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Tom Winsor
Office of the Rail Regulator
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Dear Sir

MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS

Further to my fax of today's date please find enclosed a clean copy of our response to the Consultation Document on Model Clauses for Track Access Agreements on behalf of First Great Western, First Great Eastern and First North Western.

Yours faithfully

Dr Mike Mitchell
Director - UK Rail



**Response on behalf of First Great Western, First Great Eastern and
First North Western to the Regulator's Consultation Document
on Model Clauses for Track Access Agreements**

1 Introductory Comments

- 1.1 FirstGroup welcomes the opportunity to participate in consultation on the new model clauses. It supports the objectives of the Regulator in improving the quality of track access contracts, reducing transaction costs and enhancing the environment for the future railway. This is particularly important given the present objectives of delivering quality for the passenger and effective investment.
- 1.2 Developments in model clauses should however operate in step with franchise agreement or rebranding agreement provisions. Particularly in circumstances where track access agreements expire before the termination of the relevant franchise agreements, we would expect first to be satisfied that any increase in Railtrack charges flowing from the introduction of model clauses would be covered by appropriate adjustments to the subsidy line.

2 Responses to questions raised in Chapter 2

- 2.1 *Is it desirable that standard access contracts contain commercial purpose provisions? Should they be in standard form? If so, what should the standard provision contain? Are commercial purpose provisions appropriate only in contracts which provide for the carrying out of major investment in the network or in rolling stock?*

We are not opposed to the use of commercial purpose provisions. The principle is familiar to the rail industry for example in the context of the Regulator's Section 4 duties, the decision criteria in Part B of the Access Conditions and the contingency principles in Part H.

With regard to standard access contracts, we suspect that the obligations in respect of parties are quite well understood and supported through the range of other obligations which have to be fulfilled, for example, in connection with licence obligations and safety obligations. Commercial purpose terms are likely to have a stronger application in projects involving change, such as investment or development of the network. They should not be allowed to be a substitute for clear drafting in the allocation of responsibilities and setting of outputs which are capable of objective measurement. This factor combined with the differing requirements of different operators is likely to work against the development of standard common purpose clauses which go much beyond the restatement of duties which are already defined or understood.

Where commercial purpose provisions are applied in respect of multi-user sections of the network, then we would expect these to be consistent with approved priorities and standards in relation to the treatment of all the users of the network.

2.2 *Is it appropriate that, in carrying out the obligations under the contract, one or both of the parties should be expressly required to meet certain minimum standards of competence? Are the standards implied by the Supply of Goods and Services Act 1982 sufficient, or is more needed? Should the standards be the same? If not, what should be the standards for (a) Railtrack and (b) the Train Operator?*

It is reasonable for parties operating within the rail industry to be expected to work to higher standards than those implied generally by law. Franchised train operators are already subject to a higher standard of performance under their franchise agreements. They are obliged to "carry out in a professional manner all those duties which may be required to secure the satisfactory performance of the passenger services which would ordinarily and properly be carried out by a reasonably experienced, efficient and competent passenger rail operator in relation to passenger rail services comparable in size, scope and complexity to the passenger services". At least this level of obligation would therefore be acceptable under the track access agreement and for both parties. It may, of course, be appropriate for these to be supplemented by specific obligations, for example, regarding safety or speeds of response in specific situations.

However, the significance of the standards depends upon the consequence of failure to meet them. Under the current structure the performance standards have limited relevance because of the nature of the exclusions of liability for train performance and the provisions on termination. However, this is made up for by the strict liability nature of the performance regime, at least in relation to day-to-day performance.

Train operators would particularly like to see minimum standards applied to Railtrack in terms of the quality of maintenance and improvement of the network which it offers. However, these concerns are unlikely to be resolved through general standards of performance, since these will not be sufficiently sensitive or clear to address the necessary detail. The setting of standards requires to be supported by the establishment of objective criteria which are capable of measurement. This indicates the importance of the current network management statement processes.

In principle standards applied to Railtrack in relation to its management of the network could also be applied (with necessary changes) to the train operators' compliance with timetabling processes and the train operators' and the ROSCOs' management of rolling stock. From the train operator perspective, the latter would need to recognise the constraints imposed upon train operators by reference to the established ROSCO arrangements and the extent to which aspects are already covered by the performance regime.

2.3 *Are there circumstances in which access rights should be absolute and not expressed to be subject to the Rules of the Route and the Rules of the Plan? If access rights are to continue to be subject to these rules, is there a need for additional protections for train operators against their amendment without the agreement of the affected parties? Are there specific circumstances (for example, new safety obligations or abuse of a dominant position by an operator) in which elements of access rights should be subject to review or "use it or lose it" provisions? Are there elements of access rights which should be subject to more general review over the life of the contract and, if so, how often and in what circumstances? If access rights are to be reviewed, what should be the nature of the review? For example, should change only be in cases where the parties have agreed on it (with the approval of the Regulator)? Or should there be cases where a change is possible without all concerned being in agreement and, if so, what are they? Should the journey times to which a train operator is entitled be subject to any entitlement of Railtrack to add pathing time or other allowances? Is it appropriate for Schedule 5 to provide rights over and above quantum and frequency which would constrain what other operators can do on the network, or should train operators rely on access Condition D and the associated rights of appeal for their protection?*

We would not expect access rights to be absolute in all circumstances, for example including whatever engineering works or network improvements might be required or whatever special circumstances might arise. However in the absence of special circumstances, we would expect there to be some qualified commitments regarding minimum and maximum journey times and quanta of slots. The extent of these unqualified rights might vary, particularly in the context of infrastructure projects involving major investment.

Where features have particular commercial, social or political significance, there is certainly scope to introduce an intermediate stage of protection. In this case erosion of the relevant rights through amendments to the Rules of the Route or the Rules of the Plan could be made subject to a requirement for specific justification to be made out by Railtrack, with appropriate rights of appeal through the disputes process if agreement is not reached.

We would support the application of use it or lose it provisions, subject to the use it or lose it provisions being established appropriately to recognise situations where capacity is genuinely being reserved in the context of the delivery over time of investment programmes.

It is likely that the scope for revision of access rights in the light of change of law or new safety obligations will need to be reserved. However this must only be on the basis that equivalent provisions are included in franchising arrangements.

The prospect of more extensive "compulsory" review of access rights may be possible in some limited situations, for example where train operators are not involved in major investment and there are corresponding adjustment provisions contained in their franchise agreements. Where any significant level of investment is involved or there is no corresponding adjustment under the relevant franchise agreement, compulsory review is unlikely to be bankable.

We expect that journey time entitlements for train operators will need to include a margin in respect of pathing time or other allowances in order to ensure a practical degree of flexibility to enable the timetable to be operated and to assist in the management of the network to reduce performance risks and congestion costs. However we would generally expect Railtrack's entitlement to add pathing time or other allowances to be subject to limits and a requirement for Railtrack to justify any imposition.

It is not appropriate for schedule 5 to be limited to rights on quantum and frequency. It is consistent with the move to higher quality contracts that schedule 5 should deal with other details. It is of great importance to the business of many train operators and necessary for them to be able to fulfil their PSR obligations that they have a greater level of assurance as to the type and quality of access to which they are entitled. This does not rule out schedule 5 rights being reviewed on refranchising and the award of a new track access contract in order to reset priorities between train operators on a route and make capacity in a way which is then considered most in the public interest. Clearly the nature of any such change is something which the refranchising process should enable the relevant parties to take into account in their refranchise bids.

- 2.4 *Does clause 6 provide the train operator with sufficient specification of the obligations of Railtrack in relation to the operation, maintenance and development of the network insofar as the train operator is affected? If not, in what respect should clause 6 be improved? For example, should it include explicit track and ride quality perimeters? If more clearly defined specifications are to be established, should they be universal or route specific? Are train operators satisfied with the annual five year network plans provided for in clause 6? Do they meet the contractual standards laid down for them? Does Railtrack believe that the five year plans provide sufficient information to train operators? If not, in what ways could and should they be improved?*

Clause 6 is inadequate. Delivery of an appropriate quality network is about attention to detail. General specification of obligations are likely to prove inadequate. The requirement is therefore for detailed specifications and clarity regarding the consequences of failure to meet them.

We support the progress represented by the network management statement and the SSRA's base line exercise. We believe that these types of processes need to be maintained and strengthened.

In view of the need for detailed measures and their effect on the quality of journey experience provided and wear on vehicles, we would support track and ride quality parameters. These are likely to need to be set on a route specific and potentially also train operator specific basis. However in order to make them meaningful we would expect them to be incorporated into a performance regime service credit/liquidated damages type mechanism.

2.5 *Is Part G of the track access conditions a sufficiently detailed and effective process for ensuring network change operates in the interests of all users of the railway? Does it enable a proper balance to be struck between strategic considerations and those relevant to a specific case? If not, how could it be improved? Does Part G provide adequate protections for Railtrack, affected train operators and other stakeholders when proposals to change the network are made and pursued? Are the rights to object to and block a proposal for change correctly structured, or are they too strict or too weak? Do they promote or inhibit improvement and the use and development of the network? Are the rights to financial compensation (both in terms of the costs of feasibility studies and compensation for the changes themselves) appropriate and adequate? Is Part G being operated well by train operators and Railtrack? If not, in what respects?*

The network change process does not operate to enable interests of users of the railway to be taken into account. It does not involve striking a balance between strategic and specific considerations. If proposals are made, there is no particular point for debate and the grounds for objection are tightly defined. In particular there is no adequate forum for discussion of the benefit of the change versus the disruption which it would involve or whether some alternative or enhanced network change would be more appropriate. The process could be improved by addressing these issues.

However, in practice, the industry as presently structured is not in a position to operate Part G. In theory projects should proceed through network change, then major project, then amendment to the rules of the route to enable implementation. In practice projects are seldom able to be managed in this way. For example, we are aware of cases of major schemes where rules of the route incorporating necessary possessions were proposed shortly before the timetable development process, so that all parties were under great pressure to accept them in order to avoid the timetabling process being very seriously disrupted; the network change process was instituted after the timetable change conference with limited information only; nearly six months on information on the effects of the network change is still being sought. Consultation on the network change process should have begun at least a year earlier.

There is a lack of timescales or coherent guidance on process within Part G. Urgent improvement is required, in particular if the pace of investment is to be raised.

Consequently Part G does not presently provide adequate protection. No significant practical improvement is likely to be possible until greater discipline is introduced into the process, with network changes being notified in adequate time and properly supported by information.

We will continue to support a network change process which includes indemnity type compensation (including for revenue lost) for the parties affected by network change. We would not generally welcome the SSRA proposals to limit compensation for the effects of network change to schedule 4 levels, save perhaps for the quantified effects of particular schemes which might have been able to have been taken into account in appropriate detail by a franchisee in the course of a franchising process.

We would support an enhancement of the Part G mechanisms in order to assist in the full and speedy recovery of compensation in respect of the effects of network change. This would play an important part in helping to reduce transaction costs and address what can otherwise be a very difficult period of negotiation between train operators and Railtrack.

- 2.6 *Is it desirable that contractual "local output statements" reflecting the points discussed above are established? What should be the balance between enforcement of contracts and via Railtrack's network licence? What should be the nature of any such arrangements and how should they be enforced? What remedies should there be if they are not complied with? If such arrangements are to be put in place, are the provisions of Part G of the track access conditions sufficient to deal with the failure of Railtrack and the affected train operator to agree? If not, how should they be improved?*

We have no doubt that detailed local output statements are required. However it is necessary to ensure that there is adequate means for setting those statements when train operators and/or Railtrack may have differing views. There must also be an effective recourse where the output is not met. Against this background and given past experience of the inadequate effect of very substantial performance payments to modify Railtrack's behaviour, we believe that there will be a significant on-going requirement for enforcement through Railtrack's network licence.

As an addition, we might envisage the development of local output statements involving service credits or refunds of track access charges by reference of failures by Railtrack to deliver relevant outputs.

Obviously in a case of specific major infrastructure projects, we would expect those projects to include their own developed mechanisms to ensure that the relevant project is delivered.

- 2.7 *What categories of information does a train operator need from Railtrack in order to make the best use of the network? How should this information be supplied? What standard should it meet? Should there be different standards for different categories of information? Are there circumstances in which it is reasonable for a train operator to make additional payments to Railtrack for certain information? If so, what categories of information and what criteria should be used to assess the charges? What information should a train operator provide to Railtrack, in particular having regard to the interests of other operators?*

Train operators should be entitled without additional charge to a high level of transparency and access to information maintained by Railtrack which is relevant to their legitimate interests as parties to track access contracts. This should include information regarding the gauging, capacity and quality of the network which Railtrack might reasonably be expected to have as a professional network operator. It should also include information on plans relevant to its routes, network changes, access charges, timetabling, performance and congestion.

We would accept that train operators should be required to pay Railtrack for information which they obtain from Railtrack in a consultancy role, in which case a reasonable price should apply.

In return, train operators might be expected to make available levels of information regarding the rolling stock which they operate on the network and their assessments of their reasonable requirements.

- 2.8 *Is it appropriate that track access contracts continue to contain no express assurances from Railtrack in relation to the capacity which has been sold under the contract? If not, what should be the nature of the assurances, and what remedies should be available if they are not honoured?*

So far, train operators have relied upon the regulatory process to protect them from over-selling of capacity. We appreciate that in an increasingly complex and crowded network dependence on Railtrack for an accurate analysis at capacity is growing.

It will be critical for the award of access rights to continue to be underpinned by regulatory scrutiny. We would like to see firm contractual rights which are awarded reinforced by additional assurances from Railtrack. The starting point for the assurances might be the Part G type basis of compensation in respect of costs, losses, expenses and loss of revenue, on the basis that the effect of failure to fulfil such rights is similar to there being a reduction in a promised capacity.

3 Responses to questions raised in Chapter 3

- 3.1 *Should Schedule 8 be the only remedy for the cancellation or delay of services? Are there circumstances in which Schedule 8 should be suspended and other remedies take over? If so what are they and what are the appropriate remedies?*

In the ordinary course of day to day operation it is appropriate for Schedule 8 to be the only remedy for cancellation or delay. Separate quantification of the effects of delays and cancellations is not realistic or likely to be cost effective. There is a mutual benefit for both sides from the certainty and control on liability which the regime provides.

There are cases for departure. The present Part G compensation basis is one and it is correct that this should extend to disruption flowing from a network change where this results in loss which is shown to be in excess of Schedule 8. This is because the disruption is related to the project risk and not to the day to day operation of the railway. The same should apply where Railtrack bargains for access rights to be given up, for example to support property development on neighbouring land.

More radically there may be a case for permitting an indemnity style top-up over Schedule 8 recovery rates where disruption follows a persistent unremedied breach of a material obligation. This might be the case for example where persistent failure to maintain some infrastructure results in its failure and serious disruption. This would require careful further consideration to establish with clarity when the top-up might apply and so as not to introduce risks which have an adverse impact on funding. Licence obligations will continue to be very relevant.

In the context of major infrastructure projects additional assurances are also likely to be appropriate, perhaps involving acceptance processes, additional liquidated damages, service credits and delays in the payment obligations.

The Schedule 8 mechanism must also be tested to be robust for example in the circumstances of Railtrack industrial action or failure of key infrastructure items.

- 3.2 *What liability should there be if a party fails to comply with its obligations under, for example, the Track Access Conditions or the dispute resolution arrangements? What liability should there be for breach of maintenance and network enhancement obligations, environmental obligations, obligations concerning the provision of information or its confidentiality? What should the contract say about other breaches of contract? Should the parties be exposed to unlimited liability in any circumstances? If not what should the liabilities of the parties be? Should there be different limits on liability depending on the nature, time and severity of the breach in question? Should wilful misconduct be an exception to any general rule? If so, what should be the definition of wilful misconduct and what liability should attach in such a case?*

The liability matrix under the contract should take account of the ability to insure, the ability to manage the risk, the need for adequate incentives, the appropriateness of allocations of the cost of breach and the affect on funding. The current approach of unlimited liability for physical damage, liquidated damages only for performance and exclusion of economic loss is not unusual and reflects many of these issues. They do however leave a gap regarding performance of some ancillary areas of the contract. As referred to above, there may be a case for permitting an indemnity top-up to the performance regime where wilful, persistent or unremedied breaches of ancillary obligations affect performance. Breach of confidentiality may also be considered as a special provision to be outside the other limits on liability in the contract. Subject to this it may be more practical to rely on common law rules on damages than to construct a matrix of different liability caps.

- 3.3 *Are there circumstances in which parties to access contracts should be able to apply for remedies other than the payment of money? If so what are they, and what remedies should be available? Are there any circumstances in which a train operator should be entitled to "self-help" remedies? Would specific performance of an access contract be an appropriate available remedy? Or should specific performance be restricted to certain types of breach leaving money compensation the only remedy in others?*

Money remedies will often be appropriate but equally the preference of train operators is often to have a situation promptly put right rather than to be paid compensation. Injunctions can be relevant, for example to prevent the grant of conflicting access rights or to prevent implementation of inappropriate possessions or the modification of the network without following the network change process. On established principle, specific performance is available in fewer situations. Self-help remedies are generally likely to be of limited application because of the safety and regulatory environment which applies to Railtrack's operations.

While we would not rule out special provisions being written in in particular for major projects, our preference would be to leave open the opportunity to claim alternative remedies, with their award being in accordance with established legal principle and subject to the discretion of the arbitrator, court or other relevant body.

- 3.4 *Are the events of default specified in the standard track access contract appropriate? Are there any missing? Are any of them inadequately defined? What should be the rights of the parties in the case of an event of default on the part of the other party? Should they be the same for Railtrack and the train operator or do the different circumstances of these parties warrant different remedies? Should the remedies available to the party not in breach vary according to the nature of the breach which he faces? If so, in what ways? Should there be the possibility of a response which is more graduated than the existing position? Are there any circumstances in which the train operator should be entitled to withhold payment of access charges? If so, what are they and what conditions should apply?*

The development of the track access agreement to provide for some intermediate response between operating the performance regime and suspension/termination would be very welcome. It is correct that suspension/termination are not realistic remedies for train operators, both because of the seriousness of such a step for their businesses and because a very serious breach by Railtrack may not warrant such drastic action. Intermediate steps might involve "call-ins", allowing an uplift to schedule 8 recovery or a reduction in access charges. The broad range of potential circumstances suggests that the response would probably have to be set through a disputes process rather than being pre-established.

The termination events will require review, particularly if intermediate steps are made possible and the contract is revised to include more developed network management obligations. This is likely to involve persistent breach concepts and possibly a clearer cross-relationship with the levels of achievement of committed outputs. The train operator event of default regarding non-operation of a train slot appears inappropriate and better addressed through a money liability or use it or lose it type approach where there has been a genuine mis-application of track access rights.