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MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS

Thank you for the document of 25th July. From what has been drafted so far, it appears that the proposals form a welcome improvement for all parties over that which exists at the moment. In general Wales & West approves of the general thrust of the proposals.

You will have seen a response from Prism and this response complements it and is in addition to it.

I will comment in order as the subjects appear in the document. It needs to be understood that all the comments below are dependant to some extent on the results of drafting still to be published or updated. It could be that this later material (either model clauses or charging review) will cause me to put in a revised response.

BIGGEST WORRY

My main concern when reading the documents was how the proposals and those yet to be drafted will relate to the obligations in the Franchise Agreement. In the short time left, I would find it incredible if the ORR and sSRA were able to match everything properly. With all the concerns over the timetable for transition (new franchises, new T.A.A.s etc) as well as concerns over the contents and "joined-upness" of the drafting, I am looking for good leadership from sSRA and ORR. If this does not happen, there is a strong likelihood that many deals and proposals will have to go on hold while the bidders assess the risks contained in the gaps.

COMMERCIAL PURPOSE

The clause as drafted seems to have the potential to add weight to the contract. I would not like to see it as a substitute for properly drafted provisions where they can be foreseen. There is a big risk of the clause being used to help procure sSRA obligations which are not matched by provisions in the Track Access Agreements. Commercial Purpose must not be seen as a substitute for "joined-up-regulation"!

ACCESS RIGHTS

Specification of Rights - The initial impressions are that many of the essential characteristics of TOCs' Rights will be incorporated into the proposals. I am however disappointed that there is to be no flexibility proposed depending on type of operator. There is a world of difference between an operator whose business is running a narrowly defined service over a long distance InterCity route and an operator such as Wales & West which has a multiplicity of routes, frequencies, end-to-end pairs and a P.S.R. running to well over 100 pages. Wales & West also needs considerable flexibility in its schedule 5 if the timetable process is not to grind to a halt each year in anticipation of Section 22 applications for dozens of minor or trivial changes to the Rights. Until the template is published, meaningful comment is impossible.

I note that you seem to be in favour of **journey time protection**. I hope that your draft will also include some comprehensive provisions on **Pathing Time caps** at route/service group level and at TOC level. This is needed to supplement journey time protection. Wales & West needs to have its individual trains protected from excessive journey length simply to protect the P.S.R. However, if **every** train were to approach that cap, the company would be in difficulty. Trains which suffer a long planned journey need to be offset by others which are given a very good offer. i.e. “give & take”. Similarly, a particular route or service group may need to take a hit one year with extended schedules. Provided other routes show a betterment then there may be no problem. However if **each** route was to suffer at the same time then that is unacceptable. There needs to be a layered approach at these three levels which gives Railtrack considerable flexibility in individual cases while ensuring that overall they cannot encroach beyond a limit of total pathing time.

I must stress that the **Access Conditions do not offer this protection contrary to what is said in 3.8**. The Access Conditions D4 only really looks at individual trains and there is no **pathing time** protection in the wider scenario at all. D4 would probably permit all schedules to be extended with no provision to say that Railtrack had taken too much.

There needs to be a right to calling patterns and there must not be an excuse for Railtrack to invalidate **Pathing Time** guarantees as is presently a risk. There must be a clear statement of the sorts of service changes (driven by the TOC, **not** by Railtrack or other circumstances) which could trigger an increase in the Pathing Time Cap.

Tiered Rights - I am pleased that the proposal for tiered rights has been dropped.

Rules of the Route/Plan - I see no problem with the proposals re. Rules of the Route/Plan and strongly endorse the Railtrack proposals to involve TOCs in the Engineering Conference.

Changes to Access Rights Over Time - I remain very sceptical over this proposal. If the rights have been properly drafted, then there should not (for a passenger TOC) be a likelihood of a surplus emerging. If Railtrack wished to acquire rights which were being used, then one has to question what is going on. If the services are P.S.R. then they must run. If they above P.S.R. they are probably profitable and one questions why the incumbent has any less need to use them than the new TOC.

It is quite right that there should be the facility to change rights and this exists. Any contractual compulsion in the process would send such poor signals to investors that I hate to think of the consequences. If there is a pressing “national interest” scenario, then sSRA should use its influence.

Any trading that takes place should be through Railtrack. If operators wish to “trade” between themselves, there is already the facility to hire rolling stock and crews between each other. The only real hurdle is the performance regimes. Schedule 8 and the Railtrack systems need to be amended to cope more easily with “joint” or “through” services. I think that given movement on this, the whole subject becomes a non-issue.

Capacity Warranty - I am pleased that you endorse the principle of Capacity Warranty.

You wish to see **consolidated agreements** at Railtrack’s expense. So do we! I believe that, to a limited degree this already happens but it is perhaps not widely known.

I am still unsure of the benefits of a **register of rights** that make the effort of its compilation worthwhile. It is not terribly difficult to order agreements from the ORR library and if these happen to be consolidated too then I do not see that a TOC could need much more.

OUTPUT STATEMENTS

I am pleased at the proposal to create **local output statements**. It is important that the outputs include more than just the traditional sorts of output (punctuality, ride quality etc). Process matters such as timetable development standards are vital. Similarly there are various outputs such as the information feed to **customer information systems**. These are fed by train describers, track circuit berths etc and are impossible to operate if Railtrack interrupts the information supply. At the moment, we have no contractual arrangement with Railtrack and consequently, the information systems can suffer when Railtrack chooses to put its priorities elsewhere.

I object strongly to the suggestion in 4.10 that there should be **operator output statements**. While it is always open to Railtrack to make approaches on any subject, it is unacceptable that the customer should be brought into obligations in this way. The necessary obligations (safety etc) are adequately spelt out in the T.A.A. and the incentive regimes should cover most other problems for Railtrack.

I hope that the output statement will be allowed to contain the material lost to us by the removal of 6.3.3. from the front end.

NETWORK CHANGE

I await the drafting with interest and will comment further once it has arrived.

I am worried (as I was when responding to the Schedule 4 proposals in the Charging Review) about compensation arrangements. As I said there, operators need to be fully compensated for the effects of Network Change. This is particularly the case where the operator is heavily inconvenienced during the work and gains little from it or is disadvantaged in the long term. The thought of trying to calculate actual losses and the resultant arguments about completeness of declarations etc is not pleasant. Provided schedule 4 is calibrated right and has sensible discounts then the template compensation is much to be preferred. I recommend that ORR considers 75% discount for a Part G possessions which are packaged so as to be timetabled in the permanent plan and subsequently appear in the GBTT and other TSDB derivatives. This would also remove the need for arguments when there is (quite sensibly) a mixture of renewal/maintenance/Part G in a possession and one or other party wants to play games by choosing the package likely to deliver the highest (for TOCs) or lowest (for Railtrack) level of payments.

NETWORK CODE

I approve of the general principles behind the proposed Network Code.

However, as I said earlier, I think the Access Rights Register is a waste of time.

I am very concerned at any prospect of the breakdown of the **star model**. It is the basic plank on which everything else is built. Any degradation is out of the question. It is true that the Emergency Access Code is a precedent against this but it is small and applies only in closely defined situations which are usually (by definition) off Railtrack's Network and thus a private matter to the TOCs concerned anyway.

I am pleased that ORR has stopped short of any significant **Rights for third parties**. Any situation where rights are needed are best dealt with using a series (or triangles) of bilateral contracts (TOC/ third party/ Railtrack). This has been done quite successfully near here where local authorities have funded infrastructure. Anything more direct will make the matrix unmanageable.

The Regulator's approach to implementation appears sound. However, the circumstances will exist where TOCs refuse to incorporate changes and so the matrix must work with some TOCs hanging onto their agreements for years to come.



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MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS

Following my reply to you of Friday 29th August, I have had a few further thoughts which I must draw to your attention where I believe that the drafting of the proposals has some serious flaws. I hope that you can take them into consideration.

STABLING

Although the proposed drafting of the definition and clause 5.4 (old clause 6.5) have not changed, I believe that the railway has moved on beyond what was the case in 1994/5. I have no problem with the definition, but the new clause 5.4 says that stabling should reasonably be provided to meet the WTT. Unfortunately, train planning at most key locations now involves the timing of all ECS and shunting (Ancillary) moves which involves the proving of the availability of stabling capacity before the plan comes into being. Therefore there cannot be a WTT which does not already have proven capacity. Therefore 5.4 is a circular clause which only gives any protection to an Operator from reductions in capacity after a timetable has been planned. It is therefore offering considerably less protection to operators than when originally drafted when planning of ancillary moves was less rigorous.

If a change of some sort occurs which causes (through no fault of the operator) there to be too little stabling at a location from the beginning of a new timetable, then the operator is at serious risk. While the new timetable is being planned the operator may be forced to make some sort of manoeuvre to accommodate that fact that it can no longer make a particular stabling movement. The WTT it needs will not be planned but the clause does not provide any redress. The protection of clause 5.4 will not be invoked. This will probably be quite expensive and/or be a risk to PSR etc.

Clause 5.4 needs to be redrafted to be more compatible with the definition, i.e. there should be reasonable endeavours to provide stabling to give effect to the services rather than the WTT. Where there is rising demand for stabling from another operator who is increasing his services through new rights, then Railtrack need to negotiate with that operator. The operator which is trying to maintain status quo should be largely unaffected. I do not think that this request is unreasonable as it simply clarifies what I believe most people think the clause actually does now.

ROUTES

The definition of "Routes" has been changed in the proposed drafting. At the moment, an Operator can plan to run its Services over the Schedule 2 Routes under circumstances of "normal" operation. If contingency arrangements on the day, or pre-planned diversions for engineering etc would be assisted by a diversion, then that diversion is permitted (often on a contingent basis). Similarly, Ancillary Movements are permitted in a way that is necessary or expedient for the provision of the Services.

The proposed drafting of Schedule 2 is not known, so I cannot tell if the Routes will include every conceivable main, ancillary, diversionary and depot route. The very unpredictability of some of the rarer movements means that the list in Schedule 2 will have to be unduly large to make it usable. If the list is restricted to the planned and common unplanned movements, the relationship with Railtrack will break down every time a practical requirement emerges for which there is no express permission. Passengers on a delayed train will not be amused to hear that their journey is terminated because the Operator does not have the diversion in its schedule 2 or that their train is cancelled because the TOC had no rights to get its loco from the depot to the train!

SERVICES

I am not sure why the definition of “Services” has been changed. Schedule 5 does not in general describe services. It is a set of Rights defining the boundaries within which one may bid for train paths. It should also admit the assorted variants which we have to run as a consequence of Railtrack Engineering etc. If we are only permitted to run “...services described in Schedule 5...” The practical railway will be prohibited from running on many occasions. I should be interested to hear the logic for the suite of definition changes. The blue document does not explain the plan behind the new definitions. I would offer suggestions for improvements if I could see what the objective was.

PATHING TIME & OTHER ALLOWANCES

Any drafting relating to these matters needs to be very carefully considered. Terminology and custom and practice varies considerably around the country and so confusion is easily created. The different components of these allowances in the Rules of the Plan (and Route) need to be carefully separated and closely defined. The National standards are gradually coming together but the custom and practice has a way to go yet.

PROTECTED RIGHTS

There is no mention that I can find of “Protected Rights”. This is a central feature of the present agreements. It provides the certainty that the owner of a franchise will possess the basic rights it needs in order to continue its trade. The loss of protected status is bound to reduce the security of a franchise and reduce its value. The proposal for compulsory redemption of access rights just adds insult to injury in this respect!