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Office of the Rail Regulator
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17 May 2000

Our ref: njo22e
Your ref:

Dear Paul,

MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS
EMERGING CONCLUSIONS ON KEY ISSUES A SECOND CONSULTATION
DOCUMENT

This letter and attachment forms the response of English Welsh & Scottish Railway Limited ("EWS") to the above consultation document.

EWS recognises the importance of the establishment of Model Clauses both for passenger and freight and has therefore sought to participate fully throughout the consultation process from responding to the first consultation document, attending seminars, being involved in the Working Groups and making supplementary written submissions. We were therefore disappointed that whilst the second consultation document further developed the principles for passenger model clauses, freight did not seem to get the same focus. The only comment on freight was that the passenger principles would apply unless the Regulator could be persuaded otherwise.

It was difficult for us to respond therefore without knowing how the Regulator's thinking on freight was developing and in particular whether the representations made by EWS so far in identifying the key requirements of freight had been taken into account or rejected. However, we were pleased that this was recognised by the Regulator at the recent seminar and granted our request to meet with the ORR and its legal advisors to discuss the key freight issues EWS had raised during the consultation process thus far. This meeting was very helpful giving us an understanding of the Regulator's thinking on freight and therefore informing our response to this stage of the consultation process.

Yours sincerely,

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MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS
EMERGING CONCLUSIONS ON KEY ISSUES
A SECOND CONSULTATION DOCUMENT

A response by English Welsh & Scottish Railway Ltd.

17th May 2000

Section 1 - Executive Overview

This section contains a summary of the key points EWS has raised in this response:

- EWS believes the model clauses process is of vital importance in facilitating the continued operation and growth of freight on the network.
- Whilst there are some areas where model clauses developed for passenger will be appropriate to freight, there are many areas where freight needs its own bespoke model clauses.
- EWS supports the revised timetable the Regulator has set out in paragraph 1.9 of the consultation document.
- EWS supports the mandatory use of model clauses except in cases where both parties to the contract agree that they are not appropriate to meet a particular circumstance and this can be demonstrated to the Regulator's satisfaction.
- EWS supports the "big bang" approach for the incorporation of model clauses into all operators track access agreements, particularly where the efficacy of the clause requires operators to adopt a common approach.
- EWS supports the Regulator's provisional conclusion that a commercial purpose clause should act both as an aid to interpretation and to deal with ambiguities and omissions which are not otherwise covered elsewhere in the main body of the agreement.
- EWS would like to see a commercial purpose for freight that supports and reinforces the structure of access rights, the concept of a sustained network of freight capability and a capacity/capability warranty to deliver the train paths under the access agreement. It should also specify what the access charges are buying and what Railtrack is undertaking to deliver for those access charges.
- EWS supports the standardisation of the specification of access rights in track access agreements and the creation of templates for different types of operator and believes that both passenger and freight access rights should have their own separate templates.
- EWS believes the structure of access rights contained in its present track access agreement meets the needs of freight and would like to see this structure embodied in a model provision. This includes the right to spot bid into "white space" capacity within the advertised freight capability of the network.
- It is of vital importance that if access rights are to remain subject to the Rules of the Route and Rules of the Plan that Railtrack is prevented from using these mechanisms to degrade an operator's rights over time either through Railtrack's commercial interests or as a consequence of inefficient operation and maintenance/renewal of its Network.
- EWS believes the current process for making changes to the Rules of the Route & Rules of the Plan is wholly inadequate for national operators and therefore support the Regulator's proposals to undertake a review in this area.
- EWS firmly believes that Railtrack should issue with each Rules of the Route/Plan consultation a statement of the changes and the resultant likely effect (if any) on each operator's access rights.

- EWS supports the introduction of a "use it or lose it" provision to enable rights which are not used for a certain time being given up to Railtrack with appropriate compensation for the operator concerned. EWS does not however support the creation of a multilateral trading mechanism for access rights or the ability for Railtrack to compulsory purchase access rights from an operator.
- EWS fully supports the Regulator's provisional conclusion that Railtrack should provide a capacity warranty to warrant that the capacity to meet the obligations of the contract is available at the time the relevant rights may be exercised. In addition, for freight it is of vital importance that this is also extended to freight capability and has put forward the concept of a sustained freight capability of the network.
- EWS supports the Regulator's intention to require Railtrack to produce action plans to facilitate a better understanding of the effects new access rights will have on the availability of capacity and on performance and of the spare capacity available on the network.
- EWS supports the Regulator's provisional conclusion that Railtrack should have a contractual obligation to produce and deliver local output statements and that these should be operator-based rather than route-based.
- EWS believes the primary outputs of the access relationship are capacity and capability for train paths today, capacity and capability for different/greater train paths in the future and information. Local output statements for freight should support these primary outputs by focusing on how these assumptions are shaping up in practice.
- EWS believes that local output statements should also mirror parts of Railtrack's Network Licence Condition 7 particularly the customer reasonable requirements process and the obligation to maintain, renew and develop the network in accordance with best practice and in a timely, economic and efficient manner.
- EWS supports the Regulator's suggestion to develop a standard format for the specification of Network Changes which sets out a minimum level of information that should be provided by Railtrack.
- EWS disagrees with the assertion that compensation should be unnecessary in most cases for the ongoing effects of an enhancement. Enhancements which benefit some operators may equally have a detrimental effect on others.
- EWS believes that as well as allowing for the payment of compensation for the ongoing effects of an enhancement, network protection should also be provided for operators whose businesses would be seriously damaged by the change and who do not consider money as suitable compensation. By network protection, EWS means the provision of suitable alternative network solutions by the network operator and in extreme cases the enhancement not to be proceeded with.
- EWS firmly opposes the proposal that operators will be required to make mandatory contributions to the cost of projects if they are net beneficiaries from someone else's enhancement.
- Whilst the consultation document has dealt with Part Gin terms of enhancements, EWS would like a number of essential improvements to be included in order to provide protection for freight from rationalisations of the network.
- EWS believes that Railtrack's normal liability should be liquidated damages however would strongly support the remedy of specific performance orders in appropriate circumstances.

- EWS supports the Regulator's view not to include a force majeure provision in track access agreements.

Section 2 - General Comments

2.1. EWS believes the model clauses process is of vital importance in facilitating the continued operation and growth of freight on the network. This will ensure that the form and structure of track access agreements will help to promote these aims which are both reinforced in Government policy and enshrined in the Regulator's general duties under Section 4 of the Railways Act.

2.2. This response builds on and reinforces the representations EWS has made at the previous stages of the consultation process on model clauses. Whilst there are some areas where model clauses developed for passenger operators will equally be appropriate for freight, there are many key areas covered where freight needs its own model clauses. EWS has aimed to focus upon these in this response.

Section 3 - Answers to the Regulator's Questions

Chapter 1: Introduction and process

Views of the consultees are sought on the *following* key points:

- *the revised timetable leading to the publication of model clauses;*
- *whether the use of these model clauses in the new track access agreements should be mandatory and circumstances where divergence might be considered appropriate; and*
- *whether a piecemeal or big bang approach to the incorporation of model clauses into track access agreements is preferable. If a big bang approach is preferred, suggestions are sought on how this might be achieved.*

3.1. EWS supports the revised timetable the Regulator has set out in paragraph 1.9 of the consultation document.

3.2. Providing model clauses are tailored to meet the needs of freight as well as passenger then EWS would support the mandatory use of model clauses. However, should both the beneficiary and Railtrack believe that in particular circumstances that certain aspects of the model clauses are not appropriate to meet a specific requirement then, subject to the Regulator's approval, the parties should be allowed not to use some or all of them as the case maybe.

3.3. EWS supports the "big bang" approach for the incorporation of model clauses into all operators track access agreements, particularly where the efficacy of the clause requires operators to adopt a common approach. For freight operators this approach should be achievable given that the three major freight operators have, or will be, negotiating new track access agreements within the next year. EWS would therefore support the use of freight model clauses from the start of each new agreement.

3.4. We appreciate however that the "big bang" approach would not be so straightforward for passenger operators as many agreements are not yet due for renewal and the Regulator has no power to enforce changes to access agreements he has already approved. However, EWS believes that again where the efficacy of the model clause

requires a common approach across all operators, the Regulator should try and persuade operators and Railtrack to voluntarily submit amendments to their agreements to incorporate the model clauses. Where appropriate the Regulator should also seek to use his powers to amend the Track Access Conditions.

Chapter 2: Commercial Purpose

Views of the consultees are sought on the following key points:

- the Regulator's provisional conclusion that a commercial purpose clause should be *established which creates additional rights and obligations to deal with ambiguities and omissions* in the contract;
- the Regulator's provisional *conclusion* that, generally, this should not go further and provide for general *obligations on* the parties which would operate even in the *absence of* ambiguity or omission elsewhere in the contract; and
- the benefits and risks of train operators being able to *pass to Railtrack, by means of* such a clause, certain aspects of their *obligations to* the sSRA under their franchise agreements.

3.5. EWS supports the Regulator's provisional conclusion that a commercial purpose clause should act both as an aid to interpretation and to deal with ambiguities and omissions which are not otherwise covered elsewhere in the main body of the agreement.

3.6. EWS would like to see a commercial purpose for freight that supports and reinforces the structure of access rights, the concept of a sustained network of freight capability and a capacity/capability warranty to deliver the train paths under the access agreement. We would also like to see the commercial purpose encompassing what the access charges are buying and in particular what Railtrack is undertaking to deliver for those access charges.

3.7. EWS also agrees with the Regulator's provisional conclusion that the commercial purpose should not be extended to provide general obligations on the parties over and above ambiguity and omission elsewhere in the contract.

3.8. EWS has no comments to make on whether certain obligations of franchised passenger operators under franchise agreements should be passed to Railtrack. However, if in the event this approach is adopted, we would not want to see such obligations passed to Railtrack which would directly or indirectly result in franchised passenger trains being given preference to freight services on the network.

Chapter 3: Access Rights and capacity consumption

Views of the consultees are sought on the following key points:

- *whether there should be a template specification of access rights and what it should contain;*
- *whether there should be development of tiered access rights;*
- *the Regulator's provisional conclusion that access rights should remain subject to the Rules of the Route and Rules of the Plan;*

- *the scope and procedure for reviewing the content of, and process for, establishing the Rules of the Route and Rules of the Plan;*
- *how the issues concerning change in access rights over time should be addressed, for instance by a system of access rights which are redeemable with compensation, and the scope of any use it or lose it provision;*
- *the Regulator's provisional conclusion that Railtrack should be obliged to provide a capacity warranty, and to improve the assessment and transparency of capacity consumption of new access rights; and*
- *the Regulator's emerging view that the principles set out in this chapter also apply to freight and whether there are any specific considerations in respect of freight which should be taken into account in developing the policy.*

3.9. Freight services are operated in response to specific demand to take account of the many individual needs of requirements of each end freight customer. This is very different from the passenger business which operates a timetable of services in anticipation of demand. It is crucial therefore that the different needs of freight are taken account of separately from the proposed passenger structure outlined in the consultation document.

3.10. EWS therefore supports the standardisation of the specification of access rights in track access agreements and the creation of templates for different types of operator. We believe that both passenger and freight access rights should be templated. This process should provide the right balance between commercial certainty on the part of the operator and the needs of Railtrack to maximise the efficient use of its network.

3.11. EWS has previously submitted a letter to the Regulator setting out in detail its views on why freight needs a different structure to passenger and how it sees the structure of its present access rights as meeting this requirement and so should be embodied in a model provision. This letter dated 27 March 2000 is attached as Annex 1 for ease of reference.

3.12. In summary, the current structure of EWS's access rights was established by private sector negotiation during 1996/97 and replaced the less appropriate preprivatisation regime. This structure has helped to grow the amount of freight on rail and in our view adequately balances the need for commercial certainty for EWS and the needs of Railtrack to have a degree of flexibility to manage network capacity both efficiently and economically. Access rights are simply expressed and are easy to understand. It provides three distinct levels of access rights (although different to those proposed for passenger) including the right to make spot bids into available "white space" capacity in accordance with the advertised freight capability of the network. This is essential to meet the changing needs of freight customers and to facilitate growth. EWS therefore want to see this structure reinforced and enshrined in a model provision.

3.13. It is of vital importance that if access rights are to remain subject to the Rules of the Route and Rules of the Plan ("the Rules") that Railtrack is prevented from using these mechanisms to degrade an operator's rights over time either through Railtrack's commercial interests or as a consequence of inefficient operation and maintenance/renewal of its network.

3.14. Railtrack should not sell access rights which conflict with the Rules at the time they are sold or if they do this is fully understood by the operator concerned. There is no point in buying access rights that cannot then be exercised in the way intended because they conflict with the Rules. If this concept is accepted then the issue becomes one of addressing changes to the Rules over time. We believe the current process for making

changes to the Rules is wholly inadequate for a national operator such as EWS and we therefore support the Regulator's proposals to undertake a review in this area.

3.15. Currently EWS receives the Rules from all seven Railtrack Zones. The amount of information to be digested is huge and changes are not easily identified. EWS in the short space of time available has to assess the effects the changes to the Rules will have on its access rights for the timetable concerned, respond, and if necessary refer any disagreements to the Timetabling Committee for resolution. In practice because of the enormity of the task facing EWS in managing this process as many of our trains traverse many Zones adverse changes are sometimes not identified in time and the chance to appeal to the Committee is lost.

3.16. EWS firmly believes that Railtrack should issue with each Rules consultation a statement of the changes and the resultant likely effect (if any) on each operator's access rights. We have heard the representations of Railtrack to this proposal that it is all too difficult and this is best left for operators to manage. EWS do not accept this position. In making changes to the Rules Railtrack must take account of its contractual commitments to operators. Until systems become more advanced to allow all possible effects to be identified, the statement should at least cover the effects the changes would have on the previous timetable on the basis of assuming operators will bid to exercise their rights in the same way again.

3.17. EWS believe that the right of appeal an operator should have against any changes to the Rules which have an adverse effect on its access rights must be able to provide for an outcome of either the change not proceeding or, if it does, that compensation is payable. The current route of appeal through Part D of the Access Conditions to the Timetabling Committee does not provide for both these outcomes. Either Part D should be enhanced or such appeals should be able to be dealt with under Part G.

3.18. EWS would support the introduction of a "use it or lose it" provision to enable rights which are not used for a certain time being given up to Railtrack with appropriate compensation for the operator concerned. EWS does not however support the creation of a multilateral trading mechanism for access rights and believe that all rights should be given up or bought from Railtrack. We would also not support the ability for Railtrack to exercise a right to compulsory purchase access rights from an operator.

3.19. However, if the Regulator decided such a mechanism was to be introduced there would certainly need to be strict safeguards over its use. Firstly these would have to ensure that Railtrack was not left to manage the process in its own commercial interest and that any compulsory purchase must be subject to regulatory approval in the public interest with robust rights of appeal for the operator affected and full compensation to be payable. There should also be an appeal mechanism which provides for cases where Railtrack refuses to use compulsory purchase where an operator believes it is being unreasonably blocked from gaining access to the network by the rights of another operator.

3.20. Unlike passenger operators who tend to align their access agreements to the length of their franchise, freight operator agreements now tend to cover many different customer contracts all of varying lengths. Some contracts will last the whole term of the agreement whilst others will fall away during the term and new ones can be added. Our current structure of access rights, which EWS has recommended to the Regulator should be enshrined in the freight model clauses, already provides adequate protections for changes over time such as "use it or lose it" (a copy of which is attached as Annex 2), increasing flex and certain levels of superflex. We therefore believe for freight, provisions such as redeemable access rights are not required.

3.21. EWS fully supports the Regulator's provisional conclusion that Railtrack should provide a capacity warranty to warrant that the capacity to meet the obligations of the contract is available at the time the relevant rights may be exercised. In addition for freight it is not just the capacity that should be warranted but also capability. Capacity and capability are of equal importance to freight operators. As well as capacity we need to be certain that capability, for example route availability, gauge and trailing load, will be available at the time the relevant rights are to be exercised. Without the network being sustained at its advertised capability the quality of freight access rights diminishes greatly.

3.22. Diminished capability can lead to restrictions being placed on the types of locomotives and wagons that can be used, the loads that can be carried, the amount of load in each wagon, wagons that were in gauge are no longer so and on the length of trains. All these factors as well as many others can result in the inefficient use of capacity, through having to run more trains to carry the same amount of goods, and inefficient resource utilisation, both adding greatly to the cost of using railfreight. For these reasons it is essential that capability as well as capacity is warranted for freight.

3.23. EWS also supports the Regulator's intention to require Railtrack to produce action plans to facilitate a better understanding of the effects new access rights will have on the availability of capacity and on performance and of the spare capacity available on the network. National freight operators have great difficulty in currently understanding the effects large scale new and amended rights will have on their services.

Chapter 4: Output statements

Views of the consultees are sought on the following key points:

- *the Regulator's provisional conclusion that there should be a contractual obligation to produce and deliver local output statements for individual train operators;*
- *the Regulator's provisional conclusion that these should be operator-based;*
- *the outline content of such statements and their relationship with Condition 7 and existing contractual provisions;*
- *the desirability of and mechanism for local funders (e.g. PTEs) having similar local output statements; and –*
- *the applicability of the proposals to freight operators.*

3.24. EWS supports the Regulator's provisional conclusion that Railtrack should have a contractual obligation to produce and deliver local output statements for individual operators. We also support the need for these to be bilateral (operator-based) rather than multi-lateral (route-based) for the reasons outlined by the Regulator in paragraph 4.12. of the consultation document. This approach will also enable the output statements to be focussed on the specific needs of freight which in many cases will be different those of passenger. National operators such as EWS should have the option of breaking the local output statement into routes to enable easier management of the process.

3.25. EWS believe the primary outputs of the access relationship are capacity and capability for train paths today, capacity and capability for different/greater train paths in the future and information. Delivery of these primary outputs assumes:

- effective maintenance and renewal of the network;
- well targeted enhancement programmes; and
- full understanding of the capacity and capability of the network.

3.26. Local output statements for freight should support the primary outputs by visible focus on how these assumptions are shaping up in practice. Today's backlog of maintenance and renewal will translate into train path failures in the future if they are not tackled effectively. By the time the train path failure occurs the problems will have become more extensive and time consuming to deal with. Local outputs should therefore also focus on early indicators of where underlying asset health is degrading and/or not being improved. They should focus on;

- the functioning (and failures) of the network in operation; and
- the delivery of enhancements into operation

3.27. In respect of the functioning network the focus should fall on

- *network capability*- it is essential for freight that the advertised capability of the network in terms of, for example, gauge, trailing loads, route availability, maintenance of connections to facilities and access to network sidings is sustained and is not allowed to be eroded over time without proper consultation including robust rights of appeal for the operator. Whether this concept of sustained capability is dealt with as part of a capability warranty (see paragraph 2.21. above) or in the local output statements or both, EWS is neutral, however it must be provided for somewhere within the process.
- *network capacity*- the amount of "white space" capacity suitable for freight to bid into on a route specific basis and expressed as numbers of paths per standard hour.
- *network availability*- freight on rail is a 24 hour seven day a week operation. It therefore needs the network to be available as far as is possible to meet this requirement. This could be achieved through more efficient network maintenance/ renewal methods leading to less possession time and providing suitable alternative routes.

3.28. Network enhancement would focus on measures and timing of capacity improvements, expressed as outputs.

3.29. EWS also believes that local output statements should mirror parts of Railtrack's Network Licence Condition 7 particularly the customer reasonable requirements process and the obligation to maintain, renew and develop the network in accordance with best practice and in a timely, economic and efficient manner. Enforcement would be available to operators under their local output statements and by the Regulator for wider licence non-compliance. The latter would need to take account of any operator enforcement under local output statements.

3.30. EWS would expect changes to the network resulting from any operator's local output statements should remain subject to the Network Change procedures.

Chapter 5: Network Enhancement

Views of the consultees are sought on the following key points:

- whether there *should* be a presumption that, subject to regulatory approval, when an *operator* pays for capacity *enhancement over and above* the capacity that it is

expecting to bid for in the timetabling process, it should have a rights to that capacity where there is a public interest benefit;

- *whether and how the clarity in the timing and detail of information provision through Part G of the Track Access Conditions should be improved;*
- *whether and how the Part G of the Track Access Conditions should give more certainty about the timing of implementation of changes to the network;*
- *whether and how the position in respect of compensation under Part G of the Track Access Conditions could be improved;*
- *whether there should be arrangements in Part G for operators to be required to contribute to the cost of a project if they are net beneficiaries from an enhancement; and*
- *whether the proposals set out in relation to network enhancement should also apply to freight operators.*

3.31. EWS accepts that because capacity tends to come in "chunks" rather than "slices" in many cases more capacity will be generated by an operator enhancement than would be required for utilisation by the service level increases under-pining the investment. If this capacity is truly additional and not merely replacement capacity, then provided the operator can demonstrate to the Regulator that it has a reasonable expectation of using that capacity in the short to medium term or that it is required as a performance "buffer", then EWS would agree the funding operator should have a right to this capacity through the track access agreement. However, until it is required by the funder this capacity should be made available to other operators to use. By replacement capacity we mean any pre-existing "white space" which has been taken up by the operator's service level increases.

3.32. Freight for instance operates many short-term services to meet the specific needs of customers, for example a four-month contract to provide aggregates for a roadwidening scheme would be a case in point. EWS believe it would not be in the public interest to prevent such short-term services from being accommodated because the capacity is reserved for the future use of another operator, even if that operator had paid for it. Of course once the funding operator needs the capacity for its own services then it would no longer be able to accommodate the short-term requirements of others.

3.33. If the operator on the other hand cannot demonstrate a need for the extra capacity or the capacity merely replaces pre-existing capacity partly used up by the operator's service enhancements, then it should not have rights to such capacity. If it did then this could cause a sterilisation of capacity which could prevent other operators gaining access to the network. EWS believe this would not be in the public interest.

3.34. As a national freight operator EWS receives more Network Changes than any other operator. These come in all shapes and sizes and differ from Zone to Zone and sometimes even within each Zone both in format and information supplied. Much time and effort is taken up requesting more information as the detail supplied is not sufficient to enable us to assess the effects of the change on our services. This can add much time into the process. EWS therefore supports the Regulator's suggestion in paragraph 5.11. of the consultation document that consideration be given to a standard format for the specification of Network Changes which sets out a minimum level of information that should be provided by Railtrack. The provision of a statement which sets out the effects of the change on each operator's access rights would be particularly welcome.

3.35. EWS also supports the imposition of a minimum consultation period of 4 weeks. We believe this is adequate to meet the majority of proposals, particularly if the standard format is taken forward. However, for changes that cover major enhancements to the network such as resignalling schemes and route upgrades then clearly a lot longer would be required. As mentioned in our response to the first consultation document dated 2nd February, we believe that building in a pre-Network Change consultation period into the process would help identify problem areas at an early stage and would give more time for solutions to be found. This has to be better than waiting for the formal notice to be issued later in the process and the affected operator having to lodge an objection at that stage.

3.36. Being allowed to move the implementation works of a Network Change without consultation for example from summer to winter could increase the adverse effects on freight operators as heavier traffic levels are carried in the winter months. EWS therefore supports the Regulator's suggestion in paragraph 5.17. of the consultation document that if the implementation of the change is not undertaken in the timescales specified then a new Network Change and further consultation process would be required.

3.37. EWS disagrees with the assertion that compensation should not be necessary in most cases for the ongoing effects of an enhancement. Enhancements which benefit some operators may equally have a detrimental effect on others. For example, an enhancement allowing for the operation of higher-speed trains which is achieved through increasing the cant of the track around curves can have a significant effect on "slower" operators whose trains would receive a disproportionate amount of wear on the wheels using the inner rail.

3.38. In some cases the adverse effects of a network change for enhancement is not realised until that enhancement is subsequently used. It is essential therefore that the effects of the Network Change should deal not only with the detailed inputs necessary to achieve the change but also the outputs to be delivered by the change, for example train paths and their subsequent utilisation.

3.39. As well as allowing for the payment of compensation for the ongoing effects of the enhancement, network protection should also be provided for operators whose businesses would be seriously damaged by the change and who do not consider money as suitable compensation. By network protection, we mean provision of suitable alternative network solutions by the network operator and in extreme cases the enhancement not to be proceeded with. An example of network protection is the PUG 2 upgrade of the West Coast Main Line where the proposed enhancement would have a significant effect on many operators using the route. Rather than the payment of compensation to those operators affected by the ongoing effects, Railtrack undertook to provide additional infrastructure and replacement capacity.

3.40. EWS firmly opposes the proposal that operators will be required to make mandatory contributions to the cost of projects if they are net beneficiaries from someone else's enhancement. We recognise the reasons why the proposal has been put forward but we believe that deterring "free riding" will be outweighed by the disbenefits. These would include:

- operators objecting to schemes they have not sponsored on the basis that they would be obliged to contribute even though they may receive marginal benefits;
- operators who cannot justify investing in schemes they would receive benefits from would put forward enhancements knowing other operators would be liable to fund the gap through mandatory contributions;
- mandatory contributions would be unpredictable and therefore pose a significant risk for operators who would likely be prevented with any degree of certainty from developing their own more worthwhile investment plans; and
- would be difficult to manage particularly for national operators such as EWS who would constantly have to evaluate and defend the imposition of mandatory contributions to schemes across the whole network.

3.41. Whilst this section has dealt with Part G in terms of enhancements, EWS set out in its response to the first consultation document dated 2nd February a number of essential improvements to Part G in order to provide protection for freight from rationalisations. In summary these included making the Network Change process:

- encompass parts of the network not in current use but likely to be required in the future;

- include disposals of land likely to be required for rail or rail related use;
- ensure temporary changes such as speed restrictions are consulted upon after three months rather than six as the present process allows; and
- include freight closures which at present are not dealt with either in the Railways Act or under Network Change.

EWS would not want the Regulator to lose sight of these process enhancements we have suggested.

Chapter 6: Liability and remedies

Views of the consultees are sought on the following key points:

- *whether additional remedies should be available if operational performance falls below a predefined floor level and, if so, what remedies might be appropriate;*
- *the circumstances in which the right to seek specific performance might be an appropriate remedy;*
- *what the liabilities of the parties should be in the event of a breach of other obligations under the agreement and the nature of any limitations on liability;*
- *the Regulator's provisional conclusion that no force majeure provision should be incorporated;*
- *whether the suspension arrangements in the current agreements are adequate in the event of an operator breaching its safety obligations;*
- *the potential impact on the risk faced by Railtrack and operators and the implications (if any) for their costs of finance and for the feasibility of innovative financing options; and*
- *whether there are any special factors in respect of freight.*

3.42. EWS believes there is a case for additional remedies and for freight we would like to see these applying to instances of extended and reoccurring disruption rather than to performance falling below a pre-determined floor level of minutes delay. In normal circumstances the remedies should be for a higher level of liquidated damages to "cut in" after an agreed period of time.

3.43. EWS would strongly support the remedy of specific performance orders in appropriate circumstances. These would include circumstances in which it became habitual for performance to worsen because it was acceptable to the paying party to incur damages at the rate the performance regime provided for rather than address the underlying causes. In cases where Railtrack has allowed network capability to fall below that advertised, a blend of a specific performance order to reinstate the capability and the payment of additional costs in the meantime would be appropriate.

3.44. For non-operational matters EWS believes that no attempt needs to be made to anticipate the large number of circumstances in which a breach of obligations may arise and establish in advance what ought to happen. The ordinary principles of contract ought to apply at the time and appropriate remedies determined then.

3.45. EWS supports the Regulator's view that in certain circumstances, for example wilful conduct, there should be a change to the current position that claims for indirect loss and loss of revenue are generally excluded. We would also believe there should be a caps on the damages which a party may incur for breach of its various obligations.

3.46. EWS supports the Regulator's view not to include a force majeure provision in track access agreements.

3.47. EWS believes the current suspension arrangements for operator breach of its safety obligations are sufficient. No doubt in such circumstances the Regulator would also be considering action under the operator's licence.

Chapter 7: Other issues

Views of the consultees are sought on the *following key points*:

- *whether parties other than Railtrack and train operators should have contractual rights established through track access agreements;*
- *whether there should be a model clause providing for standard of performance and, if so, whether it should be in the form of the draft provision reproduced in paragraph 7.5.;*
- *the Regulator's provisional conclusion that a model clause should be established relating to the reciprocal provision of information;*
- *whether an operator's rights under its track access agreement should be assignable to a financing institution; and the potential impact on the risk faced by Railtrack and operators and the implications (if any) for their costs of finance and for the feasibility of innovative financing options; and –*
- *the applicability of these proposals to freight operators.*

3.48. EWS would have no objection for third parties such as rolling stock manufacturers being party to parts of the access framework in this case Part F and perhaps Part G of the Access Conditions. However, unless the third parties wish to acquire access rights which the Railways Act already allows, then rights to information should be limited to those areas pertinent to the third party and secured through a mechanism other than a track access agreement.

3.49. EWS believes there should be a model clause providing for a standard of performance and the drafting suggested by the Regulator in paragraph 7.5 of the consultation document would seem appropriate to meet this requirement.

3.50. EWS believes there should be a model clause providing for the reciprocal provision of information provided that the information required by Railtrack is needed for the future planning of its network. In cases where this information is confidential then there should be specific undertakings not to divulge the information to other parties without the express permission of the other party. The types of information that a freight operator would need from Railtrack was listed in our response to the first consultation document dated 2nd February.

3.51. EWS does not believe that the assignment of access rights to financial institutions should apply to freight.

end.