowances?

Is it appropriate for Schedule 5 to provide rights over and above quantum and frequency which would constrain what other operators can do on the network, or should train operators rely on Access Condition D and the associated rights of appeal for their protection?

Network operation, maintenance and development

69. Condition 7 of Railtrack's network licence requires Railtrack to maintain, renew, replace, improve, enhance and develop the network in accordance with best practice and in a timely, efficient and economical manner so as to meet the reasonable requirements of train operators and funders in respect of the quality and capability of the network. It requires Railtrack to do this to the greatest extent reasonably practicable having regard to all relevant circumstances including its ability to finance its activities. Enforcement of this obligation is a matter for the Regulator.

70. By contrast, Clause 6 of the standard track access contract imposes on Railtrack an obligation to maintain and operate the network to a standard which permits the running of the train operator's services in accordance with the working timetable. It does not provide for several of the things covered by Condition 7, even though in several respects the access charges which train operators pay cover them.

71. Clause 6 also requires Railtrack to provide the train operator with an annual statement of its plans for the following five years in relation to material maintenance, repair, renewal or modification of the network used by the train operator's services.

72. Part G of the Track Access Conditions contains a procedure for the making of changes to the network. The procedure is not detailed. Virtually all use of the Part G procedure has been by Railtrack. The procedure contains provision for appeals to the Regulator. There have been no appeals.

Does Clause 6 provide the train operator with sufficient specification of the obligations of Railtrack in relation to the operation, maintenance and development of the network insofar as the train operator is affected?

If not, in what respects should Clause 6 be improved? For example, should it include explicit track and ride quality parameters?

If more clearly defined specifications are to be established, should they be universal or route-specific?

Are train operators satisfied with the annual five-year network plans provided for in Clause 6? Do they meet the contractual standard laid down for them? Does Railtrack believe that the five-year plans provide sufficient information to train operators?

If not, in what ways could and should they be improved?

Is Part G of the Track Access Conditions a sufficiently detailed and effective process for ensuring network change operates in the interests of all users of the railway? Does it enable a proper balance to be struck between strategic considerations and those relevant to a specific case? If not, how could it be improved?

Does Part G provide adequate protections for Railtrack, affected train operators and other stakeholders when proposals to change the network are made and pursued? Are the rights to object to and block a proposal for change correctly structured, or are they too strict or too weak? Do they promote or inhibit improvement and the use and development of the network? Are the rights to financial compensation (both in terms of the costs of feasibility studies and compensation for the changes themselves) appropriate and adequate?

Is Part G being operated well by train operators and Railtrack? If not, in what respects?

Local output arrangements

73. Significant parts of Railtrack's network carry the trains of more than one operator. Those operators may have different commercial objectives and financial strengths, and contracts of different duration and specification. Yet what Railtrack does to the network affects all of them.

74. In order to establish the reasonable requirements of train operators and funders and thus secure compliance with its Condition 7 obligations, Railtrack has set up an account planning process which establishes a statement of reasonable requirements for each operator and funder. The Regulator has stated that he wishes to strengthen the obligations in Railtrack's network licence in relation to the company's dealings with its dependent customers. This could involve reinforcing the account planning process.

75. In Chapter 12 of his December 1999 provisional conclusions document for the periodic review of Railtrack's access charges, the Regulator set out his proposals for the definition of the baseline network paid for in the base level of access charges in the next charges control period. He said that he expects to see a balance of contract and licence enforcement. In particular, he expects that specific local outputs will be better enforced by train operators than by the Regulator via Railtrack's network licence.

76. The improvements in the baseline network and the network investment which Railtrack has said it intends to carry out in the future will involve significant alterations in the capacity and character of the railway. It may also mean major disruption of services in the short term, whilst the work is carried out. As part of the franchise replacement programme and in other circumstances, Railtrack and train operators may enter into bilateral contracts

which provide for network improvements. This happened with the West Coast main line upgrade. However, in that case, by the time the capacity enhancements were completed, the access rights of all of the other affected train operators would have expired. Things may not be as simple in the franchise replacement programme.

77. There may be a case for parts of the network to be subject to common contracts - or even multilateral ones - involving all affected train operators. They could specify what Railtrack has agreed to do and the financial consequences for all concerned. This could be an elaboration of the obligations of Railtrack under Condition 7, or the greater specification of a planned network change under Part G.

78. However, if there were to be common or multilateral arrangements, it is possible to foresee difficulties in relation to their enforcement by the affected train operators in the light of their different characters and requirements.

Is it desirable that contractual 'local output statements' reflecting the points discussed above are established?

What should be the balance between enforcement of contracts and via Railtrack's network licence?

What should be the nature of any such arrangements, and how should they be enforced? What remedies should there be if they are not complied with?

If such arrangements are to be put in place, are the provisions of Part G of the Track Access Conditions sufficient to deal with the failure of Railtrack and an affected train operator to agree? If not, how should they be improved?

Information

79. In order to make effective use of its rights to operate trains on the network, a train operator needs information from Railtrack. This information may involve detailed operational matters or affect long-term strategic development of the train operator's business. Provision of such information should be timely, the information should be accurate, and the charges (if any) should be clearly understood.

What categories of information does a train operator need from Railtrack in order to make the best use of the network?

How should this information be supplied? What standards should it meet? Should there be different standards for different categories of information?

Are there circumstances in which it is reasonable for a train operator to make additional payments to Railtrack for certain information? If so, what categories of information and what criteria should be used to assess the charges?

What information should a train operator provide to Railtrack, in particular having regard to the interests of other operators?

Capacity

80. The essence of a track access contract is the sale by Railtrack, and the purchase by the train operator, of network capacity. That purchase may be subject to conditions such as the possibility that the rights may be forfeited or downgraded in status if they are not exercised to their full extent over a certain period. But once contracted for, they belong to the train operator. Without them, he has no right to run his trains. The train operator therefore has a right to expect that they will be honoured when they are exercised, and that the capacity will not have been oversold by Railtrack. If Railtrack has sold capacity once, it cannot sell the same capacity a second time.

81. Commercial contracts typically contain assurances by the supplier that he has title to and can deliver the things which he is committed to provide. Most existing track access contracts do not.

82. In *Criteria for the Approval of Passenger Track Access Agreements*, 2nd edition, Office of the Rail Regulator, London, March 1995, the first Regulator said, at paragraph 13—

“The Regulator will expect to be satisfied that Railtrack has carried out proper checks to ensure that the proposed agreement does not conflict with any pre-existing access contract (whether regulated or not). However, responsibility for ensuring that track capacity is not oversold rests with Railtrack. Regulatory approval of an agreement under section

18 does not constitute a guarantee that the capacity exists and it is essentially a matter for the train operators what measure of assurance they obtain from Railtrack.”

83. Although that was a clear statement that it is up to train operators to obtain the appropriate contractual protections against the overselling of capacity, train operators have not generally been successful in seeking them from Railtrack.

84. If Railtrack has accepted a bid for a trainpath and then fails to honour it because there is insufficient capacity, the train operator has the right to financial compensation under Schedule 8 of his track access agreement. However, if Railtrack refuses the bid on that ground, it may be doubtful whether any Schedule 8 rights arise. In those circumstances, the train operator would appear to have no remedy.

Is it appropriate that track access contracts continue to contain no express assurances from Railtrack in relation to the capacity which has been sold under the contract?

If not, what should be the nature of the assurances, and what remedies should be available if they are not honoured?

Chapter 3: What happens if things go wrong?

Liability - operational performance

85. Under the standard track access contract, when trains are delayed or cancelled, the train operator's only remedy is to financial compensation under Schedule 8. As mentioned in paragraph 17, the revision of Schedule 8 is part of the periodic review of Railtrack's access charges and is not therefore covered by this consultation.

86. However, there is a body of opinion to the effect that Schedule 8 should not be the only remedy for violation of obligations which prejudice the ordinary running of scheduled services, although it may also be necessary to take account of any adverse effect that performance of a contract might have on third parties. An example is the overselling of capacity.

Should Schedule 8 be the only remedy for the cancellation or delay of services?

Are there circumstances in which Schedule 8 should be suspended, and other remedies take over? If so, what are they and what are the appropriate remedies?

Liability - breaches which do not lead to train delays or cancellations

87. Clause 8 of the standard track access contract deals with liability for violation of safety, environmental and physical integrity obligations. In some parts it appears to place fairly significant limits on the liability of the parties for certain types of what it calls "indirect losses". In others, it provides for indemnities without limits.

88. The Regulator believes that the position in relation to the parties' liabilities for non-operational violations is confused and needs to be clearer.

What liability should there be if a party fails to comply with its obligations under, for example, the Track Access Conditions or the dispute resolution arrangements? What liability should there be for breach of maintenance and network enhancement obligations, environmental obligations, obligations concerning the provision of

information or its confidentiality? What should the contract say about other types of breach of the contract?

Should the parties be exposed to unlimited liability in any circumstances?

If not, what should the liabilities of the parties be?

Should there be different limits on liability depending on the nature, time and severity of the breach in question?

Should wilful misconduct be an exception to any general rule? If so, what should be the definition of wilful misconduct and what liability should attach in such a case?

Non-money remedies

89. As mentioned in paragraph 87, the standard track access contract provides for indemnities in some cases and Schedule 8 financial compensation in others.

90. Money compensation is not the only remedy which the law provides for. It is sometimes possible to obtain an order from a competent tribunal requiring a party in breach to perform his contract, rather than waiting to make a claim for money damages or a financial indemnity. Often the innocent party will be more interested in performance than damages.

91. In some commercial contracts, the parties agree that the right to obtain an appropriate order from a judge or arbitrator is a preferred remedy, or one with equal status to money compensation. In one track access contract, the parties have established an 'early warning mechanism' under which the right to apply for a mandatory order is conferred before a breach has taken place when one party believes a breach is likely and could have serious and adverse consequences.

92. In some circumstances, an urgent remedy may be needed. A 'fast-track' procedure may be appropriate, and in some cases parties will establish one in advance to ensure that it is available at once if it is required.

Are there circumstances in which parties to access contracts should be able to apply for remedies other than the payment of money?

If so, what are they, and what remedies should be available? Are there any circumstances in which a train operator should be entitled to 'self-help' remedies (similar to the self-help remedies in station and depot access contracts)?

Would specific performance of an access contract be an appropriate available remedy? Or should specific performance be restricted to certain types of breach, leaving money compensation the only remedy in others?

Events of default and remedies

93. The standard track access contract lists a number of events of default. They can apply to the train operator or to Railtrack.

94. If Railtrack commits an event of default, the train operator has the right to suspend his own access rights and decide to not to run his trains. However, this is unlikely to be an attractive option the train operator, especially if it involves a necessary violation of his obligations under his franchise agreement.

Are the events of default specified in the standard track access contract appropriate? Are there any missing? Are any of them inadequately defined?

What should be the rights of the parties in the case of an event of default on the part of the other party? Should they be the same for Railtrack and the train operator or do the different circumstances of these parties warrant different remedies?

Should the remedies available to the party not in breach vary according to the nature of the breach which he faces? If so, in what ways? Should there be the possibility of a response which is more graduated than the existing position?

Are there any circumstances in which the train operator should be entitled to withhold payment of access charges? If so, what are they and what conditions should apply?

Appendix 1

Commercial purpose clause from West Coast track access and upgrade contract (PUG 2)

Note— This provision uses a number of defined terms (which are capitalised). The definitions have not been reproduced because the terms in question are sufficient for the purposes of illustration.

General [principal operative clause]

Railtrack and the Train Operator shall each take the steps contemplated by this Agreement, and such other steps within its sphere of competence as shall be reasonably necessary or expedient, in order to secure the achievement of the commercial purpose, and in seeking to achieve the commercial purpose due regard shall be had to the Regulatory Obligation.

Commercial purpose

(A) *General*

The commercial purpose is that—

- (1) the Infrastructure and its capacity shall be altered, enlarged and operated;
- (2) the Rolling Stock shall be constructed, tested and operated; and
- (3) the Relevant Stations shall be changed,

in all respects in a manner and to the extent necessary or expedient so as to secure that—

- (a) by and after the Phase 1 Anticipated Path Availability Date, the Phase 1 Outputs shall have been and shall (except insofar as inconsistent with the Phase 2 Outputs) continue to be achieved, including the journey times specified in the New Phase 1 Schedule 5; and
- (b) by and after the Phase 2 Anticipated Path Availability Date, the Phase 2 Outputs shall have been and shall continue to be achieved, including the journey times specified in the New Phase 2 Schedule 5,

in the most efficient and economical manner;

- (4) as far as reasonably practicable, the programme for achievement of the Phase 2 Outputs may be accelerated in whole or part pursuant to the provisions of Chapter VII;
- (5) the Minimum Number of Hourly Services in the Existing Schedule 5, the New Phase 1 Schedule 5 and the New Phase 2 Schedule 5 shall be operated by the Train Operator in order to generate passenger revenue (so far as is consistent, in the judgement of the Train Operator, with growing the profitability to the Train Operator of such Services) which shall be shared between Railtrack and the Train Operator; and
- (6) Railtrack and the Train Operator shall explore commercial opportunities (for the mutual benefit of the parties) to enhance the Infrastructure and its capacity beyond the Phase 2 Outputs.

None of the provisions of this Clause 2.2(A) necessarily has priority over any other.

(B) *Phase 1 Outputs*

The Phase 1 Outputs are—

- (1) the Rolling Stock is—
 - (a) in reliable and lawful commercial service on the Routes, providing at least the Minimum Number of Hourly Services;
 - (b) kept in a condition which ensures that passengers travelling on the Services shall have that degree of comfort and are provided with that degree of customer service which they may reasonably expect to have on a modern, well-maintained high-speed railway using the Rolling Stock; and
 - (c) kept in a condition which ensures that the maintenance and other costs of or connected with the upkeep of the Infrastructure shall be as low as reasonably practicable;
- (2) the Infrastructure is—
 - (a) altered, enlarged and operated so as to enable the Train Operator to provide the Services, using the Rolling Stock, as specified in the New Phase 1 Schedule 5;

- (b) kept in a condition which ensures that passengers travelling on the Services shall have that degree of comfort which they may reasonably expect to have on a modern, well-maintained high-speed railway using the Rolling Stock; and
 - (c) kept in a condition which ensures that the maintenance and other costs of or connected with the operation of the Rolling Stock shall be as low as reasonably practicable; and
- (3) the Relevant Stations are changed so as to enable the Train Operator to provide the Services, using the Rolling Stock, as specified in the New Phase 1 Schedule 5.

(C) *Phase 2 Outputs*

The Phase 2 Outputs are—

- (1) the Rolling Stock is—
 - (a) in reliable and lawful commercial service on the Routes, providing at least the Minimum Number of Hourly Services;
 - (b) kept in a condition which ensures that passengers travelling on the Services shall have that degree of comfort and are provided with that degree of customer service which they may reasonably expect to have on a modern, well-maintained high-speed railway using the Rolling Stock; and
 - (c) kept in a condition which ensures that the maintenance and other costs of or connected with the upkeep of the Infrastructure shall be as low as reasonably practicable;
- (2) the Infrastructure is—
 - (a) altered, enlarged and operated so as to enable the Train Operator to provide the Services, using the Rolling Stock, as specified in the New Phase 2 Schedule 5;
 - (b) kept in a condition which ensures that passengers travelling on the Services shall have that degree of comfort which they may reasonably expect to have on a modern, well-maintained high-speed railway using the Rolling Stock; and

- (c) kept in a condition which ensures that the maintenance and other costs of or connected with the operation of the Rolling Stock shall be as low as reasonably practicable;
- (3) the Relevant Stations are changed so as to enable the Train Operator to provide the Services, using the Rolling Stock, as specified in the New Phase 2 Schedule 5;
- (4) there is a degree of reliability of performance which is not lower than (unless the parties otherwise agree) 85% of the Services arriving at their final scheduled destinations within 5 minutes of the scheduled arrival time;
- (5) there is that degree of track quality and vehicle ride quality as is set out or referred to in paragraphs 22 and 25 of the [train-infrastructure interface specification];
- (6) the capacity of the parts of the Infrastructure which are either—
 - (a) not ordinarily used wholly or mainly by the Train Operator and other high-speed train operators; or
 - (b) ordinarily shared between the Train Operator, other high-speed train operators, and persons who are not high-speed train operators,shall be such so as to accommodate the quantum of services or, as the case may be, train paths set out in and on the terms of Schedule 16; and
- (7) the adverse effects on the services of the Train Operator and other persons of the occurrence of disruption shall be kept as low as reasonably practicable.