

Paul Stone  
Office of Rail Regulation  
1 Kemble Street  
London  
WC2B 4AN

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Dear Paul

## **CONSULTATION ON THE REFORM OF ACCESS CONTRACTUAL ARRANGEMENTS**

Thank you for the opportunity to comment on your consultation on the reform of access contractual arrangements. As requested, our response is specifically directed towards the consultation questions on Schedule 5 and the specification of access rights. We intend to respond separately to the remaining aspects of the consultation by the later deadline of 18 April.

It is important to stress at the outset that we are supportive of change providing it can be demonstrated that it will deliver benefits to users, reduce costs and protect the interests of all rights holders. Against this background our members believe that the current level of specification of access rights is broadly correct and are firmly opposed to any proposals to relax them for the following key reasons:

- Any reform should focus on facilitating the delivery of outcomes passengers and funders want, not on process and how it might be simplified to reduce the burden on the railway. In the context of Schedule 5 and its application this means focussing not on the form of rights themselves but on ensuring that Network Rail delivers its obligations to identify capacity and plan the timetable such that TOCs can serve the market effectively. We would emphasise here that the ORR's Section 4 duties include promoting the efficient use of the railway via its role as economic regulator of the infrastructure manager.
- Clearly-defined access rights provide the certainty TOCs need to deliver services passengers and funders want. This certainty is fundamental to the commercial viability of TOCs' businesses: it drives industry revenue, defines the resource base and cost structure and enables operators to compete effectively with other modes. Equally importantly, it ensures TOCs are able to deliver funders' requirements as detailed in Service Level Commitments. In this context relaxing access rights may in fact undermine efforts to achieve the savings identified by the McNulty Value for Money Study by injecting risk into franchises which in turn would be reflected in future franchise bids. This would not be a sensible outcome for passengers or taxpayers.
- Well-defined access rights have not inhibited development of the timetable. Since privatisation, the form of Schedule 5 rights has changed relatively little while the timetable has changed significantly as new services have been added. As a consequence we have been able to carry over 70% more passengers with only a 20-25% increase in rolling stock capacity. This indicates that the way in which Schedule 5

rights are specified has not ossified the timetable and constrained capacity but has, in fact, allowed the development of services to meet increasing passenger demand while protecting the commercial interests of operators.

- As proposed, diluting access rights would leave rights holders to rely on Parts D, J and M of the Network Code and, in the limit, ORR action to enforce Network Rail's licence. However, these proposed protections are insufficient and were never designed for this purpose. Furthermore, action against NR for breach of its licence has rarely been employed which suggests it would be very much considered an option of last resort in this context. There is therefore little confidence that TOCs would be left no worse off if access rights were loosened.

More broadly the reform of access contractual arrangements must be cognisant of wider industry changes currently underway, including the reform of franchising and moves towards closer alliancing between Network Rail and TOCs. The latter development in particular may well place a much stronger emphasis on ensuring secondary operators which are not party to an alliance have the necessary protection afforded by clearly defined Schedule 5 rights. In this context loosening the specification of rights now could have significant unintended consequences for these operators further down the line.

Our responses to the individual consultation questions relating to Schedule 5 are set out below.

### **Comments on specific consultation questions**

#### **Q2. Consultees are invited to comment on the level of specification in Schedule 5 of TACs and the specific barriers which, in their view, might prevent a move towards a less prescriptive specification of rights.**

The presumption here appears to be in favour of less prescriptive rights. However we do not believe there is compelling evidence to conclude that the current specification of access rights should be relaxed. While it is possible there may be some instances where rights could potentially be loosened without impacting unduly on the operator's business, on the whole we would reiterate there is a strong rationale for access rights to be clearly defined and that the current level of specification is broadly about right.

#### **Q3. Consultees are invited to comment on where they believe responsibility for conducting the timetable process should lie and why. In doing so, consultees should provide specific examples of difficulties they have experienced during the timetable process and suggest ways in which these could be addressed.**

We believe that, as a base position, Network Rail should continue to carry out the timetabling process but that there ought to be a greater emphasis on ensuring it has the appropriate resources and capability to carry out the process properly. As the infrastructure manager with responsibility for strategic planning it is Network Rail's role to identify capacity and develop the timetable in response to the demands of its customers (TOCs and FOCs) who are closest to the market.

Clearly, as the industry develops, alliancing may bring opportunities to combine timetabling and planning expertise from both operators and NR in order to best serve passenger needs. However as already noted, it is important that where this occurs, secondary operators are not disadvantaged and the continued protection offered by well-defined rights will be important to retain.

**Q4. Do consultees agree with the suggestion of a 'commercial purpose' clause? If so, what do they think it should include?**

We agree that some form of 'commercial purpose' clause or recital within TACs may be helpful as guidance in order to help interpret the contract, however it cannot and should not be a substitute for rights themselves. While useful we would therefore not support reliance on a 'commercial purpose' clause alone as a replacement for specified rights.

**Q5. Do consultees agree that there is scope to simplify and reduce the amount of information currently provided in Schedule 5? If so, consultees are invited to comment on our specific proposals and to put forward any other suggestions they have to improve the structure and content of Schedule 5.**

We agree there is some scope for simplifying certain aspects of Schedule 5, for example combining some tables where there may be duplication and a number of additional suggestions were made at the recent workshop which are well worth pursuing. However it is important to recall that Schedule 5 is intended to be applied by track access specialists rather than the layperson and that the content should be fit for purpose, unambiguous and be capable of straightforward application. Similarly there should not be a presumption that simplification means removal; any streamlining of the drafting or layout should be designed to support effective implementation, promote clear understanding, and to ensure that all necessary information is retained, even if it is not used very often.

Further, it is important to be realistic about what can be achieved through this exercise. Most TOCs already employ relatively small track access teams and therefore it cannot unlock huge savings by making the contractual interface significantly less resource-intensive. The industry is supporting major change to deliver better value for money to customers and funders, and we do not believe that wholesale revision of and dilution of Schedule 5 will promote the outcomes that we wish to secure.

I hope this helps inform your thinking and we would be happy to engage further on any of these issues if you feel it would be helpful.

Yours sincerely

Alec McTavish  
Director, Policy & Operations