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Dear Mr Hammill

### **Criteria and Procedures for the Approval of Passenger Track Access Contracts: Third Edition**

South West Trains welcomes the opportunity to respond to the Regulators Consultation on the Criteria and Procedures for the Approval of Passenger Track Access Contracts: Third Edition published in December 2002.

On a general level South West Trains believes that the Criteria and Procedures provide clear and easily understood guidance on the process of agreeing, submitting and approving Track Access Contracts and our experience of seeking both Section 18 and 17 Agreements suggest that the setting of clear rules and procedures can only be of benefit to all involved. That said, we do have a number of individual comments to make, mostly in the form of clarification questions. In making these comments we have followed the numbered paragraphs in the published document.

Paragraph 2.26 talks of the publication of Network Rail's code of practice for dealing with dependant persons. Having been consulted on, and responded to the document dealing with Network Rail's proposed process for arriving at the Code of Practice we would like to know when the code itself will be finalised and published. As Track Access Rights are so important to Operators, and to secure them normally involves some degree of negotiation with the monopoly supplier of infrastructure – Network Rail, we believe that it is important that Network Rail's code for negotiation is finalised and published at the same time as the Regulator's own conclusions.

In Paragraph 2.42 we question the accuracy of the statement "Network Rail has no inherent ability to flex bids; it gets it only from the individual access contracts in question...". We suggest this should be clarified by excepting non-compliant, open access and spot bids. This acknowledges that Operators and others at their own risk can still bid to operate services outside the constraints of their contractual rights but that Network Rail has the powers to accept such bids, reject such bids or flex such bids as it sees fit.

We welcome the development of Standard Forms for Access Applications (Para 2.46 and 3.19 refers) as this will allow all applications to be submitted on the basis of fact, rather than commercial interpretation. We believe that this standard format will assist the Regulator in objectively assessing applications and thus reduce the time required for Regulatory scrutiny. It is important that Network Rail acts as co-signatory in any Section 18 application, as it means that Network Rail is stating their agreement to all the terms of the agreement prior to submission.

We welcome the ability for Operators to include bespoke departures from the model track access contract as stated in paragraph 3.19 c, recognising that these bespoke departures will need to be clearly identified.

The Timescales section of the document (Para's 3.35 – 3.42) raises a number of issues pertinent to operators like ourselves who require new Access Contracts in place for Summer 2004. The worked example in Paragraph 3.39 suggests that any new contract required for the Summer 2004 timetable requires to be submitted to the Regulator no later than the end of January 2003. Clearly this is impractical, given that the model clauses have yet to be finalised, that some of the clauses have yet to be consulted (e.g. Moderation of Competition issues and Use it or Lose it Provisions), that the requisite changes to the Network Code have yet to take place and indeed, that time has already run out to enable this timescale to be complied with. We would welcome clarity that some latitude will be applied this year. We believe that Network Rail is unlikely to completely agree to any adoption of Model Clause format contracts until all elements of the contract currently (or indeed yet to be) undergoing consultation are finalised putting timescales at risk for June 2003. The provisions of Paragraph 3.42 seem to provide for this situation, whereby if time is short the Regulator may invite the parties to submit a parallel application for a short extension of the existing agreement, to ensure that there is no gap in the provision of services. However it is not immediately clear how this provision will work where the contract to be extended is a Section 17 (i.e. unilateral rather than bilateral agreed Section 18 Contract). It could be that the Operator wishes to extend its existing Section 17, without the approval of Network Rail (i.e. by way of a further Section 17 to cover the short extension), or with the agreement of Network Rail as a Section 18 extension of a Section 17 original. Alternatively an extension which is just a rollover of the expiry date could possibly be dealt with as a Section 22 or 22A amendment. We would welcome a definitive view on these issues which have been discussed.

The Regulator discusses the legal consequences of overselling capacity and the difference between Network Rail's liability in the event of overselling under an agreed contract as opposed to its liability under a compulsory one. By virtue of sections 17(1)(b) and 22A(4)(b) any directions imposed by the Regulator, which would force Network Rail to breach pre-existing obligations, will be void.

The Regulator has developed defeasance provisions to cover this eventuality, which would provide appropriate compensation for the operator. He states that he will "consider" including a defeasance provision if it proves impossible to be certain about adequacy of capacity (paragraph 4.9), as an alternative to directing a shorter contract length.

Presumably from this Network Rail would only have the right to raise overselling of supply as a defence to the breach of an imposed contract where the adequacy of capacity was one of the reasons given for the failure to reach agreement. Where Network Rail is directed to enter into an access agreement for failure to agree on other issues, there is therefore no need for a defeasance provision in the agreement, and they should therefore remain liable to the operator for breach of contract. This is not made clear in the criteria.

It is also unclear whether it is intended that the Regulator will always impose defeasance provisions in the agreement if there is any question over capacity or whether there are some criteria to be applied in reaching a decision. The wording in paragraph 4.1.5 suggests that the introduction of defeasance will be at the Regulator's discretion and that defeasance will not be automatically imposed. If the

Regulator does not impose defeasance in any situation where there are issues over capacity under an imposed contract, would the operator be compensated in the event that capacity has been oversold?

The criteria refer to the *EWS – Railtrack, Rail Regulator’s conclusions on application under section 17 of the Railways Act 1993* (ORR May 2002) for the rationale and application of defeasibility. It proposes that Railtrack would still be obliged to pay compensation in the event of defeasance under an imposed contract where the overselling of capacity is a result of a failure of the part of Railtrack to discharge its obligations under its network licence or properly to maintain and operate a competent and efficient system for the allocation of capacity of its network. It does not give any indication of the criteria for the imposition by the regulator of the defeasance provisions.

With regard to the other provisions of the document we will be responding separately with points of detail on Schedule 5 and Local Output Commitments to the separate consultation documents “Draft Model Passenger Track Access Contract” and “Local Output Commitments and the provision of information – draft conclusions” dated December 2002 respectively.

Yours sincerely

Andy Peberdy  
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