

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

Wednesday 7 November 2007

One Kemble Street, London

14:00-17:00

Attendees

ORR	Network Rail	Train operators
David Robertson (DR) Richard Gusanie (RG) Gary Taylor – Secretary	Juliet Brilliant (JBt) John Boon (JBn) Sue Yeo (SY)	Chris Dellard (CD) – ATW Jim Goodhead (JG) – SWT Rob Holder (RHr) – FGW Robert Hodgkinson (RHn) – West Coast Trains Michael Leadbetter (ML) – Freightliner Group Nigel Oatway (NO) – EWS Mike Vila (MV) – Londonlines Niel Wilson (NW) – Northern
Department for Transport (DfT) – Robin Marie (RM)		

Introductions and Apologies

Apologies

1. David Walker and Mary Bonar.

Introduction

2. DR opened the meeting by thanking all attendees for participating in the Criteria & Procedures Industry Working Group (IWG). IWG had been established to provide representative industry input into the development of the more detailed proposals arising from the C&Ps review. DR explained that group members had been chosen for their experience in dealing with track access issues. As such, the input of members would be vital to ensuring that the proposals were workable and would provide the necessary protections and safeguards before the wider industry was consulted.

Discussion of general concerns

3. DR invited IWG members to raise any general concerns they had with the C&Ps review in order that those concerns could be discussed and addressed. The main concerns raised were timescales for implementation, sign off/engagement by operators and the ability of Network Rail to carry out consultations.

Timescales for implementation

4. DR discussed the planned implementation date of 1 January 2008. The train operators on IWG were particularly concerned about whether Network Rail would be adequately resourced and organised to carry out pre-application consultations. There was a general consensus amongst the train operators

that the necessary resources should be in place before the C&Ps review was implemented. It was thus considered that the 1 January 2008 date was unrealistic. DR said that it might be desirable to slip the implementation date to 1 March 2008. Some train operators doubted that Network Rail would be ready to take on responsibility even from this date.

5. To prevent confusion as to which arrangements would apply for the approval of access rights for the Subsidiary Change Date 2008, it was suggested that a pilot approach might be better. This would involve the new procedures being used for a specified number of the timetable supplementals, with the existing C&Ps being used for the majority of agreements. This would provide a relatively safe arrangement for testing the new procedures and identifying teething problems and issues before they are rolled out in full. IWG supported this approach.

6. DR reminded the group that after the industry has taken on the additional responsibilities proposed in the C&Ps review, ORR would remain available for guidance or to discuss any issues or concerns train operators have.

Action: Network Rail to liaise with TOCs following the Priority Date 2008 to identify which agreements might be suitable for the pilot. DR said that he would report back to ORR IWG's concerns and suggested way forward.

Communication

7. DR asked what would be the most effective form of communication for disseminating the outcome of the C&Ps review and ensuring that all appropriate industry parties know how the new procedures will work. NO suggested that a seminar/workshop similar to that held in April would be a useful forum for this purpose. This was welcomed and ORR agreed to arrange.

Integration of new processes

8. DR confirmed that the CoP would eventually be incorporated into the revised C&Ps.

Remit

9. The remit was endorsed by IWG.

Proportionality Criteria

Model clauses

10. NW queried criterion on model clauses and asked what would happen if an application was made which include a previously approved departure from model clauses. He asked whether ORR would consider that application to be material (thereby suggesting that applicants should build in more time to their application process) or would ORR consider that the application was not material in respect of that departure.

11. RG replied that the proportionality criteria existed to distinguish between those issues that were not of regulatory significance, and those issues that should receive scrutiny from ORR. In respect of model clauses, ORR's general policy was all contracts should follow model clauses unless

there were good reasons for a departure. Departures that were appropriate for one operator may not necessarily be appropriate for another. Therefore, where an application contains a departure from model clauses, ORR would expect to consider the merits of adopting the departure in that particular case. Thus, applicants should not consider that the amendment would be non-material, and should build more time into the application process. However, where the departure is relatively uncontentious and has been approved by ORR before, ORR is likely to be able to make a decision on whether the departure is appropriate sooner than if the departure was entirely new. DR mentioned that ORR welcomed early pre-application discussions where applicants were considering non-model clauses.

Charging – de minimus framework

12. NW expressed concern that train operators would no longer benefit from ORR scrutiny of additional permitted charges (e.g. for additional signal box hours) that fall within the proposed de minimus framework. Even though a train operator might, on paper, sign up to an agreed application for an additional charge, it was felt by some members of IWG that the train operator was at a disadvantage. This was because Network Rail could pressure a train operator into accepting its proposed charges because the train operator would need to have the additional service provided by a specific date in order to run its trains. It was felt that the section 22A process did not always provide a protection in such cases because there was insufficient time for ORR to go through due process.

Action: ORR said that it would review this issue and look to provide some additional guidance and criteria in the revised C&Ps for the agreement of these additional permitted charges.

Miscellaneous points

13. IWG members made a number of minor comments on the draft paper. Suggestions included:

- (a) defining “congested infrastructure” and making clearer what was meant by “busy” parts of the network for reference “E” in the Table;
- (b) adding in links to the relevant parts of the C&Ps to make it easier to cross-refer to the relevant ORR policy; and
- (c) whether agreements that derive access rights from access options or are related to enhancements should automatically receive greater scrutiny.

14. In respect of reference “F”, NW asked whether ORR’s proposed congestion charging arrangements would mean that all applications for additional rights would be considered as significant and thus receive greater scrutiny.

Action: RG said he would investigate the charging proposals to see whether “F” needed amending.

15. Following concerns raised by IWG, ORR would look at the boundaries describing when ORR would become more actively involved in a case.

16. JBt suggested that it would be useful to record timescales to ensure that streamlining of processes is taking place. DR agreed and said that the initial period will prove to be time consuming but in the longer-term, as processes bedded in, he would expect to see improvements.

Consultation Code of Practice

General concerns

17. Train operators on IWG had general concerns with the proposal for Network Rail to take responsibility for handling track access consultations. These concerns stemmed from existing problems with Network Rail's processes and some parties were worried that the transfer of responsibility from ORR to Network Rail for consultation might lead to less efficient processes. There was particular concern with Network Rail's internal sign off process for when a train operator was seeking new or revised access rights. This was criticised as often being tortuous for train operators. When a CRE has to defer to colleagues in another part of Network Rail, train operators said they often have to wait an unreasonably long period for a response. Network Rail said it would review these internal processes to try to make them more efficient. DR added that it would be useful for Network Rail to produce an outline of their procedures which could be included in the consultation code of practice (CoP). JBn and JBt agreed.

Action: Network Rail to review its internal sign-off arrangements. Network Rail to produce an outline of their procedures for obtaining internal sign-off of proposals.

18. There was a concern for some train operators that when Network Rail becomes responsible for consultations on track access applications, the member of staff responsible for conducting that consultation may not have the authority necessary to obtain responses from other Network Rail staff or other industry parties. This was contrasted with the position of the track access case officers at ORR who, it was considered, had the 'clout' to seek responses to questions. There were also concerns that if CREs were responsible for administering consultations, then they might not behave as independently as ORR's case officers. This was because it was the job of each CRE to support a particular train company, and so they may act in a biased manner when dealing with the consultation concerns of other parties.

19. ORR explained the current ORR process to help allay these concerns. Where a third party responded to an ORR track access consultation, the ORR case officer invariably forwards the response to the CRE/customer manager at Network Rail (that is, the CRE whose name was on the application form) for a response. Where the CRE is unable to answer the question by themselves, the CRE liaises with the appropriate Network Rail colleague (e.g. a CRE for another TOC or someone in the train planning team). The CRE then sends the response either to the ORR case officer (who forwards it to the consultee) or directly to the consultee (copying in the case officer).

20. With Network Rail taking responsibility for handling pre-application consultations, the only difference from what happens at present would be that the consultee would send their response direct to Network Rail instead of via ORR. Under the proposed arrangements, if a consultee is not satisfied by the

response of Network Rail, it would be able to lodge an objection which would be brought to the attention of ORR if that application was submitted for approval. RHR suggested that consultees or the applicants should be able to approach ORR directly during a pre-application consultation if a particularly significant issue arose. This would give ORR more time to consider the issue rather than leaving it until the application is made to ORR. DR said that this suggestion would be incorporated into the CoP.

21. Network Rail said it would propose some principles that it would follow when conducting consultations. Network Rail agreed to produce and circulate these to IWG by the end of November 2007. These principles could then be included in the revised CoP.

Action: NR to provide work on principles and send out a draft proposal to IWG.

Arrangements for communicating consultations

22. IWG discussed arrangements for notifying consultees of a proposed application. It was agreed that email was the best way of notifying industry parties of such proposals. As ORR does at present, interested parties should be advised by an email containing a link to the relevant webpage carrying the consultation documentation.

23. IWG discussed the criteria by which Network Rail should decide which train operators to consult on particular track access applications. It was agreed that, for each train operator, there should be a list of those other train operators who would want to be consulted on applications for that operator. As applications would be placed on the Network Rail website, those who were not notified by email of a particular proposal for track access rights would still be able to look at current consultations and comment if they so wished.

24. It was acknowledged that it would be essential that the list of consultee contact details remained up to date. There was a concern that the contact details for the individuals at each train company responsible for receiving details of consultations could become defunct if those people change jobs and Network Rail is not notified of the successor's contact details. RM suggested that each train operator could set up a generic email address such as [track.access@\[TOC name\].co.uk](mailto:track.access@[TOC name].co.uk). Network Rail could then send details of consultations to these addresses and it would not matter if there were a change of personnel. Of course, it would be up to each company to decide whether they did this. As an additional safeguard to ensure that contact details remain up to date, the Network Rail CRE should be aware if their principal track access contact at a TOC changes. Therefore, they could check that the contact list had been updated with the new contact's details.

25. ORR had asked a question in its draft CoP document about whether the DfT would wish to be consulted on all applications for franchised train operators, whether or not it involved only very minor changes. RM advised ORR that DfT should be consulted on all such applications. This would be incorporated into the CoP.

Approach on section 17 and 22A applications

26. ORR sought the views of IWG on its proposal for the train operator to be able to request Network Rail to carry out a pre-application consultation on applications that the train operator proposed to submit to ORR under section 17 or 22A. Whilst it was acknowledged that this would be entirely optional, with train operators free to apply directly to ORR and for ORR to carry out the industry-wide consultation, it was considered that there might be occasions when a train operator may want a pre-application consultation to occur. For example, where Network Rail and the train operator were in agreement on the number and characteristics of access rights in Schedule 5, but could not reach agreement on purely commercial matter (such as a Schedule 8 issue).

27. It was agreed that the CoP should provide for three options for section 17/22A applications:

- (a) for the train operator to apply to ORR which would then carry out the industry consultation;
- (b) for the train operator to request Network Rail to administer a pre-application consultation before applying to ORR; or
- (c) for the train operator to administer a pre-application consultation itself, before applying to ORR.

Timescales for consultation

28. RG raised the possibility of reducing the consultation period from twenty-eight to twenty-one days. ML said that with numerous workstreams and the possibility of annual leave, twenty-eight days was an appropriate amount of time to allow for consultations – especially for freight operators who are consulted on most applications. It was agreed that 28 days should remain the standard consultation period.

29. The issue of urgent applications was discussed. At present, where ORR receives an application outside the normal timescales which seeks access rights urgently, where it considers it appropriate ORR conducts a consultation of less than 28 days whilst providing consultees with the opportunity to request more time if they reasonably require this to assess properly the likely impact on their services. IWG agreed that Network Rail should be able to act in a similar fashion when it takes responsibility for pre-application consultations. This would therefore be incorporated into the revised CoP.

Draft consultation/application forms

30. IWG briefly discussed the format of the track access application forms and how these would fit with the new consultation arrangements. ORR envisaged that there would be a single form (based on the existing application form) that would be used to:

- (a) advise consultees (and ORR, when an application for approval is made) of the nature of a proposed application; and
- (b) provide additional sections to detail the outcome of the consultation (i.e. any concerns raised or outstanding objections, and any aspect of the application that changed as a result of the consultation).

31. It was agreed that ORR would produce a draft template of the new application form. RHR also noted that on the supporting flow chart, no timescales had been added. DR stated that these would be added.

32. ORR would produce a revised draft CoP incorporating the points discussed with IWG.

Miscellaneous issues

33. NW suggested that the CoP should distinguish between formal and informal submission to ORR. The draft CoP would be revised to reflect this.

Action: ORR to produce a revised draft CoP and draft application form and to add timescales to flow chart.

Draft new C&Ps

34. DR explained that drafting of the new C&Ps was behind schedule. However, ORR was continuing to work on the new document, which would combine passenger and freight C&Ps into a single web based format. Current work included combining the charging chapters of the two existing documents. A draft would be distributed to IWG for comments on the structure before it is sent out more widely.

35. It was observed by some that the new format would mean that there would be significantly more pages for an operator to read through. It was suggested that for new companies, such as open access operators, this might be burdensome. ORR responded that the structure of new format should make it more user friendly (i.e. by having hyperlinks). In particular, there would be much better guidance on completing the model contracts. It would also cut down the number of separate documents on track access in existence (such as the current "Guide to the model passenger/freight track access contract").

Next Steps

36. DR said that he was producing a paper for IWG on general process arrangements for transition to cover issues such as accountability, migration, risks, due diligence, industry relationships (including the role of train operators), training, implementation and timescales.

37. DR mentioned the new general approval which was issued last month. As part of the next phase of the C&Ps review, ORR expected to issue another general approval in 2008. Whilst this would implement the proposals in the Way Forward paper (permitting contingent rights for up to one timetable period), DR said that ORR would consider any proposals that IWG might have for more wide ranging permissions. IWG members were therefore invited to consider other permissions that they consider might usefully be included within a general approval.

38. DR advised IWG that Bill Hammill (ORR Track Access Manager) was working on producing a new freight general approval to cover minor changes to freight agreements.

AOB

39. None

Date of next meeting

40. IWG discussed whether the most of its business should be dealt with by correspondence or through meetings. The consensus view was that it was more effective to hold meetings and it was agreed that meetings should be scheduled for January, February and March, with the February meeting only being held if it was necessary. GT would arrange these meetings.

Action: GT to arrange meetings

Summary of actions

- Network Rail to review its internal sign-off arrangements
- Network Rail to produce an outline of its internal sign off procedures for inclusion in the CoP
- NR to produce a paper on the principles that its CREs would work to when conducting pre-application consultations and send this to IWG
- ORR to produce a revised version of the proportionality criteria incorporating suggestions from IWG, and to consider guidance in new C&Ps on how Network Rail and TOCs should agree additional permitted charges.
- ORR to produce a revised version of the CoP:
 - providing for three options for unagreed applications (paragraph 27)
 - setting out that Network Rail can conduct shorter consultations in urgent cases, subject to following the same principles that ORR follows for such applications
 - with timescales on the flowchart
 - with space for inclusion of Network Rail's principles (see above)
 - including provision for a party to refer a significant issue to ORR during pre-application consultation
 - revising the section on contact details at the end of CoP to reflect IWG discussion
 - distinguishing between formal and informal submission
 - including a draft application form with sections dealing with the pre-application consultation
- ORR to draft interim arrangements paper
- ORR to send to IWG draft C&P document when ready
- GT to arrange future meetings