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12th May 2000

Dear Mr. Carey,

### **Model Clauses for Track Access Agreements**

I refer to the above consultation document on which you have requested comments by 12<sup>th</sup> May. There are a considerable number of issues raised and I detail below the key issues for Nexus:

#### **Section 1**

I have no comments to make regarding the timetable leading to the publication of model clauses.

With regard to whether these should be mandatory or whether there may be circumstances where divergence might be appropriate, as an operator of Metro, Nexus has made provision for the reopening of its track access agreement with Railtrack to include model clauses. Generally I believe they should be mandatory but the Regulator should allow parties to opt out if they agree and material public interest benefits can be obtained by not using them and these could not be achieved by provisions within the clauses. I am referring particularly to instances where substantial public investment had been made to the network for which a party needed some protection in relation to access to the network. If provision cannot be made for this in model clauses, the parties may need some different form of agreement.

In relation to the introduction of general clauses, certainty creates the right circumstances to encourage investment and early implementation would be beneficial.

#### **Section 2**

##### **Commercial Purpose**

Nexus welcomes the inclusion of a commercial purpose clause which creates clarity and a primary obligation to perform general obligations in the Track Access Agreement. This should also not impinge on any parties' obligations to third parties such as the SSRA. The Regulator needs to ensure that any such clause in an agreement does not conflict with other Track Access Agreements by providing incentives to enhance performance for any train operator at the expense of another. I agree that there should be appropriate safeguards to protect the position of third parties.

### **Section 3**

#### **Access Rights and Capacity Consumption**

I have the following general comments to make.

I agree that there should be a template specification of access rights in line with Section 3.10.

In circumstances where there is only one passenger operator over a particular route and substantial spare capacity I believe PTPs should be given the opportunity to hard-wire departure times. This is a useful benefit in marketing and growing patronage on a service. For nonintensive urban operations I accept the advantages of the development of tiered access rights.

I agree that there should be Rules of the Route and Rules of the Plan covering arrangements for engineering work and timetabling parameters but that these should be subject to review with the aim of ensuring the more efficient use of the network.

I am concerned about the establishment of redeemable access rights and the potential rights of Railtrack to acquire a train operators access rights when services have been approved by a Passenger Transport Authority. I would certainly say that if this was ever contemplated it should refer to only Category g and C rights. Overall should Railtrack and the Regulator not be working to increase capacity on the network to accommodate all existing and possible additional rights

I agree that a model clause should be established that required Railtrack to warrant that the capacity to meet the obligations of the contract is available at the time the relevant rights are to be exercised.

### **Section 4**

#### **Output Statements**

Nexus would support the list of proposed local output statements as listed in Section 4.15.

Track Access agreements are with individual operators and it seems logical that output statements should be operator-based. It is acknowledged that Railtrack has route-based output statements and these will have to be converted to operator statements, the details of which will vary with the , route operated.

Nexus would like to see an output statement for the services it provides. This will be of particular importance to any PTE that invests substantially in the network and would create a contractual commitment from Railtrack to the PTE.

### **Section 5**

#### **Network Enhancement**

Nexus supports the principle that when an operator pays for capacity enhancement above the capacity that it is expecting to bid for in the timetabling process, it should have rights to that capacity where there is a public interest benefit.

With regard to the proposals for Part G of the Track Access Conditions, Nexus would agree with the recommendations. Compensation for disruption during the Metro construction works is currently being discussed and some further clarity would have been of assistance here. Equity also suggests that operators should be required to contribute to the cost of a project if they are net beneficiaries from an enhancement.

## **Section 6**

### **Liability and Remedies**

I agree that where operational performance falls outside a "normal" range of performance, additional remedies should apply covering the obligations listed in 6.5. Generally I agree that this should be an indemnity against costs and losses which the injured party might incur. Self help remedies or a right to step in and take over the discharge of a particular obligation is not a satisfactory solution.

## **Section 7**

### **Other Issues**

In relation to the possibility of funders having rights under the timetabling process, this could be of benefit to PTEs although currently we rely on the Train Operating Company to protect our interests. If rights were given would these be joint with the Train Operating Company.

Nexus would agree to the inclusion of a standard of performance clause as in 7.5 and a clause relating to the reciprocal provision of information.

Yours sincerely

**W.R. HARBOTTLE**  
**Technical Finance Manager**