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Consultation response - Reform of Access Contractual Arrangements (Schedule 5)

This letter constitutes the Go-Ahead Group's response to the element of the consultation document concerned with changes to schedule 5 of the track access agreement and also represents the views of the Southern, Southeastern & London Midland train operating companies. I confirm that no part of this response is confidential.

The starting position of your consultation is that the rights contained in schedule 5 are too specific and prescriptive. This is not our opinion and from the evidence of your workshop of the 15 February the shared view of train operators is that schedule 5 rights should be retained largely in their current form. The rights set out in schedule 5 describe what is being bought from Network Rail by train operators in contracts worth tens of millions of pounds; as this is a share of space and time on the network, rather than a tangible product a degree of complexity in the description of its characteristics is inevitable and a degree of specificity is necessary as other parts of the access contract deal with the consequences of non-delivery by either party.

The core rights set out in schedule 5 protect quantum, interval and journey times; these are the basic elements of any operator's timetable which is its core commercial offer to the market and define its competitive position. Any dilution of rights to these elements of schedule 5 would seriously weaken train operators' position with Network Rail.

For franchised operators there is a further requirement for firm and specific rights in that where an operator is unable to deliver an element of its service level requirement (SLC) it has to demonstrate to the funder that it has used all the leverage available to it on Network Rail. Looser specification of access rights would weaken the available levers and ultimately risk delivery of funders' specifications.

The three levels of journey time protection continue to be required as they have different and in our view essential purposes. The maximum journey times and the maximum key journey times exist primarily to ensure the TOCs' timetabling aspirations are met. The fastest key journey time is intended to ensure that the infrastructure remains capable of delivering that journey time and this is of value to regulator and funders as well as operators.

Protection of journey times is essential as there is often a conflict between the commercial drivers to offer the fastest possible journey time and the temptation for Network Rail to insert pathing time to enable it to more easily deliver its performance targets.

It is hard to see how parts D & J of the Network Code offer operators the same level of certainty to plan their businesses as well specified access rights. Reliance on such an approach would be certain to lead to an increase in the number of disputes, particularly in respect of the application of the Decision Criteria in part D. Well specified access rights assist Network Rail in reaching decisions on capacity allocation when compiling the timetable and reduce the scope for dispute.

When considering whether there are elements of schedule 5 which could be simplified it should be borne in mind that schedule 5 needs to be able to cope with the differences between TOC businesses, so for example, for many operators turnaround times can be left to the timetable planning rules, but some, particularly long-distance operators, require extended turnaround times to clean and replenish their services. This is driven by commercial rather than operational need and as such it is appropriate for it to be dealt with in the access contract; however those operators who do not require extended turnaround times do not need to complete that section of the access agreement, this would suggest that the tables in paragraph 8 should normally be left out of the contract and only added if needed.

In summary we believe that schedule 5 in its current form provides valuable protections for operators and funders and clarity for prospective users of the network. Given the financial value of the contract, the difficulty of describing of what is being bought and sold and the specific requirements of some operators, despite some of its limitations and frustrations, it is an effective tool. After 10 years experience of the model clause form schedule 5 it is also well understood by those who use it and there is significant levels of expertise within the industry to support those new to the contract.

Our answers to your specific consultation questions are attached.

Yours sincerely

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Director, Rail Policy

Copy: Kai Hills, Southern
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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 in this question would appear to be already in favour of less prescriptive rights. As the ORR will recall from the workshop of 15 February there was a very clear and almost unanimous view that the current specification of access rights served an important purpose for all parties and should not be relaxed. Our view is that a looser specification of rights would import ambiguity and confusion into the timetabling process, while potentially reducing value of franchises, with an increase in risk to the satisfactory delivery of service specifications

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.

Our view is that as infrastructure manager and access provider Network Rail is the party best placed to carry out the timetabling process, provided that it is suitably resourced to fufil that role in an effective and efficient fashion. We also believe that the recent rewrite of Part D should clarify and assist all industry participants in that access process.

Clearly, the industry needs to ensure that the interests of network wide and minority users are not prejudiced by the move to joint working through Alliances. However we question the ability to devolve the access planning process beyond the present unified system without generating possible disbenefits, particularly on core sections of the network with many users including long distance passenger and freight operators.

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

While a 'commercial purpose' clause has not been a feature of previous Track Access Contracts, with the possible exception of the 1997 PUG2 WCTL contract, we are of the view that such a clause is only of value if the parties to that agreement are fully aligned towards the delivery of that commercial purpose.
We doubt if such a clause would necessarily add value to the contractual weight of access agreements: and certainly do not believe that it would be of any merit as a substitute for rights themselves.

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.

There may be some scope of simplifying some areas of Schedule 5, and give some examples below in response to the suggestion by ORR in the consultation paper.
However it should be recognised that Schedule 5 remains a technical document to be used by the industry and that the move to "model form" expression some 7 or 8 years ago has led to clarity and consistency in the expression of rights.

Since then, ORR has been able to fine tune the policy towards the grant of rights by specific adjustment to the detail and content of some proposed Schedule 5s or in relation to specific

amendments of existing Rights. In particular the ORR has only approved “Paragraph 8” rights by exception, and we accept the ORR position on this, except in relation for Firm Right to Stable at specific locations.

With regard to the suggestions made by ORR in the consultation paper:

4.18 (a): We believe that merging Schedule 2 into Schedule 5 may not lead to increased clarity. The issue may be for appropriate description of routes listed within Schedule 2

4.18 (b) We would support any move to clearer language and definitions;

4.18 (c) We are not sure that footnotes present such an issue and are a hindrance to clearer expression (we would welcome sight of a particular s.5 which ORR believes supports this proposal)

4.18 (d) as stated above we believe that Para 8 rights should be retained on a by exception basis, specifically justified by the applicant. We would also ask the ORR to reconsider whether there is a case for the reintroduction of Rights to Stable;

4.18 (e) We support any attempt to merge the data set out in the various tables at present so that information on a specific point to point flow could be obtained in one location in s.5 rather than in three or four specific tabular entries.

4.19 (a) We do not support the elimination of calling patterns, particularly as that often will define the available capacity of a route, through the running times of an “all stations” service. In addition practicioners of model clausing often find that the calling pattern provides the starting point for the construction of a new or amended Schedule 5.

4.19 (b) Turnaround times are specified by location and traction in the TTPR. We do not see why they would need to be repeated in the TAC

4.19 (c) As a paragraph 8 right we can understand the current policy on approving Firm Rights on platforming. That said, we believe NR should be required to use reasonable endeavours to meet the aspirations of operators in this respect.

4.19 (d) Journey Time protection are an essential element of the contract for any access party. That said the defintion of JT protection could be reviewed, given that the explanation of “Key Journey Times” and the associated contractual entitlement appears complicated is sometimes difficult to explain to non track access specialists

4.19 (e) We do not support deletion of Specified Equipment from Passenger TACs, particularly given its relationship to JT protection, and the benefit of a Firm Right to train slot under a TAC.

4.19 (f) We do not support any proposal to delete Early & Latest trains from Schedule 5. The implied data in the EAS relate to overall network availability, *not* train services.

Finally, the industry should also properly consider whether such reform of this area is likely to yield genuine savings of the order specified by the McNulty report. Operators’ access contract teams are not particularly large, and it was acknowledged at the workshop that simplification – even if desirable – would not lead to major efficiencies or financial savings for the industry