

Meeting of the Industry Working Group for the review of the Criteria & Procedures (C&Ps) for the approval of track access contracts

14:00–16:00 on Thursday 3 April 2008 at 40 Melton Street

Attendees

ORR

David Robertson (DR)
Richard Gusanie (RG)
Gary Taylor – Secretary

Network Rail

Juliet Brilliant (JBt)
John Boon (JBn)
Sam Gibbins (SG – on
secondment from ORR)

Train operators

Mary Bonar (MB) – WSMR/Renaissance
Chris Dellard (CD) – ATW
Robert Hodgkinson (RHn) – West Coast
Trains
Rob Holder (RHr) – FGW
Nigel Oatway (NO) – EWS
Mike Vila (MV) – Londonlines
Niel Wilson (NW) – Northern

Department for Transport (DfT) observer – Ray Harris (RHs)

Apologies

1. Michael Leadbetter (Freightliner), Dave Walker (Southern) and Jim Goodhead (South Western Trains).

Introduction

Actions from last meeting

2. DR said that the actions from the last meeting on 7 November 2007 had been superseded by events. That was, the decision of ORR to press ahead with implementation of the new pre-application consultation arrangements from January 2008 against the view of IWG which was to implement a phased introduction starting with pilot applications for the Subsidiary Change Date.
3. IWG members were invited to raise any issues following on from the last IWG meeting. NO asked what assurances were there that ORR would not overrule future decisions by IWG.
4. DR said that the decision made by ORR following the last meeting had been discussed at a high level within the organisation. Going forward, however, DR said that he was the project manager for the Criteria and Procedures (C&Ps) review and, whilst he was unable to give any guarantees, he did not expect any further IWG decisions to be overruled by ORR.

Issues arising from implementation of new consultation arrangements

5. DR said that the first application to be processed under the new consultation procedures had now been approved. This application had raised a concern from a consultee which Network Rail, the applicant and the consultee worked together to resolve before the application was submitted to ORR.

Feedback from IWG on new process

6. DR said that ORR had not received any comments from train operators on the new processes. He asked IWG for feedback on their experience of the new arrangements thus far.

7. JBt said that generally Network Rail had found the process to be working well. NO said that he had not experienced any significant problems as yet. However, he said he was unclear as to what would happen if an insurmountable problem occurred that could not be addressed by Network Rail. JBt said that if Network Rail was unable to resolve an issue arising in the industry consultation, this would be identified as an unresolved issue in the application to ORR. JBt said that the Eurostar section 18 application provided an example of the way in which such an issue was being dealt with; Network Rail had detailed the issue in section 8.3 of the application form to ORR, which was now reviewing it as part of its consideration of the application.

8. There was a concern from train operators that they have no way of knowing whether Network Rail has correctly reflected their concerns when Network Rail makes an application to ORR. SG said that the consultation code of practice¹ required the applicants to submit the details of material consultation responses to ORR. IWG agreed that Network Rail should inform those consultees who have responded to a consultation whether they are going to proceed with the application. SG said that this was a requirement of the code of practice (paragraph 33).

Action: Network Rail to remind CREs to inform respondent consultees whether or not they are going to proceed to apply to ORR for approval following a consultation

9. However, the train operators present considered that there should be a way to check that their representations have been submitted to ORR accurately. It was suggested and agreed that ORR should place application documentation on its website for transparency.

Action: ORR to place applications on its website.

Post meeting note: ORR case officers have been advised of this change to the process and will post future applications on-line. Applications will be viewable on the same pages used for consultations². It should be noted that those applications that are processed very quickly by ORR may not appear on the relevant current applications pages.

Network Rail internal processes

10. JBt said that Network Rail had provided to its Customer Relationship Executive (CRE) teams with internal guidance on their role in the process as part of a series of briefing sessions on the new process. The aim of this was to confirm that CRE teams had a clear understanding of their roles. Network Rail already updated and reissued this guidance following the experience of the process gained thus far. JBt fed back to IWG that CREs had expressed the view that their role in handling the consultations had led to better communication with operators.

¹ *Industry code of practice for track access application consultations*, available at <http://www.rail-reg.gov.uk/upload/pdf/candp-CofP-211207.pdf>.

² See <http://www.rail-reg.gov.uk/server/show/nav.205>, and the subsidiary pages for section 17/18 and section 22/22A applications.

Other train operator feedback on consultation process

11. MB stated that as a consultee, she has been receiving consultation emails prior to the documents being placed on Network Rail's website. This meant that consultations had begun a day earlier than consultees could access the information relating to the application and it meant having to act on an email twice. MB suggested that CREs should send out consultation emails after the relevant documents had been placed on the website.

12. JBt apologised for this and said that this issue would be addressed. She said that Network Rail's internal guidance did actually state that consultation emails should only be sent out once the documentation was available online.

Action: JBt to discuss the issue of consultation emails and availability of documents with CREs

13. NW said that he thought he had not yet received a consultation email for any application. JBt said that she would investigate this. NW said that he would check his inbox to see whether he had missed any emails.

Action: NW to check whether he has received any consultation alert emails and advise JBt accordingly. If NW was not being consulted, JBt would investigate and resolve this.

14. RHn asked whether ORR would contact consultees who had raised material concerns in respect of an application. DR confirmed that ORR would expect to do this, even if it was just to say that ORR did not consider the objection to be relevant. He added that he would hope that in the application form Network Rail would give valid and sufficient reasoning in response to an objection to preclude the need for ORR to ask Network Rail further questions.

15. NW stated that he felt it wasn't clear as to why ORR took on the consultation for West Coast. JBt said that this was done as part of the "hand over" transition arrangements so that Network Rail was not overburdened with significant applications at the time when it was adjusting to handling consultations. JBt said that in the future Network Rail should be fully capable to take on consultations on agreements as significant as those for West Coast. DR endorsed this and said the general principle would be that ORR would not conduct consultations on agreed applications in the future.

16. MB asked whether there should be some text on Network Rail's website advising that ORR's website should also be checked when viewing current consultations. JBt stated that there is currently a reference to ORR's website directing people to look at both websites. MB asked for this to be checked so that it was clear to everyone that both websites need to be checked. ORR would revise the text on its website to provide cross-references to Network Rail's consultation pages.

Action: Network Rail to check that its consultation webpages make it clear that consultees should also check ORR's website for details of any applications (i.e. s17/22A) that it is consulting on. ORR would revise the text on its webpages to provide cross-references to Network Rail's webpages.

Post-meeting note: ORR has now updated its webpages to provide references to Network Rail's webpage. IWG may wish to note that for technical reasons,

hyperlinks listed on ORR's website cannot contain the 'equals' sign which is used in many Network Rail web links. Therefore, the link to its website would be to the "Resources" page on Network Rail's website, which then provides a link to the consultation pages through the "Track Access" link on the left menu list.

The Network Rail website has been updated so that both the current and completed consultations pages contain reference to ORR also carrying out consultations in some cases and a link to the ORR current applications page.

Review of implementation

17. DR said that, overall, he was pleased with how things had gone so far. He added that a review of the new arrangements would take place after the May timetable. However, given that it was not expected that applications for the May timetable would raise significant issues, and consultations for West Coast and the North London Railway track access option were being handled by ORR, the real test for the arrangements would be agreements submitted for the Principal Change Date in December 2008. However, ORR would like to get an early feel on whether there are any major issues arising from the new arrangements and whether any changes would be required. Accordingly, SG would be conducting a 'lessons learnt' review after May 2008. A fuller review would occur after December 2008.

Draft new C&Ps document

18. DR said that the latest working draft version of the C&Ps document had been circulated to IWG. DR said that the document would be web based with hyperlinks to enable easy navigation.

19. ORR's intention was to take on IWG's comments arising from this meeting and then circulate a second draft internally within ORR and to Network Rail, for it to review the new guidance.

Structure of the C&Ps

20. IWG discussed whether the C&Ps should incorporate all relevant track access policy documents (such as moderation of competition, track access option policy) or whether it should be a slimmer 'gateway' document with links to relevant policy documents. IWG supported the 'gateway document' approach.

21. MB said it was important that the 'gateway document' approach should have a short description of each policy area relating to track access even if there is a cross-reference to another policy document. DR agreed.

22. RHr asked whether the rationale for policies would be included within the C&Ps. DR said that the rationale for policies may not necessarily be included as this may have been covered in previously issued policy documents, which were available on the ORR website. MV asked whether the industry would be notified of updates to the document. DR confirmed that industry parties would receive an email notification as and when updates occur.

23. NW asked whether the document will be a mandatory, "must do" document or a guidance tool. SG said that the purpose of the document was

to set parameters as opposed to strict instructions. ORR's statutory duties were the ultimate criteria against which ORR must assess applications, but the C&Ps mainly provide parameters for operators to operate within, though there were some firm guidelines. The chapters on completing the model contract would be a guidance tool. However, as per criterion B in the guidance on ORR scrutiny³, where there were departures from model clauses, or the model clauses were misused, ORR would give greater scrutiny to that application.

24. MB suggested removing the introduction sections of the C&Ps (chapter 2) to the document, particularly as information on the industry framework already exists on ORR's website. ORR agreed to review this, particularly given that the proposed overarching document would provide some of the same background material.

25. NW said that it was important for ORR to avoid duplication of information between documents, as they may end up explaining an issue in a slightly different way, which could lead to confusion. RG agreed and said that at present there were duplications of information between the C&Ps document and the draft overarching document. However, he would aim to eliminate duplication and provide cross-references instead.

Action: ORR to review "Front End" of C&Ps document and work to remove duplication between the C&Ps and overarching document.

26. MB said that she felt neither the draft document or the current passenger C&Ps document actually set out specific criteria for how ORR would review applications. This contrasted with the original C&Ps document issued in 1994.

27. RG said that chapter 3 of the C&Ps set out the procedures for making an application, whilst chapter 4 set out the criteria and policy relating to capacity utilisation and chapter 5 addressed the economic criteria and policy for applications. JBn suggested that the name of the C&Ps might be misleading and that one option was to adopt a name that better reflected the document.

28. MB raised her concern of the size of the document. JBn suggested that the size of the document shouldn't be an issue; the document would be web-based which should facilitate better access to the relevant information. However, he suggested that there should be a link which takes the user back to the contents page to aid navigability. Network Rail would advise ORR how to incorporate this into the document.

New guidance in the C&Ps document

29. RG gave two options for the type of guidance that could be included in the C&Ps document:

³ Guidance on the level of scrutiny that ORR expects to give to applications for track access contracts and amendments to them under sections 18 and 22 of the Railways Act 1993, available at http://www.rail-reg.gov.uk/upload/pdf/candp_reg_scru_gdnce-211207.pdf.

- (a) a guide to completing all the relevant sections of the model contract, with cross-references from those clauses in the contract that may be amended/completed to paragraphs of the C&Ps relating to the corresponding policy; or
- (b) a commentary on each clause in the model contract, alongside a guide to how the model clauses should be completed.

30. RHr asked whether there were sufficient resources to draw up a commentary. RG said that current commentary in the 'layman's guides' could be updated but given ORR's other major workstreams, this would not be a priority.

31. IWG endorsed the inclusion within the C&Ps of guidance on completing the model contracts and the update of the separate 'layman's' guides to the model contracts.

Action: ORR to finalise guidance on completing the model contracts for inclusion in the C&Ps.

32. RHs suggested that, as well as a hyperlinked contents page; it would be useful if there was an index or catalogue at the back of the C&Ps listing all the associated policy documents. IWG agreed with this suggestion.

Flowcharts

33. IWG endorsed the use of the revised flowcharts in the draft C&Ps document but queried the colour scheme. ORR would include a key to provide clarity.

34. IWG agreed that flowcharts were useful reminders of a process but noted that they were a summary, rather than a comprehensive guide to a process. It was suggested that the C&Ps preface the section on flowcharts with a caveat that the associated policy and procedures should be read alongside the flowchart.

Action: RG to add a key to flowcharts and add a caveat.

35. MB asked whether the C&Ps should contain explanations of how the passenger and freight documents have been brought together. ORR's view was that much of the material in the current passenger and freight documents was common to both markets and so bringing them together would reduce duplication. It was not ORR's intention to produce any explanation on how the documents had been merged but it would be clear where a policy applies only to passenger or freight.

Next steps

36. ORR would take forward the work on the C&Ps document, taking on IWG's comments. Network Rail would be involved in the development of the guidance on completing the model contracts. Once the draft C&Ps document has been developed further, ORR would circulate it to IWG. IWG members would then have the opportunity to comment further then if they wished to do so.

Frequently Asked Questions (FAQ) section

37. IWG discussed the proposed FAQ section of the draft document. It was noted that the name FAQ did not particularly reflect the nature of the issues to be included. IWG was invited to offer suggestions for other entries in this section.

38. SG suggested that a section could be included to give guidance on what types of amendment were covered by the general approvals. NO suggested that there could be a summary of the different ways of amending contracts (e.g. section 22 (specific and general approvals), section 22A, Network Code provisions (such as Part J). NW suggested that there could be some guidance on how to obtain rights to run 'specials'. It was also suggested that there could be some guidance on vehicle change.

Comments about the new general approvals/suggestions for additional permissions in the general approvals

39. IWG was invited to raise any major concerns relating to the two proposed general approvals for which consultation would close on 4 April 2008. No points were raised. However, NO expressed a concern about Network Rail not providing updated consolidated contracts quickly enough. DR said that ORR had raised this issue with Network Rail and would continue to monitor this issue. JBt confirmed that Network Rail had this work well in-hand.

40. IWG was also invited to suggest other permissions that might usefully be included in a general approval. No suggestions were made.

Update on overarching document

41. DR updated IWG on progress with drafting the overarching regulatory framework document (which had the working title "Guide to Starting Mainline Rail Operations"). This would provide a manageable introduction to the regulatory framework (i.e. licensing, access and safety) for new entrants to the market. The document contained references to the more detailed policy documents such as the C&Ps as well as information on timescales. A draft was currently out for internal ORR consultation but ORR hoped to be able to circulate the document for IWG members by the end of April if they wished to review it.

AOB

42. NO asked when the model clause charter track access agreement would be available. DR stated that Network Rail was leading this work and the aim was for the new contracts based on the model clause agreement to become effective from 1 April 2009, with charges consistent with the Periodic Review (PR) 2008.

43. RHn suggested that the C&Ps should refer to the changes to the economic framework (particularly Schedule 4) that will arise from the PR2008. DR agreed that the introduction to the economic chapter should mention ongoing work on the review but said that, as the C&Ps would be a live document, it would be updated to reflect PR2008 nearer the time of implementation.

DONM

44. Given the review of the implementation of the new C&Ps arrangements that would be taking place after the May timetable change, IWG agreed not to set a specific date for the next meeting. SG would be talking to IWG members separately as part of the review. The decision on when to hold the next meeting would be made during or after that review, as necessary.

Summary of Actions

- Network Rail to remind CREs to inform respondent consultees whether or not they are going to proceed to apply to ORR for approval following a consultation
- To support transparency, ORR would place applications on its website for which a pre-application consultation had been carried out.
- Network Rail to review procedure of sending out consultation emails to the industry. In future, consultation emails (and the consultation period) would only start once documentation has been uploaded.
- NW to check whether he has received any consultation alert emails and advise JBT accordingly. If NW was not being consulted, JBT would investigate and resolve this.
- Network Rail to check that its consultation webpages make it clear that consultees should also check ORR's website for details of any applications (i.e. s17/22A) that it is consulting on. ORR would revise the text on its webpages to provide cross-references to Network Rail's webpages.
- ORR to review "Front End" of C&Ps document and work to remove duplication between the C&Ps and overarching document.
- ORR to finalise guidance on completing the model contracts for inclusion in the C&Ps.
- ORR to include an index of associated policy documents at the back of the C&Ps document.
- ORR to add key to flowcharts to provide clarity on the colour scheme and add a caveat to the introduction section to remind users of the document that they should read the written guidance as well as the flowcharts.