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12 July 2011

To industry colleagues by email only

Dear colleagues

Consultation on consolidation and revision of freight general approvals

Purpose

1. The purpose of this letter is to consult you on our proposal:
 - (a) to consolidate all of the existing freight track access general approvals (“existing GAs”) into one document to provide a single point of reference in a more user-friendly format; and
 - (b) to take the opportunity to propose revisions and additions to clarify and extend the scope of the existing GAs – as explained in more detail below.

In line with our existing GAs, the new one, a copy of which is at **Appendix A**, will continue to provide our prior approval of certain, specified, changes to and entry into freight operator and freight customer track access contracts held with Network Rail Infrastructure Limited (“Network Rail”).

Scope

2. This consultation does not relate to either **Passenger Track Access** or **Ports and Terminals** general approvals. Any reviews of those general approvals will be dealt with separately by ORR and consulted on in the usual way.



INVESTOR IN PEOPLE

Background

3. We currently have four freight track access general approvals relating to access to Network Rail's network which, as you know, permit freight operators and freight customers to enter into or amend track access contracts with Network Rail without the need for ORR's specific approval. These are:

- (a) Freight Access (Changes to Track Access Contracts) General Approval 2009 issued on 23 March 2009 (which superseded the 2008 version) ;
- (b) Freight Access (New Track Access Contracts) General Approval 2009 issued on 10 July 2009;
- (c) Freight Access (Model Contract Amendments) General Approval 2008 issued on 23 January 2008; and
- (d) Freight Customer General Approval 2011 issued on 15 March 2011.

ORR's approach

4. We believe that the proposals contained in this consultation will help to achieve our goals of;

- (a) providing the industry with greater responsibility for, and control over, its contractual relationships;
- (b) ensuring that ORR remains focused and effective in our regulation of track access contracts, concentrating our efforts on those areas where we can provide most value and benefit;
- (c) promoting the principles of Better Regulation; and
- (d) meeting the objective of theme one of our published corporate strategy "Promoting safety and value in Britain's railways: Our strategy for 2009-14" in focussing on (passenger and) freight customers, now and in the future.

5. It is worth mentioning here that some of the proposals allow the parties to track access contracts far more freedom to make changes to existing firm rights and the inclusion of new firm rights. Should these proposals be incorporated into the new general approval, in agreeing to such changes and inclusions Network Rail will need to satisfy itself that it can meet any new contractual obligations.

Our Proposals

Existing provisions

6. Provisions within the existing GAs have been 'brought forward' into the new general approval. These relate, in the main, to changes to existing freight track access contracts between Network Rail and the Train Operator and focus on changes allowed to the Rights Table in Schedule 5, resulting for example, from those established and agreed at Rights Review Meetings under Condition J9 of the Network Code.

Consultees are invited to comment on the effectiveness of the existing provisions and whether they consider any changes to them are required.

New proposals and additions

7. As referred to above we are also taking the opportunity of consolidation to propose changes and additions to the provisions of the existing GAs. Based on our experience of the way in which the existing GAs are being used and the number of supplemental freight track access applications being submitted for specific approval for what are effectively minor changes which have no impact on other users of the network, we believe that there is a strong argument for extending their scope. This will have the benefit of capturing better the frequent changes agreed to access contracts and reducing transaction costs for the parties and generally speeding up the process for making changes to access contracts.

8. These changes and additions are set out in **Appendix B**, but the key ones include;

- (a) under certain conditions, the inclusion of new Level Two Rights (firm rights) in the Rights Table in Schedule 5;
- (b) the inclusion of Level Three Rights (contingent rights) in the Rights Table in Schedule 5;
- (c) changes to the timescales in paragraph 2.5 of Schedule 5 in relation to Train Operator Variation Services and Train Operator Variation Requests (see paragraph 7 of Appendix B);
- (d) the limited extension, under certain circumstances, of an access contract by amendment of the Expiry Date; and
- (e) changes to certain aspects of the Rights Table in Schedule 5 of an access contract if the changes reflect train slots held by a train operator (or customer) in the Working Timetable;

9. We accept that there could be other proposals for inclusion in the general approval but we have not proposed drafting to capture these given that some are bespoke provisions rather than generic provisions: for example, changes to the model contract to give effect to Scottish Law. Another would be to apply many, if not all of the provisions which apply to changes to access contracts between Network Rail and freight operators, to the freight customer model contracts.

Consultees are invited to comment on these proposals.

Consultees are also invited to submit any further suggestions and proposals they may have, together with reasons.

Freight Model Contract amendments - general

10. In reviewing the provisions of the existing GAs, we have identified a number of provisions within our existing freight model contracts¹ which we consider either need clarifying or revising to bring them up to date and/or make them more fit for purpose. We propose to re-visit our model contract and consult the industry separately on these shortly. To allow for this and to ensure an easy transition, we have include a provision in our revised general approval at paragraph 4(2) which allows for any subsequent changes to current freight track access contracts to be made. We have also included at paragraph 4.2 a provision to allow for changes to the freight customer track access contracts to give effect to any changes we may make to those model contracts 'from time to time'.

Previous proposals

11. We have also taken the opportunity to revisit some of the suggestions made by consultees the last time we consulted on our existing GAs. These are discussed at **Appendix C** attached. For ease of reference, we have replicated the text from our decision letters, which includes individual consultees' responses and our decision at the time we published our general approvals. Our current views ('ORR's 2011 position') are italicised. As you will see, there is only one substantive issue on which we have modified our approach; our proposal that Level Two rights, being firm rights, are generally approved. We have explained our reasons for that proposal at **Appendix B**.

Consultees are invited to comment on this and to make any further representations.

¹ <http://www.rail-reg.gov.uk/server/show/nav.2006> and <http://www.rail-reg.gov.uk/server/show/nav.2250>.

Consultation summary

12. This letter consults you on:

- (a) the format of the new consolidated freight track access general approval (see **Appendix A** attached);
- (b) revisions to the current general approval provisions brought forward and the reasons for them (see **Appendix B**);
- (c) new general approval provisions we have proposed and the reasons for them (also in **Appendix B**);
- (d) our review of previous comments made and our decisions on previous freight general approval consultations (see **Appendix C**); and
- (e) other provisions consultees consider should be included in the new freight track access general approval.

Additionally: although the new general approval contains a consolidated Explanatory Note (which does not form part of the general approval), consultees are invited to comment on whether this should be deleted from the published version of the new general approval.

Consultation arrangements

13. If you have comments on the proposed general approval, please send them in either hard copy or electronic format, to be received as soon as possible, but by no later than

23 August 2011 to alice.jones@orr.gsi.gov.uk or to:

Alice Jones
PA to Director of Legal Services
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

14. Please note, when sending documents to us in electronic format that will be published on our website, we would prefer that you email us your correspondence in **Microsoft Word format**. This is so that we are able to apply web standards to content on our website. If you do email us a PDF document, where possible please:

- (a) create it from the electronic Word file (preferably using Adobe Acrobat), as opposed to an image scan; and

- (b) ensure that the PDF's security method is set to **no security** in the document properties

15. We shall make all responses available in our library, we shall publish them on our website and we may quote from them. If you wish all or part of your response to remain confidential, you should set out clearly why this is the case. Where your response is made in confidence, it should be accompanied by a statement summarising the submission (excluding the confidential information) which we can then use as above. We will publish the names of respondents in future documents or on our website, unless you indicate that you wish your name to be withheld.

Next steps

16. We intend to publish the new general approval, "Railways Act 1993, Freight Access (Consolidation and Revision) General Approval 2011" in September 2011. In accordance with our usual practice, we will also publish a document explaining the reasons for our decision and addressing issues raised by consultees. The existing general approvals will remain in force until this is published at which time they will be revoked. Following publication of the new general approval, we will make any appropriate or consequential changes to our Criteria & Procedures document.

This by email and posted on our web-site at <http://www.rail-reg.gov.uk/server/show/nav.67>

Yours sincerely



David Robertson

Appendix A

For ease of reference, the draft general approval accompanies this letter as a separate document.

Appendix B

Revisions to the current general approval provisions brought forward and the reasons for them

1. We have amended the requirement to undertake consultation in respect of adding the definition of “Public Holiday” to a freight access contract. We no longer consider this to be a requirement and so we are removing this administrative requirement. This is reflected in paragraph 1(5) of Annex D to the general approval.

2. We have included additional wording in the provisions which allow all types of changes to the Rights Table in respect of “Standard Specified Equipment (Timing Load)” and “Alternative Specified Equipment (Timing Load) to make it more specific. These changes are reflected in paragraphs 7(w) and 7(x) of Annex D to the general approval. The proposed wording allows all types of changes to these Timing Loads subject to the Network Code Part F process having been completed. But we wondered whether alterations (other than for reductions) to these Timing Loads, and possibly where they are not related to the introduction of new rolling stock/equipment (which may require a further provision), should be subject to consultation given the potential impact those changes could have on other operators. Alternatively, consultees may consider this is a matter for Network Rail to satisfy itself over before agreeing to such changes.

New general approval provisions we have proposed and the reasons for them

(a) under certain conditions, the inclusion of new Level Two Rights (firm rights) in the Rights Table in Schedule 5”. (See Annex A, paragraph 4(a), Annex B paragraph 3(a) and Annex D paragraph 7(d) to the general approval)

3. We are proposing to provide our general approval of Level Two Rights but not those which form part of Y-Path². For all other Level Two Rights, which are firm rights but which have no timings and are rights for a quantum of services only, Network Rail will need to satisfy itself that it can meet its obligations in agreeing to grant them. We are proposing that they are approved for a limited period only (for two years from the date of approval).

² Where a Service has two or more paths which run to/from alternative origins/destinations or different routes.

This will enable freight operators to secure firm rights to meet customer requirements at the outset of gaining a customer contract. The restriction will also enable Network Rail to grant such rights 'short term' whilst retaining flexibility in capacity planning beyond a two year 'horizon'. Given these restrictions and flexibilities, we propose that no formal industry consultation is necessary in this instance.

4. If Network Rail and a freight operator wish to remove the time restriction they could do so under the general approval (Annex D 7(v)) but only after consultation had been undertaken on such a change. Where a dispute arose in respect of such a consultation and remained unresolved, and the parties still wished to make the amendment, a specific application would need to be made to us and we would consider all representations made.

5. We have excluded from our general approval Level Two Rights which form part of a Y-Path (see (f) below) given the complexity of such paths and the potential effect of their approval on other operators' access rights passing through a Cordon. Our specific approval will be required for such Level Two Rights.

(b) the inclusion of Level Three Rights (contingent rights) in the Rights Table in Schedule 5 (Annex A 4(b), Annex B 3(b) and Annex 7(c) to the general approval);

6. Level Three Rights are 'Contingent Rights' and Access Proposals made in respect of them will only be satisfied after those made under firm rights. As such, we are content for Level Three Rights to be agreed between Network Rail and freight operators. They could even be time limited. We consider that no consultation is required in this instance.

(c) changes to the timescales in paragraph 2.5 of Schedule 5 in relation to Train Operator Variation Services and Train Operator Variation Requests (Annex A1(5) and Annex D1(6) to the general approval);

7. Experience tells us that train movements under Train Operator Variation Requests can sometimes extend for a period greater than the six months currently permitted under the model contract. This could be for several reasons, including the time it reasonably takes for Network Rail and a freight operator to negotiate/agree Level One and/or Level Two Rights and then undertake, as appropriate, industry consultation on them. Given that Level One Rights will still require our specific approval, we propose an extended period of up to 12 months for the parties to contractualise matters for the longer term and to avoid situations where freight operators could run trains under 'void' arrangements. We consider that no consultation is required in this instance.

(d) the limited extension, under certain circumstances, of an access contract by amendment of the Expiry Date” (Annex D 1(2) to the general approval);

8. This provision allows the parties to an access agreement to extend its duration for a period of one year to meet extended customer requirements. This will enable the term of the access agreement to be extended up to a maximum period of five years (in accordance with our Long Term Access Contract policy) provided it has no Level One Rights. We consider that no consultation is required in this instance.

(e) “changes to certain aspects of the Rights Table in Schedule 5 of an access contract if the changes reflect train slots held by a train operator (or customer) in the Working Timetable” (Annex D7(b) to the general approval);

9. In the light of experience in dealing with applications sent to ORR for specific approval we note that many of them relate to changes to Level One Rights to reflect the characteristics of current paths in the timetable. Given that these trains are already operating within the constraints of the new path we consider it appropriate to provide a mechanism to allow the parties to agree amendment of the access rights to reflect more accurately a freight operator’s current train movements. The provision will apply to paths already established under the timetabling process (in Part D of the Network Code) within the Working Timetable (as revised in May and December each year).

(f) A new definition of “Y-path”:- “has the meaning ascribed to “Y” in the Explanation of References section contained in the Working Timetable”.

10. We have included this definition to provide clarity as to which Level Two Rights are generally approved under the new general approval.

11. We are currently undertaking a review of Part J of the Network Code and it is likely that we will want to include a definition of “Y-path” in the revised version of Part J. If we are able to conclude that review prior to the issue of the new general approval we may well want to amend this proposed definition to refer to that in the revised Part J.

Appendix C

Previous responses to ORR's Freight General Approvals

As mentioned in our covering letter, we said that we would revisit consultees' responses to previous freight general approval consultations. The consultations are identified below by date and name along with consultees' responses to them. Our current views on the responses are italicised.

2008 consultation: ORR comments on industry responses from our decision letter dated 12 June 2008 - Freight Access (Changes to Track Access Contracts) General Approval 2008

1. This appendix sets out our views on comments received from the Department for Transport (DfT), English Welsh & Scottish Railway Limited (EWS), Freightliner Group Limited (Freightliner), Network Rail Infrastructure Limited (Network Rail), Nexus and West Coast Trains (WCT) in response to our consultation on the drafting of the freight and passenger general approvals.

Department for Transport

2. The DfT stated its view that ORR, when granting general approvals, should have regard to the overall utilisation of scarce network capacity. It considered that there should be mechanisms included within the general approvals to ensure that short-term (one timetable period) changes cannot be subsequently rolled forward into, or incrementally increased, by general approval in successive timetable periods.

3. ORR's 2008 comments: We agree with DfT on this point. As drafted, the passenger general approval prevents the use of a general approval to extend any permission to use the network which was previously authorised by a general approval and which would otherwise expire. Therefore, general approvals cannot be used to perpetuate access rights. Where a train operator wishes to continue the use of a train slot obtained pursuant to a general approval, it should make an application in good time for our specific approval.

4. While the changes made under the freight general approval will last longer than one timetable period, unless subsequently amended, the changes authorised by the general approval are limited in scope, and do not include the creation of any new track access rights.

ORR's 2011 position: ORR proposes a different approach to 'generally approved' new track access rights. We are now proposing that the new freight general approval allows

Network Rail and freight operators/customers to agree and include in their track access contracts new Level Two (firm) rights. We believe that this will enable freight operators /customers to plan their businesses with a greater degree of certainty going forward. Given that Level Two rights are quantum firm rights, having no timings for timetabling purposes and expressed as, for example, four trains per day, we would expect Network Rail to be able to agree them in the knowledge that paths sought in the timetable can be accommodated. We might not expect Network Rail to agree to new Level Two rights (or any other new access rights for that matter) where capacity is constrained on certain parts of its network, unless exercise of them was governed by a Cordon and Cordon Cap. So that capacity is not effectively 'tied up' by a freight operator/customer for the whole period of its freight track access contract, we propose to allow new Level Two access rights for up to a period of two years. In arriving at this decision to restrict the term of these new Level Two rights, we have been mindful of the possibility of longer term rights could have on proposed and intended route timetabling and network enhancement industry strategies and plans. As such, we consider two years strikes the right balance for Network Rail and freight operators/customers. The expiry date of new Level Two access rights can be contractualised in the "Special Terms" column of the Rights Table. We have not included new Level One access rights under this proposal because Network Rail does not have the same flexibilities in accommodating Level Two access rights under Access Proposals.

EWS

Proposed section 18 general approval for track access contracts

5. EWS was the only consultee to respond to our request for views on our proposal to develop a section 18 general approval to permit the making of "spot bid-only" freight access contracts. It suggested that such a general approval was not necessary because there would be ample time for a freight operator to follow the standard section 18 application procedure in parallel to obtaining its licence and safety certification. EWS was concerned that such a general approval might lead to the use of customised contractual provisions that differ from those in the freight model track access contract.

6. ORR's 2008 comments: We agree with EWS that it would not be desirable for a general approval to permit customisations of model clauses. We consider that if we did issue a section 18 general approval for spot bid rights, it should be conditional on using a template contract without customisation. Where a freight operator wished to have a contract that included departures from the template, it would have to make a specific application to us under section 17 or section 18, which we would then review on its merits.

7. We note EWS's point that the section 18 application process would not normally extend the 'start up' period during which the applicant has to obtain its licence, safety certification

and access rights. However, we believe that for situations where only spot bid rights are sought, a general approval would reduce the bureaucracy for obtaining approved access rights and thus make it easier for new entrants to commence operations. It would also contribute to a more effective allocation of regulatory resources.

8. Our proposal for a section 18 general approval will be subject to further consideration and development work, and if we are eventually minded to issue such a general approval we will consult the industry on the draft.

ORR's 2011 position: Subsequent to our 2008 comments, we issued a section 18 general approval for new freight operators on 10 July 2009. We are proposing no change to this general approval which is incorporated into the new, consolidated, general approval.

Comments relating to both proposed general approvals

9. EWS stated that it believed ORR's intention was for both general approvals to apply only to agreements for which Network Rail was the facility owner. If this was the case, it suggested that the general approvals make this explicit. We confirm that our aim in producing them is to reduce the regulatory burden in relation to agreements where Network Rail is facility owner and we have amended the general approvals to make this clear.

10. ORR's 2008 comments: Both general approvals require Network Rail to conduct a consultation on certain proposed amendments in line with the Code of Practice. Therefore, it seems sensible to limit the general approval to Network Rail's network. In any case, we are not aware of any track facility owner other than Network Rail using previous passenger general approvals. In terms of freight, whilst there are some freight track access agreements to which Network Rail is not a party, these agreements are not based on the terms of the model contract. The majority of permissions under the freight general approval could only be applied to model clause agreements, so it is appropriate to make it clear that it can only be used where Network Rail is facility owner.

ORR's 2011 position: We are content with the wording of the provisions in the current general approval which are brought forward into the new, consolidated, version.

11. ORR's 2008 comments: We expect to consult separately later this year on our proposals to reduce the regulatory burden in respect of track access agreements where Network Rail is not the facility owner.

ORR's 2011 position: We have already issued a general approval which provides for new track access contracts to be entered into and changes made to them at ports and

terminals where Network Rail is not the facility owner. We are not proposing changes to them under this consultation.

12. EWS commented on our proposals to permit amendments to passenger and freight track access contracts that incorporate any change made by ORR to the model contracts. Following further thought within ORR on the drafting of this permission, we have decided to withdraw it from both general approvals. This is because we found it difficult to draft the permission in a sufficiently robust form. We do not consider that the omission of this permission will disadvantage the industry as we will continue to issue separate general approvals to permit parties to update their contracts as and when necessary. The existing general approvals enabling the most recent updates to the model contract to be made to existing track access contracts remain in place¹.

ORR's 2011 position: On 23 January 2008 we issued a freight general approval which allows specific changes to track access contracts already entered into between Network Rail and freight operators to incorporate model contract amendments. The consolidated general approval we are proposing includes this permission.

Section 22 freight general approval

13. EWS considered that paragraph 4(4) of the proposed freight general approval, which permits reductions to cordon caps, was not necessary because agreed reductions to cordon caps can already be carried out pursuant to Part J of the Network Code. Whilst Part J does provide a mechanism for reducing cordon caps, we consider there may be circumstances where Network Rail and a freight operator wish to make a number of changes to their track access contract under the general approval, which may include the reduction of cordon caps. If we removed the permission in 4(4), both parties would have to process a Part J modification notice as well as a supplemental agreement. Therefore, we consider that the permission in 4(4) should be retained to reduce the amount of paperwork needed.

ORR's 2011 position: As our views have not changed we propose to carry forward this provision into the consolidated general approval.

14. EWS also made several minor suggestions on the drafting of the proposed freight general approval. We have incorporated these.

Freightliner

15. Freightliner had some concerns with certain aspects of the freight general approval. It was worried that the provisions which permitted the "Origin" and "Destination" aspects of access rights in the Schedule 5 Rights Table to be amended "to correct drafting errors and clarify ambiguities" might be used by operators to make substantive changes. It is not our

intention for substantive changes to be made to the "Origin" or "Destination" under the freight general approval and have amended these provisions to permit changes to correct drafting errors only.

ORR's 2011 position: We are content with the wording of the provisions in the current general approval which are brought forward into the new consolidated version.

Network Rail

16. Network Rail stated that it believed that changes to Standard Specified Equipment (Timing Load) and Alternative Specified Equipment (Timing Load) in freight contracts should be subject to the Part F processes having been undertaken. We have modified the general approval to make clear that any change to Specified Equipment must comply with the procedures of Part F. Network Rail also expressed its belief that there is a need to emphasise that the rolling stock to be introduced must be able to achieve the sectional running times (SRT) assumed in the working timetable. We consider that, before signing up to an amendment, Network Rail (as facility owner) should consider whether the rolling stock to be introduced would meet the SRTs. If it is not satisfied that the rolling stock would achieve the SRTs, then it should not enter into the amendment.

ORR's 2011 position: We are content with the wording of the provisions in the current general approval which are brought forward into the new consolidated version.

17. Network Rail suggested that when it conducts consultations in connection with a general approval, it should send ORR copies of consultation responses so that we have visibility of the issues raised. Network Rail mentioned the concerns raised by some train operators last autumn that it might fail to consult all potentially affected parties on proposed access contracts. It noted that this risk has been mitigated by some extent by ORR giving Network Rail an indicative list of the parties it should generally be consulting. For applications for ORR's specific approval, this risk is reduced further by ORR reviewing the list of the parties consulted to ensure that Network Rail has not missed a potentially affected party. However, Network Rail noted that with a general approval, ORR would not be performing this role because it is not involved in the process, hence its suggestion to copy ORR into the consultation responses.

18. Whilst we note Network Rail's wish to ensure that the process of consulting in connection with the use of a general approval is sufficiently robust, we do not consider that we should be copied into consultation responses for amendments to be executed under a general approval. We also note that no train operator raised this as a concern in our consultation on the general approvals. By granting the general approval we are empowering the industry to make changes to access contracts without the need for our oversight.

ORR's 2011 position: *We are content with the wording of the provisions in the current general approval which are brought forward into the new consolidated version.*

19. Our only involvement in the processing of amendments under a general approval is to place a copy of the executed agreement on the public register. Where the validity of a supplemental agreement executed pursuant to a general approval is conditional on Network Rail completing a consultation in accordance with the Code of Practice, there is an incentive on Network Rail and the train operator to undertake the process properly. If they do not, the validity of their contract will be in doubt – something that they should be concerned to avoid. If Network Rail considers that there should be greater transparency, it could adopt a policy of posting consultation responses on its website.

Nexus

20. Nexus was generally content with the proposed general approvals. However, it stated that it was concerned about the potential for reduced performance for existing operators arising from the scope for increased usage of the Pelaw Junction to Sunderland route that could be permitted through the use of the general approvals.

21. ORR's 2008 comments: The more significant amendments permitted by the general approvals which could adversely affect stakeholders require Network Rail to undertake a consultation of interested parties in compliance with the provisions of the Code of Practice. Nexus would therefore be consulted on any proposed amendment that could affect its interests. It would then have the opportunity to make representations and object to a proposed amendment if it believed its interests would be adversely affected. Should this happen, Network Rail and the parties would work to resolve any issues identified. If the issues could not be resolved to Nexus's satisfaction, the amendment could not be made pursuant to the general approval. Network Rail and the train operator would need to apply to us for our specific approval if they wished to proceed with the amendment. We would then consider Nexus's concerns and make a decision.

ORR's 2011 position: *We are content with the wording of the provisions in the current general approval which are brought forward into the new consolidated version.*

Changes to the Code of Practice (CoP)

22. At its last meeting, the C&Ps Industry Working Group proposed that, where Network Rail has conducted an industry consultation and submitted the application for approval, ORR should post application documentation (including consultation responses) on its website for transparency. The aim of this is to enable consultees to check that Network Rail has correctly reflected any representations that they may have made during the consultation. ORR has implemented this proposal.

23. To embed this within the new industry arrangements, we have amended the Code of Practice to reflect this. We have also stated in the CoP that consultees should be aware that we may post their consultation responses on our website.

24. We have made some other minor changes to the Code of Practice. Most of these were to improve the flow of the document. The only substantive change from the version we consulted on was to make consistent Network Rail's ability to consult for less than the standard period in exceptional circumstances. The consultation version provided Network Rail with the scope to reduce the consultation period for all applications (including those relating to amendments to be executed pursuant to the passenger general approval) except those proposed to be made pursuant to the freight general approval. We consider that the same arrangement should apply to all types of application and have removed this inconsistency. We have also made it clearer that where Network Rail does consult for less than the standard period defined in the Code of Practice, it must still give consultees a reasonable period in which to respond.

ORR's 2011 position: We do not consider that any changes are required to the CoP stemming from our new, consolidated, freight general approval.

2009 consultation: ORR comments on industry responses from our decision letter dated 23 March 2009 - Freight Access (Changes to Track Access Contracts) General Approval 2009

1. We received two responses to our consultation:

(a) **Network Rail** responded in favour of the changes proposed, with no modifications suggested; and

(b) **DB Schenker** also endorsed the proposed new general approval but suggested that any removal of access rights should require an industry consultation. DB Schenker noted that consultation could be of benefit as other operators may be able to use the relinquished capacity.

2. ORR's 2009 comments: We have considered DB Schenker's position but do not think requiring industry consultation for relinquished access rights would be appropriate. Consultation will only be required when there is potential for any adverse impact on industry stakeholders. In such situations consultation alerts stakeholders to proposed amendments and provides an opportunity for objection and collaborative working to ensure well informed decision making and appropriate outcomes. Consultation does add time to

the process of amending TACs and should not be required when it is not necessary to safeguard the rights of stakeholders. We can not envisage any instance in which the removal of access rights from a TAC could negatively affect other stakeholders. Therefore consultation is not required under the 2009 FGA when rights are relinquished from a TAC.”

ORR's 2011 position: We have again reconsidered DB Schenker's views but remain of the view that no consultation is required for relinquished access rights for the above reasons. As such, we are content with the wording of the provisions in the current general approval which are brought forward into the new, consolidated, version.

2009 consultation: ORR comments on industry responses from our decision letter dated 10 July 2009 - Freight Access (New Track Access Contracts) General Approval 2009

Review and consultation

3. We are issuing the s18 FGA because we believe it will encourage new entrants to the rail freight market by enabling them to commence freight services, under spot bid arrangements, faster to meet customer demand. It also enables us to focus our regulatory responsibilities where we can add most value to the industry. We are satisfied that it is appropriate to introduce the s18 FGA given completion of our Periodic Review process under which we introduced standardised freight performance (Schedule 8) and variations to services (Schedule 4) regimes which have now been incorporated into all freight train operators' track access contracts.

4. On 7 May 2009 we consulted industry on the proposed s18 FGA. We received six consultation responses:

- (a) **First Greater Western** supported the s18 FGA, noting that spot bid rights are key.
- (b) **Transport for London (TfL)** supported the objectives of the s18 FGA but had a number of questions about how it would work in practice. TfL also queried whether consultation would be appropriate.

ORR's 2009 position: We are satisfied that the s18 FGA will enable a new operator to enter into a standardised freight track access contract which will incorporate existing industry practices, including routine spot bidding for access on the network, in line with all current freight operators. In addition, we do not think consultation is necessary under the s18 FGA as any new contract is limited to spot bid rights only.

Each new contract will be placed on the ORR public register, in compliance with the Railways Act, and published on our website.

ORR's 2011 position: We are content with the wording of the provisions in the current general approval which are brought forward into the new consolidated version.

- (c) **Virgin Trains** agreed in concept with the s18 FGA but was concerned that additional operations could potentially have a negative impact on performance. Virgin requested that Network Rail engage with potentially affected passenger operators when negotiating new contracts to advise existing operators of anticipated quantum, traction, timing and duration of services. Virgin suggested this could be done through existing operators' customer relationship teams.

ORR's 2009 comments: As always, we encourage communication and transparency between rail stakeholders. It is incumbent on Network Rail, as network manager and operator, to ensure appropriate information is shared with all relevant parties when negotiating any track access contract. We have considered the points that Virgin Trains raised which would certainly be of concern if the s18 FGA enabled approval of firm rights. However, as it limits such approval to spot bids only, we expect Network Rail will undertake the usual and well established process of confirming whether it can accommodate those bids for capacity on its network and the implications of proposed train operations on train and network performance before it allows a train into service.

ORR's 2011 position: We are now content to propose new Level Two rights under the general approval and have explained our reasons for this above. Consultees views on that proposal are invited.

- (d) **First GBRf** agreed with the concept of the s18 FGA but asked for assurance that should an operator wish for firm or contingent rights these would be sought under existing industry processes, which include consultation. First GBRf also suggested that Network Rail be required to inform all existing freight track access holders when a contract is entered into under the s18 FGA, providing the name of the party and the commencement date of the contract.

ORR's 2009 comments: We can confirm that any new freight train operator who acquired a track access contract under the s18 FGA would be expected to seek specific approval from ORR should it wish to obtain firm or contingent (Level Three) rights. Under current processes, which are identified in our Criteria & Procedures publications, this would include a Network Rail led industry consultation.

ORR's 2011 position: We are now content to propose new Level Two rights under the general approval and have explained our reasons for this in Appendix B. Consultees views on that proposal are invited.

ORR's 2009 comments: We do not think it is necessary to place a positive obligation on Network Rail to inform other operators of new market entrants as full details of each new contract will be placed on the ORR public register and website.

ORR's 2011 position: Given that there is no evidence to suggest that this process is not working our views in this regard have not changed.

- (e) **DB Schenker** had some helpful minor comments on the text of the s18GA which we have considered.
- (f) **Network Rail** supported the draft s18 FGA.

Given the substance of these responses and our views on them we are content to issue the s18GA.

2011 consultation: ORR decision to publish the Freight Customer General Approval 2011

Commentary

We first mentioned our proposal to issue a Freight Customer General Approval in an explanatory note contained in Annex G of our 'Freight customer model track access contract: final conclusion' document³ published in September 2009. On 31 January we consulted industry colleagues on a draft Freight Customer General Approval. No consultation responses were received and so we published the final version on 15 March 2011. Whilst it has yet to be used, we consider its terms brought forward into the new general approval are still appropriate and fit for purpose.

Consultees' views on this position are invited.

³ ORR web-site <http://www.rail-reg.gov.uk/server/show/nav.2250>