

CONNEX RAIL LIMITED

**SUMMARY OF RESPONSE TO THE
RAIL REGULATOR'S
CONSULTATION**

**RE: MODEL CLAUSES FOR TRACK
ACCESS AGREEMENTS**

Submitted on 3 February 2000

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This is an abridged version of Connex's response to the Rail Regulator's consultation regarding model clauses of Track Access Agreements submitted by Connex on 3 February 2000.

INTRODUCTION

Connex Rail Limited welcomes the Regulator's consultation for the improvement of the quality of track access agreements. We see this as the most important opportunity since privatisation to employ the benefit of the rail industry's experiences to improve the efficiency and performance of passenger railway services. As is evident from the many consultations you have undertaken, this process will necessitate the alteration of the existing relationship of the industry participants. The role of Railtrack as infrastructure owner and operator is key to these relationships and our ability to deliver improved performance to passengers is very much dependant on the terms on which we are granted access to Railtrack's facilities. Change to the existing provisions of the track access agreements will be the most significant way of redefining Railtrack's role and the impact on us will be commensurate.

With this in mind we have given detailed consideration to the proposals and questions contained in your consultation document for model clauses for track access agreements. In undertaking this process we have had regard to a draft paper prepared on behalf of ATOC in response to your consultation. The ATOC response is the product of a comprehensive and considered review of your document. It represents the position of TOCs generally. We have reviewed ATOC's paper and concur in principle with the position they are putting forward. We have set out our answers to your questions based on our franchise objectives, our specific experiences and peculiarities with our franchises.

So as to avoid repetition of issues on which we share ATOC's view we have framed our response to you by separately setting out our individual answers to your questions and where we have endorsed ATOC's position we have made specific reference to relevant paragraphs of their paper.

FRANCHISE REPLACEMENT BID

Significance of Track Access Agreement

As you are aware, we are currently preparing a formal bid for submission to the SSRA for the grant for a replacement franchise for South Central. Our proposals are structured on the basis of certain principles which we feel will create an environment to allow us to deliver passenger railway services at a performance level which meets the SSRA's requirements.

We propose to commit to deliver recognised benefits such as increased reliability and capacity and improved quality of services through the implementation of various schemes for major infrastructure enhancement. These enhancements are to take the form of the construction and long term maintenance of new facilities and development and upgrade of existing facilities.

Consequently the bid addresses our relationship with Railtrack in terms of the use, maintenance and renewal of railway facilities which we are proposing be built or developed. Since our need to continue using existing facilities remains crucial our bid also deals with the performance aspects of the baseline railway. These are matters which you regulate and are reviewing as part of your various consultations, including the present consultation on model clauses for track access agreements.

Scope of Consultation Response

It is important to us that you understand the principles on which we are basing our proposals to achieve a high performance passenger railway service so that you can take them into account when developing the terms of track access agreements. We believe many of these concepts could form model clauses in a new track access agreement.

We note ATOC's comments in paragraph 5.12 of its response that it expects that you may issue a number of different model clauses to cater for different scenarios. Accordingly we have set out our comments on matters which in some instances may go beyond standardisation of a track access agreement governing a simple TOC/Railtrack relationship.

STANDARD OF PERFORMANCE OF OBLIGATIONS

Is it appropriate that, in carrying out the obligations under the contract, one or both parties should be expressly required to meet certain minimum standards of competence?

Yes, we feel that the current provisions of track access agreements need to be far more precise about the descriptions of the obligations of each party and the standards to which those obligations must be performed. Our perception is that the fact that the current agreements are standard in nature has meant that the parties to them have not had the opportunity to discuss and negotiate the issues which had been addressed in the agreements in order to make the agreements relevant to them and as a result the agreements are akin to non-negotiable standard terms of a monopoly supplier and have tended to be shelved and ignored from an operational view. This is highly unsatisfactory given the status of track access agreements as a core document in the railway industry. We feel that it is a document which should be crafted so as to "live and breathe" during its currency by requiring parties to use the commercial purpose to customise obligations and performance standards according to the individual circumstances and relationship of the parties. In this context it would seem appropriate for performance standards to be determined by reference to whether the particular investment is considered to be value for money.

Are the standards implied by the Supply of Goods and Services Act 1982 sufficient, or is more needed?

No, the peculiarities of the railway industry warrant more specific standards designed to address particular issues and circumstances.

Should the standards be the same? If not, what should be the standards for (a) Railtrack and (b) the Train Operator?

If the focal point of the contract is the provision of benefits to passengers then the standards should relate to the nature of the obligation rather than the party performing it.

BASIC ACCESS RIGHTS

Are there circumstances in which access rights should be absolute and not expressed to be subject to the Rules of the Route and Rules of the Plan?

Provided the protections we suggested in response to the question below are effected then we do not think it appropriate to make any particular access rights absolute.

ANSWERS TO CONSULTATIVE QUESTIONS

COMMERCIAL PURPOSE

Is it desirable that standard access contracts contain commercial purpose provisions? Should they be in standard form?

Yes, we believe that commercial purpose provisions should be included to achieve the three effects mentioned in your consultation, particularly for use as a reference point for deciding how other matters affecting the parties are dealt with under the contract. The track access agreements current in force were created to deal with the use of an ossified network over a relatively short period. As the new track access agreements are likely to be entered into for a much longer term than they have previously there is a greater need to deal with change during the life of the agreement. It is unwise or even impossible to legislate in advance as to how matters arising in the future should be dealt with at a particular time. The danger is to be too prescriptive too early on.

If so, what should the standard provisions contain?

Our suggestion is for the commercial purpose to be stated in terms of a framework of precise objectives which reflect our full partnership with Railtrack for the term of the agreement and the proper alignment of our interests.

Are commercial purpose provisions appropriate only in contracts which provide for carrying out of major investment in the network or in rolling stock?

No, commercial purpose provisions perform the same role in all types of access agreements albeit according to different facts and circumstances. We propose a structure for commercial purpose provisions which distinguishes between on the one hand a high level/framework type provision which is capable of standardisation across all track access agreements whether they relate to a "steady state" railway or one which contemplates major investment in the network, and on the other hand "local" or franchise specific purposes which would be in more detail, such as the West Coast Mainline commercial purpose. In Connex's case, for example, a local commercial purpose would be the need for regular metro services at ten minute intervals replicating London Underground frequency. This would allow for greater accuracy and certainty when the parties apply the commercial purpose to oblige and incentivise parties to act with a common aim and to deal with interpretation and future changes by reference to the commercial purpose as and when they arise.

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Further, we believe that all third parties, such as CTRL and local, authorities, who are able to disrupt passenger services should be subject to the Rules of Route.

If access rights 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 party?

Railtrack should only be permitted to change the agreed Rules of the Route and the Rules of the Plan in order to accommodate certain specific circumstances and then only if such change is justified by reference to the commercial purpose. Further if Railtrack proposes to make a change to such Rules which has an adverse effect on any TOC then Railtrack must be obliged to consult with such TOC to negotiate the change with the aim of minimising its impact on TOCs and passengers. In the absence of agreement the matter should be resolved by a form of fast track dispute resolution.

We would also seek a warranty from Railtrack that the Rules and any change thereto are such as to allow the operation of services to ensure maximum capacity is being utilised in a way which is in the best interest of passengers. As a monopoly Railtrack must be compelled to maximise the efficient use of a scarce resource for public interest.

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?

Provided the "use-it-or-lose-it" provisions are consistent with the commercial purpose of the agreement we generally accept the benefit of such provisions. Our only concern is that there may be circumstances in which the failure to use particular access right should be permitted because when viewed as part of a larger arrangement, such lack of use is ultimately beneficial to passengers. In this regard we have in mind a circumstance where a TOC funds an investment in infrastructure to improve reliability and create extra capacity and for performance reasons choose to use some but not all of such extra capacity. If such unused extra capacity was able to be sold off then consideration would need to be given as to whether the benefits created from that additional capacity would be achieved. There will be situations where capacity is not used per se but gives flexibility or otherwise assists performance. A TOC should not lose access rights in such circumstances.

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 Regulators) or should there be cases where a change is possible without all concern being in agreement and if so what' are they?

Yes, we consider all elements of access rights should be reviewed. The review should coincide with reviews conducted by the SSRA under the terms of the replacement franchise agreements.

Any change following the review should require the TOC's consent. Railtrack should be required to vary the access rights at the reasonable request of TOCs but a TOC should not be under any obligation to do so and can maintain its pre-existing rights.

Should the journey times to which a train operator is entitled be subject to any entitlement of Railtrack to add a pathing time or other allowances?

No, journey times stated in the contract should be inclusive of all allowances and Railtrack should not be entitled to increase the same by adding a pathing time or other allowances.

Is it appropriate for Schedule S 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 for appeal for their protection?

Subject to the need to ensure that a constraint was in the best interest of passengers and compliant with the commercial purpose we think that there are circumstances where a TOC should be allowed to have rights over and above quantum and frequency such as regular clock face intervals which are attractive to customers allowing easy to remember train times, without the need to consult timetables.

NETWORK OPERATION, MAINTENANCE AND DEVELOPMENT

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?

No, we feel that this provision is extremely inadequate because it was designed to penalise Railtrack not incentivise it to perform for passenger benefit.

If not, in what respects should Clause 6 be improved? For example, should it include explicit track and ride quality parameters?