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Dear Paul

### **Model Clauses: Access Rights and Moderation of Competition**

I refer to Nicola Shaw's letter and enclosure of 1 June regarding the above and am pleased to give you Arriva Trains Northern's comments on the proposals contained in the consultation document. The paragraph numbers referred to are those in the main body of the document, unless an appendix is specifically quoted.

#### 2. Access rights: definition in Schedule 5

We believe the current proposals are a significant improvement over those in the September 2000 consultation document, but find the approach to journey time protection in particular still rather muddled. It is not helped by the confusing use of the word "service" for both generic point to point journeys and individual trains (as in Schedule 8). It is also difficult to appreciate the implications fully without the benefit of a calibration guide, as much will depend on the actual values attached to the various measures and how they relate to each other.

- 2.12 We generally support these principles, but on the first point would add that the financial need for certainty about journey times is not just to underpin investment but also to minimise the risk premiums that franchise bidders will have to add to their bids during the refranchising process.

The specific recognition of the importance of reflecting PSRs and other franchise commitments is welcomed, but again a calibration guide is required to illustrate how much weight these are to be given in the negotiation process and whether the new Schedule 5 and franchise agreements will be fully back to back.

- 2.14 If it is a choice between a pathing time cap and journey time protection then we would certainly support the latter as journey times are what we sell our customers. A single Maximum Journey Time for a service would only be undesirable if it were the sole protection, but with the addition of an average journey time restriction across the day Railtrack would be prevented from timing all trains up to the maximum and the risk of upward creep could be avoided. Moreover, average journey time is in most cases more relevant than either maximum or fastest and capable of putting a value on. We find it strange that the importance of average journey time is recognised both here

and in paragraph 2.16 without any proposal being made to enshrine this worthwhile output measure in a right, as in Arriva Trains Northern's existing Schedule 5.

- 2.18 We strongly believe that making Maximum Journey Times (MJT) subject to changes in the Rules of the Route or Plan (ROR/P) would render them virtually worthless other than as a pathing time cap in another guise. What other purpose are they intended to serve? The example quoted is irrelevant anyway, as operators are incentivised through Schedule 8 to avoid station overtime and if they were to increase dwell times above the Rules of the Plan minimum to address this it would not trigger an increase in the MJT.
- 2.19 We do not think it is either sufficient or appropriate to rely on the ROR/P consultation and appeal process to protect against "unreasonable" increases in MJTs without defining what is unreasonable. There should be an upper limit as of right and the role of the appeal bodies should be to interpret and enforce such rights. Furthermore, the proposal for variable MJTs gives Railtrack no incentive to improve on the status quo, whereas improvements in average journey time rights could be sold.
- 2.21 Whilst we have not hitherto sought to rely on the Fastest and Maximum Key Journey Times in our Schedule 4 because we have more comprehensive protection in Schedule 5, they will save much negotiation for operators with template Schedule 4s as the values have already been agreed. They will also afford some protection at least against changes to the ROR/P.
- 2.22 We would wish to reserve our position on the deletion of the indemnity provisions until we have seen the alternative proposals in the consultation document on the liability regime.
- 2.23 Why is it proposed to make MJTs subject to the ROR/P when the Maximum Key Journey Times are not? We simply do not follow the logic of this or understand the calibration of the respective values if the examples in Figure 1 are supposed to relate to the same journeys.

There appears to be a deep-rooted confusion between the Rules of the Route and Rules of the Plan, possibly because the same process in Access Condition D applies for changing both. The Rules of the Plan are a reflection of the functionality of the network for a particular Specified Equipment, and operators must be protected against degradation of this in all journey time rights.

Unfortunately, the picture has been clouded somewhat by Railtrack's transfer of engineering allowances, which have a clear relationship to possessions and have in fact been determined by arbitration to be a Possession themselves, from the Rules of the Route to the Rules of the Plan. Within these, for the purposes of journey time protection, a distinction needs to be made between standard TSR allowances, which should be treated in the same way as other Rules of the Plan allowances and capped by the journey time protection, and engineering allowances for single line working, weaves, diversions, signal testing etc. which are specifically linked to possessions in the traditional sense and need to vary by day of the week and from year to year to enable Railtrack to fulfil its obligation to maintain the network whilst not adversely affecting performance.

If the latter were transferred back to the Rules of the Route, we would be happy to accept "subject to the Rules of the Route" but not "subject to the Rules of the Plan".

- 2.24 A calibration guide will be essential if MJTs are to include headroom over and above existing journey times which are not currently subject to a PSR maximum. Where

there is already a wide range between the fastest and slowest times for a journey, the slowest should become the new maximum. How many journeys is it envisaged this provision would cover, compared with the Maximum Key Journey Time?

- 2.25 As noted under 2.23 above, without the benefit of a calibration guide we are having some difficulty understanding the relationship between Tables 6.1 and 6.3. This paragraph implies that there will be even more headroom in Maximum Key Journey Times for both flexing and Rules of the Plan changes, which far from protecting against network degradation will actually make provision for it. Similarly, we do not understand the relevance of the respective numbers of services covered by Maximum and Maximum Key Journey Times to the values for the same services. So far as Fastest Key Journey Times are concerned, why should operators have to bid for at least three slots with certain characteristics to qualify for protection against network degradation? Few if any operators advertise a fastest journey time achieved by only one train a day and if the intention is to prevent degradation this would be better achieved by simply capping the ROR/P. In our Schedule 5 this is done through a theoretical Basic Journey Time, which provides a benchmark for ROR/P changes at the consultation stage, not a backcheck at the bid and offer stage when it is too late.

If the existing Schedule 4 indemnity provisions are effectively to be transferred to the new liability regime, the situation of “deemed Network Changes” (paragraph 7.2 of the draft template) should also logically be covered by it. We think these arrangements need reviewing anyway, as we believe that in such a situation operators are obliged under Access Condition G2.1(a)(i) to serve notice of breach of contract, which should then be remedied by Railtrack, not absorbed into the contract. Has the provision ever been used? In practice it would be very difficult to monitor given all the variables.

- 2.30 It is suggested in the last sentence that it “may be feasible” to negotiate revised MJTs for Specified Equipment of inferior performance, but it is not clear by what mechanism and why this should not also apply to other rights such as stopping patterns and service linkages.

- 2.32- The flexibility proposed for different types of operators and services and dovetailing  
2.35 with other services is very much welcomed. However, we still do not understand why rights to service intervals and Clockface Departures should be conditional upon bidding in accordance with the Regular Calling Pattern, as the subsequent journey time is not relevant. Provision is also needed for infrequent services which do not operate to any regular pattern but are market or resource driven. Is this the purpose of Table 8.3?

- 2.44 See detailed comments above.

- 2.45 It is not clear how much flex would apply under paragraphs 2.2, 2.3 and 2.6 of the template. By definition Railtrack’s Flexing Right can only be exercised in a way which is consistent with the Bidder’s Firm Contractual Rights. If a different flexing limit to those in elsewhere in the template is proposed it should be stated, otherwise this is an unnecessary gloss. There is one permutation still missing: the ability to use the same slot for different services over different parts of the route. This is particularly important when through services have to be broken for resource reasons.

- 2.48 We believe the new multilateral arrangements in the network code should be established first rather than include a provision for the relevant bilateral elements in any new track access agreements to be superseded by them. Only a handful of agreements are likely to be involved and as pointed out, the Access Conditions take precedence anyway.

2.49 Whilst it would be extremely useful for a register of all rights to be available for inspection, especially if broken down into standard route sections, we can see no advantage in this being part of the network code. We assume that it would be in addition to and not instead of individual operators' Schedule 5s.

### 3. Changes of rights over time

3.5 Whilst we reluctantly accept the principle of use it or lose it, we are concerned that for a resource-led operation two years may be too short a period for rights to become truly redundant. Also the time proposed in Condition J11.2 for operators to object to a use it or lose it notice (28 days) could be very demanding in some cases.

3.6 We agree that mitigating circumstances need to be taken into account in some way and this could be done by adding to Condition J11.10(a) a restriction on Railtrack's entitlement when non-use is for reasons beyond the operator's control. This could be tested if necessary through ADRC before progressing to full arbitration.

3.14 We agree with the Regulator's proposal to adopt the same process for the temporary surrender of rights as for permanent.

3.17- We endorse ATOC's opposition to and the SRA's reservations about the permanent  
3.22 mandatory removal of rights and the uncertainty this would create for operators, which would not necessarily be dispelled by the prospect of compensation. We deplore the suggestion in 3.21 that Railtrack should be able to apply for the removal of rights to improve operational performance if it has oversold capacity and there is an infrastructure solution to the problem at its own cost.

If the proposals are adopted, however, we are concerned that the 28 days allowed in the draft Condition J10.4 for operators to submit a detailed response and claim is inadequate to do themselves justice. In response to the question in 3.22, we believe that the parties should be given the opportunity to agree the amendments to the track access agreement first rather than have them dictated by the Regulator in his determination.

### 4. Moderation of competition

4.7 By focussing on benefits to users and the protection of investment we believe the Regulator has undervalued the cost to the community of uncertainty about potential competition, which franchise bidders will reflect in their bids by the addition of a risk premium. To derive the best value for taxpayers, bidders need to be reasonably certain that cherry-picking will not generally be permitted and that in the rare cases where it is allowed adequate compensation will be paid. The risk of cherry-picking cannot be significantly influenced by bidders so is best managed centrally.

4.13 We are not sure why the Regulator should have particular regard to the financial position of the SRA and believe that protecting the finances of the operators of loss-making services deserves at least equal priority under his statutory duties.

4.15- We agree that the existing flow-based arrangements should form the basis for the  
4.17 new application. It is relatively simple and has been proven to work in a flexible way.

4.18 In order to minimise the cost of capital or risk premium the protection should start from the date of commitment or franchise bid submission. The protection should, however, be related to achievement of specified and agreed investment milestones.

4.19 We agree that the duration of protection should be flexible and, again, tied to delivery of specified user/community outputs, for example:

Investment of £Xm in route upgrade	5 years
Reduction in journey time between A and B to y minutes	+ 2 years
Increase in frequency to z trains an hour	+ 3 years

- 4.21 It should be borne in mind that the longer the period of protection the lower the cost to the SRA, and therefore the public, of the new franchises.
- 4.23 In principle, the availability of compensation is a good way of delivering community benefits at minimum cost.
5. Methodologies for compensation
- 5.6 We have found the propositions in this chapter and Appendix C extremely difficult to follow, but given that most enhancements agreed during the re-franchising process are likely to be loss-making a value based approach would seem to be more appropriate than cost based.
- 5.8 We would favour this approach as it could require new entrants to share in the risks associated with enjoying the benefits of major upgrades. If this option is progressed, the criteria adopted by the Regulator should be based on societal benefit taking due account of the impact on franchised operators' viability.
- 5.10 This should be based on net income rather than profit, as many services will never make a profit.
- 5.11 This appears to imply that compensation should be based on the average cost/ revenue per train over 24 hours, 7 days a week, whereas by definition a cherry-picking competitor will only compete at the most profitable times of the day, week or year. Compensation should be based on a detailed (MOIRA?) analysis of the competing services proposed by the incoming operator. While the methodology must, as suggested, be transparent, the actual numbers to be included in any assessment could and should only be determined at the time.
- 5.12 Whilst this proposition is probably correct, it will depend on the nature of the PSR/franchise commitments.
- 5.13 As explained in our response to 5.11 above, we believe the use of average values is totally inappropriate.
- 5.14 Issues of commercial sensitivity could be addressed by the use of third party analysts. Revenue impacts should be modelled using MOIRA or similar industry-wide accepted models.
- 5.15- We agree with both of these views and would add that the payments should also reflect "normal" profit.

To summarise our position on the various issues in Chapter 5:

- Whilst investment is important, the proposals should also address the impact of competition risk on re-franchising costs.
- To maximise societal benefit, compensation for "unexpected" competition is appropriate, but it should be based on loss of expected net revenue rather than profit or cost.

- It must be recognised that investment in route upgrades by a franchised operator will almost invariably generate network capacity that could be exploited by a competitor. Franchisees therefore need to be protected from having to pay through their access charges for upgrades only to have them exploited by competitors.
- A clear policy statement by the Regulator that cherry-picking will be prevented would be helpful and appropriate.
- Given the introduction of compensation, which allows flexibility, why not continue with the existing Stage II arrangements?

## Appendix B

As a general comment on the drafting, a thorough check needs to be made for the use of initial capitals for defined terms, and some additional definitions might be helpful where capitals have been used for non-defined terms.

- 1 The use of the word Service in several definitions and elsewhere in the template is highly confusing as in Schedule 8 it means an individual Train. It either needs to be differently defined in this schedule or other words such as “journey” used.
- 1.1 “Clockface Departures”: after the word “fixed” in the third line, substitute “at the same number(s) of minutes past each hour”, to allow for more than one train an hour.  
  
 “Journey Time” must be based on the advertised times as annotated in the Working Timetable, not just the “time taken by a service in travelling”, as some performance allowances are in the form of earlier advertised departures and/or later advertised arrivals.  
  
 “Pathing Time”: the insertion of the word “any” between “between” and “two points” in the first line would make it clear that the timing points need not be consecutive. As we have previously pointed out, additional time caused by the application of margins can be at timing points such as junctions or stations: it is not always classic “circle time”.
- 3.3(a) This must be subject to the right to make the connections specified in Table 8.2. We are also concerned that the flexing of an hourly service by up to half an hour could result in serious customer inconvenience in some cases, and feel that some absolute limit should be put on the amount of flex.
- 4.4 We may need Firm Contractual Rights for occasional non-standard station stops where these are required by the PSR. Flexing the stops out is not an option where the service is very infrequent and geared to specific social needs.
- 5.4 Why specify metres?
- 6.1-3 In each case, the right should be expressed as “entitled to a Journey Time not exceeding the corresponding...”
- 6.1(a)(i) We have an ongoing issue with Railtrack about the documentation of sectional running times, as these are only generally available from on-line systems and there is no definitive record. This must be addressed if there is to be a datum point against which changes are compared.
- 6.2 The first line should read “The Train Operator shall, in respect of at least one of each of the Service(s) per Weekday listed under...”, subject also to my general comment

about the use of the word Service. Otherwise, Railtrack will be able to choose just one of the services! And why only Weekdays? Journey Times matter at weekends as well.

- 7.5 Has the Regulator ever exercised this right? If so, in what circumstances?
- 8.2 Delete the words “to operate train services”, which are superfluous, and substitute “in accordance with that operator’s Firm Contractual Rights”. Rights other than quantum, such as Journey Time and connections, must also be protected.
- 8.3 Provision also needs to be made for train-specific connections. It is no good if the daily quantum of connections is provided at times of the day when few people are travelling.
- 8.4 This must be based on advertised arrival and departure times, as they are what drive the identification of connections in both the NRT and electronic systems.
- 8.6 If the hours are to be specified, these may need to vary by day of the week.
- 8.7 Turnround times need to be capable of variation by point of origin, as generally the further a train has come the longer both the minimum and maximum turnrounds required.

Thank you for the opportunity to comment on the issues raised and the proposed templates in the document and I hope the above comments are helpful. We would be pleased to discuss any of these further if required and I confirm that we do not wish any part of this response to be kept confidential.

Yours sincerely

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