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Dear Paul

Code of Practice for the Application of sections 16A to I of the Railways Act 1993

Network Rail welcomes the opportunity to respond to ORR's consultation paper concerning its draft Code of Practice for the Application of sections 16A to I of the Railways Act 1993, issued on 2 August 2006.

Network Rail is broadly supportive of the approach taken by ORR in its draft Code of Practice; we do, however, consider that there are some issues which merit further consideration and / or clarification. These issues are set out below:

- We believe that ORR should ensure consistency of language as to the likely circumstances as to when the section 16 mechanism may be utilised. At paragraph 1.8 of the consultation document, ORR states that the Code of Practice has been developed on the basis that section 16 applications will only be necessary in 'limited' circumstances, whilst at paragraph 2.6 of the consultation document, ORR states that it would only expect it to be necessary to consider making an application under section 16 in 'exceptional' circumstances.
- Network Rail agrees with ORR that the existing investment policy framework provides the normal approach for undertaking schemes to improve, develop or provide new railway facilities and that the powers granted to ORR under section 16 should be viewed as being a power of 'last resort'. An application made to ORR under section 16 is likely to represent a serious failing in the normal investment policy framework. Taking this into account, we believe that it would be helpful if ORR could clarify that it only expects to use the powers granted to it in 'exceptional' (as paragraph 2.6 states) rather than 'limited' circumstances. In addition, we believe that it would be helpful if ORR's Code of Practice could establish an expectation that an applicant should explain how the application falls within the criteria and should set out what has been done to try and progress the proposal through other means. We are

concerned that unless such an expectation is established, the section 16 powers may be considered as an appropriate way of progressing standard investment opportunities, whereas this is obviously not the case.

- It would be useful if paragraph 4 of the Executive Summary could make specific reference to Section 13 (and the accompanying material) of Network Rail's Code of Practice for dealings with dependent persons. Section 13 of the Code of Practice for dealings with dependent persons provides detailed information on the investment process and contractual framework and so should be an important point of reference for promoters wishing to invest in the rail network. Network Rail welcomes proposals to enhance and develop the railway network and where such proposals are received we are committed to working with our customers and potential customers to develop and deliver such schemes.
- Paragraph 16E of the Act provides that ORR may only give a direction to a person if it is satisfied that the person will be adequately rewarded for providing, improving or developing the railway facility in accordance with the direction. Accordingly, the issue of adequate reward will be a key consideration in ORR's decision as to whether to issue a direction. However, whilst adequacy of reward is addressed by ORR in paragraphs 2.16 and 2.17 of its draft Code of Practice, in the context of the process for making an application to ORR under section 16A, we believe that this information, or much of it, is best placed in section 3 of the Code of Practice which sets out the ORR process for making decisions on applications.
- Within section 3 of the Code of Practice (specifically at paragraph 3.6 – 3.7), ORR set out its process for making decisions on applications. However, whilst ORR notes in its process flowchart (as set out in Annex B) that an application made under s.16 of the Act may be accepted or rejected, it may be inferred from paragraph 3.7 of the Code of Practice that an application made to ORR will always be accepted. For completeness, Network Rail believes that ORR should also confirm that circumstances may exist in which an application is rejected.
- At paragraph 3.12 of the consultation ORR sets out the position with regard to the bearing of costs where a direction is made. For the avoidance of doubt it would be helpful if the Code of Practice also sets out the position regarding costs where a direction is not made. In such circumstance we would expect to see a presumption that the applicant also bears those costs (unless a direction is not made because the parties agree a contract for dealing with the works, so that a direction is unnecessary, and the contract addresses the position regarding costs).

Other Comments

Whilst we have set out above what we believe to be the main issues to be addressed, we take this opportunity of setting out below a number of other comments with regard to typographical or contextual matters. We finally provide some comments on the flowchart as set out in Annex B of the consultation document.

Paragraph 2.7 of the consultation document refers to section 16A being used to develop or improve an existing railway facility '*to allow additional services to operate.*' This interpretation of section 16A is narrower than what the section itself appears to provide. In order to ensure consistency between the Act and ORR's Code of Practice we therefore suggest that the words set out in italics above are removed from paragraph 2.7 of the draft Code of Practice.

Paragraph 2.12 of the consultation document refers to section 16D(7)(c) of the Act. However, it appears that a reference to section 16D(7) as a whole would be more appropriate.

Paragraph 2.20 of the consultation document requires reworking to ensure that it makes grammatical sense; we assume that the first sentence of this paragraph should read as follows:

'We may substitute any other person for the applicant, but only if the applicant, the other person and the DfT or TS (if neither is the applicant) consent to the substitution.'

Paragraph 2.21 of the consultation document contains closing brackets that were never opened. We assume that this is a typographical error that should be deleted.

Paragraph 3.3(e) of the consultation document requires the brackets to be closed at the end of the paragraph. To ensure consistency with the Railways (Provision etc. of Railway Facilities) (Exemptions) Order 2005, the words 'non franchised' should be inserted before the words 'passenger services' – see paragraph 6(1)(a)(iv) of Schedule 1 to the 2005 Order.

Whilst we note ORR's statement at paragraph 3.5 of the consultation document that applicants should seek their own legal advice as to whether a facility is exempt before making an application to ORR, it is unclear whether paragraph 6(1)(b) of the 2005 Order is deliberately excluded from ORR's summary listing of those who are not exempt from this regime. To ensure completeness of ORR's summary of the Order it would require expansion to cover paragraph 6(1)(b) of the 2005 Order.

We believe paragraph 3.4(e) of the draft Code of Practice which sets out exempted facilities can be deleted. Light maintenance depots listed in Schedule 1 of the 1994

Order already fall within the definition of a 'specified station or light maintenance depot' as set out at paragraph 3.4(d). Under the 2005 Order 'specified light maintenance depots' are defined as those specified under the 1994 Order, which itself includes – via article 2(1), those LMDs mentioned in article 4(m), which then refers to the Schedule 1 listed LMDs.

Paragraph 3.4(f) should read, 'any part of a station which was used by the British Railways Board (or a subsidiary) or [rather than 'and'] TfL prior to 1994', i.e. the part station doesn't have to have been used by both BRB and TfL. This would reflect the use of the word "or" at the end of paragraph 13(1)(2) of Schedule 2 to the 2005 Order.

Annex A of the consultation document which seeks to replicate the text of sections 16A – I of the Act is inaccurate in some minor respects as follows:

- The heading of 16B should continue with the words 'from section 16A'
- The heading provided at 16E should be 16E rather than 6E. The semi colon after the word 'applications' should be a colon.

The process chart as set out in Annex B of the consultation is very useful, but could be tidied up in a number of respects:

- The process flow chart refers to the Scottish Executive (SE). To be consistent with the rest of ORR's draft Code of Practice it would be helpful if the flow chart could be amended to refer to Transport Scotland (TS).
- In the box beginning 'ORR directs applicant' the words 'a part' should read 'apart'.
- In the box beginning 'ORR may direct' the text should read '...the costs incurred in connection *with the* application.'
- The box beginning 'ORR notifies intention to give' needs reformatting to ensure that the text appearing within the box can be read.
- Section 16F(3) of the Act stipulates that 'if the applicant make representations that the direction should not be given, the Office of Rail Regulation shall not give it.' However, as currently drafted, the flow chart does not take this into account. To address this, we suggest that a new box is inserted into the flow chart after the box 'ORR notifies intention to give direction in modified terms...' which states 'Does applicant require that such a direction is not given?' From there, a 'no' link should go to the box 'ORR gives direction...' and a 'yes' link should go to a new box which states 'No direction is given'.
- Whilst the note at the foot of the flow chart page sets out the statutory wording, it would be helpful if the second could be amended to emphasise the fact that an applicant may only vary what the direction would require the Specified Person to do, in advance of the direction being made by ORR.

We would be happy to meet with ORR to discuss in more detail any of the comments made in relation to this consultation document. Should you

consider that this would be helpful, please do not hesitate to get in touch with me.

Yours sincerely

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Regulatory Legal Specialist