

Ekta Sareen
Assistant Economist
Competition & Regulatory Economics
Office of Rail Regulation
1 Kemble Street
LONDON
WC2B 4AN

6th May 2008

Dear Ekta,

Consultation: Train Operator Compensation from Possessions

This letter is ATOC's response to John Thomas's consultation letter of 8th April. No part of this letter is confidential.

In response to the specific issues you raised:

- We accept ORR's reasoning in respect of the transitional arrangements, without evidence of existing bespoke arrangements there is no justification for the transitional arrangements proposed. If the consultation reveals any individual circumstances which require to be addressed, then we would expect this could be dealt with via individual arrangements, for example involving pre-agreement of Type 2, 3 or SPP treatment as appropriate on a consistent basis with any existing agreed arrangements, or through implementing terms which address how the pre-agreed arrangements will be permitted to continue.
- Whilst we maintain that a phased implementation of the regime would be more easily managed from a TOC perspective we understand that DfT, ORR and Network Rail favour full implementation of the new regime from 1 April 2009. The Periodic Review is about the incentives which act on Network Rail, and we therefore accept the ORR's decision.

It is important for the franchise agreement schedule 9/clause 18.1 provisions that the changes to Part G of the Network Code made using condition C8 are formally accepted by DfT as being made in connection with the access charges review and therefore are subject to schedule

9/clause 18.1. This will be a pre-condition to proceeding via the C8 process. We welcome the statement in your letter that DfT have agreed this treatment, but franchised TOCs will require direct confirmation from DfT and the Scottish Ministers.

The consultation is confident that DfT/ Scottish Ministers will reach agreement on the clause 18.1/Schedule 9 treatment of the consequences of the review. Your consultation also assumes that the compensation outcome in respect of Major Projects and significant Network Change is likely to be very similar under both the old and new regimes. We are hopeful that such agreements will be reached, but do not under-estimate the challenge which may emerge in doing so. This may be particularly the case if TOCs are not allowed the benefit of all the new regime (for example including the improved costs and revenue recovery) but are exposed to the new Type 3 and SPP Triggers, including the potential for Network Rail to reclaim compensation paid. We believe there will be solutions to this and look forward to early engagement with DfT and Scottish Ministers to develop a workable approach.

- In respect of the legal drafting, ATOC's legal advisor has been closely involved in the drafting of the revised schedule 4 arrangements, we are therefore largely content, recognising that delivering an industry solution necessarily involves some areas of compromise.

We would however note two aspects for ongoing consideration.

We are concerned that the new Schedule 4 has a real potential to reduce the requirements on Network Rail to discuss the design and impact of possessions at an early stage: the new Schedule 4 seeks to provide certainty of cost and deal with payment after the event. This could reduce the levels of partnership and cooperation which will lead to most efficient outcomes. Network Rail has offered assurances that this will not be the case and there is a permissive mechanism to allow early discussion and the funding of mitigating action. However this must remain subject to ongoing careful review and if necessary further action may be required to ensure best cooperative practices are developed and followed.

One issue which has come to light as the consultants calibrating the cost compensation model have been working with TOCs: as the proposed model is built up from existing custom and practice there needs to be a provision in the schedule which sets out what to do with the cost compensation model in the event that a new or unusual method of managing a possession is developed. Paragraph 5 sets out a mechanism for permanent change and the working group discussed that ORR guidance would develop the criteria to be applied in determining what changes would be made, essentially ensuring that

the regime was kept cost reflective. However we would suggest that if the method is a one-off there should also be facility to deal with this through an agreement subject to a general approval.

More generally we support the proposed changes to the regime as these will provide stronger incentives on Network Rail to minimise the disruption to passengers caused by possessions, and better recognise the costs incurred by train operators when providing 'bus services.

Yours sincerely

Kai Hills
Policy & Regulation Manager