

Great North Eastern Railway

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Your Ref
Our Ref

For the attention of Paul Carey Esq.

Dear Sirs

Model Clauses for Track Access Agreements

We set out below the formal response of Great North Eastern Railway Limited ('GNER') to the ORR's second consultation document dated 19th April 2000 on Model Clauses for Track Access Agreements.



References in this letter are to the paragraph numbers adopted in the ORR's second consultation document. This letter supplements the previous submissions made by GNER on 2nd February 2000 and 22nd February 2000 and should be read in conjunction with those submissions.

1.16

The franchise replacement process is at this time the primary concern of GNER. The revised draft timetable, which envisages finalisation and publication of model clauses by September 2000, appears to facilitate this process. However, difficulty would be caused if this timetable were to be subject to significant delay, as GNER would be obliged to negotiate a number of crucial commercial agreements without the benefit of knowing the final form of the model clauses.

With regard to the use of model clauses, sufficient scope should be allowed for the particular commercial requirements of the parties to be reflected in the agreement concerned, for example in the definition of the outputs required.

A 'big bang' approach to the inclusion of the model clauses is to be preferred in the interests of equality between industry parties. However, GNER recognises that in practical terms this may prove to be impossible, given the incremental timescale of the franchise replacement process.

2.5

GNER agrees that a commercial purpose clause should be established in the terms envisaged by the Regulator. However, in access agreements involving significant upgrades, GNER agrees with other industry parties (such as Virgin) that such a clause should have real teeth, as it will represent the key statement of the core commercial output for which the parties are contracting. In this respect, the commercial purpose clause should not just seek to address ambiguities and omissions in the contract, but should require the taking of steps to fulfil the outputs set out in the contract.

As with other agreements, it is essential that TOCs should be able to reflect, on a back to back basis, the contractual obligations imposed on TOCs by the SSRA, particularly where these involve risks which are controllable by Railtrack.

3.29

GNER agrees with the proposal to establish a template specification of access rights.

The rights identified by the Regulator in paragraph 3.10 offer a useful and constructive basis for further consultation. However, where business critical issues are involved, a TOC should be able to address these on an individual basis in a commercial agreement with Railtrack.

The development of tiered access would offer potential solutions to several problems, though not a complete solution to the high quality firm access rights required by TOCs such as GNER in respect of its business critical requirements. Most of these are likely to be 'A' rights. In addition, whatever system is adopted must offer clarity and certainty and must not be over complex.

With regard to the Rules of the Route and the Rules of the Plan, it is important that business critical outputs are protected from degradation or flexing.

GNER is against the compulsory redemption of access rights, save in exceptional and carefully defined circumstances, constructed in order to ensure that core business rights are protected. GNER is generally in favour of 'use it or lose it' provisions, subject to the provision of adequate protection for the TOC concerned via an appeals procedure. However, in circumstances where a TOC has paid for extra capacity critical to its business, it should have the exclusive right to use that capacity when it is required in the future. It may be appropriate to allow other TOC's the right to use that extra capacity for a specified period subject to the consent of the TOC providing the additional capacity.

GNER is wholly in favour of the Regulator's provisional conclusion that a capacity warranty should be provided by Railtrack, and also agrees that Railtrack should be required to improve the assessment and transparency of new access rights.

GNER agrees that these principles should also apply to freight.

4.19

GNER agrees that local operator based output statements should be provided by Railtrack. This issue is particularly important in a context where franchise operators

are required to deliver a constantly increasing quantity and quality of specific outputs in commercial agreements with third parties such as the SSRA.

Output statements should in particular reflect Railtrack's obligations under Condition 7 of its Network Licence, and any provisions in relation to existing and prospective franchise agreements.

GNER has not identified any issue of principle why such local output statements should not apply to local funders and freight operators.

5.26

GNER believes that where an operator has paid for infrastructure enhancement it should have rights to capacity where a public interest benefit can be identified, for example in the context of a significant upgrade, where the TOC concerned can demonstrate an intention to use enhanced capacity in the medium term. As mentioned above, a compromise may be to permit other TOC's to use that capacity for a specified period subject to the funding TOC's consent.

GNER's experience of Part G of the Track Access Conditions is that it has operated well in all respects.

The proposals set out in relation to network enhancement should also apply to freight.

6.12

GNER believes that there is merit in the provision of additional remedies if operational performance falls below a certain level. Depending upon the circumstances of the breach in question, those remedies might consist of a higher level of damages, or a contractual performance order. However, the precise wording of the Regulator's model clauses (when published) will need to be carefully scrutinised by industry parties, and GNER looks forward to commenting in detail on the draft clauses. It is important that TOC's are adequately compensated for damage caused as a result of disruption (in particular major disruption) to their services whether through a properly calibrated Schedule 8 or otherwise.

GNER believes that specific performance would provide a powerful and effective tool for TOCs in ensuring compliant contractual performance from Railtrack, in defined and identifiable circumstances.

A distinction appears to be drawn by the Regulator between operational and non-operational related performance by Railtrack. Whilst Railtrack's performance in respect of operational matters may be subject to public interest issues which should properly restrict the scope for recovery of contractual damages by individual TOCs, clear non-compliance by Railtrack with its non-operational contractual obligations as a commercial counterparty should be subject to general common law and statutory liabilities. These should reflect the negotiated commercial arrangements between Railtrack and the TOC concerned.

Given Railtrack's status as a monopoly infrastructure provider, GNER agrees with the Regulator's preliminary view that the absence of a force majeure clause from the model clauses will provide an effective incentive for Railtrack and others to facilitate recovery from disruption in the most effective possible fashion.

GNER considers the current suspension arrangements in the event of an operator breaching its safety obligations to be adequate.

The effect of the model clauses overall should be carefully considered in the light of comments from funders and other parties. However, a reasonable, judicious and robust contractual framework, based on a sensible and appropriate allocation of risk between Railtrack and other industry parties, should not be expected, in itself, to unduly concern funders.

7.11

In carefully defined circumstances it may be appropriate for third parties to have specific rights in relation to track access agreements, particularly where this facilitates additional investment in the network.

GNER is in general agreement with the form of the model clause set out at paragraph 7.5, subject to any comments that it may have on the form of the final draft.

GNER agrees that a model clause should be established relating to the reciprocal provision of information subject to appropriate confidentiality safeguards.

On the basis that such a provision would facilitate the growth of investment in the network, an operator's rights under its track access agreement should be assignable to a financing institution, subject to the continuation of appropriate regulatory safeguards.

Yours faithfully,

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