



ASSOCIATION of TRAIN OPERATING COMPANIES

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22 August 2005

Dear David

**CONSULTATION RESPONSE - NETWORK CODE REFORM PHASE 2:
UPDATE AND EMERGING CONCLUSIONS**

Before commenting in detail on the individual consultation questions it is worth summarising the thinking which underlies our response.

The final conclusions which follow from this consultation should mark the end of the reforms of the Network Code as a consequence of the Rail Review. The reform process has consumed a large amount of resource from all sections of the rail industry. In this context the industry should consider carefully whether any further significant reforms should be made before the effects of the phase 2 reforms have been fully understood, and how such reforms should be taken forward.

In considering the proposals in respect of the changes to parts F & G we have tried to consider the position of all parties and we fully understand the need to encourage the joint venture approach envisaged by the Rail Review. However, whilst superficially symmetrical rights in parts F & G appear to encourage that approach it is our belief that a serious asymmetry in our commercial relationship with Network Rail would result.

Contd/

In respect of part K we believe that the current drafting has not kept pace with the development of the informational requirements on Network Rail, and whilst an information requirement is still needed, a more streamlined approach would be appropriate.

I confirm that no part of this response is confidential.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alec McTavish', with a stylized flourish at the end.

Alec McTavish
Director of Policy & Regulation

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Chapter 2 (Phase 2 progress to date) – paragraph 3.23

Consultees are asked to identify any areas where they believe further work to reform the Network Code is required.

Considerable progress has been made in the reform of the Network Code. A period of stability to allow the effects of the Phase 1, and when complete Phase 2 reforms to be understood would be beneficial before making any further major reforms.

Chapter 3 (Parts F and G) - paragraph 3.12

Views of consultees are sought on the objective in paragraph 3.11, and whether such an objective should be explicitly incorporated in parts F and G as the purpose of the relevant provisions.

The problem with introducing an overriding objective into Parts F&G is that either it is consistent with what follows – in which case it does not add much – or it is inconsistent in which case there is a problem. Consider for example blocking rights. Are the rights which appear to be absolute in the agreement to become less absolute if an overriding purpose was introduced?

Chapter 3 (Parts F and G) - paragraph 3.24

Views of consultees are sought on the propositions that:

- (a) existing network licence provisions give Network Rail the significant obligations in respect of general facilitation of new rolling stock and network commitments, and Network Rail should now make a statement setting out how it proposes to do this in the light of the obligations;**
- (b) project specific facilitation contracts should be available once a project has been specified and the risk allocation defined and whether the existing arrangements are adequate; and**
- (c) ORR should not establish model contracts for bi-lateral VRACs, but that this should be dealt with through the Network Code.**

We agree that the obligations given by the licence provisions, strengthened by the recent amendments to licence condition 7 in respect of route planning, are sufficient in this regard, and that Network Rail should make such a statement.

We support the proposition that a requirement for project specific contracts, setting out the agreed risk allocation be incorporated to the code. This would ensure clarity for the project funder, and that Network Rail is properly incentivised to deliver the project.

We agree that ORR should not seek to establish VRAC model contracts, at present we can see no particular benefit in such contracts and would prefer a more flexible approach which allowed a contract tailored to each individual scheme.

Chapter 3 (Parts F and G) - paragraph 3.30 and 3.31

ORR seeks views on:

- (a) whether Part F of the Network Code should be changed:**
 - (i) to enable Network Rail to make proposals for vehicle change, and ultimately (subject to appeal) to require them;**
 - (ii) to extend the definition of vehicle change to include vehicle operation; and**
- (b) whether they see any merit of justification for the provision of a technical arbitration process in Parts F and G and, if so, the nature and scope of such a process, and its relationship with the existing dispute resolution mechanisms.**

In responding to consultation it would be helpful if:

- (a) Network Rail could identify any changes which it considers have been, or are being, hindered, by the existing arrangements;**
- (b) train operators and rolling stock companies could set out how they believe current arrangements can or could ensure that changes which are of wider industry benefit will be made.**

ATOC does not support the suggestion that Network Rail should have rights to propose vehicle changes and ultimately to require them (subject to appeal) . To date we have seen no substantial evidence that train operators have been uncooperative in implementing changes to rolling stock where such changes have been necessary and a robust business case for both the train operators and Network Rail has been demonstrated: as you state in the document the fitting of sanders to the fleet demonstrates this most clearly.

Effort should instead be concentrated on determining on the basis of evidence best whole industry solution. This is a job for the whole industry. In that context we believe that the System Interface Committees combined with specific local work between TOCs and Network Rail is the right way forward. If, following this work, there is evidence that good ideas are not being implemented, then we should reconsider this aspect of the Network Code. But to date, it has not been the problem.

But even if it was shown that local optimization could occur by a change of rolling stock and that the TOC or FOC was unwilling to do it, we continue to be concerned about the legality of any attempt to require an operator to change TSI compliant stock. We would value the view of the ORR on this point.

The proposal for technical arbitration may have some merit if a problem was shown to exist; however, such an approach will require careful consideration and at first glance would appear to be fraught with difficulties. For example: what would be the relationship between the arbitrators and the SICs? An arbitration process which pits one group of technical experts against another is likely to be costly, and potentially wasteful, in terms of scarce resources. Given the early stage of the thinking on this proposal and the potential difficulties with it, we suggest the proposal is considered separately from the phase 2 reforms.

Chapter 3 (Parts F and G) - paragraph 3.34

ORR seeks views on its emerging conclusion that the separate F and G processes should be retained, but changes might be needed to ensure the processes work in parallel where appropriate.

We support the proposal that separate F & G processes are retained. The considerations on respect of vehicle and network change are different, and as stated above, Network Rail should not be given rights to propose vehicle change because of the potential commercial asymmetry that this creates. However, we agree that the processes should be as closely aligned as possible and would support changes which ensured this.

Chapter 3 (Parts F and G) - paragraph 3.42

ORR seeks views on the emerging conclusions set out above, particularly:

- (a) the key principles set out in paragraph 3.36 above;**
- (b) the right to seek to block a change being subject to specific criteria as set out in paragraph 3.38 above; and**
- (c) no change to the existing compensation arrangements for changes of law.**

We support the conclusions that have been reached by the ORR. The principles set out in paragraph 3.36 combined with the proposed specific blocking rights in paragraph 3.38 ensure that interests of affected current and future users of the network are protected.

We also strongly support the expanded definition of Network Change proposed in the July 2004 document (Annex 4).

We can currently see no reason for a change to the existing change of law provisions.

Chapter 3 (Parts F and G) - paragraph 3.45

ORR seeks views on its emerging conclusion that there should be a mechanism for adjusting Network Rail's outputs by giving them the right to make changes to access rights subject to compensation, and appeal to ORR.

In the context of the revised arrangements for undertaking access charging reviews set out in the Railways Act 2005, and the increased involvement of funders in the specification of network outputs we recognize that such a mechanism is necessary. However, in order to protect the commercial position of franchised train operators it is important that access agreements are granted for the whole franchise term and the effects of any changes are compensated on that basis.

Clearly adjustments to network output must be subject to compensation which hold operators financially neutral from the effects of the changes to access rights and the protection provided by a right of appeal to the ORR.

The ORR must give some consideration to what mechanism will be required to link the outcome of an access charges review to changes in access rights, for example a requirement on Network Rail to produce a plan setting out the consequences for access rights as part of its annual business plan.

Chapter 3 (Parts F and G) - paragraph 3.49

ORR seeks consultees view on our emerging conclusion that there should be bespoke arrangements for larger and more complex projects?

The initial difficulties with the GSM-R project have proved the worth of bespoke arrangements for large and complex projects, and we support the emerging conclusion. However, bespoke arrangements should be limited to the administration of the change process and recognize that the principles underlying the compensation arrangements remain unchanged.

Chapter 3 (Parts F and G) - paragraph 3.52

ORR seeks views of consultees on the way changes to Parts F and G should be implemented.

It is our view that the ORR should undertake the detailed drafting. However, implementation should be via the C5 mechanism, not C8.

ORR seeks views of consultees on:

- (a) the circumstances under which third parties may require Network Rail to facilitate changes to the network or to vehicles operated on it;**
- (b) whether a scheme specific contractual mechanism is the appropriate means;**
- (c) what rights and obligations these contracts should contain and whether they are different from those enjoyed by and imposed on train operators under Parts F and G of the Network Code;**
- (d) what the appropriate mechanism for doing this is.**

We would welcome a statement from Network Rail of the approach it proposes to adopt in relation to scheme-specific contracts for third parties in respect of facilitating vehicle change and facilitating and delivering infrastructure improvement. The approach would of course need to be able to reflect ORR's economic framework for investment in the network (we recognise that this is not due for publication until August 2005).

In our view it is not appropriate for Network Rail to take the lead on implementing changes to vehicles on the network for third parties. Vehicle change should be led by a holder of an access agreement. In terms of changes to its own assets, it is for Network Rail to determine the circumstances under and extent to which it facilitates change. However, when undertaking change to the network it must, consistent with its role as holder of the whole industry business case, consider the consequences of such change on the industry.

It is likely that some form of scheme specific contractual mechanism would be required as third parties, by their nature, are unlikely to make use of a change or enhancement in the same way as a train operator. Therefore the rights and obligations in the contract will be different from those in the network code, for the most part they are more likely to resemble those in a construction contract, rather than an access agreement.

Chapter 4 (third parties) - paragraph 4.17

ORR seeks the views of consultees on the proposal that Network Rail and train operators develop a code of practice setting out how they will consult interested third parties in respect of industry processes in the Network Code and, what the code should contain.

We agree that a code of practice would be useful in addressing how third parties are consulted. This should be developed jointly between Network Rail and Train Operators drawing directly from those with most experience of engaging third parties, for example train operators who operate services on behalf of PTEs.

Chapter 5 (Part K – Information) – paragraph 5.12

ORR seeks views on the broad approach and specifically:

- (a) on whether ORR should be switching on Part K;**
- (b) what the content of the annual information report, and the regular monitoring reports should be;**
- (c) what provision should be made for specific information flows.**

ATOC does not believe Part K should be switched on in its current state. In saying this ATOC support the conclusion reached by the industry working group on BHLK. Since Part K was promulgated material changes have occurred in the provision of information to industry parties (licence changes; annual business plan; better F&G processes). We would prefer to take stock on Part K with industry parties through the BHLK group and come back with proposals.