

**Response of First Great Western, First Great Eastern and First North Western to
the Rail Regulator's Provisional Conclusions in relation to Model Clauses for
Track Access Agreements**

1 Introduction

- 1.1 This document sets out the response of the FirstGroup TOCs, First Great Western, First Great Eastern and First North Western, to the Regulator's provisional conclusions regarding Model Clauses for Track Access Agreements.
- 1.2 We have taken part in the ATOC consultation and preparation of responses in relation to the provisional conclusions and generally support the ATOC response. This paper sets out areas upon which we wish to make particular comment.
- 1.3 We confirm our support for the Regulator's stated aim of streamlined, simpler, clearer and stronger contracts which provide clarity and stability. The current proposals go some way towards meeting this objective but there remain significant areas where the stated objectives are not met and there remains a significant amount of work to do before an overall satisfactory outcome is achieved.
- 1.4 We are endeavouring to support the Model Clauses and other processes through constructive comment as positions develop. We recognise that given the complexity of the issues to be considered, it is not possible to provide a complete picture at this stage. However, the comments which we make now are, therefore, necessarily limited. We reserve the right to comment further once a more complete picture emerges of all the constituent parts which will make up the track access relationship. In particular, we require further financial information before we are able to confirm our final views (for example, in relation to the nature and extent of liability proposed under the Track Access Agreement).
- 1.5 We note the assumption underpinning the provisional conclusions that the proposals represent a limitation of liabilities which are presently unlimited, thereby implying that the introduction of Model Clauses should not require any further adjustment to the level of charges payable for track access. If, for any reason, it were to transpire that an increase in track charges were to be required in connection with the introduction of the proposed Model Clauses, then this would be a very material factor altering the basis of the provisional conclusions. If these circumstances were to come about, in the absence of any suitable assurance regarding the pass-through of the additional charges to the SSRA, we would expect there to be substantial further consultation with the views of train operators being taken fully into account.
- 1.6 The remaining sections of this paper comment following the order of the Provisional Conclusions.

2 Commercial Purpose

- 2.1 We fully support ATOC's conclusion that the current proposed commercial purpose clause should not become a Model Clause.
- 2.2 Without repeating the concerns set out at length in the ATOC response, our particular concerns regarding the commercial purpose clause include the imposition of an obligation on train operators to run services, the general uncertainty of the commercial purpose obligations and the difficulty in establishing with certainty the relationship between the commercial purpose obligations and the balance of the Agreement. There is a very significant and probably irreconcilable tension between introducing into an output-based contract commercial purpose objectives which also relate to inputs.
- 2.3 We accept that commercial purpose clauses may have an ongoing role to play in other circumstances, for example, in the context of infrastructure projects or setting the terms of reference for arbitrators called upon to decide certain categories of dispute.

3 Access Rights

Tabular Format

- 3.1 We look forward to the opportunity to consider and comment on the proposed Schedule 5 Model Clauses and tabular format. In the absence of the proposed drafting the comments made in this paper are necessarily limited.
- 3.2 The range of different types of operation conducted by FirstGroup TOCs has indicated to us the diversity of requirements of train operators. We note the Regulator's conclusions that it does not expect the structure of Schedule 5s to be "significantly different for different types of operator". We will be very interested to identify to what extent necessary customisation will be possible within the Regulator's proposals.

Journey Times

- 3.3 We wish to stress the requirement of train operators for journey time protection including caps on pathing time at an operator level. What is significant to TOCs is the journey times which they can offer to their customers. Route pathing time caps are no solution where they permit extension of individual journey times. The Part D decision criteria provide inadequate protection regarding pathing times, since the emphasis may equally be on establishing additional access for other operators rather than maintaining journey time standards for existing trains. The protection of journey times must also address the prospects for extension of journey times via the Rules of the Plan. This is an area where it is not acceptable for the projected journey times to be subject in all respects to the Rules of the Plan.

- 3.4 The proposal for protecting sectional running times through the provisions of Part G is welcomed and might be supported through particular changes to Part G. We look forward to seeing the Regulator's proposed drafting in due course.

Station Calling Patterns

- 3.5 Regarding varying station calling patterns, as train frequencies increase, variations to station calling patterns can become an important tool in reducing journey times and avoiding the need for pathing time. Station calling patterns may be varied as much by removing stations as adding them in. There is risk of ossification in fixing the rights to station calling to a single specific pattern. These issues need to be addressed more thoroughly in order to assure train operators of the necessary degree of flexibility for their services. A satisfactory outcome would relate journey time protection to station calling patterns and might permit a number of different calling combinations, with an opportunity for these to be revised as services develop. A realistic approach may be preferable to forcing train operators to require a defensive suite of access rights in order to protect their positions.

Firm Rights

- 3.6 The Regulator set out at paragraph 3.11 a number of firm rights which would be included in the tabular format. We note that the proposals to number train slots by reference to origin and destination may not sit easily with the diagramming, for example, of First Great Western services and we are keen to understand the level of flexibility proposed within the table in order to accommodate these established requirements. The rights to frequency and regularity are to be dictated by commercial importance: for these purposes we would expect PSR, franchise plan and ASC commitments to be given a higher priority in determining what is of commercial importance. Other rights may also be of critical importance which are not included at present in the Regulator's list, for example, these may include rights concerning the joining together of trains or the use of specific platforms (for example, where motor-rail services need to call at platforms with facilities for cars to be loaded and unloaded).
- 3.7 We welcome the fact that tiered access rights are not being pursued.

Rules of the Route and Rules of the Plan

- 3.8 We accept the conclusions regarding the ongoing roles for the Routes of the Route and the Rules of the Plan. We note that the Regulator expects to be addressing in more detail the possessions planning and management process. While we support these objectives, we are seriously concerned by the difficulties often encountered in practice in the advanced planning of engineering works. This presents a major challenge to establishing meaningful processes which take place at an earlier stage in the timescale of development of the Rules.
- 3.9 We also note the importance for establishing with clarity what aspects should be dealt with and to what detail in the Rules of the Route and the Rules of the Plan. We note in this regard the recent disputes which have taken place regarding the

categorisation of engineering allowances and the relationship of these allowances with the Schedule 4 compensation regime. It needs to be established that such allowances related to engineering works should be included in the Rules of the Route and compensated under Schedule 4. The possible alternative is to regard them as part of the derogation of sectional running times for the purposes of Part G or of the journey time which is now to be assured under Schedule 5.

Voluntary Trading

- 3.10 We consider there is scope for development of the current voluntary trading system set out in Part 9 of Schedule 7. Our understanding is that the current system has hardly, if ever, been used. There have been differences of opinion regarding its scope, particularly regarding the nature of an "adjustment" and potentially of "surrenders" of parts of rights. Clarity of the valuation to be placed on rights adjusted or surrendered would also be helpful. The formula proposed at paragraph 3.19 appears to be at odds with the overall approach to construction of the track access charges and also not easily adaptable to situations where an element only of rights is surrendered (for example, where a pathing time cap is relaxed).

4 Permanent Redemption of Rights

Use it or Lose it

- 4.1 We are generally supportive of the use it or lose it principles, subject in particular to adequate protection for rights purchased in genuine anticipation of future investment (e.g. new rolling stock) and potential developments which may require TOCs to purchase capacity to be left unused to safeguard performance.

Redemption of Rights

- 4.2 We continue to oppose the proposals to permit the compulsory redemption of access rights. These proposals must be put in the context of the likely revised Schedule 5s, which imply that access rights will, in any event, be stripped of any extraneous or superfluous details. The Schedule 5 access rights will necessarily form the basis of the relevant train operator's business plans to enable it to fulfil its franchise, both in terms of the detail of the franchise commitments and the larger business which forms part of franchise operation. Any proposals to permit the compulsory acquisition of any of these underpinning rights must, therefore, be viewed very seriously and provides a threat to the certainty and stability required for franchise businesses.
- 4.3 In these circumstances, we find it difficult to conceive of practical circumstances where a compulsory redemption would be justified in practice. If it were to be required, then we would consider it more appropriate to be driven through a right for the SSRA under the Franchise Agreement to require the train operator to make the necessary surrender using the Schedule 7, Part 9 process. This route would better enable all the franchise implications to be taken into account.

- 4.4 Assuming that a compulsory redemption right will be insisted upon by the Regulator, we consider that the tests for application of the redemption rights set out in paragraph 3.21 are currently set far too low. The proposed tests are that there are other willing users and the rights are not required to meet a PSR commitment. This would be likely to put at risk substantial areas of Schedule 5 rights and introduce very significant risks and uncertainties over the operations of many train operators. This would be the case, in particular, for train operators where the PSRs are not extensive because the size of the fare box has been judged sufficiently significant to provide incentives for the services to be operated. So the proposals open a way to compulsory acquisition on precisely the type of revenue generating flows which will be essential to underpinning the investment which the franchisees will be required to commit to in the next round of franchising.
- 4.5 The proposed minimum test appears to take no account of the new additional service commitments proposed under the new model Franchise Agreements or to Franchise Plan commitments. This is a significant omission which must be corrected.
- 4.6 The proposals for payment of compensation in respect of expected profits for flows compulsorily acquired is likely to be inadequate. We note in particular, that services may play an important role in the structure of operations beyond generation of profit. They may be the fruit of significant investment. They may play a role in the overall coherence of service offering, diagramming and marketing. Calculations of expected profit are also notoriously difficult as franchisees are entering into long term franchise commitments on the basis of their forecasts and expectations in relation to the exploitation of the relevant access rights. It strikes at the heart of the franchise bargain that this may be replaced by a calculation of expected profit.

Moderation of Competition

- 4.7 Paragraph 3.22 refers to the effects of Schedule 10 moderation of competition provisions. We note the lack of comment elsewhere in the Model Clauses document regarding moderation of competition and its future. We look forward to clarification from the Regulator on what is proposed in relation to Schedule 10.
- 4.8 We also note that ongoing moderation of competition protection is likely to be essential to make possible many of the significant investments now being considered in the light of refranchising. We would not expect any such moderation of competition protection to be over-ruled by compulsory redemption, otherwise the value of the moderation of competition protection is seriously prejudiced. We invite the Regulator to confirm the position on this aspect.
- 4.9 We note that proposals for compulsory redemption to be dealt with by a new Part J to the Track Access Conditions. We have not yet seen any proposed drafting, so we are not able to offer detailed comments. However, at this stage

we would expect to object to the inclusion of such compulsory redemption rights in the multilateral Track Access Conditions document. We regard the track access rights which Railtrack is committed to provide to us as an essential part of one of our most important bilateral contractual relationships.

- 4.10 We note that the compulsory redemption rights are not proposed to extend to existing rights. Does this proposal include existing rights once reformulated into new Schedule 5s? If not, this will add a very material barrier to the acceptance of new Schedule 5s and an unacceptable point of difference between some TOCs (those with existing longer term access agreements would have an unacceptable advantage over those being required to renew access agreements). If reformulated rights are to be protected from pre-emption, there is likely to be a real difficulty in identifying what rights are new and what are reformulated existing rights. The resultant patchwork of some rights which are subject to redemption and others that are not as likely to have a serious impact on the utility of the redemption provisions. This would increase the potential for competitive imbalance between operators over the same routes and the prospects for the provisions being used to target new services after the incumbent operator has invested in their establishment.

Capacity Warranty

- 4.11 We support the developments proposed. However, we note that the warranty as drafted is about inability to fulfil access rights because of the grant of conflicting access rights. Fulfilment of the access rights may be prevented by other causes, notably lack of capacity within the network. Operators should not need to be concerned as to the reasons why the access rights cannot be fulfilled (subject to the application of Part H, Rules of the Route and the Rule of the Plan).
- 4.12 We support the ATOC conclusions regarding the consolidation of access agreements.

5 Output Statements

Scope and Content

- 5.1 Establishing the content of the local output statements will represent a major task for Railtrack and TOCs, with the parties having differing aims and objectives.
- 5.2 TOC support for the output statements is based on an assumption regarding the adequacy of their eventual content. This assumption is still to be proven. There is an urgent need for detailed guidance going substantially beyond general principles in order to confirm the likely worth of the output statements and to make the task of preparation manageable.
- 5.3 We would expect the Regulator to be taking this opportunity to establish the model format of output statement to be customised by the parties and then fitted into the Access Conditions, Track Access Agreement, Licence Conditions matrix.

Clause 6.3.3

- 5.4 Medium to long term forecasting of engineering work activity is valuable to assist TOCs in their planning. We do not see this as replaced by local output statements, although it may be covered by other developments regarding the provision of information which are yet to be seen. At this stage, we do not support the abolition of clause 6.3.3.

Third Parties

- 5.5 We support the Regulator's version of the proposed approach to third parties as set out in paragraph 4.15 (i.e. their involvement is via their contracts with TOCs and not directly in the output statement process).

6 Network Change

- 6.1 We note the absence of any new drafting for Part G at this stage and look forward to the opportunity to review and comment on this in due course.

Network Enhancement Projects

- 6.2 We agree that there may be value in some standard clauses for use in connection with enhancement projects and look forward to involvement in their development in due course.
- 6.3 While acknowledging the need to focus on outputs, inputs should not be overlooked. If a particular solution is offered to deliver an output and selected and funded accordingly, it is reasonable for the funder to expect that solution to be delivered (and not, for example, a poorer quality, money-saving short-cut).
- 6.4 We note our objections to the redeemable rights proposals generally and to the particular proposal for them to override outputs purchased as part of an enhancement project.
- 6.5 In the proposed hierarchy for enforcement of outputs, we note that the first stage for enforcement of project arrangements is through Part G. We have noted the significant delays in following through the Part G process in the case of some projects. An earlier opportunity for enforcement is, therefore, required in respect of the period prior to completion of the Part G process.

Part G

- 6.6 The proposals include an outline of changes to be made to Part G.
- 6.7 We reiterate the comments which we have earlier made about the gross inadequacy of limiting TOC rights to compensation to Schedule 4 rates. Contrary to Treasury Task Force Guidelines, this limitation operates to transfer to TOCs a significant range of costs and risks in relation to major projects over which they have little or no control. These concerns are only increased by the

extent of the discounting proposed to be permitted for possessions included in the timetable.

- 6.8 By way of a brief example, the current South Manchester resignalling project involves the imposition of no weekend services over a significant section of route over two years' summer timetables and other major blockages, including one of nine days' duration. The impact on FNW is very substantial, both in terms of loss of revenue and the costs of bus substitution and additional planning. If similar situations apply in the future, the incentive will be for Railtrack to be cautious in making provisions in its possession requirements, because of their cheap cost in Schedule 4 terms. The impact on TOCs will be no less but the heavily discounted Schedule 4 compensation will leave them very significantly exposed. In the future there is, therefore, a real risk that a major project will threaten the financial viability of affected TOCs.
- 6.9 See Section 7 for our comments on the extension of rights to third party funders. In summary, we seek further information on the proposals and in particular, we wish to understand how the 'obligations' side of Part G will be applied to the relevant third parties. We have significant concerns that this will not be able to be satisfactorily achieved.
- 6.10 We would like to see clarified the relationship between the Part G process and the ability of Railtrack to deliver the TOCs' Schedule 5 rights. At the very least, we would expect it to be expressly established that, save to the extent otherwise clearly notified in writing, TOCs can expect Railtrack to continue to deliver all of their Schedule 5 access rights with no worsenment of performance. This might help to address concerns arising on some recent projects that they may have been under-specified, leading to potential future problems in fulfilling access rights and maintaining performance standards. These failings are typically very difficult for TOCs to establish from the usual presentation of an engineering specification for a network change.

Timetable

- 6.11 We welcome proposals to bring together the various strands of work which together make up the Track Access Agreement relationship. The opportunity to consider the whole picture before completion of the review is vital.
- 6.12 However, we support the concerns voiced by ATOC at the timescales to which the most recent stages of development have taken place. There are many very serious matters which remain to be addressed, much of which will require significant investment of time in the detail. We are concerned that the timescales proposed for finalisation will not be sufficient for the changes proposed to be established on a sound footing. Further serious consideration is required as to how the proposals for change may be brought to a satisfactory conclusion.

7 Liabilities/Other Issues

Operational Performance

- 7.1 We remain of the view that the Track Access Agreement should enable increased rates of recovery where there is a material collapse in operational performance. This is precisely the circumstance most likely to give significant concern to TOCs. It is consistent with the Franchise Agreement regime, where enforcement measures apply in addition to the performance regime where there are significant failures.
- 7.2 The form of the enhanced liability could involve increased Schedule 8 rates or an entitlement to recover proven losses in excess of what is recovered under Schedule 8. This would not be inconsistent with the legal requirement for liquidated damages to represent a genuine pre-estimate of loss, as suggested at paragraph 6.4. TOCs do genuinely expect their losses to be more serious where there is a material collapse in performance.
- 7.3 In the absence of such an approach being adopted, the continued restriction of liability for operational performance to Schedule 8 will mean that the extent of Railtrack's liability to TOCs for the core of the Track Access Agreement remains substantially unchanged.
- 7.4 The proposal that local output statements include operational performance levels is a useful development. We look forward to further detail being included in the Regulator's guidance on the content of the statements. However, while the financial remedies remain limited to the operation of Schedule 8, their value will be largely in terms of pr.
- 7.5 Against this background, we expect the Regulator to have an ongoing role in policing and securing performance, including using licence conditions.

Train Delays and Cancellations

- 7.6 The exclusion of liability for delays and cancellations requires urgent clarification. In the light of the proposals for liability for revenue loss, this can be expected to come under intense scrutiny in future years.
- 7.7 The scope of the exclusion has been reduced when compared with the existing template. It now relates only to cancelled or late trains. The exclusion no longer applies to diversions away from intermediate stations, missed station stops or possibly partial cancellations or starting short.
- 7.8 Is the intention that any operational performance which is not within the precise delay/cancellation category should now be recoverable separately from Schedule 8 as revenue loss? This question must be answered both in the context of Railtrack to TOC liability and TOC to Railtrack liability in relation to disruption affecting third party trains and then reflected in the drafting. We suspect the intention is for all operational performance to be covered by Schedules 4 and 8 alone, but this is not clear.

- 7.9 The relationship between liabilities for delays and cancellation and revenue loss might also be further clarified. To what extent may this exclusion be applied to prevent almost any revenue loss claims by TOCs, because the loss of revenue in many situations is likely to be related to inability to run trains? We presume that the exemption genuinely should not apply where the breach results in trains not being able to be timetabled, so that they are not caught by the Schedule 8 regime, except where the trains are not able to be timetabled for reasons covered by the Schedule 4 regime. This would expose Railtrack to liability for breach of the capacity warranty or failure to deliver incremental outputs related to capacity. It would also expose TOCs to liability if, say, a TOC damaged a tunnel leading to a long term closure affecting the services included in a future timetable.
- 7.10 We also assume that the exemption would not apply to quality issues. This means that a revenue loss claim associated with track quality should now be possible where services run but are uncomfortable or give rise to increased maintenance requirements. If, as indicated, the Regulator should introduce a track quality performance regime, then there would need to be a further amendment to limit Railtrack's liability to the new performance regime. In the meantime, we envisage a series of actions by Railtrack and train operators testing the nature and extent of the liability provisions.

"Loss of revenue or other indirect loss"

- 7.11 We note the interpretation being applied by the Regulator and at this stage, do not express any opinion as to its correctness. We note our opening comments as to the basis upon which this paper has been prepared.
- 7.12 We support the requirement to establish liabilities underpinning obligations, so that those obligations are real and have a value. If the obligations are contained in a contract, then the related liabilities should include meaningful contractual liabilities.
- 7.13 As noted by the Regulator, these contractual liabilities may operate in both directions. Both sides need to understand the prospects for increasing claims, for example, in the areas of track/wheel wear/wheel flats. At first sight there may be increased opportunities for Railtrack to claim revenue loss when compared with TOCs, because of the nature of the exclusion of liability for delays and cancellations. Railtrack may more easily argue for revenue losses associated with doing extra work which is not related to delays or cancellations. More work is required to ensure consistency over the boundary between operational loss recoverable only under Schedule 8 and other revenue loss.

Economic Loss

- 7.14 We have some concerns at the speed with which the principle of accepting liability for revenue loss has been embraced. A range of factors relevant to reaching a final conclusion are not addressed in the provisional conclusions. We are particularly mindful of the difficulty of quantification of revenue loss, its

tendency to lead to inflated claims, the relative ability of parties to insure and the potential imbalance regarding application of the exclusion of liability for delay and cancellations. There may also be further challenges in setting caps on liability which operate fairly but do not distinguish between the different categories of loss.

- 7.15 This suggests to us that the rights to recover economic losses might more appropriately be focussed to defined situations, such as breach of the access rights warranty, track quality and breach of confidentiality.

Limiting Liability

- 7.16 In order to comment reliably on these impacts, it will be necessary to have an indication of the levels of limits on liability which might apply and confirmation of the scope of the exclusion of liability for operational matters.
- 7.17 We have significant concerns regarding the complexity inherent in the proposals for a range of caps in each contract. Clear and detailed guidance will be required if these are to be satisfactorily negotiated, given the opposing interests of the parties.
- 7.18 In particular, the level of cap must have an implication for the level of charge. It would be helpful for the Regulator to clarify what levels of assumption of liability underpin his proposed conclusions on charging, together with an indication of the rates of variation (up and down) of charges which might be expected as caps are reduced or increased.

Performance Orders

- 7.19 We support the introduction of performance orders and welcome the additional remedy which it will provide.
- 7.20 The relationship between the performance order and availability of financial remedies needs to be clarified. We presume what is intended is merely that a party should not opt for a financial remedy to the extent that the relevant events could reasonably have been expected to be corrected via a performance order. In most situations parties can therefore be expected to pursue performance orders and financial remedies in parallel, with the financial remedies covering whatever ground is omitted by the performance order.

Suspension

- 7.21 We consider the suspension arrangements are not so much "adequate" as unlikely to provide a sensible remedy in practice. We object to the reduction in Railtrack events of default, which serves to limit the circumstances in which suspension might be claimed.

Standard of Performance

- 7.22 We generally accept the comments about the standard of performance proposals. However, we share the concern raised by Railtrack that the clause as drafted leaves a significant uncertainty when judging the standard of performance as to the relevance of the circumstances in which the party concerned has to operate. To what extent will it be relevant that a party may be making the "best" use of unsatisfactory assets inherited on privatisation or that limited resources have had to be applied elsewhere to what were considered as more pressing needs? Similar clauses included in franchise agreements have sought to take into account these sorts of concerns for train operators. There are material issues to be addressed as to how they might be applied in the context of the track access agreement for example to obligations on the heavy maintenance of ageing rolling stock leased from ROSCOs or the renewal strategies applied to track and signalling equipment. We look forward to further clarification from the Regulator on these aspects.

Summary

- 7.23 It will be apparent from our comments that even if the proposed direction is followed through, this is an area where significant further work is required before acceptable model clauses are achieved. Particular areas requiring development are:

- the precise scope of the exclusions of liability for operational performance
- the relationship with Schedules 4 and 8, and potentially also Part H
- the detailed operation of the outline proposals for caps on liability.

8 Implementation of the Regulator's conclusions and development of a network code

Implementation of Model Clauses

- 8.1 We agree with the general principle that Model Clauses should be mandatory, so as to provide a level playing field across all train operators and simplify dealings with Railtrack. However, this is subject to the Model Clauses being developed to a point where they are robust and fit for purpose.

Changes to Track Access Conditions

- 8.2 Our initial view is that any proposed changes should be processed via the Class Representative Committee process in Access Condition C rather than the Regulator's change of power in Condition C8. This reflects the significance of the proposals and our view that the Regulator's unilateral change of power should be reserved for exceptional matters only.

"Big Bang" or Piecemeal Introduction

- 8.3 Once the Model Clauses are developed to a satisfactory standard and assuming that they are cost neutral, then we would favour a situation where all train operators operated to the common standards. This would imply a "big bang" approach. It will, therefore, be vital for the Regulator to secure commitments from Railtrack regarding the offering of revised terms to all train operators.
- 8.4 We note the comments made regarding the prospects for variable charges depending upon whether contracts incorporate Model Clauses or not. As indicated above, the proposals for variable caps suggest there may be further room for flexibility within charges. We note that this opportunity for flexibility may offer attractions for both parties, depending upon circumstances and the precise nature of the variations concerned.

Towards the Network Code

- 8.5 The provisional conclusions contain proposals for radical change to the Track Access Conditions. There is very little detail on the significant proposals giving third parties enforceable rights and permitting direct enforcement between holders of access rights. We are very concerned at such significant changes being proposed at this late stage in the process when little detail is available.
- 8.6 Significantly more time is likely to be required for development and consideration of the proposals. However, our initial view is against the development of the Track Access Conditions to provide direct enforcement by holders of access rights against each other and to give third parties enforceable rights. This represents a material change to the existing basis of the access agreement relationships. It introduces the prospect of significant additional complexity without there being clear, corresponding benefits. We believe this is contrary to the objectives of streamlining and simplicity.
- 8.7 While we are not unduly concerned at the title given to particular documents, we would be content to retain the "Track Access Conditions" title as accurately reflecting the document's status.
- 8.8 As parties come to contemplate the refranchising process, certainty regarding terms of the fundamental Track Access Agreement relationship is extremely important. This informs our reluctance to see elements of increasing contractual significance moved into a code which is subject to change processes over which we have only limited control.

"Star Model" or Multilateral Code

- 8.9 We support the Regulator's conclusion in favour of continuation of the Star Model.
- 8.10 We have concerns about allowing direct enforcement by access beneficiaries of Track Access Condition provisions against other access beneficiaries, without their being required to operate via Railtrack. While we would be prepared to

consider specific proposals, we have general concerns that this would introduce significant complexity and multiplicity of claims. Where the concerns are in relation to information or procedural obligations, then an outcome may be better achieved through effective process management and the structuring of processes which incentivise compliance (e.g. the process may not proceed if relevant information is not provided or challenges made in time are not resolved).

Rights for Third Parties

- 8.11 We refer to the conclusions at paragraph 4.15 that rights of third parties are best dealt with through their contracts with train operators who are access beneficiaries.
- 8.12 We have concerns at applying the Contracts (Rights of Third Parties) Act 1999 in the context of the Track Access Conditions. In particular, there may be significant difficulties in identifying those bodies who are to have rights in any particular situation; the Act deals with the grant of rights rather than the imposition of obligations and in the case of the Track Access Conditions, many of the rights are closely related to obligations; and there may be further challenges associated with identifying where rights have crystallised and how they may then be handled, including the application of the Access Conditions change processes. We also note that existing parties to the Track Access Conditions are governed by the CAHA arrangements, which may have an impact on the extent of their liability owed to one another. These limitations would not apply to the third party bodies, putting them on a different footing to the Track Access beneficiaries.
- 8.13 Aside from these technicalities, we are concerned at the complexity, uncertainty and additional administrative burden which might be imposed through this type of blanket extension of rights. This position is far better managed through individual contract relationships, which offer greater efficiency and certainty.

9 Draft Track Access Agreement

Introduction

- 9.1 In this section, we set out outline comments on the draft Track Access Agreement. We would welcome the opportunity to participate in further development of this Agreement in order to reach a satisfactory conclusion.

Comments on particular provisions

- 9.2 **Clause 1.1, Confidential Information:** We have some concerns that the revision of the definition to introduce a value judgment as to whether or not information is worthy of protection as confidential information. Subject to the stated exceptions, we would generally expect both parties to be able to rely on the other keeping confidential information which was disclosed to it, without the need for a separate assessment of likely compromise or prejudice to commercial interest.

- 9.3 **Clause 4, Commercial Purpose and Standard of Performance:** For the reasons set out above, we do not consider that clause 4 is suitable for inclusion as a Model Clause. For this reason we do not propose to set out the significant concerns which we have on the particular drafting of the clause.
- 9.4 **Clause 5.5, Access Right Warranty:** The warranty is limited to the train operator being prevented from exercising access rights as a result of access rights granted to another person. We are concerned that the access rights warranty must go further in order to give adequate protection to train operators. It should cover situations where access rights may not be exercised due to inadequacies in the network. This might cover, for example, circumstances where Railtrack is not able to fulfil all the rights granted to a train operator over a section of route where that train operator is the sole train operator.
- 9.5 **Clause 6.1, Operation and Maintenance of Trains, General:** This provision sets out a range of obligations on train operators in relation to the rolling stock which they operate. These obligations will become of very much greater importance once recovery of revenue loss is permitted. Against this background, it is critical to establish with absolute clarity the standards which are required to be applied and the nature of the liabilities which might flow from any shortfall in the standards.
- 9.6 We support ATOC's comments that the commitment for rolling stock to be "in reliable and lawful commercial service" was a requirement specific to the West Coast Mainline arrangements and should not be applied generally. Schedule 8 supplies adequate incentive already regarding the reliability of rolling stock.
- 9.7 The obligation to maintain and operate rolling stock to a standard which will permit provision of the services in accordance with the working timetable reflects an existing commitment. Again, we would expect financial liability in relation to a breach of this provision to be restricted to Schedule 8. There may also be opportunities for suspension or performance orders to apply. Please can this be confirmed.
- 9.8 The obligation to keep specified equipment in a condition which keeps network costs as low as reasonably practicable incorporates very significant uncertainty. What are the relevant standards? Presumably, the obligation regarding "keeping" rolling stock in a particular condition does not commit train operators to put rolling stock into a better position than it might already be, recognising the limitation of the positions in which many TOCs will find themselves in the context of their relationships with the ROSCOs. The complexity of the Charging Review process serves to indicate the difficulty of identifying what costs of upkeep are as low as reasonably practicable.
- 9.9 We consider that very significant work is required to advance these provisions to a stage which meets the regulatory objectives of clarity and stability.
- 9.10 **Clause 8.2, Liability for Late Trains:** As indicated above, further work is required to clarify the operation of this provision. In particular, the nature of the relationship and the ability to recover revenue loss needs to be worked out in

greater detail. It must be clarified the extent to which liability for other interruptions to trains apart from delays and cancellations may be recovered as revenue loss. The relevance of Schedule 4 and compensation under Part G also needs to be established.

- 9.11 **Clause 9, Indemnities:** These are now expanded to include revenue loss. This is commented above in greater. In particular, the precise boundary of the relationship with clause 8.2 needs to be worked out.
- 9.12 **Clause 9.3, Restrictions on Claims:** The general principle of a requirement to notify claims within 90 days is supported. However, there has been dispute over the operation of this provision in practice and this should be clarified. For example, there has been argument as to how much information needs to be included in the notice (i.e. will the notice be invalid if a fact which was known but thought to be insignificant but subsequently proves to become relevant is not included; if there is an inquiry can the notice be delayed until the finding of facts at the inquiry). We submit that the requirement should be to notify within 90 days of becoming aware of any incident which is considered likely to give rise to a claim, with the incident being described in sufficient detail for it to be identified by the other party (e.g. landslip at location X on [date]).
- 9.13 **Clause 9.3.2, Obligation First to Seek Performance Order:** We expect the likely requirement in practice will be for performance orders and claims for revenue loss to be able to proceed in parallel, with the eventual claim for revenue loss being reduced to the extent that it is mitigated by performance.
- 9.14 **Clause 11.1, Relevant Failures:** Presumably, a performance order procedure should also be available in relation to a past failure to comply, for example, where a relevant procedure was not followed by the relevant date.
- 9.15 **Clause 11.3, Fast Track Arbitration:** The time required for running through the standard performance order process is significant. (It might be clarified whether the notice referred to in clause 11.2.2 is intended to be the notice calling the initial meeting or a subsequent notice issued at some point following the call of the initial meeting.) This means that particular emphasis is likely to be placed upon the fast track arbitration procedure. This is presently addressed in very little detail. The provisions must be developed to provide particular emphasis on how the fast track process will be operated.
- 9.16 **Clause 11.5, Appointment of Arbitrator:** We regard the requirement for the initial agreement of a panel of arbitrators is likely to prove cumbersome and imprecise, particularly over the potential 20 year life span of the agreement. We would regard it as appropriate for there to be a limited opportunity for the parties to select an arbitrator by agreement and failing this, for the arbitrator to be appointed from a list maintained by the Regulator.
- 9.17 **Clause 12.5, Part J, Network Code:** We note that drafting of Part J of the Network Code is still to be provided.

- 9.18 **Clause 15.4, Notices:** The treatment of electronic transmission as referred to in clause 14.1.3, needs to be clarified.
- 9.19 **Schedule 3, Collateral Agreements:** The status of Station Access Agreements for ISOs as collateral agreements is questioned.
- 9.20 **Schedule 6, paragraph 1.1.1(e), Train Operator Events of Default:** We note that the event of default which previously related to "serious financial loss" now relates to "material financial loss". This implies a lowering of the threshold which previously applied. Is this intended and if so, what is the nature of the reduction which the Regulator proposes to effect?
- 9.21 **Schedule 6, paragraph 1.1.3, Railtrack Events of Default:** The Railtrack events of default relating to non-payment and breach leading to serious financial loss should be reinstated. Arguably, there should be a further event of default relating to material breach leading to material disruption of train operation. This would ensure that there was appropriate reciprocity between the termination arrangements for both parties. The provisions may have relevance in relation to the operation of the suspension provisions (which the Regulator had indicated earlier in the provisional conclusions were expected to continue unchanged from the previous model) and the potential to terminate and replace the agreement under Section 17 in the event of a very material failure on the part of Railtrack.
- 9.22 **Schedule 9, paragraph 2.2 and paragraph 3.2, Caps on Overall Liability:** The time periods for the overall cap on liability needs to be established, particularly in the context of agreements likely to have a duration of 20 years.
- 9.23 **Schedule 9, paragraph 5, Restriction on Small Claims:** The wording needs to clarify once the relevant sum has been exceeded whether the full amount of the claim can be recovered or only the excess.
- 9.24 **Schedule 9, Table:** We have noted above our concerns over the likely difficulties of successfully negotiating the table and the requirements for clear and detailed guidance from the Regulator, including in relation to the implication for charges. Further work will also be required on the aggregation of incidents or not for the purposes of the table (for example, where defective track damages several trains or a train with one or more wheel flats runs over different section of track).

10 Network Code: Part I

- 10.1 This part sets out our comments on the draft Network Code: Part I.
- 10.2 "Definition of Local Output": We do not accept the extension of Part I to include the performance or operation of rolling stock by train operators. This provision is about Railtrack outputs under a contract pursuant to which they supply track access to train operators.
- 10.3 Paragraph 2: Contents of Local Output Statements: Local output statements should include the whole network and not just improvements and outputs to be

implemented. Again, we consider there is a material requirement for the Regulator to provide detailed guidance on the format and content of local output statements in order to assist the processes of customisation and negotiation. We expect there to be significant debate and dispute over the nature and content of output statements and what outputs are required to be delivered without a requirement for additional funding. This underlines the requirement for firm guidelines and a robust appeals process capable of addressing these difficult issues.

- 10.4 Paragraph 6, Implementation of Local Output: The provisions in relation to train operator's specified equipment and its operation should be deleted.

FirstGroup plc

31 August 2000