

By Fax: 020 7282 2042



Paul Carey
Office of the Rail Regulator
1 Waterhouse Square
138-142 Holborn
London EC1N 2TQ

Your Ref :
Our Ref : MCR/KL/218C.24
Tel : 0141 333 3100
Fax : 0141 333 3703

Date : 31 August 2000

Dear Mr Carey

MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS: PROVISIONAL CONCLUSIONS

I refer to Michael Beswick's letter of 25 July 2000, enclosing the Regulator's provisional conclusions on model clauses for track access agreements, and requesting comments by 31 August. This reply provides Strathclyde Passenger Transport Executive's (SPTE's) comments on the various issues raised in the consultation document.

The comments below are listed under the relevant chapter or annex heading in the consultation document, cross-referred where appropriate to the relevant paragraph or clause number. If a comment refers to one of the specific consultation questions, the reference is included in square brackets.

Chapter 2 - Commercial Purpose

As indicated in my letter of 12 May 2000, SPTE generally concurs with the basis which the Regulator is proposing for a Commercial Purpose clause, and his intention that this new wording (Clause 4 of Annex 2) should apply only where there is an ambiguity or omission in the Track Access Agreement.

Sub clauses (a) to (d) provide a useful tool in the event of ambiguity or omission in forcing the parties to discuss issues in a focused manner with a view to taking the matter forward. They set out the minimum criteria covering a basic description of the parties' commercial outputs in their broadest sense.

Sub clause (e) however is very specific and is of quite a different character. It appears to be designed to give parties scope to come up with creative ideas for commercial opportunities with the target of "enhancing capability, quality and performance of the Network". SPTE has some concern that this sub-clause is drawn solely with reference to Railtrack and the Train Operator, and there may be a case for expanding it by including an obligation for the latter to have regard to the requirements of their funder(s).

Chapter 3 - Access Rights

Subject to the detailed comments below, SPTE generally supports the Regulator's provisional conclusions as set out in this part of the consultation document.

Template Schedule 5 document (para 3.11)

SPTE welcomes the Regulator's proposal for the suggested format for the development of the templated schedule, and would wish to be included in the detailed consultation on the structure of the intended table. It also welcomes the Regulator's position on journey time protection.

On a point of detail, SPTE has previously commented on the possible need to clarify the status of public holidays within this part of the Agreement, and confirmation of the Regulator's intention in this regard would be welcome (especially in view of the differing statutory definitions of bank and public holidays in Scotland and in England). *[para 3.32 1st indent]*

Access right subject to the Rules of the Route and the Rules of the Plan (paras 3.14-15)

SPTE strongly endorses the conclusion that access rights should remain subject to the Rules of the Route and the Rules of the Plan, but is concerned that as presently constituted the procedures governing these rules may not adequately reflect the interests of PTEs in maintaining and improving journey times: current industry arrangements could, for example, encourage conservatism in specifying sectional running times for new rolling stock on sponsored services, since both Railtrack and the TOC are incentivised to build in performance margins.

While welcoming the Regulator's intention that changes in capability and timetabling principles will be subject respectively to Parts G and D of the Track Access Conditions, SPTE currently only has a locus under Part G. It specifically seeks involvement in the industry workshop proposed in paragraph 3.32, and a direct locus in the Timetable Conference, the Engineering Conference, and in possessions planning. All of these processes impact directly on its revenue interests in service performance. *[para 3.32 4th indent]*

"Use it or lose it" provisions (para 3.17)

SPTE supports the Regulator's conclusion that rights relating to an enhancement project which an operator has paid for should not be lost under the "use it or lose it" provisions. However, there also needs to be some form of protection for enhancements funded by third parties (such as PTEs) and which may have been paid for by means other than reimbursement from the operator to Railtrack via track access payments.

Permanent redemption of rights (para 3.21)

The condition proposed by the Regulator in the 2nd indent of this paragraph does not appear to reflect the separate statutory rights of PTEs to specify passenger service requirements. Moreover, through separate commercial agreements such funders may procure services which are in addition to the formal PSR specification. Protection for such interests should be included within the necessary conditions for any redemption of rights, and this should also extend to a broader requirement for consultation with funding bodies to ensure that their policy goals were not affected by any such removal of rights. SPTE would therefore want to participate in any further consultation which the Regulator intends to carry out on this subject. *[para 3.32 5th indent]*

Voluntary trading of rights (para 3.18)

Similarly, SPTE considers it essential that the consent of local funding bodies such as itself should be required before rights affecting their sponsored services are traded. This omission is a serious flaw in current Track Access Agreements.

Capacity warranty and capacity consumption (para 3.25)

In SPTE's view, the phraseology proposed in Clause 5.5 of Annex 2 is apt and appears to work. The granting of a capacity warranty would assist SPTE as a funder and specifier of rail services, by giving greater certainty in service planning and ensuring best use of capacity. [*para 3.32 6th indent*]

Development of an Access Rights Register (para 3.28)

SPTE welcomes this proposal, which will be valuable for planning purposes, particularly if freight access rights are included. Whether the Register is secured via the Track Access Conditions or via a licence condition, if it is not placed on the Regulator's Public Register SPTE would wish an enforceable right of access to those sections of the Access Rights Register which relate to its sponsored network. [*para 3.32 8th indent*]

Chapter 4 - Output Statements

Proposed Track Access Condition I (paras 4.3-12)

The concept, purpose and proposed content of local output statements are welcome. However, in my letter of 12 May 2000, I confirmed that SPTE would wish to have its own local output statement, but was prepared to see this "nested" within a ScotRail statement. While it is appreciated that in the context within which the proposal is now being put forward it would not be possible to accord the same contractual status to a statement which dealt solely with a local funder's interests in the network which it sponsored, SPTE remains of the view that it should be possible for the ScotRail output statement to be sub-divided in a format which expressly reflected the rights and interests of the PTE in those parts of the network as defined in Parts 1B and 3B of Schedule 3 of the current ScotRail Franchise Agreement.

SPTE considers that its statutory duties in terms of the Transport Act, 1968 and the Railways Act, 1993, its role in bearing revenue risk on its sponsored services, and the terms of Railtrack's Network Licence Condition 7, all provide a sufficient locus for its interests in the performance and enhancement of its sponsored network to be explicitly embodied in the relevant local output statement. This view is reinforced by the Regulator's reference in paragraph 4.3 (3rd indent) to the establishment of a route-based consultation mechanism to achieve consistency between different operators' local output statements covering the same route: on several occasions SPTE has had to have direct recourse to regulatory processes to protect the access rights of its sponsored services, and would not wish to see this ability diminished through the adoption of purely TOC-based processes to deal with such interface issues. [*para 4.16 1st indent*]

Remedies and liabilities (para 4.13)

Regarding the Regulator's approach on remedies and liabilities, SPTE considers that it is possible to have parallel rights and remedies. Railtrack should not be contracting locally to do something that is in breach of its licence. Establishment of additional local contractual rights may in fact assist in achieving outputs locally without the need for direct regulatory involvement. [*para 4.16 3rd indent*]

Freight (para 4.14)

SPTE notes that the Regulator proposes to place on Railtrack an obligation to ensure that freight and other multi-route users are not faced with an “unacceptable burden” through the local output statement mechanism. However, given SPTE’s repeated experience of inadequate consultation on the part of some operators in this category, it is also important to ensure that any bespoke procedures for long-distance operators do not diminish the protection given to the rights and aspirations of local network operators and their funders. *[para 4.16 4th indent]*

Third parties (para 4.15)

SPTE’s argument that local funders should have direct rights in local output statements is set out above, and the Regulator is therefore requested to reconsider his current view as expressed in paragraph 4.15. Noting his reference in the second sentence of this paragraph to the use of the contractual chain as the preferred means of enforcing funders’ requirements, SPTE’s view is that Franchise Agreements as presently drafted do not place sufficient direct enforcement powers in PTEs’ hands to make this an effective remedy in practice. SPTE would be prepared to provide the Regulator with additional information to supplement this aspect of its response if required.

It is noted that the Regulator proposes an enforceable right for third parties to be consulted as part of the local output statement process. In itself, of course, a right to consultation is limited in its effect, so it would be helpful to have clarification of the obligation which the Regulator intends to place on TOCs and Railtrack, especially since the present drafting of Access Condition I does not appear to incorporate any consultation requirement. *[para 4.16 5th indent]*.

Chapter 5 - Network change

Model clauses for network enhancement projects (paras 5.3-7)

In general terms, SPTE welcomes the proposal to encourage the adoption of standard clauses for enhancement projects. These could reduce transaction costs and enable the focus during the negotiation of development agreements to be on policy and commercial aspects. There may be value in encouraging an industry-wide forum to share experience which could contribute towards the drafting of such model clauses.

As indicated above, SPTE welcomes the Regulator's proposals for protecting operators' access rights which have been purchased as part of an enhancement project. As already noted, however, it considers that such mechanisms should be extended to protect the interests of third party funders in access rights created to their specification, especially when these have been funded by means other than additional access charges.

Part G (paras 5.8-9)

SPTE notes and welcomes the Regulator's proposals in this part of the document. It particularly welcomes the Regulator's conclusion that third party funders should have the right to propose network changes.

SPTE notes the Regulator's proposal in paragraph 5.10 for further consultation on the detail of Part G. However, it may be helpful at the present stage to refer to the comments previously made on Part G when responding to the April consultation document, in particular support for the Regulator's proposal that there should be more detailed provision of information, including information to third parties, and its reference to the need to ensure adequate pass through of compensation to PTEs which take revenue risk. In view of the Regulator's proposals for a third-party right to propose changes under Part G, it is assumed that the rights and obligations under Part G will also be revised more generally to ensure that PTEs have more extensive rights in situations where they are not directly promoting a change but their interests are affected by it.

Chapter 6 – Liabilities/Other Issues

Liability for Operational Performance (paras 6.2-6)

The proposed additions to liability for the operational performance regime in respect of local output statements are welcome, since the existing regime caters inadequately for extreme cases of poor performance. SPTE's primary interest is in the effective carrying out of obligations by all parties involved in delivering passenger services, and it has already indicated broad support for the proposals contained in paragraph 6.6. These should go a considerable way to overcoming the deficiencies of the liquidated damages approach in this area.

Liability for non-operational performance (paras 6.7-56)

SPTE is in broad agreement with the Regulator's goals in seeking to introduce certainty to the liability regime for non-operational performance and shares his concerns over the inconsistencies between the various overlapping regimes contained in the existing contractual documents. Although only slight differences in overall liability result, they engender a great deal of confusion and potentially unnecessary transaction and legal costs. The proposals for allowing recovery generally but subject to caps would be the easiest and most efficient to administer. Such an approach would also promote effective planning of the services and funding activities for which SPTE has responsibilities. Customised caps would be useful for particular projects and it would be interesting to learn of the proposed criteria to which reference would be made in giving regulatory approval to such caps. With reference to paragraph 6.44, how would the Regulator view the role of a body such as SPTE in considering the relative value of the contract to a particular party? Clarification is also sought from the Regulator as to what he means by "wilful breach of contract" in Paragraph 6.45. Generally, it is exceptionally difficult to classify contract breaches into those which are more wilful or fault based than others. Specification of individual categories might be preferable to a subjective test of this type.

Performance orders (paras 6.48-56)

In order to achieve its policy objectives, which are to ensure the effective delivery of the passenger services which it specifies to meet the needs of its area, SPTE's primary interest is in seeing outputs provided. In the Regulator's words, financial compensation is a second best. The device of the performance order would therefore be particularly useful in this regard, and SPTE supports the proposal that this should be the prior option. Compensatory amounts may not entirely predict and may inappropriately compensate for the activity that is not carried out.

While there are clear differences between the law of Scotland and English law in relation to remedies, to resort to courts and legal processes should be avoided as far as possible due to the inter-dependent and collaborative nature of the railway industry. Therefore alternative mechanisms in the hands of the Regulator which provide effective relief are preferable. Accordingly, the availability of specific performance orders in Scots law does not alter SPTE's view. It does however have a concern with the proposal in paragraph 6.53, that a performance order should be available not only when a breach has occurred but also when there is a "likely breach of the contract". Appropriate wording needs to be arrived at to avoid any dilution of legal certainty. The issue of what is to be "likely breach of the contract" can be highly subjective and may lead to some confusion in practice.

Liabilities and performance: force majeure (paras 6.57-9)

SPTE welcomes the Regulator's position on this matter.

Standard of performance (paras 6.61-7)

It is useful to have an objective standard of relevant skills etc for the industry being applied to all the parties' obligations in the model track access agreement clauses. However, SPTE wonders whether the same standard should also be explicitly applied to the relevant elements of the commercial purpose clause when it takes effect in respect of ambiguities and omissions in the contract.

Provision of information (para 6.68)

The further letter of 21 August on this matter is noted.

Assignment (para 6.69)

SPTE commented on this matter in its response dated 12th May 2000. It would be concerned to ensure that, in the event of an assignment, there were back to back arrangements in place to prevent the dilution of any franchise obligations. This suggests that any such application to the Regulator by a TOC for consent to an assignment should require the prior agreement of all other parties to a franchise agreement.

Impact on risk (paras 6.70-5)

SPTE's response has necessarily had to be made without sight of the further quantification from Railtrack referred to in paragraph 6.74. *Prima-faice*, SPTE considers that, rather than creating looser or unquantifiable risks, the proposed regime could allow a better alignment of risk allocation within the industry. In turn, this should promote more efficient financial planning and greater certainty and thus reduce the potential for litigation and the associated costs. It would also assist in allowing innovative financing schemes to be assessed with greater consistency and risk quantification, permitting financiers to commit on a more informed basis and allowing the public sector a clearer overview of where risk allocation lay in projects which it was funding. The provision for specific caps in particular schemes also appears to provide an appropriate means of customisation.

In general terms, SPT has argued in a number of the preceding comments for the position of funding bodies to be more explicitly recognised within the model clauses arrangements, with appropriate rights of enforcement where necessary. SPTE considers that these interests and rights also need to be accommodated within the Regulator's final review of the risk matrix arising from the model clauses proposals.

Chapter 7 – Implementation of Regulator’s conclusions and development of a network code

Implementation of model clauses (para 7.1)

As previously indicated, SPTE considers that the clauses should be mandatory, but the requirement for regulatory approval gives adequate safeguards where any customisation is required. In the second exception envisaged in paragraph 7.1, where the facts of the case are not covered at all, SPTE seeks clarification of how commercial purpose clause 4.2(e), which is extremely broad in its scope, would relate to these circumstances. [para 7.22 1st indent].

Changes to track access conditions/method of introduction (paras 7.2-6)

SPTE's strong preference would be for those changes which can be made through variation of the Track Access Conditions to be made by the Regulator in terms of Condition C8. This would automatically give PTEs a right of consultation, whereas they have no involvement in the class representative committee process.

SPTE remains extremely concerned at the variable strength of powers that will result if modified track access agreements require to operate alongside existing agreements of long duration. It is unlikely that any operator who possesses more favourable access terms under a previously-negotiated agreement will voluntarily surrender these. The Regulator's position as stated in paragraphs 7.5-6 is noted, but SPTE trusts that he will continue to monitor the situation and use any remedies at his disposal to reduce the unevenness of the access playing field. [para 7.22 2nd-3rd indents].

Freight (paras 7.7-8)

It will be primarily for freight operators to comment on this part of the Regulator's conclusions, but SPTE considers that in the interests of equity and balance that the same principles should flow through to the freight sector. [para 7.22 4th indent]

Towards a Network Code (paras 7.9.-12)

SPTE welcomes the general approach proposed by the Regulator. However, in addition to the various changes which it has suggested to the Conditions to reflect the interests of funding bodies, it feels that consideration should also be given to the incorporation within the Code of an element relating specifically to the funders' role and interests. This would be valuable given their lack of formal contractual nexus in the Track Access Agreements and the increasing importance of the funders' role for the industry, and would reflect the intended status of the Code as the base industry document dealing with all relevant matters. [para 7.22, 5th indent].

"Star model" or multilateral code (paras 7.13-16)

SPTE feels that the proposal in para 7.15 would be particularly helpful in relation to Finance Schemes where SPTE may be an access beneficiary, and where it might be appropriate for the Conditions to be invoked in certain circumstances against (for example) an operator providing services on its behalf. [para 7.22 6th indent].

Rights for third parties (paras 7.17-20).

While welcoming the Regulator's acceptance of the principle that third parties should have specific and enforceable rights, for the various reasons already detailed SPTE does not consider that the present proposals extend far enough. In particular, and in relation to the first indent of paragraph 7.18, existing consultation requirements are far too limited. Indeed the existing Track Access Agreement and Conditions are not fit for purpose so far as the interests of revenue-risk-bearing PTEs are concerned.

While, as the Regulator implies, the position of third parties under Scots law differed until recently, recent statutory interventions have changed the common law position which did give rights to third parties under contracts in terms of the doctrine of *Ius Quaestium Tertio*. There are now certain requirements relating to evidential matters in this regard.

On a matter of detail, is it the Regulator's intention that the Track Access Conditions/Network Code would generally be governed by English law even where it is incorporated into Track Access Agreements governed by Scots law? [*para 7.22 9th indent*].

Annex 2: Draft Track Access Agreement

1. Interpretation

Consider definition of “Confidential Information” being expanded to include “Associates” if it is intended that information is shared with parties and that this should be placed under confidentiality obligations. Also the definition of “Relevant Losses” may need to be expanded in relation to funders where there is a knock-on effect of loss of government subsidy funding or grants although it is recognised this may cause technical difficulties in the definition in certain circumstances.

4. Commercial Purpose

See comments on page 1 above.

9. Indemnities

SPTE believes there are technical aspects of the wording of the general indemnities which may require to be considered further. “Wilful misconduct” is not a concept which is generally recognised in the legal systems in the UK and as a result where it is used in other industries to avoid doubts to its application full definition is provided in the particular circumstances of the agreement to which it applies. SPTE believes that an industry-specific definition which contains the key elements which differ from legal concepts such as negligence ought to be provided to promote certainty. In relation to the exception for negligence, as such exceptions are generally interpreted *contra proferentum* against the party seeking to rely on them to promote certainty, doubt should be removed about the effects of cases such as the Orbit Valve. It is suggested that consideration is given to inserting words such as “including breach of duty, statutory or otherwise” after the word “negligence” in clauses 9.1 and 9.2 to make them fully effective if it is intended to exclude all recovery for negligence type claims.

11. Performance Order Procedure

There are clearly differences between English and Scots Law in relation to arbitration and some of the terminology and statutory provision differs between the systems. Has the application of this in relation to Scotland been considered and would different terms apply?

12. Confidentiality

Aspects of the confidentiality obligations including the extent of disclosure may need to be expanded to include the position of Associates.

Network Code Part I

1. General and Definitions

See SPTE's comments above re Chapter 4 for its views on the need for the scope and content of local output statements to reflect PTE interests.

3. Development of draft Local Output Statements

As already noted, the draft does not deliver the Regulator's proposals for an enforceable right of consultation with PTEs. This should provide for adequate timescales and the capacity to make representations and objections, together with a right of representation at relevant meetings.

4. Establishment of Local Outputs

SPTE seeks further clarification of Clause 4.2(a)(ii) where Railtrack has a power not to include a local output if it "reasonably considers that" its reasonable cost in implementing. Such a local output would not be met where it is to be funded by a third party. What is the clause intended to achieve?

7. Appeals

SPTE could expect an appropriate right of appeal for bodies such as itself. Since it is not party to the Access Rights resolution Committee process, this right of appeal should be direct to the Regulator.

I hope that these comments will be of assistance, but if you wish any clarification or amplification please contact either myself at the above telephone number or Elaine Harris, Head of Legal & Administrative Services, on 0141-333 3110. I confirm that SPTE does not require any part of this submission to be treated as confidential, and that it can be made publicly available by the Regulator and quoted as required.

Yours sincerely

Malcolm C Reed
Director General

cc. Iain Wylie
Hazel Martin
Elaine Harris