Stations and Depots Team
Office of Rail Regulation
1 Kemble Street
London
WC2B 4AN

28 May 2012

CONSULTATION ON A REVISED CONTRACTUAL REGIME AT STATIONS: EMERGING CONCLUSIONS

Please find attached FirstGroup's responses to the consultation document.

We broadly support the views which have been submitted by ATOC and have provided comment to them ahead of this response.

Should you require clarification on any of the comments, please do not hesitate to contact me.

Yours sincerely,

Vernon Barker

Managing Director
First Rail Division

FirstGroup Response to ORR 28 May 2012 Station Change Consultation

Consultation Questions

1	**4.5**	**Do you agree that we should introduce the concept of "Exempt Activity" and adopt the definition as developed for the proposed Stations Code?**

We agree that the concept of "Exempt Activity" should be developed as a definition.
The activity must not exceed the threshold of the Financial Impact Test in order to qualify as an Exempt Activity
A non-exhaustive list of probable "Exempt Activity" would be useful for the industry to follow as a guide.
The activity should also comply with all statutory regulations.
Please refer also to 4.23

2	**4.21**	**Is £5,000 an appropriate level for assessing financial impact to determine the type of Change Proposal, subject to it being kept under review?**

We advised ATOC that this will not cover all options, although we will support the value cap at £5,000 in principle pending further clarification how this will be assessed and reviewed.

3	**4.22**	**Do you have any views on the alternative proposals dealing with the circumstance when a single change proposal has a material impact on one station party, but not another?**

We believe that a single process is the most appropriate approach, although we are unsure as to how this can operate. There will be uncertainty because SFO's do not necessarily understand the level of impact which the change will have on beneficiaries businesses. Therefore categorisation of the Station Change may prove difficult or incorrect.

4	**4.23**	**Do you agree that we should introduce a separate minimum compensation threshold (set at the same level as the Financial Impact Test of £5,000) to determine the point at which consultees are eligible to receive compensation for a Material Change Proposal? Under this arrangement, a consultee must incur costs of £5,000 or more in its own right before**

compensation becomes payable for the affected consultee. Parties whose cost do not meet the £5,000 threshold will receive no compensation. We consider that this would make financial arrangements consistent with other part of the Station Change regime.

The quantum of the work is a critical consideration. For example, roll out projects such as CCTV below the threshold at a single station could have a material impact on beneficiaries if rolled out across a TOC estate. The ability to review and not wait until costs of over £5,000 are incurred is key as is a clearly defined consultation period and prompt compensation payment process. See also 4.24 below.

5 4.24 We would be interested in your views on how to deal with the situation where a series of Change Proposals are made at separate stations, which individually do not meet the Financial Impact Test threshold but when taken together do and could a material impact on the consultee

The quantum of the work programme should be considered as with the delivery dates to prevent discrete grouping or Gaming by a proposer. We do not consider time barring of works to be a solution as this could curtail customer improvements. We agree with ATOC that all such schemes "would be taken into account together in order to calculate whether or not, cumulatively, the Financial Impact Threshold had been triggered".

6 5.8 Do you have any comments on the proposed revised list of valid objections?

We believe the proposed list of objections is should be comprehensive and circulated for comment following this consultation. Section 5 does not make the proposed grounds explicit and requires cross-referencing to Stations Code documentation.

Specific objections to be considered (which is not an exhaustive list) include:

1. Proposal would result in an unsafe working environment on the station(s) involved.
2. Would adversely affect a Beneficiaries ability to operate its trains from the station(s) involved.
3. Closure of Passenger facilities at a station without direct replacement.
4. Closure of "Core Facilities" without direct replacement.
5. Affects a Beneficiaries service at the station(s) affected, including non-core facilities

6. A general reduction in facilities at a station which would not be beneficial for passengers and/or Beneficiaries

7 6.12 Do you have any suggestions on the terms of the "participation deed" that third party developers should be required to sign?

The question of how to enforce the “participation deed” and recover funding is not clear as with a transfer of scheme to another party. Enforcement of the deed may prove to be difficult.

8 7.18 Should there be a distinction between public and private investors at all or should they be treated in the same way? Please explain the reasons for your view.

There should be a distinction as the dynamics and scope are invariably different. Private investors have their commercial role as a key driver, which can create issues for TOCs.

9 7.19 If public and private investors are to be treated in the same way:

(a) should we have on qualifying financial threshold and duration of interest and at what level should those be sat?; or

(b) Should we retain two financial thresholds and two different duration of interest time limits (to distinguish between the scale of different levels of investment) both of which can apply to a private or public investor?

We support ATOC’s view as below :-

“A single system should apply. There should be one qualifying threshold, which we believe should be [£100,000] per station. The sponsor should be the SFO for any investment of less than that.

The duration of interest should be five years in every case, except where the funder is continuing to pay for the repair and maintenance of the asset they have installed, in which cases it would be for the life of the asset in question.

However, consultation with the third party funders in connection with any Change Proposal made after the installation of their funded works should be limited to the extent that the proposed works would adversely affect the asset that they had paid for. Third party funders should not have general rights of consultation in connection with future Change Proposals; the works proposed may concern an entirely different part of the station and have no bearing at all on the asset installed at the cost of the funder. Third party funders should have a right to object to a Change Proposal that proposed an adverse impact on, or the removal of, their funded asset, but they should have no right to claim compensation”.

10	7.2	**If we retain the concept of Strategic Contributor with spending at a strategic spread of stations, should that entitle it to an interest just at those stations it has invested in or to all of the station on that particular network?**

There should be an interest only at the invested station.

11	7.21	**Are the other ways that a third party's "interest" in a station could be determined e.g. length of interest to be determined by the life of the asset(s) that their investment has funded?**

On –going ownership of the asset, maintenance and future renewal should be defined whether there will be a continuing interest.

12	8.1	**We asked in our earlier consultation whether respondents agreed that:** **(a) unless the parties agree otherwise, unresolved financial compensation issues should be dealt with via the dispute resolution process?; and** **(b) an otherwise agreed station change should be allowed to proceed while the financial compensation issues are resolved?** **We have set out why we consider this approach is the be preferred, but if you do not agree,** **(a) please explain your reasons why; and** **(b) please provide your suggestions for dealing with the situation**

The proposed approach is accepted subject to:

- Matters in dispute being capable of resolution quickly;
- Compensation being paid in a timely manner;
- Consultees being able to insist on payment of its costs on an emerging costs basis in general and pending resolution of any dispute.

Consultees should not be expected to subsidise a sponsor's scheme.

13	8.34	**Should loss of revenue (in addition to total loss of profit) be capable of being included as part of any compensation claim?**

There should be some form of revenue loss to be included in the compensation claim, as the losses would be directly attributable to the parties proposing the change The proposer should be liable for the loss of revenue. Ticket revenue loss should form part of the business case for the scheme.

14 8.35 **Do you have any comments on the proposal that no party can insist on compensation being payable by way of fixed-sum payments(s)? Rather this should be an issue for the parties to negotiate and agree, but ultimately it is for the proposer to decide if it wants to pay a fixed-sum compensation amount (whether by a single upfront payment or by instalments).**

We agree that it is for the Beneficiary to decide on how it wishes to be paid, following negotiation.

15 8.36 **If a consultee wishes to request payment by way of fixed-sum payment(s), do you agree:**

(a) that the request should be made within a defined period, and not at any time during the project?; and
(b) if you do agree, what should the time limit be?

There should be a mechanism to review the payment process to ensure the Beneficiary is not held at a loss further due to the progress of the project.

16 8.37 **As currently drafted, the co-operation Agreement envisages reimbursement of costs to and the end of an operator's Franchise. As highlighted in paragraph 8.21 above, this may not be appropriate for all consultees. What period of reimbursement do you consider would be appropriate?**

This would fall into the case by case category.

Whilst the end of franchise is an appropriate end point for an operator, if a project life will straddle a re-franchising, then DfT should also be party to the compensation agreement in order to extend the life of such an agreement beyond the life of an outgoing franchise.

17 8.38 **Do you agree that we should retain the provision for a developer to propose "Savings Suggestions" that can be taken to dispute if the parties cannot reach agreement on their terms? Do you agree with our preferences to remove the proposer's entitlement to seek any information it requires?**

We do not agree to this provision. The Proposer can propose suggestions to save costs, but should not be entitled to commercial information from franchisees to articulate same. Savings suggestions may not meet the requirements of the franchise operator.

18	8.39	**We are keen to hear your view, and the reasons for your views, on:** **(a) whether a developer's liability should be uncapped** **(b) whether the introduction of a liability cap would be appropriate; and** **(c) the level at which any liability cap should be set.** The level should be uncapped.
19	8.4	**Should operators be able to recoup money from passengers e.g. by way of increased fares that are justified on the basis of network improvement resulting from a station change, in the same way that Network Change is drafted?** We do not consider this is appropriate for station developments.
20	8.41	**In assessing the amount of compensation payable, is there any reason why it is not acceptable to net off the likely ability of an operator to recoup money from its passengers or other sources of revenue?** This is not acceptable as fare increases are not driven by individual station improvements and there is invariably a drop in revenue during disruptive works.
21	8.42	**We propose that the payback of overpaid compensation should be free of interest as long as its paid back within a defined period of time, otherwise interest becomes payable, backdates to the date of the payment request:** **(a) do you agree with this approach?** **(b) Is 28 days an appropriate period for payback?** **(c) If you do not agree either with this approach of with the payback period, please provide your alternative suggestions.** Overpaid compensation should be paid back within 28 days of the request for overpayment to be repaid. This, of course, should be following negotiation between both parties that there has been an overpayment

22 8.53 **Paragraph 8 of Annex 1 to the revised SACs set out a list of Core Facilities at stations. We propose that the provision of alternative accommodation in the revised SACs should extend beyond those "Core Facilities" and seek your views on what those additional facilities should include (e.g. the "Station Facilities" as set out in paragraph 10 of Annex 1 to the current SACs, or something wider).**

Alternative accommodation needs to extend beyond 'Core Facilities' and should extend to any accommodation used by the consultee in connection with its rail business, except where the consultee agrees otherwise. This may include ticket offices, retail waiting and back of house.

23 9.8 **Do you agree that re-instatement of the original position should be considered on a case by case basis?**

Yes it depends on the condition of the station at the time.

24 9.9 **Do you agree:**
(a) with the introduction of a Relevant Undertaking in which a proposer must undertake to compensate station parties for the costs/losses that they might incur if the development is not implemented in accordance with the terms of original Station Change proposal; and
(b) that affected parties should be able to object to the terms of the relevant undertaking?

We agree that compensation is payable and the required wording of the undertaking that the proposer must provide in these circumstances should be set out in the SACs. It should be a full indemnity for costs/losses that affected parties may incur in connection with the failure to implement in accordance with the terms of the approved Change Proposal.

The affected parties should be able to negotiate their position and therefore should be able to object to any terms contained that would adversely affect them.

25 9.1 **Do you agree that an incomplete scheme should be subject to a new Station Change proposal so that the optimum outcome can be negotiated between the parties?**

Agreed.

26	10.8	**Do you think that the protections in Part G:** **(a) should be incorporated into the proposed new "Notifiable Change" process?; or** **(b) should remain in Part G of the revised SACs, separate from the Station Change provisions?** These should remain in Part G of the Revised SACs, and be relevant as appropriate
27	11.15	**We will consider whether it is appropriate that, following agreement of a Station Change by the parties, ORR approval to any consequential amendment (to a Station Access Agreement) might be obtained "in principle", to allow registration and implementation to proceed before formal section 22 approval of an amendment to and access agreement is given. We invite comments on this suggestion.** Is this appropriate in all cases? If the scheme is significant, then would advocate allowing ORR early sight to ensure the Proposer has addressed all issues.
28	14.5	**We wish to hear from respondents on what (regulatory) impact - positive or negative - you believe that proposed changes will have on you.** The introduction of an additional registration process will increase bureaucracy and result in incorrect categorisation of Station Change. Suggest prohibit implementation of an approved proposal as suggested by ATOC for 3 months. Notifiable Change or Material Change defined to ensure there is no confusion with the process.
29	14.5	**While we have raised specific questions, summarised in chapter 13, we equally welcome respondents' views on any aspect of the proposed modifications, including if respondents consider we could go further in stream-lining the process.** Guidance notes will be helpful and further streamlining potentially an issue.