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Dear Mr Dawson

**Model Clauses for Passenger Track Access Contracts – Final Policy Conclusions,
December 2002**

I make the following response to the above consultation document on behalf of Arriva Trains, referring below to the numbering of the draft model clauses.

We welcome the introduction of model clauses, subject to the reservations expressed in this letter. We also make the general point that we support ATOC's response to the consultation document, both in general terms and as specifically stated below.

1. Clause 1.4

This clause potentially introduces ambiguity into the relationship between the parties. Therefore, we request its deletion.

2. Clause 6.1(a)(i) and (ii)

We believe that the wording "reliable and lawful commercial service on the Routes" in clause 6.1(a)(i) has an uncertain meaning and duplicates other provisions in the TAA. On this basis, we propose that the wording should be deleted.

We specifically support ATOC's concerns on the liabilities and ambiguities which may arise from the obligation in clause 6.1(a)(ii).

3. Clause 6.2

We should prefer to revert to the original wording of "reasonable endeavours", rather than use the proposed more onerous wording of "all reasonable endeavours".

4. Former Clause 6.6

The model clauses do not contain the definition of the Train Operator's protected rights which was formerly found at this point for the purposes of Condition C8 of the Access Conditions. The relevant wording should be restored or its absence explained.

5. Clauses 8.2 and 8.3

We specifically support ATOC's concerns as to the need to restructure the distinction between Non-operational Breach and Operational Failure.

The definitions of Non-operational Breach and Operational Failure should only be mutually exclusive to the extent necessary to prevent duplication of payments or remedies, but should allow for both definitions to be applicable where a breach or failure has multiple effects, both operational and non-operational.

The draft contract does not explain or detail how the main result of a breach is determined or quantified. For instance, would value of losses or duration of effect be the criterion?

6. Clause 11.1(a)

It is not clear when the period of 365 days begins. It is proposed that this clause should be amended so that the period commences when the relevant party becomes aware that it is likely to have a claim. The obligation to notify should similarly be linked to knowledge of the likelihood of a claim, and not to knowledge of the relevant facts, the latter wording being inherently ambiguous and having previously produced differences of opinion between the parties. The following wording is proposed:-

"shall notify the other party of its intention as soon as reasonably practicable (and in any event within 365 days) after first becoming aware that it is likely to have such a claim".

7. Clause 13.4.1(b)

The specific arrangements for set-off, withholding and resolution of disputes provided in the current template Schedules 4 and 8 are to be retained.

For the avoidance of doubt, therefore, this sub-clause should refer to, "any undisputed sum for the purposes of Schedules 4 and 8".

8. Clause 14

We specifically support ATOC's concerns that aspects of the performance order process are uncertain.

9. Clause 15.2

The wording formerly found in clause 17.2(k) relating to PTEs should be restored to the model clauses in an updated form so that it may be deleted by TOCs to which it is not relevant.

10. Clause 15.3

Compliance with this obligation may not always be required, for instance, if the contract is terminated only by consent and replaced by a new track access agreement. Therefore, it is suggested that it should be qualified to become active only upon request by one party of the other party.

11. Clause 18.1

We share ATOC's views on Force Majeure.

Also, we consider that sub-clauses (b), (c) and (g) should be deleted; sub-clause (a) should refer to war, civil war, armed conflict or terrorism and sub-clause (d) should refer to the stated contamination, unless the source or cause of such contamination is as the result of any act of the relevant party. This is upon the basis that only uninsurable risks should be covered by Force Majeure. These proposals are in line with the Office of Government Commerce guidance on PFI schemes. We also request clarification of the reasons for the inclusion of sub-clause (f).

12. Clause 19.3.2

This clause appears to exclude, for example, the remedy of injunction or specific performance from the Court. Is this consistent with paragraph 5.15 of the Final Policy Conclusions?

13. Schedule 5

Please refer to the annex to this letter which deals with Schedule 5.

14. Schedule 6, Paragraph 1.1(c)(iii)

This new Event of Default does not appear to have been consulted on and should therefore be deleted.

15. Schedule 9

We share ATOC's concerns as to the appropriateness of symmetrical caps, but accept that it is reasonable to have higher caps on Network Rail for operators with more revenue risk. However, we are concerned that Arriva Trains Merseyside, as a small operator, may receive a lower priority than larger operators because of this, and will remain alert to this possibility.

We share ATOC's objection to the disapplication of the limitation in respect of a "wilful breach" and request its deletion. As an aside, we believe that the expectation that TOCs ensure that all of their staff are aware of the terms of an access agreement is unrealistic and would not necessarily prevent a wilful act in any event (paragraph 4.29 of the Final Policy Conclusions).

16. Bespoke Arrangements

The opportunity to produce bespoke arrangements, subject to the Regulator's approval, is welcomed. It will be particularly important for the Merseyrail Electrics franchise which will be granted as a concession from the Merseyside PTE in July 2003 and which will need to be reflected in the Track Access Agreement.

17. Insurance Arrangements

We will need to consider the impact of the consultation document upon our insurance arrangements and to take insurance advice for that purpose.

18. Revised franchise agreement

The revised franchise agreement is not available to allow comparison with the draft model clauses. Therefore, we reserve the right to raise further issues in future on the model clauses to the extent that the new franchise proposition creates obligations or processes which do not fit with the model clauses.

I am happy for this response to be placed in the ORR Library and on its website.

Yours sincerely

Roger Cobbe
Group Development Director

Annex - Schedule 5

Whilst we do not yet have any experience of populating the draft Schedule 5, we endorse ATOC's general comments about the need for flexibility in customisation, especially when attempting to conform Arriva Trains Northern's necessarily complex rights. The template may therefore need to be reviewed in the light of experience.

Paragraph 1.1

We support the greater precision given to the two levels of rights by substituting Firm and Contingent Rights for "entitled to" and "may bid", and the detailed definition of Firm Right, which should be replicated in Access Condition D as soon as possible. One notable omission from this, however, is main routes (only diversionary and maintenance/ancillary routes are mentioned!)

A new definition "relevant change" has been added but the references to it in paragraph 7.5 onwards have all been deleted, which is unfortunate because the revised wording is more cumbersome.

It is not clear whether the Working Timetable time in the definition of Journey Time includes public differentials as identified in the WTT. This needs to be clarified.

The word Service appears throughout with an initial capital (except in the definition of Journey Time!) but is only defined in Schedule 8, whereas in Schedule 5 it is used in a more general sense. It should therefore either be defined separately here or spelt in lower case.

Table 3.1(a)

Presumably there will be a separate table for morning peak services based on arrival time bands.

Paragraph 3.6(a)

It may be necessary to restrict the amount of Flex around the clockface where the frequency is hourly or less and services are timed to meet customer needs, particularly connections.

Paragraph 4.5

We need the additional calls to be Firm Rights as they are generally designed to meet specific market needs, for example school children, for whom the acceptable time range can also be quite limited.

Table 6.3

Standard Calling Pattern should read Regular Calling Pattern, and "maximum key journey times" in the footnote should be spelt with initial capitals.

Paragraph 7.2

We do not believe this procedure will be used much in practice as it will be impossible to monitor automatically achievement of scheduled (Scheduled?) Journey Times for just those trains which meet the Fastest Key Journey criteria. We also believe that it only serves to condone any deterioration of the Network.

Paragraph 7.3

We do not understand the use of the words “would, if implemented”, if the Network Change is deemed to have already occurred.

Paragraph 7.9

The cross-reference to paragraph 7.6 should be to 7.7.

Paragraph 8.2

The words “so as to avoid” imply intention rather than result and should be amended so as to avoid this.

Table 8.2

Customisation will undoubtedly require some time band specific connections to be made at busy times.

Paragraph 8.4

Electronic timetable systems generate connections based on public not working times, and Working Timetable therefore needs to be qualified as in the definition of Journey Time (see paragraph 1.1 above).