

ANNEX 1

THE REGULATOR'S LOC CRITERIA: DRAFT FOR CONSULTATION

Introduction

1. This document comprises the Regulator's LOC Criteria for the purpose of Part L of the network code (Railtrack Track Access Conditions 1995), by reference to which any matters referred under Conditions L7.1 or L7.2 of the network code shall be determined.
2. Condition L7.1 provides that if any Train Operator is dissatisfied as to any matter concerning or in connection with the Establishment of a Local Output Commitment ("LOC") made in respect of it, or any variation of such a LOC issued under Condition L9.2, the Train Operator may refer the matter to the Industry Committee for determination under the Access Dispute Resolution Rules (as supplemented or varied by Condition L7).
3. Condition L7.2 provides that if a Train Operator or Network Rail is dissatisfied with the final determination of the Industry Committee in relation to a matter referred to it under Condition L7.1, it may refer the matter to the Regulator for a final determination under the Access Dispute Resolution Rules (as supplemented or varied by Condition L7).
4. The criteria and notes set out in this document:
 - (a) do not apply to persons whose Access Agreement is for the carriage of goods by rail and "Train Operator" and "Train Operators" shall be construed accordingly; and
 - (b) only apply in respect of Class A Local Outputs.
5. The criteria may be revised and re-issued from time to time.
6. Unless otherwise indicated to the contrary, expressions used in this document have the same meaning as in Part L.

The Regulator's LOC Criteria

7. The matters to which the Regulator will expect to have regard when considering any reference made to him under Condition L7.2 are:

Procedural

- (a) any failure of an Access Party (as defined in Part A of the network code) to comply with the procedural requirements of Part L in Establishing the LOC and any unfairness to any person which may have resulted from any such failure;

The LOC measure of delay

- (b) the measure of delay used in any Class A LOC and its fitness for purpose in enabling the Train Operator readily to gauge Network Rail's performance against the measure;

Note 1: The Regulator would expect that a measure would meet this criterion if it is based on the number of Network Rail-attributable delay minutes per hundred train kilometres, with minutes of delay calculated and attributed according to the system known as TRUST and train kilometres measured according to the system known as BIFS.

Force majeure

- (c) the desirability of the measure of delay making proper allowance for *force majeure* events;

Note 2: The Regulator would expect that a measure of delay would meet this criterion if it incorporates an allowance based on the estimated delay minutes arising from the following force majeure events ('foreseeable force majeure events'):

- (i) *acts of vandalism or accidental damage or destruction of machinery, equipment, track or other infrastructure; and*
- (ii) *natural disasters or phenomena, including extreme weather or environmental conditions (such as lightning, earthquake, hurricane, storm, fire, flood, drought or accumulation of snow or ice).*

Note 3: The Regulator would expect that an estimate of foreseeable force majeure events would be based primarily on evidence of the past incidence of such events affecting the relevant Routes.

Note 4: The Regulator would expect that delay minutes attributable to foreseeable force majeure events would be treated as Network Rail-attributable delay minutes for the purpose of calculating Network Rail's performance against a LOC.

The substance of the LOC

- (d) the consistency of the LOC with a realistic projection of Network Rail-attributable delay minutes for each Relevant Year, taking into account:
 - (i) Network Rail's network licence obligations, including in particular Condition 7, concerning network stewardship; and
 - (ii) the Regulator's national projections of future Network Rail performance at the preceding access charges review;

Note 5: The Regulator would expect a LOC to be no more than [25] per cent above the projection of Network Rail-attributable delay minutes for each Relevant Year (i.e. where the LOC would be breached if Network Rail's performance was more than [25] per cent worse than its realistic projection). However, he would expect to make an exception if Network Rail could show that a higher figure was necessary in certain cases in order for the aggregate of all LOCs for a Relevant Year to be [25] per cent

above the aggregate of Network Rail's realistic projection of Network Rail-attributable delay minutes per hundred train kilometres (see Note 7 on how differences between LOCs for different Train Operators might be justified).

Consistency with Network Rail's other obligations

- (e) the consistency of a LOC with the performance of Network Rail's obligations:
 - (i) to any other party under an Access Agreement (as defined in Part A of the network code); or
 - (ii) concerning health and safety (including any duty of care arising at common law, and any obligation arising under statute, statutory instrument or mandatory code of practice) in Great Britain;

Note 6: The Regulator expects all LOCs to be consistent with Network Rail's performance of its contractual obligations under all other track access agreements and with its performance of its safety obligations.

Reconciliation with other Train Operators' LOCs

- (f) any material differences between LOCs made in respect of different Train Operators;
- (g) the likelihood of a LOC being set at a level which, when taken with LOCs in respect of other Train Operators, will cause Network Rail to commit to Excess Aggregate Local Outputs;

Note 7: The Regulator would expect that all LOCs would be sufficiently demanding, so he would expect to look first at whether a LOC was based on a realistic projection of Network Rail-attributable delay minutes for each Relevant Year (see criterion (d)), rather than at differences between LOCs made in respect of different Train Operators. However, he may also have regard to whether Network Rail could justify material differences compared with the level of other LOCs by reference, for example, to one or more of:

- (i) *differences in past levels of Network Rail-attributable delay minutes per hundred kilometres across the Network;*
- (ii) *differences in the cost of achieving different LOCs, relative to the passenger or societal benefits that would result;*
- (iii) *differences in the volatility of past levels of Network Rail-attributable delay minutes per hundred kilometres across different parts of the Network (where, other things being equal, a LOC slightly more than [25] per cent above realistic projected performance would be justified in respect of a Train Operator whose services are subject to greater volatility in Network Rail's performance);*
- (iv) *differences in the past incidence of foreseeable force majeure events between routes used by different Train Operators;*
- (v) *relevant strategies of the Strategic Rail Authority formulated and published under section 206 of the Transport Act 2000;*

- (vi) *planned works in the Relevant Years where it would not be cost-effective to re-allocate resources between routes used by different Train Operators; and*
- (vii) *the matters in paragraphs (i) to (v) of Note 11 below.*

Adequacy of performance plans

- (h) *the desirability of the Performance Plan specifying plans which, if properly implemented, should enable Network Rail to meet the relevant LOC;*

Note 8: Performance Plans are not contractually binding and the Regulator would not expect a Train Operator to Appeal about the detailed content of a Performance Plan. However, the Regulator would expect a Performance Plan to specify plans which, taken together and if properly implemented, should enable Network Rail to meet the relevant LOC, as well as complying with Condition L6.2 (requiring Performance Plans to be prepared in sufficient detail so as to enable the Train Operator to assess its adequacy and its likely effect on its Services).

Changes to a LOC during the Relevant Year

- (i) *The desirability of a LOC setting out clear principles and procedures to deal with cases where changes to Services provided by the Train Operator to which the LOC relates are to be made during the Relevant Year for such a LOC;*

Note 9: The Regulator would expect that a LOC would be consistent with this criterion if Services that transferred to another Train Operator (for example, following franchise re-mapping) did not count after the date of transfer when measuring Network Rail's performance against that LOC. Similarly, where Services were transferred to a new Train Operator during the Relevant Year for a LOC, the Regulator would expect Network Rail-attributable delay minutes in respect of those Services to count against the LOC made to that Train Operator starting on the date of the transfer. The Regulator would expect the LOC to set out principles to be applied to the adjustment of the LOC to take account of the extent to which Services transferring were disproportionately more or less prone to delay, including taking account of seasonal factors that would affect performance in the remainder of the Relevant Year. The Regulator would also expect the LOC to provide for a means of determining how the LOC should be varied if the parties could not reach agreement in such circumstances, such as reference to an arbitrator or expert under the Access Dispute Resolution Rules.

Note 10: The Regulator would expect that the mechanism for resolving such matters would be common to all LOCs, so that the aggregate local outputs to be achieved by Network Rail would be unchanged by the transfer of services between Train Operators.

Rolling forward LOCs for Years 2 and 3

- (j) *the desirability of LOCs for the second and third Relevant Years in any LOC Statement generally becoming the LOCs for the first and second Relevant Years in the subsequent year's LOC Statement.*

Note 11: The Regulator would expect that, where a LOC is replaced or superseded and the new LOC is less demanding for Network Rail than the previous LOC in relation to one or more Relevant Years, the difference must be justifiable against one or more of the following:

- (i) changing national priorities within Network Rail;*
- (ii) changes arising from an access charges review;*
- (iii) changes arising from franchise re-mapping;*
- (iv) unforeseen factors or factors outside Network Rail's control that will have a material effect on Network Rail's future performance; and*
- (v) evidence that the previous projection of performance – and hence the previous LOC – was flawed, based on Network Rail's performance since the previous projection was made and adjusting for any exceptional factors in that period.*

Weighting of the LOC Criteria

8. The Regulator would expect to give priority to criterion (e) (consistency with Network Rail's other obligations) and then to give appropriate weight to each of the other criteria set out above, depending on the circumstances of any Appeal.

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