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6 June 2011

Office of Rail Regulation
1 Kemble Street
LONDON
WC2B 4AN

Dear Sirs,

Consultation on a revised contractual regime at stations – Proposed changes to the Station Access Conditions and Independent Station Access Conditions – FirstGroup response

Thank you for the opportunity to comment upon the proposals to reform parts of the contractual regime at stations.

We have previously commented on ATOC's response and are fully in support of that response. We do not, therefore, propose to reiterate any of ATOC's comments or cover in detail the issues examined in depth by ATOC.

We are pleased that the Office of Rail Regulation (ORR) recognises the key role of the Department for Transport's (DfT) review of franchising arrangements, and more particularly the possibility of future franchisees being invited to take on greater responsibility for the management operation and maintenance of its portfolio of stations through a full repairing lease.

We fully support the principle contained within the review of the contractual regime at stations to encourage the drive for efficiency, improved methods of working and facilitate investment by third parties where this will be of benefit to the ultimate users of railway services.

The consultation questions in Appendix A to this letter have been responded to however we feel it would be beneficial to set out our concerns with Network Rail's proposals.

For franchised passenger train operators, the Station Access provisions of the regulated contractual regime at stations serves three key functions:

1. To provide a contractual framework for the efficient and economic operation and financing of Stations and the relationship between SFO's and beneficiaries;
2. To enable the timely and economic development of changes to station amenities or services that deliver benefits to the users of railway services; and
3. To protect their businesses from unforeseeable costs or loss which are not countered by any quantifiable benefits to customers for the duration of the franchise

These functions form the basis upon which train operators plan their businesses and deliver enhancement to customers. Changes to the current regime risks unbalancing the division of risk among SFO's and beneficiaries and thereby hindering the degree of financial and operational certainty with which operators can plan their businesses.

Against this background the proposals present some very significant concerns, most particularly the ability of SFO's to propose and implement change without satisfying beneficiaries concerns as to the financial implication of a Station Change. As the principal purpose of the Station Access regime is the division of risk among station users, the suggestion to amend this division to weigh more heavily on beneficiaries, is unwelcome. It is also of note that the proposals do not investigate how the new Station Changes regime will affect the establishment of the Qualified Expenditure (QX) or Long term Charge (LTC). It would appear from the proposal that as soon as a Station Change is established the revised values can be entered into QX or LTC and charged to beneficiaries, who will then need to recover those values through a co-operation agreement.

A key issue is that the Annex B proposals do not provide for franchised train operators to be compensated for financial costs or losses at the time that they are incurred. Train operators' businesses are characterised by both high short term fixed costs and revenues, and are thus ill equipped to bear non-anticipated costs and losses whilst dispute proceedings and/or the determination of a compensation dispute is pending. Even with the introduction of the industry's revised August 2010 Access Dispute Resolution Rules (ADRR) a substantial dispute can take many months to reach a resolution. In the event of an Access Disputes Adjudication being appealed to Arbitration, it could stretch into years. In fact, although the proposed National Station Access Conditions (SACs)/Independent Station Access Conditions (ISACs) have template Co-operation Agreements in the Annexes, the only specific obligations upon a Proposer, Specific or Strategic Contributor in relation to compensation for damage to the business of a Consultee is that in C4.1.5 to offer to enter into a Co-operation Agreement based upon the templates at Annex 13 and 14.

The ATOC response to Network Rail's proposals at Appendix 5 of Annex B articulates these concerns and indicated possible ways in which changes could be made to mitigate the risks.

It is very disappointing that paragraph 3.6 of the consultation document asserts that the NR proposals constitute the streamlined process which the ORR asked the industry to develop, and merely acknowledges ATOC's comments but dismisses them with the statement that "we consider that the draft modified Station Change process satisfies our requirements", with no explanation of the rationale behind the value judgement.

Network Rail's proposal as currently composed do not present a rationale for the decoupling of financial issues from the Station Change process. Neither do the proposals take into account the significance of transferring risk to beneficiaries and the impact that change will have on the certainty with which operators are able to plan their businesses.

Furthermore, the proposals put forward by Network Rail cannot be said to simplify the process of Station Change, rather, they represent a more complex and administratively burdensome regime. These drawbacks are most apparent in the proposal to develop multiple variety of stations change and remove the direct link between the implementation of Station Change proposals and the ongoing costs of operating the station.

We are concerned that the review has been led and drafted by Network Rail with little regard for the views expressed by ATOC and without reference to a base of knowledge and experience. This is made particularly clear by the proposed application of an indemnity provision to all Station Change proposals not just those made by Network Rail as within the current proposals, without recognition of the significance this change brings for train operators.

We would suggest that the proposed amendments to Station Change are held pending conclusion of the new lease and licence details for future franchises. We would like to offer our support to the ORR in further reviews.

Yours sincerely



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Group Director of Property
FirstGroup plc

APPENDIX A
LIST OF QUESTIONS POSED IN CONSULTATION DOCUMENT

Differentiating between proposed changes to the national template Sacs and specific Station Change proposals

6.5 *Respondents are requested to submit their comments on this proposed differentiation between Part B and Part C changes (Parts 2 and 3 of the Isaacs). In particular, we would welcome comments on the following points:*

- *the retention of a voting process for changes to the national template Sacs, and whether the 80% threshold for approving a change proposal is appropriate.*
- *The deletion of the need to hold Station Meetings (as currently defined).*

FG Comments

The proposed voting process appears a sensible one given the number of parties involved and the 80% threshold would appear to be a reasonable method of establishing majority consent. Station Meetings are rarely arranged. As the station meeting provisions require a large roundtable meeting they rarely deliver any benefits and place additional burdens of management time and administration on the industry. FG agree therefore their retention does not serve a significant purpose.

Categorisation of Station Change proposals in Part C

6.7 *Respondents are requested to submit their comments on this proposed categorisation. In particular, we would welcome comments on the following points:*

- *Is the £5,000 threshold proposed in the definition of “Financial Impact Test” for assessing materiality the correct threshold?*
- *Is there an alternative practical method of assessing materiality which respondents would favour?*

6.8 *It seems possible that an Exempt Activity may have the same substantial implications for an affected operator as a Material Change does; yet the classification of the change means that the affected operator has no right to make objections or representations, or to receive compensation for such an Exempt Activity.*

- *We invite respondents to set out their comments on whether it would be appropriate to allow operators to make representations (or even objections) in relation to an Exempt Activity, and/or to receive compensation in relation to the same. Consultation on revised contractual regime at stations - proposed changes to the Station Access Conditions and Independent Station Access Conditions*
- *Would respondents benefit from Network Rail producing guidance in relation to what is covered by its proposed definition of “Exempt Activity”?*

FG Comments

The creation of Station Changes which are not tempered by consultation would rebalance the financial and operational risk of progressing schemes to those least able to effect the schemes impact, the beneficiaries and users of the station.

The current distinctions between Material and Condition Changes and Railtrack and SFO proposals are not complicated, balance risk appropriately and engender effective working relationships between change proposers and consultees. It is by no means clear from the consultation what is wrong with this existing system and the evidence or rationale behind the new process.

The £5000 per annum threshold of materiality proposed ignores both the relative running costs of different sizes of station and the complexity of relationships between SFO's and Beneficiaries. If a station by station threshold is used, a scheme covering a number of stations where a train operator is beneficiary each of which was below the threshold at individual stations while amounting to a substantial cost overall would not be considered material.

FG would not therefore be in favour of a crude financial threshold to distinguish between material changes and believe the way around the problems with exempt activities, identified by ORR, is to develop a simplified Station Change process.

Direct involvement of third party developers

6.12 *Respondents are requested to submit their comments on the proposed direct involvement of third party developers. In particular, we would welcome comments on the following points:*

- *the direct contracting with third party developers satisfactory?*
- *the distinction between the type of developer who can qualify as a Specific and Strategic Contributor appropriate?*
- *are the proposed qualification thresholds appropriate?*

FG Comments

The station change process is founded on the relationships between the SFO and beneficiaries which for the most part find resolutions to station change issues which work and satisfy each party. To allow 3rd parties direct access to the process cuts across these relationships and brings parties into the process seeking resolutions without an understanding of the context in which a proposal is made.

Grounds for objecting to a Material Change Proposal (C4.7 of the proposed SACs and 10.7 of the proposed ISACs)

6.15 *Respondents are requested to submit their comments on the proposed grounds of objection. In particular, we would welcome comments on the following points:*

- *Are the grounds of objection as drafted sufficient?*
- *Is this separation of financial compensation (and the provision of alternative accommodation) from the list of valid objections appropriate?*

FG Comments

FG supports ATOC's suggestion that the objection criteria in the station code was both reasonable and proportionate and FG challenges the removal of the ability to object on financial grounds.

Registration and implementation of a proposed Station Change

6.16 *The proposed modification provides that a Station Change proposal must be registered with ORR in order to be effective and before it can be implemented. There is a limit on how long a registered proposal can remain effective without being implemented, before it lapses.*

- *Respondents are requested to submit their comments on the proposal that Station Changes should be registered with ORR.*
- *Respondents are requested to submit their comments on the proposal that registered Station Changes cease to be effective if not implemented within a set period after registration.*

FG Comments

The current arrangements for registration appear to work and do not inhibit the current process. We agree that any approved proposals should lapse if not implemented within a reasonable set period from the date the proposal has been approved.

Proposed deletion of Condition G6 (Condition 47 in the ISACs) - wayleaves

6.17 *The existing G6 (wayleave grants) has been deleted because this now falls within the procedure for a Notifiable Change. Since it only applies to Network Rail it has been deleted to avoid duplication and potential confusion in the treatment of the grant of wayleaves and easements.*

FG Comments

The suggestion to incorporate the grant of wayleaves into the more general station change category has merit. However, FG notes that ATOC covered this issue in some depth and considers that that analysis should be fully taken into account in any consolidation of the wayleave process.

Cost issues in the Co-operation Agreement

6.22 *Respondents are requested to submit their comments on the Co-operation Agreement. In particular, we would welcome comments on the following points:*

- *Are the alternative ways of compensating Material Change Consultees sufficient?*
- *In instances where part of a fixed sum is to be returned by a consultee because a Material Change has not been completed, is the addition of interest appropriate?*
- *If a Material Change once-commenced is left incomplete (for any reason), should there be provisions for reinstating the original position (which might lead to consultees incurring further costs)?*

FG Comments

The clarification of the compensation to cover the implementation of Network Rail Station Change proposals is sensible. The current indemnity does not focus on the negotiation of compensation issues as part of the establishment of a change leaving an open ended liability for Network Rail. As a result Network Rail is not able to manage its liability proactively or understand the risks to which it is subject at the point of a changes establishment. This lack of clarity causes Network Rail seek to escape the indemnity, thereby transferring risk onto train operators. This is at odds with the more effective Network Change process which allows for the negotiation of a methodology for compensation, which protects train operators from risk while

allowing Network Rail to better establish and manage its liabilities. Therefore, the suggestion to provide a greater level of clarity for the indemnities currently required for Network Rail Station Change proposal is welcome.

The consultation does not set out the reasons why it suggests train operators should offer the same indemnities when making proposal. Train operator SFO's and beneficiaries each share in the ongoing running costs of Stations through QX and LTC payments. As a result the current distribution of risk is aligned to the proportion of payments each train operator is required to make. Assuming negotiation of changes in QX and LTC remain part of the Station Change process there is no need for SFO's to offer indemnity to beneficiaries as once a station change proposal is established QX and LTC can be amended accordingly to reflect the renewed distribution of risk. In the case of Network Rail Station Change proposals, this intrinsic share of risk is not felt as it does not pay for the ongoing costs of the station and should offer train operators some protection against it proposals..

ATOC have made a detailed analysis of the proposed Cooperation Agreement which FG supports. However, it questions the need for a separate written agreement and suggest some consideration of the current Network Change process to see if a compensation methodology approach would be beneficial.

Provision of Alternative Accommodation in the Co-operation Agreement

6.26 Respondents are requested to submit their comments on the appropriate terms for the provision of alternative accommodation.

FG Comments

The principal appears reasonable. However, FG suggests that all Station Facilities are covered not just the Core Facilities. If a mess room is to be replaced the same should be true of public toilets.

Additional modifications

6.28 Respondents are invited to provide any comments or observations they may have on these proposed additional modifications.

FG Comments

The amendments are welcome.