

# **NATIONAL EXPRESS GROUP**

**Central Trains Limited  
Gatwick Express Limited  
Midland Main Line Limited  
Scotrail Railways Limited  
Silverlink Train Services**

**Response to the Rail Regulator's Consultation**

**Regarding**

**Model Clauses for Track Access Agreement**

## 1. INTRODUCTION

- 1.1 National Express welcomes the opportunity to respond to the Rail Regulator's consultation in respect of the use of model clauses in the Track Access Agreement.
- 1.2 The model clauses which are the subject to consultation relate to specified parts of the Track Access Agreement. It is our view that when reviewing an agreement of this type it is important if not essential to be able to consider the entirety of the agreement as in our opinion obligations and remedies relate to the whole agreement. It is difficult to enter into a discussion on remedies without putting under consideration the remedies currently set out in Schedule 8. Accordingly National Express considers that it would be useful in the next stage in this process to be able to review Schedule 8 in conjunction with the model clauses.

## 2. COMMERCIAL PURPOSE CLAUSE

*ORR Questions*      *Is it desirable that standard access contracts contain commercial purpose provisions?*

*Should they be in standard form?*

*If so, what should the standard provisions contain?*

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

- 2.1 National Express agrees that the commercial purpose of the Track Access Agreement should be made clear in the Track Access Agreement. The existing Track Access Agreement recitals do not assist in clarifying the commercial purpose of the agreements. The reference to "grant of permission to use the track" is in itself unhelpful and creates debate as to the scope of the grant of a permission.
- 2.2 It is the view of National Express that the commercial purpose should be clearly expressed so as to assist the interpretation of the Track Access Agreement.
- 2.3 The wording should make clear that the primary purpose of the agreement is to enable the TOC to carry out the business of the carriage of passengers by railway.
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- 2.4 There is a concern however as to whether the commercial purpose clause should itself create a "primary obligation" over and above the obligations of the parties set out in the Track Access Agreement.

2.5 The provision of the PUG 2 (Virgin West Coast Investment Track Access Agreement) was helpful in the debate on this point. The concerns which were expressed centred on the desire/requirement as to the certainty of obligations of the parties. It was concluded that it was preferable that:

- (a) the commercial purpose clause should not of itself create primary obligations; and
- (b) that certainty would be best developed by ensuring that the obligations of the parties be clearly developed (whilst still maintaining a high level/output characteristic) rather than have an overriding high level/output which cut across each party's express obligations.

2.6 We believe that the commercial purpose clause is appropriate in all Track Access Agreements and not just those agreements which provide for the carrying out of major investment in the network or in rolling stock.

### 3. STANDARD OF PERFORMANCE

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

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

*Should the standards be in the same? If not, what should be the standards for (a) Railtrack and (b) the train operator?*

3.1 National Express agrees that it is desirable that commercial contracts impose a standard of performance on service providers. To the extent that the TOC is required to perform obligations which impact on the service being provided by Railtrack as service provider, National Express accepts that the TOC should also be obliged to perform its obligations to an equivalent standard.

3.2 The current standard Track Access Agreement does not contain an express standard of performance. It is agreed that a clause of the type referred to in paragraph 2.13 of the consultation paper is appropriate provided that it is drafted to allow for higher standards where appropriate and in any event where specifically expressed elsewhere in the Track Access Agreement.

#### 4. BASIC ACCESS RIGHTS

*ORR Questions*      *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?*

*If access rights are to continue to be subject to these rules, is there a need for additional protections for train operators against their amendment without the agreement of the affected parties?*

- 4.1 On balance, we agree that a TOC's access rights should remain subject to route restrictions as contained in the applicable Rules of the Route and the applicable Rules of the Plan. This acceptance of the current position is qualified by the proposal that the methodology of changes to the Rules of the Plan and the Rules of the Route be made subject to further review, in particular the right of Railtrack under Condition D2.4.7 to implement changes to the Rules of the Route or the Rules of the Plan pending determination. We consider in any event that Railtrack should have an express contractual obligation to make changes to the Rules of the Plan where Railtrack is able to do so following any improvement in the track.
- 4.2 We suggest that consideration should be given to the proposal that changes to the Rules of the Route and the Rules of the Plan be deemed to constitute a Network Change for the purpose of Part G.

*ORR Questions*      *Are there specific circumstances (for example, new safety obligations or abuse of a dominant position by an operator) in which elements of access rights should be subject to review or "use it or lose it" provisions?*

*Are there elements of access rights which should be subject to more general review over the life of the contract and, if so, how often and in what circumstances?*

*If access rights are to be reviewed, what should be the nature of the review? For example, should change only be in cases where the parties have agreed on it (with the approval of the Regulator)? Or should there be cases where a change is possible without all concerned being in agreement and, if so, what are they?*

- 4.3 The striving for certainty in respect of a TOC's access rights is an important objective for TOCs and their stakeholder partners. Accordingly changes to the standard Track Access Agreement which may compound the degree of uncertainty which already exists in the present template Track Access Agreement should be avoided. The introduction of "use it or lose it" provisions or of "**general reviews**" would introduce further uncertainty and accordingly negate any advantages they may otherwise have provided.

- 4.4 It is not clear in any event why new safety obligations should result in "use it or lose it" provisions. To the extent that new safety obligations are introduced by a change in law or the direction of a Competent Authority the effects of such introduction can be accommodated by the Network Change referred to in Part G, changes to the Rules of the Plan and where necessary a surrender under Schedule 7.

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

*Is it appropriate for Schedule 5 to provide rights over and above quantum and frequency which would constrain what other operators can do on the network, or should train operators rely on Access Condition D and the associated rights of appeal for their protection?*

- 4.5 We do not agree that Railtrack should be entitled to add additional pathing times or allowances to contracted journey times without the consent of the TOC. Journey time is such a fundamental commercial deliverable that the TOC must have a high degree of certainty.

## 5. NETWORK OPERATION, MAINTENANCE AND DEVELOPMENT

*ORR Questions*                      *Does Clause 6 provide the train operator with sufficient specification of the obligations of Railtrack in relation to the operation, maintenance and development of the network insofar as the train operator is affected?*

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

*If more clearly defined specifications are to be established, should they be universal or route-specific?*

- 5.1 National Express has a number of reservations in respect of Clause 6. A primary concern is that the obligation in Clause 6.3.2 to maintain and operate the network is qualified in that the obligation is set at the standard which enables the TOC to provide Services in accordance with the "**Working Timetable**". As the Working Timetable changes frequently and is further subject to change for Extended Disruptions, we believe this is not a sufficient "anchor" for TOCs rights.

- 5.2 We agree that the maintenance standards should be set at a high output/level. However, within such level there is a need to specify that Railtrack is to comply with Group

Standards and make it clear that the maintenance and replacement is to be carried out to the standard of a defined Modern Equivalent Asset Value with the definition to state for the avoidance of doubt that the MEAV is to include such modern equivalents ordinarily expected if such asset were to be provided at the time of replacement.

- 5.3 National Express considers that track and ride quality regimes should be inserted into Track Access Agreements. Such track and ride quality regimes should involve the payment of adequate levels of liquidated damages if Railtrack fails to comply with the track and ride quality regimes. We believe it appropriate for track and ride regimes to be route specific. Maintenance and operation standards should be universal.

*ORR Questions*                      *Are train operators satisfied with the annual five-year network plans provided for in Clause 6? Do they meet the contractual standard laid down for them? Does Railtrack believe that the five-year plans provide sufficient information to train operators?*

*If not, in what ways could and should they be improved?*

- 5.4 Five-Year Statements are useful in that they provide TOCs with an element of information as to what works Railtrack is planning to perform in such period and accordingly give notice to a TOC when such TOC is considering its own plans.
- 5.5 The concern with the five-year plan is that Railtrack has no obligation to comply with the constituent elements of the plan. This is in contrast to its obligations under the Railtrack licence pursuant to which Railtrack provides Network Management Statements, Customer Account Plans and agrees to provide agreed Customer Requirements.
- 5.6 We feel that it would be beneficial to pull into the Track Access Agreement the relevant information obligations from the five-year plan, the Network Management Statements, the Customer Account Plans and the agreed Customer Reasonable Requirements. We would like Railtrack's signalling strategies to be included amongst the information that would be provided pursuant to these plans. Opportunity could then be taken to incorporate into the contract a level of obligation to undertake the planned work, so that the TOC has a level of certainty as to the works that are to be carried out and contractual remedies in the event of failure to undertake committed planned work.
- 5.7 The contractual remedy should not replace the regulatory rights of enforcement.

## 6. **Part G**

*ORR Questions*                      *Is Part G of the Track Access Conditions a sufficiently detailed and effective process for ensuring network change operates in the interests of all users of the railway? Does it enable a proper balance to be struck between strategic considerations and those relevant to a specific case? If not, how could it be improved?*

*Does Part G provide adequate protections for Railtrack affected train operators and other stakeholders when proposals to change the network are made and pursued? Are the rights to object to and block a proposal for change correctly structured, or are they too strict or too weak? Do they promote or inhibit improvement and the use and development of the network? Are the rights to financial compensation (both in terms of the costs of feasibility studies and compensation for the changes themselves) appropriate and adequate?*

*Is Part G being operated well by train operators and Railtrack? If not, in what respects?*

- 6.1 National Express agrees that Part G could benefit from the use of a framework which seeks to clarify the timelines involved in the procedure, both in the context of when the procedure is required to be invoked and timelines within the procedure itself. The use of predetermined and therefore known timelines will assist parties in the use of the procedure, although concomitant rights to extend timelines in certain agreed circumstances should be inserted to allow for some flexibility.
- 6.2 The criteria as to what can be considered to be a Network Change need to be reviewed. There is an interpretative concern as to the meaning and intention of paragraph (i)(b) of the definition of "Network Change" namely, Network Change includes "any change to the format of any operational documentation owned or used by Railtrack or a Train Operator which is likely materially to affect the operation of the Network of trains operated by the operator on the Network".
- 6.3 It is not clear what was intended by the use of "format". In the electricity industry, infrastructure access agreements included in their definition of "Modification" (a rough equivalent to Network Change) both physical changes and changes in operational procedures. We suggest that the definition of Network Change could be expanded to include both a change in format and the change of operational procedures in an operational document.
- 6.4 We have additional concern in respect of paragraph (i)(b) in respect of the ability to determine the effective impact of such change and the concern that such impact may not be understood until a later date. We suggest that this concern could be met by the introduction of a right to make claims at later dates in certain circumstances.
- 6.5 As discussed in paragraph 4.2 of this response, we consider that it would be beneficial for changes to the Rules of the Route and Rules of the Plan to be made subject to the Network Changes procedures.

- 6.6 In considering the concept of whether Part G does provide a sufficiently detailed and effective process in the interest of all users, we consider that the effect of Competent Authority Directions needs to be reviewed. As presently drafted a Network Change which arises as a result of a change of law or any Direction of any Competent Authority is dealt with in Condition G5.1 which requires each party to share risk by bearing its own costs of losses arising out of the implementation of the Network Change.
- 6.7 In addition, under Part 3 of Schedule 7, Railtrack has the right to increase the level of Fixed Track Access Charges to cover Railtrack's costs of complying with requirements directly and necessarily arising from the change of law which it is fair and reasonable to be borne by the relevant Train Operator. It is not clear as to how this corresponds with the "costs lie where they fall" principle in relation to a network change arising from a Change in Law.
- 6.8 Given the scale of their relationship with Competent Authorities, we believe that Railtrack are better placed than a TOC to manage the risks of a Competent Authority Network Change proposals, and we suggest that Network Changes which arise as a result of the operation of a Change of Law or a Competent Authority Direction should be deemed to be a Railtrack proposed Network Change.
- 6.9 We consider that the introduction of an opportunity to recover an element of development costs from other Train Operators (limited by the economic value derived by such other Train Operators) would prevent "**free-riders**" and hence encourage Train Operators to sponsor initial investment changes. The mechanisms associated with such a development would, of course, require further discussion. There needs to be consideration as to whether such recovery is to be made solely from new users of the development or from new users and existing users alike and how such rule would apply in PTE areas.

## 7. LOCAL OUTPUT STATEMENTS

### *ORR Questions*

*Is it desirable that contractual "**local output statements**" reflecting the points discussed above are established?*

*What should be the balance between enforcement of contracts and via Railtrack's network licence?*

*What should be the nature of any such arrangements and how should they be enforced? What remedies should there be if they are not complied with?*

*If such arrangements are to be put in place, are the provisions of Part G of the Track Access Conditions sufficient to deal with the failure of Railtrack and an affected train operator to agree? If not, how should they be improved?*

- 7.1 In respect of the queries raised here, see the discussion in paragraphs 5.4 to 5.7 of this response.
- 7.2 In the consultation paper, you query the possibility of multi-lateral contracts in relation to local output. We do not agree that multi-lateral arrangements would assist in respect of a local output, and believe that it would make matters more complicated than necessary.

## 8. INFORMATION

*ORR Question*                      *What categories of information does a train operator need from Railtrack in order to make the best use of the network?*

- 8.1 The requirement for information in respect of long to medium term planning has been reviewed earlier in paragraphs 5.4 to 5.7 of this response. In considering the overall questions, however, of the categories of information which a TOC needs from Railtrack, it is proposed that Railtrack should be subject to an overall obligation to provide such information which a network operator operating to the performance standards discussed in paragraph 3 of this response, should be able to provide.
- 8.2 Without limiting such overall obligation, Railtrack should be obliged to provide up-to-date information in respect of the network such as network capability or capacity, including stabling capacity, 'gauging information, box operating hours, electrical safety information and up-to-date track diagrams.
- 8.3 A key element of required information is "**real time**". Passengers not only need to be informed of the current status of the particular service they require, but need to be informed as to the impact on their journey. This requires not only information, but a predictive capability as to how the network is going to perform in the immediate term in the light of its degraded state and the perturbed resource deployment. Only Railtrack can perform such a predictive function, and they should have an obligation to do so and to make the output available to TOCs in electronic format. It is, of course, for TOCs to use the output so that they in turn can look after their passengers.

*ORR Questions*                      *How should this information be supplied? What standards should it meet? Should there be different standards for different categories of information?*

- 8.4 Any information which is supplied by Railtrack, whether under the overall or under specific obligations or otherwise supplied to the TOC, needs to be accurate, complete and capable of being relied upon by the TOC. To ensure that this is the case, an express warranty to this effect should be inserted into the Track Access Agreement:

*ORR Questions*                      *Are there circumstances in which it is reasonable for a train operator to make additional payments to Railtrack for certain information? If so, what categories of information and what criteria should be used to access the charges?*

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*ORR Questions*                      *Are there circumstances in which it is reasonable for a train operator to make additional payments to Railtrack for certain information? If so, what categories of information and what criteria should be used to access the charges?*

8.5 Although the information referred to above should be provided without additional charges, there may be instances where Railtrack could be entitled to require payment. These instances should be limited to cases in which a TOC requires a study to be prepared to provide information in respect of any change to Railtrack assets proposed by the Train Operator or as to the impact of a TOC proposal where such information is not of the type which Railtrack would have been expected to have known in the context of Railtrack acting as a good network operator. The requirement for a fee, however, in these circumstances should be limited to instances in which the information to be provided remains confidential to the person who requested the information. In the event that the information is to be available to all TOC's, Railtrack should not be entitled to impose a fee.

*ORR Question*                      *What information should a train operator provide to Railtrack in particular having regard to the interests of other operators?*

8.6 We are open to proposals from Railtrack if they believe they require information from a TOC over and above the information they currently receive though we are not clear what this need might be.

## 9. **CAPACITY**

*ORR Questions*                      *Is it appropriate that track access contracts continue to contain no express assurances from Railtrack in relation to the capacity which has been sold under the contract?*

*If not, what should be the nature of the assurances, and what remedies should be available if they are not honoured?*

9.1 As with any agreement in which capacity is "**sold/promised**", we believe there should be a warranty that such capacity is actually available with adequate recompense if such capacity is subsequently not made available. This is particularly so in the circumstances of a Track Access Agreement when it is more than reasonably foreseeable that a TOC may

act on the basis of such promised capacity to provide commitments in its Franchise Agreements and also commitments to purchase rolling stock.

- 9.2 However, the concept of "capacity" is very difficult to express in the railway operational circumstances, and this difficulty is compounded by the various different approaches adopted in Schedule 5. The test of whether contracted capacity has been provided – and hence the remedies which should apply if it has not - is far from straightforward.
- 9.3 As previously discussed, Firm Contractual Rights are subject to the Rules of the Route and the Rules of the Plan. To ensure that capacity issues are not hidden by changes in the Rules of the Route and/or the Rules of the Plan, we propose that the methodology of change be reviewed and that in any event the changes are brought under the aegis of Network Change.
- 9.4 In considering a contractual remedy, although specific performance in its own right would be the most preferable, we do not consider it to be a realistic remedy in this instance. Likewise, general damages are considered to be inappropriate in that the parties should not be compelled to go through the procedure of determining loss. Accordingly, a level of liquidated damages would appear to be the most appropriate form of remedy. It would appear reasonable to set the level of liquidated damages at the level of the daily revenue projection for that train slot which has not been provided.
- 9.5 Lack of capacity can affect Firm Contractual Rights if paths are offered which lack robustness and are inherently liable to delay or degradation. This element of capacity should be considered further. It may well be that a pre-emptive remedy is the most appropriate remedy in this instance. This pre-emptive remedy could consist of an obligation being imposed upon Railtrack to restore performance levels on such a route to the levels achieved in a benchmark year. Failure to comply with such obligation, however, should lead to liquidated damages which should include an element for loss of profit and loss of revenue.

## 10. **LIABILITY - FOR OPERATIONAL PERFORMANCE**

*ORR Questions*

*Should Schedule 8 be the only remedy for the cancellation or delay of services?*

*Are there circumstances in which Schedule 8 should be suspended, and other remedies take over? If so, what are they and what are the appropriate remedies?*

- 10.1 We note that Schedule 8 is not covered by this consultation. Schedule 8 currently contains the most important remedies available under a Track Access Agreement. Any discussion of remedies under the Track Access Agreement albeit of proposed additional remedies, which does not include Schedule 8 may need to be reconsidered once the Schedule 8 review, which is taking place under the aegis of the periodic review of Railtrack's access charges, is completed

- 10.2 Basically, we consider that a "properly calibrated" Schedule 8 constitutes an appropriate means of compensating a TOC for delay and cancellation. If the delay and cancellation were to continue over a level of time, a severe disruption payment should be brought into operation under Schedule 8.
- 10.3 Remedies for breach of warranty for capacity have been discussed in paragraph 9 of this response.
- 10.3 Concern has been raised as to the relationship between Schedule 4 and Schedule 8. We believe that the relationship between the two schedules should be reviewed if as suggested Schedule 8 is brought into the scope of the consultation.

11. **LIABILITY - BREACHES WHICH DO NOT LEAD TO TRAIN DELAYS OR CANCELLATIONS**

*ORR Questions*

*What liability should there be if a party fails to comply with its obligations under, for example, the Track Access Conditions or the dispute resolution arrangements? What liability should there be for breach of maintenance and network enhancement obligations, environmental obligations, obligations concerning the provision of information or its confidentiality? What should the contract say about other types of breach of the contract?*

*Should the parties be exposed to unlimited liability in any circumstances?*

*If not, what should the liabilities of the parties be?*

*Should there be different limits on liability depending on the nature, time and severity of the breach in question?*

*Should wilful misconduct be an exception to any general rule? If so, what should be the definition of wilful misconduct and what liability should attach in such a case?*

- 11.1 We agree that the wording in Clause 8 of the Track Access Agreement could be improved in respect of the heads of damage available to the parties. In addition, the triggers for the indemnity are too limited.
- 11.2 The "**triggers**" which permit a claim under the indemnity should be extended and the threshold of £10,000 as specified under the Claims Allocation and Handling Agreement should be reduced.

- 11.3 A concern which has arisen under the present wording is the ability to make claims under Clause 6.3.5. The standard implied by "reasonable endeavours" is too uncertain, and this has caused uncertainty and difficulty in proving a breach of this agreement.
- 11.4 In considering remedies for non-delay breaches, we suggest that remedies be provided for express obligations. Due to the difficulty in proving and assessing damages, we would be generally content to use liquidated damages or abatement of track access charges.
- 11.5 It is useful in this context to review those situations in this report where contractual remedies should be made available:
- (a) **Track and Ride Quality**  
In paragraph 5.3 of this response, it was proposed that a "**Track and Ride Quality**" regime be introduced. The suggested remedy for Railtrack's failure to comply with the parameters in the regime is liquidated damages.
  - (b) **Planned Works**  
In paragraph 5.6 of this response, it was suggested that a TOC should have contractual remedies for Railtrack's failure to perform planned works. In this instance, however, liquidated damages do not appear appropriate. Specific performance would give more assistance to the TOC. If specific performance were not to be available then an indemnity for damages for loss incurred by the TOC in relying on the planned works would be required. Such loss should not be limited by amount nor by any exclusions for various heads of damages.
  - (c) **Accuracy of Information**  
In paragraph 8.4 of this response, it was suggested that information should be accurate and complete. Again, although liquidated damages would be preferable, they could only work if a "genuine pre-estimate of loss" could be assessed for categories of failure to provide accurate information. It is believed that this would be difficult. Accordingly, the appropriate remedy would be a fallback to an indemnity for all loss suffered as a result of any inaccuracy.
  - (d) **Failure to provide information at all**  
The preferred remedy would be specific performance. In most cases, however, failure to provide information will be capable of being remedied by the actual supply of information. Accordingly, the most appropriate remedy would initially be liquidated damages for delay. We envisage that a service level regime would need to be put in place with liquidated damages being brought in at agreed parameters.

(e) **Capacity**

This has been dealt with in paragraph 9 of this response.

- 11.6 Wilful misconduct is always a difficult issue. In this instance, wilful misconduct would probably need to be defined by way of "**abandonment**". That is a wilful failure not to perform an obligation. Again, specific performance would be preferred as a remedy but as stated in paragraph 12.2 below is difficult to obtain and may not always be the appropriate remedy in that it may be too late to perform the particular obligation. Termination would not in this contract be the appropriate remedy. Damages would therefore need to be relied upon, preferably recoverable under an indemnity as opposed to under contract. In this instance, considering the nature of the default, losses should be uncapped and include loss of profit and loss of revenue.
- 11.7 As a general point on liability, consideration should be given to the location of remedies throughout the agreement. Whilst it is accepted that it is not always appropriate to contain remedies and liabilities in one model clause, the use of such a model clause should be considered in order to avoid having embedded indemnities for say key journey times located in the middle of Schedule 4.

12. **NON-MONEY REMEDIES**

*ORR Questions*

*Are there circumstances in which parties to access contracts should be able to apply for remedies other than the payment of money?*

*If so, what are they, and what remedies should be available? Are there any circumstances in which a train operator should be entitled to "**self-help**" remedies (similar to the self-help remedies in station and depot access contracts)?*

*Would specific performance of an access contract be an appropriate available remedy? Or should specific performance be restricted to certain types of breach, leaving money compensation the only remedy in others?*

- 12.1 National Express considers that self-help remedies are not generally appropriate in the context of a Track Access Agreement.
- 12.2 In paragraph 11 of this response, we have suggested a number of instances where specific performance may be appropriate. On the basis, however, that specific performance is a discretionary remedy we believe that in general specific performance may be difficult to obtain and accordingly, we reluctantly believe that damages, (where possible, liquidated damages) would be more appropriate.

### 13. EVENTS OF DEFAULT AND REMEDIES

#### *ORR Questions*

*Are the events of default specified in the standard track access contract appropriate? Are there any missing? Are any of them inadequately defined?*

*What should be the rights of the parties in the case of an event of default on the part of the other party? Should they be the same for Railtrack and the train operator or do the difference circumstances of these parties warrant different remedies?*

*Should the remedies available to the party not in breach vary accordingly to the nature of the breach which he faces? If so, in what ways? Should there be the possibility of a response which is more graduated than the existing position?*

*Are there any circumstances in which the train operator should be entitled to withhold payment of access charges? If so, what are they and what conditions should apply?*

- 13.1 The present agreement gives rights gives to a party following the occurrence of an Event of Default to suspend or terminate the Track Access Agreement.
- 13.2 In the case of a TOC the right of suspension envisages a TOC ceasing to run services together with a suspension of payment of Access Charges.
- 13.3 The right of suspension is not an appropriate remedy for the TOC. As far as National Express is aware such a right has not been exercised and it is considered extremely unlikely that it ever would be invoked.
- 13.4 A more appropriate remedy than suspension would be the rebate/deduction of access charges for an Event of Default.
- 13.5 We agree that the events of default should be extended to include a breach by Railtrack of its licence provisions and that an obligation to comply with its licence should be included in the Track Access Agreement.

### 14. GENERAL

- 14.1 As part of the next stage, it is important that there is an opportunity to comment upon and review any draft model clauses which may be developed.
- 14.2 Furthermore, at the stage draft Model Clauses are circulated, a Scots law version should also be produced by the Regulator for review.