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**Model Clause and LOC Consultation**

Dear Peter,

Thank you for the opportunity to be consulted on the Policy Conclusions for Model Clauses (December 2002) and the Draft Conclusions on Local Output Commitments and the Provision Of Information (December 2002).

I am sure that many of the comments that are made in this letter will be consistent with other operators. However, there are a number of issues that cause Chiltern Railways particular problems because of the fact that it has recently entered into a new Franchise Agreement, and many of the risks that ordinarily could be placed 'back to back' by other operators with a new Franchise Agreement, cannot be done so by Chiltern Railways.

**Model Clauses**

Chiltern Railways has a real concern over the extent of liability, either under Clause 10 or as a result of an Operational Breach. As the current draft stands train operators are liable under the definition of 'Relevant Losses' for all Network Rail's losses, including Schedule 4 and Schedule 8. Any mechanism that potentially cuts across the Star Model is unhelpful

This liability would, if implemented, be significantly higher than our current level of exposure and would also we believe indemnify Network Rail for risks which are already covered by Track Access Charges. Risks and liabilities associated with performance across the network can only be managed by the network operator, and there is considerable concern that an individual operator would not be able to either manage this type of risk or to insure against it.

Other risks that could fall to TOCs under the current drafting could include the reclaiming of lost variable track access income, or the cost of redeployment of maintenance staff or contractors to deal with a specific problem on one part of the network. Variable track charges are designed to pick up the avoidable costs for Network Rail and so, on average, Network Rail would be held neutral across the network for any reduced variable charges. The type of incident that might cause the wholesale redeployment of staff is, we believe, included in the cost and performance historic benchmarks for Network Rail. If there is a decrease in this type of incident Network Rail would benefit and if there was an increase it would be open to the risks. It is not reasonable for an individual operator to indemnify Network Rail for costs or risks that we would argue it is already paid for through the standard access charge regime.

The suggested liability caps are much higher than required, and would be very difficult to reach even in worst case scenarios. The risk is that, if these liability caps are not reduced to a more appropriate level, TOCs will face the prospect of paying for redundant insurance or, even worse, will find that the risks are uninsurable.

Chiltern Railways supports the principle of Performance Orders and believes that their introduction will aid improved performance from Network Rail. However, it is concerned that when a Performance Order is issued, an operator should not have to wait for an arbitrator or tribunal to a judge whether and to what extent a performance order should apply, before compensation above Schedules 4 and 8 should apply. The introduction of compensation above the Schedule 4 and 8 levels immediately when the 20% performance level is breached will, for example, motivate Network Rail to restore the full capability of the network and will prevent an operator from potentially going out of business.

It is also important that Network Rail is not allowed a Force Majeure clause in addition to the 20% performance order threshold. Incidents of Force Majeure are included in historic performance levels and are therefore already allowed for in its annual performance planning process.

The definition of a Force Majeure event is too loose and would enable Network Rail to argue that, for example, extreme weather had occurred, because it suited its commercial needs to do so. A more robust definition of Force Majeure would prevent future disagreements between the parties.

Under Clause 6, we share the concern raised by ATOC at the recent meeting that these requirements on a TOC only replicate its adherence to other standards (Group Standards, Safety Case, etc), and are therefore not required in this document.

Clause 6.2, which requires the parties to use all reasonable endeavours to minimise trespass and vandalism is helpful.

Whilst Chiltern Railways broadly supports the new Schedule 5 format, it is concerned that strict adherence to standard calling patterns, particularly at peak times, could

reduce capacity and flexibility. Much of the success of Chiltern Railways has been built upon its ability to operate flexibly to meet emerging passenger demand and it would not want to see this flexibility reduced because of the model clause format. Can you please confirm that you are happy for a more flexible approach to be taken where this benefits passengers?

### Local Output Commitments

Chiltern Railways supports the introduction of Local Output Commitments and believes that the introduction of Part L of the Network Code will enable it to understand more fully what it can expect from Network Rail each year and have a greater degree of confidence that it will be delivered.

However, there is lack of clarity on how Chiltern Railways is able to guarantee its 'slice of the cake' of any national Network Rail targets. Although it does not expect to be able to guarantee a reduction in delay minutes precisely in line with national targets, the levels of delay being discussed for 2003/04 are entirely unsatisfactory and are currently c50% higher than last year's targets.

As such can you please clarify whether the requirement for a 2½% year on year on Network Rail continues in 2003/04? It is understood that 2004/05 will be the subject of the interim review, but the position for 2003/04 is crucial to Chiltern Railways, particularly in light of its performance commitments to the SRA.

One of the principal commitments made in the signing of the Franchise Agreement less than 12 months ago was the delivery of PPM building to 93.75% in December 2004. This commitment was made with the knowledge that Network Rail (then Railtrack) would be required to deliver year on year reduction in delay.

Chiltern Railways believes that the basis for performance plans each year should be the previous year's targets. If the previous year's actual performance is used as the basis for predicting performance levels, it does not motivate Network Rail to make any year on year improvements, as each year performance could deteriorate by up to 20% without the risk of performance orders and its reward would be an easier target for the following year.

Any clarification you are able to provide in this area would be particularly helpful.

We would like to see pre-agreed performance order levels so that Network Rail and Operators can agree at the beginning of the year at what stage performance orders should kick in. This should be before the 120% annual figure has been breached. For example if performance is very bad in the first 4 periods of a year (say 200% of target), it could be several more months before the actual threshold is breached. This is not helpful for rectifying performance levels. However, if a sensible agreement is reached before the year begins, many of the more defensive and emotive discussions that are bound to take place could be avoided.

Thank you once again for the opportunity to be consulted on these issues. Model clauses and LOCs are both viewed as helpful by Chiltern Railways, and any further clarification you are able to provide on the points raised will be particularly welcome.

Yours sincerely

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