

**RESPONSE ON BEHALF OF FIRST GREAT WESTERN, FIRST GREAT EASTERN
AND FIRST NORTH WESTERN TO THE RAIL REGULATOR'S CONSULTATION
ON MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS: ACCESS RIGHTS
AND MODERATION OF COMPETITION**

1 Introduction

- 1.1 This paper sets out the response on behalf of First Great Western, First Great Eastern and First North Western to the Rail Regulator's Consultation Paper "Model Clauses for Track Access Agreements: Access Rights and Moderation of Competition".
- 1.2 FirstGroup welcomes the opportunity to comment on proposals for developments to the Track Access Agreement Model. Alongside its Franchise Agreement, the Track Access Agreement represents the most significant contracts for any passenger train operating company. The certainty and security in relation to its track access are critical both for ongoing business functioning and franchise extensions or renewals. Train operators are keen to participate in investment in the railway, but this can only be possible where certainty of the nature and quality of access rights is available to support forecasts of revenue with sufficient certainty to justify the investment.
- 1.3 Our response to the consultation is hampered by the lack of practical detail in relation to some proposals and the fact that not all the elements of the model clauses and related proposals are yet available. We reserve the right to comment further as further details emerge.
- 1.4 The moderation of competition proposals require an up-to-date assessment of requirements for the network given current levels of congestion and the nature of the commitments being required of franchisees, particularly in relation to capacity, quality and performance.
- 1.5 We are also concerned that proposals which submit additional access right claims to a contractual arbitration process distances the ORR from an area where it has a major role to perform. We seek clarification of the ongoing role of the ORR.
- 1.6 We wish to highlight the need for issues as critical to the business of passenger train operators as those the subject of this paper to be developed in close coordination with

the Strategic Rail Authority's franchise model. We look forward to the linkage between the scope of a franchise and the extent of track access rights being better understood and worked through. This is particularly significant regarding the proposals for moderation of competition and compulsory surrender of rights.

2 Access Rights: Definition in Schedule 5

- 2.1 The key requirement of Schedule 5 must be that it specifies access rights with the requisite degree of certainty for both the purposes of Railtrack and the train operator. A tabular format appears superficially attractive but has yet to be proven in practice. It is a particular concern that the format will lack the flexibility to cope with operations which are more complex than services regularly travelling between two points, for example, as in the case of First North Western and First Great Western.
- 2.2 The tables are consequently likely to require a substantial degree of careful customisation, in order, for example, to reflect the continuity of existing requirements for some flexibility. This is likely to be compounded when there are significant volumes of access rights, for example, First North Western with significantly more than 1,000 services a day. We suspect that the tabular format will, therefore, have only a limited role in improving certainty.
- 2.3 We strongly recommend that Schedule 5 should include firm contractual rights to quanta of trains by service group, overlaying the more detailed tables. These rights should be contingent save for quantum to the extent not bid in accordance with the more detailed tables. A train operator bidding relying on the quantum rights alone might, therefore, be flexed by Railtrack into slots according with the tables, but otherwise, where capacity was otherwise available, the train operator would have a margin of flexibility to make use of it within the specified quantum and without risking non-compliance or requiring frequent, transitory amendments to its access agreement.
- 2.4 For example, a table might express rights in respect of an aggregate of 30 trains allocated between six different services operating over a series of routes in the same geographic area. If that table were supported by a general right to run 30 trains over those routes with a further right for those 30 trains to be operated in accordance with the table, then the train operator would have the freedom to bid to transfer a slot from one service to another within the service group without the bid being non-compliant and

with all parties being satisfied that the decision criteria would safeguard against the flexibility being exercised inappropriately.

2.5 It is unhelpful that the Model Clauses do not help train operators to assess the quality of rights which can be expected to be reflected in their Schedule 5s. Will existing levels of services be safeguarded, including on any renewal or extension of existing Track Access Agreements following extension or replacement of existing franchises?

2.6 Train operators will be concerned to ensure that Railtrack is not permitted to ease the obligations which it faces regarding performance and delivery of the network through scaling back the current level of access rights. It will be important for all sides to understand before they approach customisation what should be expected.

2.7 Maximum journey times

It is understood that the maximum journey time provisions in paragraph 6.1 will constitute the principal protection for a train operator in relation to the addition of pathing time.

We expect that the specification of the maximum journey time will require particularly detailed development in order to be of practical use. For example, weekday trains may be split into a range of different time periods, probably with quite detailed timings for each and variance on timings for alternative calling patterns and routings.

The proposals do not provide protection against variation to the Rules of the Route and the Rules of the Plan. Instead, train operators must continue to rely on the operation of Part D and the relevant appeals processes. It will be important to improve these processes and achieve a higher degree of certainty regarding their operation.

If the maximum journey times are to be based on current journey times, including the current Rules of the Route and Rules of the Plan, then this may lead to undue difficulty in applying the provisions in the course of a long-term contract. Either the journey times should be stated before the application of any Rules of the Route or Rules of the Plan allowances or the current level of allowances assumed in the preparation of the table should be expressly stated in the table. Either approach will avoid the need for repeated reference back to the base Rules of the Route and Rules of the Plan in order to

establish whether there should be further adjustment due to an increase or decrease in allowances over the years or (potentially) decades since the customisation of the table.

2.8 Fastest key journey times

Details are urgently required as to the basis for customisation of the fastest key journey times. Train operators will be particularly concerned to ensure that the customisation is not adversely affected by the present poor state of the network. This may lead to a requirement for the key journey times to be subject to improvement over a period as the network is required to be restored to pre-Hatfield standards.

2.9 Maximum key journey times

Similar concerns apply regarding customisation as for fastest key journey times.

2.10 Provisions applicable to key journeys

The deemed network change consequence applies only where trains are timetabled in accordance with the key journey journey times but then fail to achieve those journeys sufficiently frequently. It is assumed that the proposed liability provisions will address the failure to achieve even timetabled times to the required standard.

A mechanism may be required to ensure proper working with Schedule 4; where engineering works result in extended journey times and are compensated under Schedule 4, this should usually be the limit of compensation.

It might be clarified that the consequence of revised journey times where there is a deemed network change, is subject to that worsenment in the journey time being compensated in accordance with the network change arrangements.

2.11 Intervals and clock face departures

We note in the case of Great Western that rights to service intervals may be required at both stations of origin and at key intermediate stations in relation to the same service.

Railtrack's entitlement to flex service intervals should be constrained such that the times advertised to passengers may remain constant. This is the equivalent in the context of clock face departures of only allowing a flex of additional minutes.

2.12 Rules of the Route and Rules of the Plan

The need for a review of these documents and their operation is noted. In particular, clarity is required as to what elements should be covered by the Rules of the Route and what by the Rules of the Plan and the consequences of these for the compensation arrangement under the Access Agreements. It is currently anticipated that engineering related matters should be addressed under the Rules of the Route and compensated under Schedule 4. Condition of track issues (including engineering allowances) should be addressed under the Rules of the Route and compensated under Schedule 4. Timetabling matters (e.g. recovery allowances but not engineering allowances) should be addressed under the Rules of the Plan and not be subject to any compensation, unless a key journey time cannot be met as a result. Network change compensation would apply to long-running Rules of the Route or Rules of the Plan matters indicating a degradation in the quality of capacity able to be delivered by the network.

2.13 Ancillary movements

It might be clarified in the proposed new paragraph 2.6 that the references to movements for testing relate to both the testing and clearance of vehicles and track.

2.14 Additional passenger train slots

Currently, train operators have generally had the opportunity to operate relief slots whenever required, rather than just at specific days and times to be listed. We object to the requirement for relief slots to be restricted to specified days and times, particularly in the context of a long running track access contract.

2.15 Clock face departures and service intervals

Provision should be made for the relationship between different service groups to be safeguarded, so that where two different service groups operate in part over a common section of route, they can be suitably coordinated.

2.16 Train length

We would expect to specify maximum train lengths which can currently be operated and that any reduction in the capability to satisfy these train lengths would constitute a network change.

2.17 The network code

We remain sceptical of proposals for expansion of the Track Access Conditions beyond Railtrack and parties to Track Access Agreements. Given the range of different types of Track Access Agreements and the circumstances in which bespoke treatment may be required, we are not able to approve of any general proposals for further transfer of access agreement provisions into the Track Access Conditions. So that this proposal can be considered further, we would ask that the particular elements of the Track Access Agreements proposed to be transferred are identified.

We do not agree with the proposal for bilateral Schedule 5 track access provisions to be transferred to the multilateral network code. We would require to retain the bilateral nature of the Schedule 5 rights, coupled with the opportunity for customisation as appropriate. We accept, however, that there might be a register of Schedule 5s (and freight Schedule 1s) made more easily accessible to operators in order to enable checks of the rights which have been granted. We question whether the inevitable bulk of such a publication, coupled with the frequency of amendment would make it useful, practical or accessible as a part of the network code.

3 Change of rights over time

3.1 Relationship with Franchise Agreement

There is an urgent need for the proposals relating to change of rights over time to be closely related to Franchise Agreement arrangements.

Passenger train operators who commit to a rail franchise (which are increasingly expected to involve material investment commitments) do so on the basis of an understanding regarding the nature and extent of the services to be franchised to them. Under the new model amendments to Track Access Agreements will require the approval of the Strategic Rail Authority so it can be expected that both the starting position of the shape of the services franchised to a train operator, plus any subsequent

amendment to that shape consequent upon another operator enhancing its access rights, will both have involved the Strategic Rail Authority. In these circumstances, a train operator who finds its rights altered would not expect to bear any element of the risk associated with that change.

Coordination is required between the track access arrangements and the franchise arrangements in order to clarify the extent to which the consequences of the change should be addressed directly by the SRA or by Railtrack, presumably then with an adjustment to the access charges being borne by the incoming operator which, in turn, would be passed back to the SRA through its subsidy profile.

It is a concern that the consultation addresses only the Track Access Agreement perspective. It is a fundamental concern that adjustments to track access rights of this nature are likely in the context of a new franchise formula to have consequences on train operators going beyond direct costs or profits flowing from the flows concerned.

3.2 Use it or lose it

The general principles associated with use it or lose it are accepted.

The consultation refers to protection from use it or lose it in relation to firm contractual rights to enhancement projects substantially funded by a train operator, while the train operator is continuing to pay the cost of those projects. Condition J11.10(a) refers only to enhancements for which the train operator has borne a material part of the cost, without reference to the period during which compensation is being paid. It should be clarified which of these two approaches is to be followed.

Consideration should also be given to further amending the template Schedule 5 in order to ensure that firm contractual rights associated with an enhancement qualifying for protection from use it or lose it are identified, together with the timescales during which the protection will apply.

The principle of protecting train operators against the application of use it or lose it to the extent that they have been prevented from making use of their rights due to circumstances outside their reasonable control is welcomed. However, it may benefit from some further development, for example, to address situations where non-use due to

circumstances outside reasonable control continues for such a significant period that the rights might be regarded as abandoned.

The concept of failure to use for a continuous period of 90 days may also be usefully further developed. As well as the bid being made and accepted, it should presumably have to be included in the working timetable other than for reasons of its being withdrawn by the train operator.

The concept of non-use for a period of 90 days appears to assume that the relevant train slot necessarily has a repetitive nature which may lead to it being expected to be used on a frequent basis throughout the 90 days. This may have adverse consequences in relation to special or dated services. For example, if a train operator had firm rights to additional services for a racing festival for one week in each year and on short notice the race festival were cancelled, non-use in the week would constitute non-use over a 90 day period, although there would have been no prospect of use during the longer period. In such a case, the ability to operate the services would not be affected, although commercially, it would clearly be inappropriate for them to be run. The use it or lose it provision should not apply in such a situation.

There may be other examples of special or dated firm contractual rights where the application of the two year rule may be inappropriate. For example, a right in relation to relief services or certain types of ancillary movements, or to use certain types of specified equipment should not be subject to loss simply because circumstances giving rise to their need have not arisen in a two year period.

There is room for clarification regarding the application of Condition J11.1(b). If the purpose disclosed in the consultation document is to be fulfilled, then presumably where train slots are bid for but not used, they should not be counted as having been included in a bid for the purposes of Condition J11.1(a). Currently, Condition J11.1(ii) describes the right subject to surrender as Train Slots, rather than relating these to any particular firm contractual rights or the application of Condition J11.1(a). Clarification is, therefore, required to explain how the surrender of train slots relates to the Schedule 5 rights.

3.3 Adjustment of Access Rights

We would wish to clarify the intended scope of Condition J1. Our understanding is that a "quantum adjustment" may relate to any increase in access rights provided that at the same time there is also a surrender, whether or not there is any connection between the surrender and the increase. A "quality adjustment" is any alteration other than a quantum adjustment, i.e. including any increase in quantum rights in the absence of a surrender.

Consequently, Condition J becomes the mechanism for train operators to follow through when seeking access rights from Railtrack, and presumably, dependent upon the forthcoming criteria for approval of access rights may become a near mandatory step prior to submission to the Regulator. This appears very significant. The role which train operators had expected to be undertaken by the Rail Regulator in understanding the network and scrutinising the manner and distribution of scarce capacity will now be undertaken in the first instance through arbitrations under Part C of the Access Dispute Resolution Rules. Consultation is with other train operators but not with the Strategic Rail Authority and other bodies who may have an interest. The hearings and investigations to which train operators have become accustomed before the Rail Regulator will not take place at this stage. It is unclear how well this process may operator where several train operators are seeking an adjustment which would use the same capacity (as in the case of the competition between Hull Trains, WAGN and GNER for additional slots over the East Coast Mainline).

Following the arbitration process, the Regulatory Approvals process will follow, presumably including the prospects of application under Section 17 or Section 22A where additional rights have been denied.

We have serious concerns regarding the implications of this additional arbitration step, including in relation to timescales for the process, costs, the limitation on the arbitrator's ability to take account of larger industry matters, the lack of consultation with SRA and other bodies and the potential for variability between arbitrators. We seek confirmation of the role which the Rail Regulator expects to play in what is likely to become increasingly difficult issues regarding allocation of additional rights over a network capacity is in short supply.

We also note that under the new model template Franchise Agreements, variations to Access Agreements by franchised passenger train operators will require SRA approval. We seek clarity as to the manner in which the SRA and the Regulatory processes authorising or approving train operators amending their access rights will be coordinated.

3.4 Temporary Surrender of Rights

We are content with the proposal that temporary surrenders be dealt with using the voluntary surrender process.

3.5 Permanent Mandatory Removal of Rights

We accept the concept of permanent mandatory removal of rights might have a place in an environment of long-term franchises. However, this must be subject to careful regulation and control, bearing in mind that it introduces risks into train operator businesses which are wholly outside their control.

In the case of franchised passenger train operators, we regard the essence of the franchise transaction being some assurance from the SRA regarding the nature of the franchised services which the franchise operator will be entrusted to run. If another franchised passenger train operator applies for the surrender of any rights associated with the services, it will be doing so necessarily with the backing of the SRA. If, then, the SRA is participating in amending the proposition which was the foundation of the initial franchise award, then there should be an effective process to transfer any risks associated with that change from the original franchise operator onto the SRA. This may occur directly (through a mechanism to be included in the Franchise Agreement) or indirectly through a series of Track Access Agreement adjustments. We are concerned that confining financial adjustments to the Track Access Agreement element will fail to address adequately the potential damage to the franchising proposition. There is, therefore, an urgent requirement for the SRA and Rail Regulator to work closely together to improve the current proposals.

The proposed conditions are too narrow in dealing only with removal. Circumstances may be envisaged where what is required is a recasting of timetables to ensure more efficient use of the network. The proposed new Schedule 5 is likely to make this very difficult because of the lack of flexibility which flows from the precise description of

rights. So, what may be required is a surrender and restatement rather than a simple surrender.

We are uncomfortable with the differentiation between pre and post 2001 access rights, particularly where these proposals will be incorporated into the Access Conditions and combined with appropriate assurances of full compensation. The result will be unequal treatment between different train operators and the potential for old access rights to hold up improvements which should otherwise be judged in the public interest and in accordance with Section 4 duties.

We do not accept that Railtrack should have the ability to seek mandatory removal with the objective of improving performance. We expect the track access arrangements generally to contain sufficient and appropriate mechanisms to ensure train operator performance. This would, therefore, suggest that Railtrack would be seeking a surrender of rights because it is failing in its performance or because it has over-sold capacity. Neither of these should provide grounds for train operators to be subjected to mandatory processes.

4 Moderation of Competition

- 4.1 The environment in which moderation of competition protection is now being considered is very different to that in which the concept originated. We have moved from an under-utilised network with opportunities for open access to a network where the challenge is one of ensuring the most efficient use of capacity to help meet the requirements for demand while improving levels of performance. At the same time, new franchisees are being expected to take on major investment obligations as well as very significant undertakings regarding performance and overcrowding.

Against this background, any consideration of moderation of competition must take into account the extent to which the interests of passengers and the larger public interest will best be met through a combination of facilitating investment and also controlling use of the network to help safeguard efficiencies and performance.

Operators may legitimately require protection from competition on a route not only for the reasons of protecting revenue needed to subsidise PSR obligations and investment but also to safeguard the efficiencies required for the longer term delivery of their franchise commitments and the efficient use of the network. This is particularly

significant given the nature of second round franchising commitments to ongoing improvements in performance and capacity. Fulfilment of commitments may easily be prejudiced through the introduction of other operators over routes which thereby accelerate or create requirements for investment which would not otherwise have existed by threatening performance or the most efficient use of capacity.

As in the case of the surrender of access rights, it is also a feature of second round Franchise Agreements that amendments to Access Agreements via franchise passenger train operators will require SRA consent. There is, therefore, an important linkage to be worked out between the principles for application of moderation of competition protection and those situations where the SRA may act to approve or object to the amendments to Access Agreements which would lead to franchise passenger train operators competing. Once this linkage is put on a considered basis, the relationship with open access operators outside of the Franchise Agreement arrangements also needs to be addressed.

We are disappointed that the consultation has not yet addressed these more fundamental issues, which we consider will be of critical importance in the future. Consequently, we do not accept that a criteria for protection based upon the commercial viability of worthwhile investment is appropriate by itself. The larger franchise package also needs to be taken into account in the context of the capacity of the network to support both the Franchise Agreement commitments over the life of the franchise and the proposed new entrants.

The judgement regarding protection of investment should not, therefore, be limited to individual infrastructure investments but take into account the overall investments represented by franchise packages. For example, an operator may undertake a franchise with commitments regarding provision of capacity and improved performance on an assumption that the level of use of the infrastructure will enable targets to be met through increased rolling stock without the need for a step change in the infrastructure. Introduction of competitors over the routes may severely affect the revenue streams required to support the rolling stock investment. At the same time, the presence of other operators may act to accelerate the requirement to provide additional capacity at very significant additional expense in order to enable the franchise operator to deliver its commitments to improve capacity and performance. The SRA's position must necessarily be exposed either through more expensive subsidy profiles or the risks of

enforced renegotiation where the award of additional access rights is not controlled to safeguard against these risks.

4.2 Form of protection

We would be content with continuation of the existing flow based protection, subject to the relevant flows being able to be included in the arrangements.

Our assessment of what moderation of competition is designed to protect means that we do not accept that once a train operator operates a single train on a flow it should not be subject to any further constraint. There may well be cases where moderation of competition protection is properly subject to exceptions up to specified amounts but then applies to protect against the grant of further access.

4.3 Duration of protection

On the basis that moderation of competition protection works through preventing the grant of access rights, we do not consider there is scope for delaying or phasing in the application of moderation of competition protection where it is agreed that it should apply. This would appear only to create a window during which rights might be granted which would then exist into the future qualifying the protection and removing its effectiveness. This would particularly be the case where operators once permitted onto a route are entitled to increase their services further without regard to the arrangements for protection. We would expect moderation of competition protection to be ongoing throughout the period of the investment to which it relates, or while the other commitments which it serves to protect are ongoing. We expect this may involve some flexibility of approach but generally, in a more extensive duration to the rights of protection.

4.4 Access protection payment

Our comments with regards to the approach to the compensation system are set out in Section 5. We question the extent to which a track access adjustment charge alone could be sufficient to compensate for the qualification to moderation of competition rights which reflect the importance of underlying franchise commitments.

We consider this approach favours the broader application of moderation of competition protection. We are very concerned at the prospects which otherwise exist for one

operator with protection to use it as a base to attack its neighbours safe in the knowledge that it is protected from any response.

5 Methodologies for Compensation

5.1 Calculation of Compensation

As indicated elsewhere in this paper, we believe that both the cost based and value based approaches are too narrow in the context of the requirements of second round franchise proposals and, accordingly, introduce levels of uncertainty which will result in inefficiencies and poor value for money when it comes to achieving the goals of investment in rail.

The removal of rights or a requirement to accommodate increased traffic on flows may involve, in effect, a redefinition of the franchise proposition with very material effects on elements such as performance and capacity, threatening breach, default or other adverse franchise consequences. These will not be adequately captured through a narrow assessment of costs or loss of profit.

The overall requirement should be to ensure that the operator losing protection or being required to give up rights is maintained in an overall position which is no worse than that in which he would have been had the relevant protection or rights been continued. We expect this would need to be assessed on a case by case basis, taking into account franchise commitments and consequences.

We believe that the potential range of circumstances are too broad to enable a particular route or valuation to be mandated in advance. For example, introducing a further operator onto a flow may have purely revenue effects or have revenue effects and, say, trigger requirements to introduce measures to increase capacity (e.g. bringing forward rolling stock and infrastructure investment programmes) and adversely affect PPM and other performance.

In all this, a process may also be required for the SRA to redefine franchise propositions and switch commitments from one franchisee to another. The compensation route limited to the track access arrangements is likely to be inadequate.

We note the proposal for methodologies not to take account of the actual service pattern proposed, but to be based on the effect of an increase in overall service numbers. We consider this to be unrealistic, given the propensity of new entrants to position services to maximise abstractive effects.

6 Implementation

6.1 Nomination of flows for protection from competition

We would welcome the maintenance of a register which facilitated the identification of which flows are protected and on what terms. However, we would expect the arrangements for protection to continue to be worked out on a bilateral basis and subject to amendment and approval in accordance with the established arrangements for amendment to Access Agreements.

6.2 Access protection payments and compensation for removal of rights

We support the reapportionment of fixed track access charges where rights are surrendered and reallocated.

We have noted above the pressing requirement for coordinating the arrangements for adjustment to track access charges with the workings of Franchise Agreements.

FirstGroup plc

30 July 2001