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Paul Carey
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31 August 2000

Our ref: njo22g
Your ref:

Dear Paul,

MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS – PROVISIONAL CONCLUSIONS

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

EWS is content for whole response to be placed in the Regulator’s public library.

Yours sincerely,

Nigel Oatway
Access Manager

**MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS:
PROVISIONAL CONCLUSIONS:**

A response by English Welsh & Scottish Railway Ltd.

31ST August 2000

Section 1 – Introduction

1.1. EWS welcomes the opportunity to comment on the Regulator's provisional conclusions on the development of model clauses for track access agreements. EWS supports the Regulator's aim that through the establishment of model clauses new track access contracts will be streamlined, simpler, clearer and above all stronger. We are also pleased that the Regulator has recognised that where the needs and requirements of freight and passenger customers diverge, different model clauses will be developed specifically for freight.

1.2. Our comments focus on the issues concerning freight and we have not therefore commented upon the matters raised that are specific to franchised passenger operators.

Section 2 – Specific comments on the consultation document

Chapter 1 – Introduction and process

2.1. EWS would wish to understand whether the Regulator's timetable for the publication of freight model clauses mirrors the one published (paragraph 1.9) and if not what alternative timetable is planned. We would particularly wish to know when it is expected that the freight drafting will be available for specific comment. EWS would request that sufficient time is allowed for freight operators to consider and respond to any proposals.

Chapter 2 – Commercial Purpose

2.2. EWS agrees with the Regulator's view that freight operators would benefit from a commercial purpose clause in their agreements. Our response to the Regulator's emerging conclusions outlined what EWS would expect to see included in such a clause for freight. We wanted a commercial purpose that reinforced and supported 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 also wanted the commercial purpose to make clear what the access charges are buying and in particular what Railtrack are undertaking to deliver for those access charges. Our views have not changed.

2.3. Unfortunately, we do not believe that the commercial purpose as drafted in the proposed passenger access template (clauses 4.1 & 4.2) meets our expectations although we recognise that the capacity warranty is dealt with elsewhere. Our specific comments are as follows:

- clause 4.2 (a) - this provides an obligation for the train operator to operate the services over the routes using the specified equipment. EWS is concerned that given the nature of the rail freight market with an ever-changing national timetable, it will not always be possible or desirable to operate the services in this way. EWS would not expect to be in default of its agreement because it had failed to operate certain services.
- Clause 4.2 (b) (ii) - the reference to the train operator maintaining and operating the specified equipment needs to take into account that some freight operators may convey private owner vehicles which are not owned, hired or leased by the freight operator. These vehicles are covered by private wagon registration agreements between the owner of the vehicle and Railtrack. Freight operators are not generally responsible for the maintenance of these vehicles and therefore to impose such an obligation at present would not be acceptable. This could be addressed through customisation of the model clause by the parties to reflect each operator's circumstances.

- Clause 4.2 (c) – again the issue relating to private wagons needs to be taken into account. EWS would like to understand more about the obligation in (ii) which obliges the operator to keep the specified equipment in a condition which ensures that the maintenance and other costs of or upkeep of the network shall be as low as reasonably practicable. We would be concerned if it were to be used by Railtrack to be able to force operators into using particular equipment that would undermine the overall economics of rail freight. We would hope that this is not the intention of the clause and that whatever the type of vehicle, providing it continues to be maintained to within the appropriate railway group standard tolerances then the obligation would continue to be fulfilled.
- Clause 4.2 (e) – this clause would be acceptable if the word “commercial” was removed from the drafting.

Chapter 3 – Access Rights

2.4. We are pleased that the representations made by freight operators, including EWS, that freight access rights need to be specified differently from passenger rights have been taken in to account. We note that at this stage that the Regulator will not be producing a freight template specification.

2.5. EWS also endorses the view that if access rights are to remain subject to the Rules of the Route/Plan that Railtrack is prevented from using these mechanisms to degrade access rights over time either for commercial reasons or to cover inadequate or inefficient operation and/or maintenance of the network. We would like to see a model clause developed which places a specific obligation on Railtrack not to degrade the train operators rights over time.

2.6. EWS supports both the establishment of a better procedure for changing the Rules and the key elements proposed by the Regulator (paragraph 3.15) to be included in this. We would like to make the following additional proposals of our own for consideration:

- For freight operators, capability to operate on the network overnight is crucial to meet the early morning delivery times many of our customers demand. EWS believes therefore that in addition to changes to the Rules of the Plan, changes to the Rules of the Route that affect the capability of the network should also be subject to the application of the network change procedure. This is not reflected in the first bullet point (paragraph 3.15). This would provide for an outcome of either the change not proceeding or, if it does, that compensation is payable where access rights are affected. The present right of appeal via the Part D procedure does not provide this outcome.
- EWS believes that, as part of an enhanced consultation process over changes to the Rules of the Route/Plan, Railtrack should issue a statement of changes showing the likely effects on operators’ access rights.
- EWS believes that there needs to be a standard format for the Rules of the Route/Plan across all Zones to aid understanding and clarity. This would be particularly helpful for national operators such as EWS.

2.7. EWS’s access agreement already contains a “use it or lose it” mechanism therefore the Regulator’s provisional conclusion that such a model clause should be provided for all operators is supported. We look forward to commenting on the Regulator’s drafting in due course.

2.8. EWS has not changed the views it has expressed previously and would not want to see the introduction of a multilateral trading mechanism for access rights. We continue to believe that all rights should be bought from or given up to Railtrack.

2.9. EWS supports the temporary redemption of rights. We note that the Regulator believes there would be limited use for this provision however it would be of interest to freight operators. EWS operates many short-term services to meet the specific needs of customers, for example a four-month contract to provide aggregates for a road-widening scheme would be a case in point. EWS believes 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. The temporary redemption of access rights would therefore address this issue.

2.10. EWS is firmly opposed to the introduction of a mechanism to allow Railtrack to compulsory purchase freight rights, particularly where such rights are required to meet an underlying customer commitment. It is essential that freight operators have the certainty that once track access has been procured to meet a customer's requirements that it is not at risk of being taken away again. Customers would view such a mechanism as a risk to their businesses and therefore its introduction for freight would act as a disincentive to use rail. Freight access rights not being used or required to meet a customer commitment would be subject to the "use it or lose it" provision in any case so a redeemable mechanism should not be necessary.

2.11. EWS fully supports the Regulator's proposal to introduce a capacity warranty by way of a model clause. EWS also endorses the Regulator's intention to request Railtrack to provide an action plan that provides a better method of assessment of the effect of new rights on the availability of capacity and performance and of the spare capacity available on the network. This last issue is of particular importance to freight operators who require the availability of "white space" on the network to grow their businesses.

2.12. EWS also supports the Regulator's requirement for Railtrack to produce and maintain an access rights register. The obligation should include making the register available to operators and other interested parties. On balance we believe this would be best accomplished through a licence modification.

Chapter 4 – Output Statements

2.13. EWS fully endorses the Regulator's proposal for the development of operator based local output statements. Given the multi-lateral involvement in developing each operator's local output statement the proposal to embody this process in a new Track Access Condition is very sensible. We would however wish to see the operator's right to delivery of their output statement reflected in a model clause in the track access agreement.

2.14. EWS set out its thoughts on what would be necessary to be included in local output statements from a freight perspective in its response to the April 2000 Key Issues document. These views have not changed and for ease of reference are attached as annex 1. We do not believe however that the proposed Part I as drafted would fully meet the expectations of freight operators. The three key factors for inclusion are network capability, network capacity & network availability. Output measures of all these elements should be able to be expressed in freight local output statements.

2.15. The nature of freight operations on the network could also require in certain circumstances the need to specify inputs as well as outputs. The placement of signals, infrastructure and the specification for connections can have a significant effect on the

operation of freight trains, particularly when gaining access to yards and sidings adjacent to the network. Local output statements for freight should allow for this option.

2.16. We are concerned that local output statements are proposed to be reciprocal i.e. Railtrack are permitted to specify outputs that the operator should deliver. To our recollection this was not discussed during the previous consultations. EWS are strongly opposed to this. We understood that the purpose of the local output statements was to ensure that the customer (the train operator) would have a better understanding of what Railtrack was undertaking to deliver in return for the access charges. As payment of access charges is a one way process it is not acceptable to make local output statements reciprocal particularly as this would give Railtrack the ability to specify changes to the operator's specified equipment. This provision should be removed.

2.17. EWS supports the Regulator's approach on remedies and liabilities (paragraph 4.13)

2.18. We welcome the Regulator's acknowledgement that developing the local output statements could put an unacceptable burden on freight and other network-wide operators (as well as Railtrack) if the consultation mechanisms are not structured appropriately. To minimise this burden EWS would suggest that prior to the start of the development process, Railtrack is required to discuss and agree with each freight operator a notional split of the routes used into manageable sections. These may for instance reflect the route sections as set out in the NMS. Once agreed, Railtrack and each operator would then agree a timetable for the development of the local output statement by attaching a priority for each route and a timescale for development and completion. This pre-development stage should be included in the new Access Condition.

2.19. EWS agrees with the Regulator's provisional conclusion that third party funders who are not access beneficiaries should not have rights to have local output statements established. Before EWS would endorse the ability of third party funders to have a right to be consulted on the development of local outputs we would wish to understand the tests that each funder would need to pass to qualify for the right of consultation. For freight we would expect any third party funders who required this provision would deal with this through their contracts with freight operators.

2.20. The following comments relate to the proposed drafting of the new Access Condition (Annex 2):

- as mentioned in 2.14 above, EWS believes the definition of local output should include capacity and availability in sub-paragraph (i). We believe sub-paragraph (ii) of the same definition should be removed (see 2.16 above).
- the draft local output statement (Condition I3.1) should be accompanied (if applicable) with a statement giving reasons why Railtrack has not included any outputs requested by the operator. This will aid understanding and inform any appeal.
- the development process needs to take account of the possibility of network-wide operators such as EWS having their local output statements being developed in phases.
- Condition I3.4 should include reference to Major Projects as well as Network Change.
- EWS believes that enforcing the delivery of a local output is a matter between each operator and Railtrack and should instead be provided as a model clause in each

operator's access agreement. Condition I6 may therefore not be required. In any event Condition I6 (i) should be removed as it relates to Railtrack's required outputs.

- the appeals process should also allow appeals in respect of any matter concerning the operation of Part I. This would bring this Part into line with the appeals procedure in Parts F & G and allow appeals if Railtrack has failed in its obligations in the development process i.e. before the local output is established.

Chapter 5 – Network Change

2.21. EWS would accept that normally access contracts specifying enhancements should be related to outputs rather than inputs, however many freight schemes are so specific in their nature that inputs are equally important as these can have dramatic effects on the operation of trains once the enhancement has been provided. As stated in paragraph 2.15 above, the ability to specify inputs must be retained as an option for freight operators.

2.22. EWS agrees with the Regulator's conclusion that operators should retain the rights to the outputs purchased as part of an enhancement project provided they are paying directly for those rights through the track access agreement. However until the outputs, in particular capacity, is required by the funder they should be made available to other operators to use perhaps through the temporary redemption of rights process.

2.23. EWS endorses the new arrangements the Regulator is proposing to introduce into Part G (paragraph 5.8). There is no further mention of the proposals outlined in the April 2000 Key Issues document that required operators to make mandatory contributions to the cost of projects if they are net beneficiaries from someone else's enhancement. We assume therefore that the Regulator has decided not to proceed with these proposals. This is welcomed by EWS.

2.24. We have a number of concerns over the process the Regulator proposes for Part G (figure 1):

- The process needs to ensure that Railtrack is incentivised to minimise development costs and not incur expenditure inefficiently. The sponsor should have the right of audit and costs must be transparent and achieve best practice efficiency levels. The Regulator should seek to benchmark Railtrack's project costs against international best practice:
- Railtrack does not commit to a firm price until near the end of the process. Operators need to know how much an enhancement is going to cost much earlier so finances can be arranged and decisions can be made whether to proceed or not. There should be the option for an operator to agree a price for the enhancement near the beginning of the process. This may result in the price for the enhancement being above what it may have been if the process was followed through as currently proposed, however some operators or funders would we believe prefer to have the certainty. This option would also incentivise Railtrack to be efficient as they would bear the risk of cost overruns but equally take the rewards of delivering at less than the agreed price.
- Railtrack negotiates the compensation with affected operators and passes this onto the sponsor. There is therefore again no incentive for Railtrack to ensure compensation is as low as possible as they bear no risk. The option of agreeing a firm price at the start would overcome this issue and so would the ability of the sponsor to be involved with Railtrack in negotiating with other operators. This may include doing a deal that provides for an affected operator agreeing to forego

compensation on the basis that the sponsor (provided they were also a train operator) would forego compensation when the roles are reversed.

- The process does not seem to allow the sponsor to develop their own enhancements without using Railtrack to procure the design, development and implementation. Proposals to open enhancement of the network to competition through third party involvement particularly for small enhancements were set out in the Regulator's April 2000 Periodic Review Incentives Framework document and were strongly supported by EWS. This needs to be included.
- In the April 2000 Incentives Framework document the Regulator stated that he was considering making amendments to the structure of Railtrack's proposed approach which would mean that Railtrack would bear the full costs of project development to level two and thereafter 25% of the risk. EWS supported these suggested amendments. Is it still the intention to introduce them?

2.25. In its responses to previous consultations EWS set out 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.

So far it these proposals appear not to have been taken on board or on the other hand specifically rejected. It is unclear to EWS whether the Regulator is proposing changes to the whole of Part G or just those aspects that concern enhancements. We hope this will become clear when the proposed changes to Part G are published during September.

Chapter 6 - Liabilities/other issues

2.26. In respect of operational performance, EWS recognises the Regulator's provisional conclusion that there would be difficulties with a liquidated damages regime which contains a "step" beyond which monetary penalties are increased. However, we believe there is a case for additional remedies for freight in instances of extended or reoccurring disruption. This would act as an incentive to rectify the underlying cause of the delay as soon as practicable.

2.27. Financial caps should apply to performance payments as well as non-operational performance liabilities. Also it is imperative that the "star model" approach is maintained for performance regimes which prevents one operator claiming from another.

2.28. EWS believes that the Regulator's provisional conclusions on liabilities need to be reconciled with the provisions of CAHA to ensure there is no conflict or unintended consequences.

2.29. EWS does not agree with the Regulator's views on consequential losses. It is widely accepted in the industry – a view borne out by past practice – that unless specifically provided for in separate contracts consequential loss, whether direct or indirect (including loss of revenue), is not recoverable between industry (CAHA) parties

. The Regulator's view appears to question this assumption and argues that loss of revenue is not a consequential loss and therefore could be claimed for. If true this would mean that when one operator's train delays another operator's train the first operator would claim liquidated damages through its performance regime with Railtrack. In addition the operator would be able to claim for full loss of revenue, to the extent it was not covered by the performance payments, through a CAHA claim against the offending operator. This would be against the "star model" principle and therefore would be unacceptable to EWS.

2.30. We are also concerned with the concept of placing a cap on liability and then allowing all relevant losses, subject to proof, to be considered. EWS believes that claims from third parties (including death and personal injury claims from staff members) must be excluded otherwise it would place industry parties at severe risk. To illustrate our concern: If an operator's train becomes derailed and causes personal injury and widespread damage to third party property then the third party claims would be dealt with through CAHA. Whilst an Inquiry would be arranged to investigate the causes of the incident, this may take many months and in the mean time actions would be taken and claims need to be dealt with. Under CAHA one party is nominated as Lead Party to deal with the third party claims until the Inquiry's findings are known and blame can be apportioned. Significant expenditure could be made in severe incidents. If the Lead Party is subsequently found not to be responsible or is only in part responsible for the incident then they would then claim against the Industry Party at fault. If that industry party was Railtrack then the claim would be subject to the proposed cap under the track access agreement, which unless it is specified as high as tens perhaps even hundreds of millions, it would place a train operator at severe financial risk. Railtrack could also be at risk if they are Lead Party and are found not to be subsequently at fault.

2.31. Therefore unless third party claims (including employee claims) are excluded from the liability cap, the Lead Party would be exposed to unlimited liability from third parties and only be able to claim limited liability under its track access agreement.

2.32. In respect of freight, given the vast range of situations where liability could arise it may be difficult to foresee, quantify and therefore set an appropriate cap to meet all circumstances. EWS believes there should be an option for freight to set a general cap to meet a range of different liabilities.

2.33. EWS is also concerned that the proposed caps on liabilities appear to have no mechanism for change particularly where long-term access contracts are envisaged. We believe there should be re-openers for specified situations. These would include – changes in law, changes in business circumstances and access to insurance markets.

2.34. Freight operators can convey private owner wagons that are registered by the owners with Railtrack under private wagon registration agreements. Freight operators may therefore require an option to exclude liability for damage caused by these wagons where they are not responsible for maintaining them.

2.35. EWS believes that for wilful breach of contract any caps should be trebled. EWS also believes there should be no caps on Railtrack's liability for negligence or breach of Safety Obligations other than currently specified in CAHA i.e. limitations on loss of revenue and property damage.

2.36. EWS is concerned over the requirement (paragraph 6.56) that an injured party would not be able to recover any losses until a performance order has been sought to the fullest extent reasonably practicable. Whilst EWS understands the thinking behind this requirement, seeking a performance order in some cases may take time and in the mean time the injured party could be incurring large unaffordable costs and losses that they would be unable to reclaim. The procedure needs to allow for compensation to be

claimed for in parallel to the start of the performance order process i.e. the parties discussing the matter at local level.

2.37. EWS supports the Regulator's provisional conclusion not to make a new provision for force majeure.

2.38. EWS believes the suspension arrangements in current track access agreements and replicated in the model clauses are unnecessary with the exception of the ability for Railtrack to suspend on safety grounds. Train operators are unlikely to invoke suspension as this would remove their permission to use and therefore their ability to run trains. With the introduction of performance orders suspension would no longer be necessary.

2.39. EWS supports the Regulator's provisional conclusions on standards of performance.

2.40. EWS would fully support an information provision in each operator's track access agreement. 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.

2.41. EWS does not believe the new assignment provisions will be necessary for freight.

Chapter 7 - Implementation of Regulator's conclusions/development of a Network Code

2.42. EWS believe the changes proposed to the Track Access Conditions should be implemented via the Class Representative Committee as provided for in Condition C5.

2.43. EWS supports the approach the Regulator proposes (paragraph 7.6) on the incorporation of model clauses in new and existing track access agreements.

2.44. Changes needed to meet the requirements of freight have been suggested throughout this response. In addition we have made some initial comments on the changes for freight that need to be made to the proposed passenger track access agreement contained in the consultation document. These are attached as annex 2.

2.45. EWS would not support any proposals that resulted from moving away from the "star model" concept even if these were limited in their scope. In EWS's view the "star model" has served the industry well. Moving away from this will increase complexity, bureaucracy and distort risk allocation. EWS believes this is not necessary.

Extract concerning the content of freight local output statements taken from EWS's response to the Regulator's April 2000 Key Issues document

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. 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.

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

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.

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

EWS's initial comments on changes that would need to be made to the Regulator's proposed bilateral passenger track access agreement to meet freight requirements

1. Interpretation

(i). Definitions would need to be added, deleted and amended to reflect the changes needed in the main body of the agreement and the schedules for freight.

(ii). EWS notes that the threshold figure in the definition of Insolvency Event has been raised to £100k. We would want to understand the reasons for this given that the parties could agree a higher figure if appropriate with the threshold remaining at the current level. Our current definition of Insolvency Event does not include reference to railway administration orders and we believe that this reference and associated wording should be removed for the freight model clause.

(iii). As a network-wide operator, EWS currently has permission to use the whole Network (subject to conditions) rather than being confined to specific Routes. This gives the flexibility required to accommodate customer requirements at short notice which otherwise may be lost to rail if the agreement was confined to set routes. Customisation needs to be able to allow for this option.

(iv). Given the vast array of vehicle types and locomotives that could be used on any particular train on any given day, EWS's current agreement addresses Specified Equipment in a different way. Our agreement provides for the flexibility required by EWS and its customers by allowing for any vehicle or locomotive type to be used provided it is registered to run on the network pursuant to Railway Group Standards and is acceptable to run within the constraints of the particular route. Again we would wish to see customisation for freight that allows for this option.

(v). EWS believes a definition of "on an after tax basis" referred to in the clauses on liabilities would be a useful addition to provide guidance and clarification.

(vi). Should reference be made to the Transport Act 2000 in 1.2 (n).

2. Conditions Precedent and Term

(i). EWS would question whether the clauses on conditions precedent are required as model clauses. Indeed they do not appear in our current agreement.

(ii). In relation to 3.1 (d), it should be made clear that in the case of the train operator that the Safety Case in question is its Safety Case for the operation of trains. Many operators have Safety Cases for depots, networks, stations etc. but the acceptance of these should not be a precedent for the track access agreement.

3. Commercial Purpose and Standard of Performance

(i). We note that the Commercial Purpose clause is repetitive of other obligations contained elsewhere. (Please refer to paragraphs 2.2 & 2.3 in the main response for our specific comments on this issue.)

(ii). The inclusion of a standard of performance clause is a welcomed addition.

4. Permission to Use

(i). The comments regarding EWS's use of the network rather than specific routes made in 1 (iii) above are relevant here.

(ii). EWS wish to understand why to Stable should be treated as the use of a Train Slot (clause 5.2 (c)).

(iii). EWS welcomes the addition of the access rights warranty.

5. Operation and Maintenance of Trains and Network

(i). As stated in 1 (iv). above, EWS's current agreement treats specified equipment differently. For freight, EWS would wish to see the proposed model clause 6.1 (a) (i) to reflect the corresponding provision in our current agreement.

(ii). As with the similar provision in the proposed commercial purpose clause, the reference to the train operator maintaining and operating the specified equipment in clause 6.1 (a) (i). needs to take into account that some freight operators may convey private owner vehicles which are not owned, hired or leased by the freight operator. These vehicles are covered by private wagon registration agreements between the owner of the vehicle and Railtrack. Freight operators are not generally responsible for the maintenance of these vehicles and therefore an obligation at present would not be acceptable. This could be addressed through customisation of the model clause by the parties to reflect each operator's circumstances.

(iii). Again as with the similar provision in the commercial purpose clause the issue relating to private wagons needs to be taken into account in clause 6.1 (a) (ii). EWS would like to understand more about the obligation which obliges the operator to keep the specified equipment in a condition which ensures that the maintenance and other costs of or upkeep of the network shall be as low as reasonably practicable. We would be concerned if it were to be used by Railtrack to be able to force operators into using particular equipment that would undermine the overall economics of rail freight. We would hope that this is not the intention of the clause and that whatever the type of vehicle providing it continues to be maintained to within the appropriate railway group standard tolerances then the obligation would continue to be fulfilled.

(iv). We do not believe clause 6.2 appears in any freight agreements. Is it to reflect that passenger operators are responsible for stations?

(v). Clause 6.3 should be reciprocal.

(vi). Clause 6.4.2. relating to train consist data is not included in current freight agreements as far as we are aware. Whilst EWS would accept the obligation in (a) to provide Railtrack train consist data (which incidentally does not appear to be defined) to calculate the track access charges, the provisions of (b). are too onerous. Given the varied nature of freight trains, both in the types of vehicles operated and the commodities conveyed, it is not possible to meet this requirement in all cases. For example, freight operators are required to declare the weight of the goods in each wagon, however in many loading points weigh bridges are not provided and therefore estimates have to be made. These tend to be over estimates of the actual weight. Coal into power stations is not usually weighed until it has arrived at destination and it is difficult to ensure the actual weights of the goods transported in containers is fully accurate.

(vii). Clause 6.4.3. should be reciprocal.

(viii). EWS look forward to being consulted on the new asset register licence condition and supports the development of a model clause dealing with information.

6. Performance

(i). The addition of the word "financial" before the word "compensation" in clause 8.2. should be made. For freight operators it should also refer to diversions of trains as well as delays and cancellations. For important clarification the addition of the words (or similar) "including the trains of operators other than the Train Operator and, in the case of trains of the Train Operator, being those which have been accepted by Railtrack to operate on the Network." should be made.

7. Liabilities

(i). EWS's comments on liabilities are contained in the main response.

8. Performance Order procedure

(i). EWS believe the addition of the words "and the remedies provided for elsewhere under this Agreement or available at law" should be added to the end of clause 11.1.

(ii). EWS believe it would be better if an industry panel was formed rather than a different one for each contract. This would save time and expense and allow the single panel to become expert in hearing railway cases. As the panel cannot be formed until the Regulator has published the qualification criteria, EWS would wish to understand when it is likely the criteria will be available for comment.

(iii). EWS believes a specific obligation should be inserted to ensure each party shall comply with the terms of a performance order made against them.

9. Confidentiality

(i). The affiliates of the Regulator, SRA & HSE should be required to give an undertaking of strict confidentiality. This provision is contained in current agreements and is reasonable.

(ii). EWS would wish to see the addition of the words “provided that the disclosing party shall notify the other party beforehand or as soon as reasonably practicable thereafter” at the end of clause 12.2.

10. Assignment and Novation

(i). The assignment of the access agreement to financial institutions is not required for freight.

11. Schedule 6 – Events of Default, Suspension & Termination

(i). The Events of Default & Termination provisions contained in EWS’s current agreement should be used as the basis for the freight model clauses.

(ii). It is difficult to envisage why an operator would want to issue a suspension notice that removes its permission to use. This issue should be addressed. (see paragraph 2.38 in main response)

(iii). EWS would like to see the following words added:

- paragraph 1.1.1 (c) – “material” before the word “threat”
- paragraph 1.1.1 (f) – “and prolonged” before the word “disruption”

12. Schedule 9 – Limitation on Liability

(i). EWS’s comments on liabilities are contained in the main response.

(ii). EWS would like to see the addition of the words “or reckless” after the word “intentional” in paragraphs 2.1 (a) & 3.1 (a).

(iii). Consideration should be given whether an adjustment mechanism needs to be built in for long term contracts to keep pace with inflation.

(iv). For the avoidance of doubt paragraph 4 should expressly exclude claims under the Performance Regime.

(v). The provisions of paragraph 5 should ensure that once the claim is above the threshold the whole claim becomes payable (i.e. not just the difference between the threshold and the claim). In addition provision should be made for cases where similar reoccurring breaches which result in amounts below the threshold that such claims can be taken together and therefore become payable if in aggregate the total is above the threshold.