



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

North Wing Offices | Platform 1 | Euston Station
London NW1 2HS

tel
fax

BY POST AND FAX: 020 7282 2043

3 August 2001

Dear Paul

MODEL CLAUSES – ACCESS RIGHTS AND MOC

This letter is Virgin Trains' response to the Regulator's consultation document published in June.

At the outset, I should make it clear that we fully support the Regulator's drive to improve access agreements and welcome many of the changes put forward. We are also encouraged to see that some of the points raised by ourselves and others in response to earlier consultation documents have been acknowledged in the revised proposals.

Some of those proposals, however, cause us considerable concern.

ATOC will offer a comprehensive response to the June document. We have seen a near final draft of that response and endorse its contents. The following comments are those of Virgin Trains and serve to emphasis points of very particular concern to us.

General - introduction

1. We broadly welcome the new template Schedule 5 and give a guarded welcome to the measures designed to increase on-rail competition in the future.
2. The document, however, includes proposals which give us very real cause for concern. Principal amongst these is the mooted introduction of provisions which would allow for the permanent mandatory removal of access rights on payment of compensation. This is unacceptable, arguably unlawful and a measure which Virgin Trains opposes and will resist to the fullest extent possible.
3. That said, it is difficult for us to assess the true significance of the current proposals when the Regulator has yet to publish his proposals to overhaul the liability and network change regimes or new approval criteria. Until the overall picture becomes clearer we cannot offer an informed commentary and we would urge the Regulator to accelerate and synchronise the publication of the outstanding key components of his access regime review so that we and the rest of the industry can evaluate the proposals in the round.

General – increased risk etc.

4. The current proposals significantly increase regulatory risk to train operators without adequate justification and shift the contractual balance heavily in favour of Railtrack.

which the public interest (and their franchise agreements) demand and are to raise the financial backing to do so, they need to be given a sufficient degree of control over the relevant processes and be allowed a level playing field. The post-Hatfield railway is already far less attractive to investors – a position which hardly warrants exacerbation by needless further regulatory intrusion.

5. If the Regulator follows through with his proposals, at the very least there should be a commensurate adjustment to operators' franchise agreements to reflect the increased risk to which they would be subject.

General – application to existing rights etc.

6. Virgin Trains has two track access agreements which contain unique features approved by the Regulator and held to be in the public interest. They represent a massive programme of investment on the part of Virgin Trains both in the purchase of new trains and in the financing of unprecedented levels of infrastructure upgrade. It is not altogether clear, however, the extent to which the Regulator's proposals are intended to apply to existing rights such as those contained in PUG2 and the Fifteenth Supplemental Agreement which support and contractualise that investment. Previous consultation documents suggest that the Regulator does not intend to retrofit all of the model clauses but will insist on their inclusion in new agreements or on the back of material changes to existing ones. On the other hand, the Regulator looks set to impose uniformity across the industry by including many of his proposals (such as Part J) in the new network code (or Track Access Conditions). The Regulator does appear to recognise the need to protect investment and has indicated that in certain circumstances operators will be able to continue to enjoy bespoke arrangements. We assume that this is the case for the Virgin Trains companies and that it is not the Regulator's intention to degrade the rights secured under PUG2 and the Fifteenth Supplemental Agreement nor to subject them to increased regulatory risk etc. This would be wholly unacceptable.
7. It would be equally unacceptable for the Regulator to seek to degrade those rights or subject them to increased regulatory risk etc. if at any time in the future they were updated or modified in any way to achieve the commercial purpose of the West Coast and CrossCountry upgrade projects in the face of changing circumstances.

Schedule 5 - general

8. The revised proposals for a template Schedule 5 are broadly welcomed and represent an improvement on previous drafts. We are particularly pleased to see that in response to points raised by ourselves and others the Regulator has adopted a fresh approach to the specification of maximum journey times and has abandoned earlier proposals for a 4-5% pathing time cap etc.
9. There remain, however, a number of fundamental issues.

Schedule 5 – journey times

10. In broad terms, we support the approach to journey times adopted by the Regulator in his suggested Table 6.1.
11. We are concerned, however, that it does not address a problem often faced by operators in negotiating new rights with Railtrack: how much pathing time in any given set of circumstances is reasonable? If Railtrack is faced with the prospect of having to agree to journey times inclusive of all allowances its tendency would be to incorporate generous amounts of pathing time and other allowances in those times to afford the greatest amount of operational (and commercial) flexibility. This could mean that the maximum journey times eventually negotiated are effectively meaningless in terms of an operator's business. (The Regulator has partially anticipated this problem in his suggestion that a specified percentage of the relevant services would be required to meet tighter journey times.) We would welcome guidance from the Regulator on the amount of pathing time and other allowances which the Regulator would normally expect Railtrack to include in the specified maximum journey times. We would ask that this is included in the draft new approval criteria.

afforded by the Rules of the Route and Rules of the Plan change processes. These processes are designed to promote changes which are in the interests of the public and the rail network as a whole. In these circumstances, an individual operator's rights might be sacrificed for "the greater good." This could significantly damage that operator's business and does nothing to foster the certainty required to win and retain investor confidence in the industry.

13. At the very least, if a train operator in such circumstances were to suffer journey time increases it should be compensated.
14. While we welcome the inclusion of the key journey time provisions in Schedule 5 and the greater clarity that this will undoubtedly bring, the proposed omission of the indemnification provisions will, of course, need to be considered in the light of the Regulator's forthcoming consultation on the liability regime.

Schedule 5 – new architecture

15. We would echo the points forcefully made by ATOC in relation to the risks of a mismatch between an operator's PSR obligations and its ability to secure the relevant access rights to meet those obligations.
16. The sentiments expressed in paragraph 2.23 of the Regulator's document place the risk squarely on an operator's shoulders as to whether it will be able to acquire the necessary rights. This is a totally avoidable mismatch and an area where a "joined-up" approach from the Regulator and the SRA is a clear logic requirement. Possible solutions include co-ordination of the franchise and access agreement processes such that PSRs are formulated on the basis of rights which are known to be available or to make the inclusion of PSRs in access agreements a *sine qua non*. Alternatively, franchise agreements could contain provisions which would automatically adjust the PSR obligations to fit the access rights which an operator is able to secure.

Schedule 5 – TACs/network code

17. The proposal to house some (if not all) access rights in the Track Access Conditions/new network code is another cause for concern. Once incorporated into those conditions, of course, they would be subject to regulatory intervention under Condition C8 and thus exposed to a significant degree of new regulatory risk. Virgin Trains is opposed to this suggestion.

Schedule 5 – protected rights

18. In paragraph 2.47 of the document, the Regulator explains that he intends to consult on the issue of protected rights when he publishes draft new approval criteria. We shall, of course, comment in detail at that time. In the meantime, however, the Regulator should be mindful of the fact that certain rights (whether they be as to quantum or service characteristics etc.) are so fundamental to an operator's business that protected status is necessary. Virgin Trains would not wish to see such status becoming the "exception rather than the rule".

Compulsory purchase of access rights

19. Virgin Trains is fundamentally opposed to the current proposals which would allow for the permanent mandatory removal of access rights on payment of compensation.
20. While a *limited* ability to realign rights might be beneficial to the industry as a whole in certain circumstances, the current proposals are far too wide. As cast, they could theoretically result in an operator being stripped of key rights (or indeed all of its rights).
21. We are also particularly concerned that the Regulator is suggesting that Railtrack should be in a position to initiate the relevant procedures (the suggested timescales in which are unrealistically short). Although the Regulator, of course, would take the ultimate decision as to whether or not to remove the relevant rights, putting Railtrack's "finger on the trigger" risks upsetting the commercial balance of power in the negotiation of access rights and operation of access

would have the right to try and buy out the troublesome rights.

22. Finally, the Regulator has indicated that the mandatory removal provisions will only apply to new rights acquired following the introduction of Part J. Does this mean, for example, that existing rights which are subsequently modified in any way at all would qualify as "new" and so come within the reach of the Part J provisions? The proposed continuous existence/materiality tests are unclear. We should be grateful if the Regulator would clarify his intentions.

Moderation of Competition

23. The Regulator's emerging policy looks set ultimately to abandon MoC and to "regulate" on-rail competition through the approval process alone while allowing protection for investment in the network.¹
24. In principle, Virgin Trains welcomes this development. It will afford operators opportunities to increase their involvement in certain markets or to enter markets hitherto closed to them for the overall benefit of the travelling public.
25. Indeed, we believe that the Regulator should go further. In our view, he should abandon the test of primary abstraction as a check on new entry and replace it with a presumption that (subject to long term investment-backed protection being unaffected) new services which make more use and more efficient use of network capacity are in the public interest and should be allowed. This would bring this area of policy more closely in line with the explicit aims of expanding rail travel as stated in the Governments' 10 year plan.

Thank you for the opportunity to record our views and we look forward to further involvement in the on-going process. Needless to say, if you have any questions in relation to the points raised in this letter, please do not hesitate to contact me.

Yours sincerely

Steve Taylor

¹ It would appear from the Regulator's comments in paragraphs 4.6 and 4.20 that the longer term protection secured under PUG2 and the 15th Supplemental Agreement would continue unaffected. We should be grateful if the Regulator would confirm that this is indeed intended and that it would be unaffected by the proposals for mandatory removal.