

Ref: 30050801

30 May 2008

Colin Greenslade
Head of Network Code Policy
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

Direct Tel: 07734 492212
Direct Fax: 020 7922 9598

Dear Mr. Greenslade,

ORR criteria for approval of changes to the Delay Attribution Guide

Thank you for your letter dated 22 April 2008 inviting comments on the views of the ORR's criteria for approval of changes to the Delay Attribution Guide (DAG) and the revised DAG process guidance. We welcome clarification of the ORR's requirements.

The purpose of the Delay Attribution Board (DAB) is to manage and oversee the effectiveness and accuracy of the delay attribution process and use of the Delay Attribution Guide. As part of its role the DAB may receive any proposal to amend the DAG, and has a responsibility for considering whether or not the DAG should be amended in accordance with the proposal. We agree that the DAB does not have the resource or remit to consider the commercial impact of changes to the DAG.

The DAG may have a material impact on a range of significant commercial matters, including Schedule 8 of the track access contract and Schedule 7 of Franchise Agreements. The ORR process for approval of changes considered by the DAB therefore has a very important part to play in ensuring that all relevant matters are properly considered and the interests of those engaged in the industry are properly taken into account.

We consider that the changes to the DAG, which it is appropriate to make, will in almost all cases be limited to amendments to refine and improve the DAG to better deliver the established requirements of Part B on performance monitoring and Schedule 8 regarding attribution, rather than amending those established requirements. We would expect changes to Part B to follow the established Network Code change process first, and then for the DAG to follow on where relevant: we would expect any changes to Schedule 8 attribution to either be first commercially agreed between all the relevant parties or established through a regulatory charges review, with franchise agreement provisions applying to address the review consequences.

Although we would not expect the DAB to be instituting DAG changes which are a material change to the established principles (or the ORR to be readily approving any such changes proposed by the DAB), it is still possible that changes of a lesser nature will have material financial or commercial consequences which may necessitate careful ORR consideration to ensure the interests of all parties are properly protected.

The revised proposed criteria for approval of changes recognise that changes to the DAG may have an adverse financial impact on an affected party. You propose that train operators and Network Rail should, as part of the consultation process, set out in their response the likely commercial impact of the proposed change (section 14b). The ORR will also need to understand whether any industry party considers that any monetary value associated with the change requires neutralisation (section 13d i).

However, the proposed criteria for approval of changes no longer explicitly state that if the proposed changes are likely to have a material impact on the value of performance regimes, the parties to the track access agreement may decide to agree to neutralise the financial effect of the changes (through a recalibration of Appendix 1 of Schedule 8 to the Track Access Agreement) (section 7j of the letter).

We consider a clearer statement is required covering:

- recognition of the important role the DAG has in giving effect to the delay attribution principles set out in Schedule 8, including the potential severe implications for changes which introduce inconsistencies in the approach to benchmarking or a discontinuity with the higher Schedule 8 attribution principles;
- how ORR will take into account financial impacts which are identified in deciding whether or not to grant approval;
- where impacts are identified, what will be the mechanisms for addressing them. Paragraph 17 of Schedule 8 provides a potential route, but this is potentially drawn out, requiring the use of experts to settle disputes and including its own ORR approval stage. This is likely to have both time and cost implications for affected parties, as well as some uncertainty to the extent that the change mechanisms do not include express criteria to help secure the desired neutralisation of impacts. We wish to understand how these will be addressed; and
- we also require assurance that any approval of changes to the guide having a financial impact would only occur to a timescale which allowed the required changes or recalibrations to neutralise the impacts to be put in place and approved first.

The letter and the proposed criteria for approval focus on the commercial impact of proposed amendments to the DAG. It is important to recognise that the commercial impacts include the affects on franchise agreement performance regimes, which commonly attribute performance in line with Schedule 8 of the track access contract, and hence in line with the DAG. Taking proper account of these implications requires that the criteria must also address the possible implications of amendments for the performance as measured under the benchmarks and targets set by the DfT/TfS in Schedule 7 of the Franchise Agreement. The implications of these are potentially severe, relating as they do to franchise continuation criteria, as well as to improvement plan, breach and default thresholds.

Again we seek confirmation that changes having such an impact would not be approved to take effect before the required neutralising amendments were actually in place.

In your letter you make clear that in the event that an industry party remains in disagreement with a proposed commercial solution, it may, once Network Rail has initiated the process, seek to have the matter determined through the appropriate dispute resolution process (section 71). This appeal mechanism is not mentioned in the ORR criteria for approval of changes. We propose that this is explicitly incorporated in the criteria, together with the recognition that changes having a material commercial impact should not generally be approved to take effect before the required neutralising changes are in fact in place.

We envisage that the proposed change process and the criteria for approval will be followed for amendments to the DAG if IDAS (Improved Delay Attribution System) is implemented by the railway industry. The implementation will require appropriate adjustments to take account of the impacts on the change in attribution on the regimes calibrated using old methods (both Schedule 8 of the TAC and Schedule 7 of the FA). We are hopeful that the proposed criteria will encourage Network Rail to directly work with TOCs to address and resolve these issues in advance – and otherwise will protect TOCs against any inappropriate implementation which fails to take account of the IDAS impacts.

Yours sincerely,

Joost Noordewier
Head of Performance
E-mail: joost.noordewier@firstgroup.com