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Dear Paul

**ORR CONSULTATION: REFORM OF ACCESS AND CONTRACTUAL ARRANGEMENTS**

I am writing to you in response to the consultation issued by the Office of Rail Regulation concerning the reform of access and contractual arrangements. This response relates to the remaining parts of the consultation following a response to questions 2, 3, 4 and 5 of the document as you requested at the start of March. This is the formal response of Freightliner Group - representing Freightliner Limited and Freightliner Heavy Haul Limited. Freightliner welcomes the opportunity to respond and is content for this response to be published in full on the ORR website.

Coupled with the first part of this consultation, the overall document covers a very wide number of areas in considerable detail. The time required to provide a response to the consultation has been considerable. Freightliner believes that the consultation has attempted to cover too many subject areas and as a result, our detailed comments have had to be focused on the areas that we see as being the most important. It would be helpful and would enable better responses if more focused consultations were undertaken in future.

Train operators are still getting to grips with the most recent changes to the Network Code, so with this in mind, Freightliner hopes that on completion of this consultation the ORR will focus any changes on key areas rather than opting for a wholesale overhaul to the Network Code.

The answers to your specific questions are provided as follows:

**Question 6: Do consultees have any comments on our proposed approach to RT3973?**

RT3973's are not contractual documents but safety documents required by the White Pages. The contractual provision is laid out in the Equipment Characteristics of the Schedule 5. We do not believe that RT3973's should be included in contractual documentation at all, and are not necessary given the Equipment Characteristics.

The provision of RT3973 is a fundamental requirement for Freightliner and other freight operators to run their day-to-day business. For Freightliner alone, over 95% of our planned services run with this permission. For Freightliner Heavy Haul (along with the other freight operators), commercial requirements dictate that a standard coal wagon (running with 100 tonnes) is the norm. This will generally require an RT3973 as this will normally apply for any wagon over 90 tonnes. Consequently, the granting of RT3973 under the current system is essential for us to honour our customer contracts.

For the intermodal business, an RT3973 form is required for all loaded services as they operate in excess of the W6A profile, even if the whole route is published at a higher W gauge (White Pages Section K1). The resulting speed restrictions that remain in place then have an ongoing impact on network capacity and performance.

Other recent examples have seen gauge clearance completed but with some speed restrictions requiring RT3973 exemptions still remaining (e.g: following the WCML to Southampton W10 upgrade).

Freightliner believes that such a change will be completely unworkable under the current system. The addition of expiry dates in the rights table would add an added layer of unacceptable bureaucracy to the Supplemental Agreement (SA) process as it would require us to have to monitor and update our Access Rights on an almost continual basis. Furthermore it would provide significant uncertainty and risk for freight operators, whose commercial haulage contracts often extend beyond the duration of the access rights that they require to honour those contracts.

Given the current length of time being taken to process SA's (as an example the Freightliner Heavy Haul 18<sup>th</sup> has taken approximately 9 months), the risk will be that were an RT3973 to expire in the middle of a SA being processed the operator will be left with access rights that do not support its customer contract.

Freightliner is opposed to the proposed changes. However, radical reform of the RT3973 process is long overdue given that 95% of freight trains rely on them. It is a complicated area and needs to be approached with caution. For example, it is not clear whether a change to a RT3973 constitutes a Network Change.

**Question 7: Do consultees agree that the 'SPOTS' forms a basis for resolving the misalignment between the timetabling and access approval process?**

Freightliner is not convinced that the 'SPOTS' proposal will improve the timetabling and access approvals process. Whilst most of the proposal looks well-intentioned, the main area for concern is Appendix A paragraphs 31-33. If we had to use the Part D appeal process to comment on another operator's paths, we would need to be reliably informed of what has changed. Were this information to be lacking, the presumable alternative would be to go through the entire national timetable twice a year looking for potential issues.

In the case of the former, NR would have to provide such information, but as it singularly fails to advise operators of the changes to our own services in the timetable offer, we have no confidence that it would do so on a national basis. In the case of the latter, we do not have the time or manpower (or inclination) to do this.

A right of objection must be retained through the track access process as now; it would be better for ORR to enforce deadlines of D-30 and D-24 for access applications (even though the offer is at D-26, TOC and FOC's will know what has been bid before D-30, and certainly of their offer by D-24). This requires NR to ensure validation work is complete at D-26 (as it should under Part D).

Freightliner is concerned that SPOTS will not make the best strategic use of capacity, and in the case of passenger services, "temporary" timetable changes can often automatically become "permanent" without question - something that is not necessarily in the spirit of the proposal. It can be less than straightforward to withdraw passenger services, once they are running due to PR and political issues as well as for financial and resourcing reasons (may have leased extra rolling stock).

Freightliner believes that SPOTS will do little to aide the increased transparency that is needed under the track access process, in order to ensure that the existing capacity on the network is utilised in the most effective manner.

As a specific example, National Express East Anglia (NEXA) recently made a bid for significant changes to its off peak services in the Dec 2011 timetable change. Due to a late bid (made in September/October) after the priority date, NR was unable to satisfy all objections from other operators and the ORR allowed them temporary paths despite them not having the necessary access rights. Freightliner and other Freight Operators objected to this application as paths were granted despite NR concluding in their report that no freight capacity was available on the route.

Freightliner is concerned that SPOTS will lead to more last minute and tactical bidding such as the NEXA example to avoid transparency afforded by the standard Track Access process.

**Question 8: Consultees are invited to let us have any further comments on the access application process, including evidence of where it has not worked, together with any further suggestions on how they would like to see it improved.**

Freightliner is broadly supportive of the proposals to encourage greater pre-consultation prior to the submission of access applications. Pre-meetings prior to applications being submitted are a good idea providing they are not overly bureaucratic. For significant applications such as timetable recasts or those that are requiring the use of flex in the existing Level 1 rights of other operators, such pre-consultation is sensible. However, we do not have the resources available to devote the time required to do this for each and every minor application that could have some impact on the Access Rights held by Freightliner.

One of the main issues with the current application system is the overall length of time taken to go through whole process. As stated in our response to Question 7 recent applications submitted by Freightliner have taken nearly a year to progress from start to finish. This makes it impossible to comply with the target set out in Part J of the Network Code which states that operators should review and update their existing Access Rights every 6 months.

A further delay has recently been experienced as a result of an apparent “dragging of feet” by NR to progress applications for new Access Rights until some unused existing rights have been relinquished by the operator. Whilst operators need to play their part by handing back rights that are no longer required, this can only be done if the whole process is streamlined and shouldn’t be directly related to the application for new rights.

To reduce the overall timescales, we believe that NR should send out applications for consultation within a week of receiving applications. Furthermore, we support your proposal to publish a “tracker” for open applications. This will make it easier for operators to progress their own applications and ensure that they can plan their resources more effectively so that consultations arising from applications made by other operators can be processed in a more timely manner.

**Question 9: Do consultees agree that we should revisit our proportionate approach criteria with a view to handing more responsibility to the industry?**

Freightliner has no substantive comment to make.

**Question 10: Do consultees support the principle of extending the scope of track access General Approvals to include more new contracts under s18 and a greater number of s22 amendments?**

Freightliner has no substantive comment to make here other than that given that the s18 and s22 forms have only recently changed we would prefer to wait and see what issues arise before making further changes to the process.

**Question 11: Do consultees have any other suggestions for extending the scope of our General Approvals?**

Freightliner has no comment to make.

**Question 12: Consultees are invited to raise further issues relating to the reform of contractual and consultation processes for stations and depots.**

Freightliner has no comment to make.

**Question 13: Do consultees consider that the regulatory requirements prompted by a change in franchise, or another similar event, is greater than it could be? If so, how might the impact of such an event be reduced or mitigated?**

Freightliner has no comment to make.

**Question 14: Do consultees consider that it would be useful for Network Rail to undertake an assessment of depot capacity in order to identify long-term needs. Do consultees believe that it would be more appropriate to carry this out when requirements for new or additional rolling stock are being identified?**

It is not clear as to whether the proposal here for Network Rail to assess depot capacity would include freight facilities. Freight terminal capacity is a totally unrelated matter and cannot practically be considered in the same workstream. Furthermore, the use of terminal facilities regularly changes so it would be very difficult for a piece of work such as the one being proposed to remain up to date. The ORR has recently completed a consultation earlier this year concerning the Access to Freight Sites. To maintain consistency any changes to freight facilities should be taken care of under this separate workstream.

**Question 15: Consultees are invited to comment on the functionality of APAs, and on specific amendments which could be considered to facilitate their ease of use.**

Freightliner has no comment to make.

**Question 16: Consultees are invited to comment on the necessity of a review of Part C, and on who should take responsibility for any further work on Part C.**

Freightliner has no comment to make.

**Question 17: Do consultees agree that there is a case for reviewing the need for Part F? If so, consultees are invited to set out what elements of Part F need to be retained, if any (either in a reduced Part F or as part of Part G). If any consultee disagrees, it would be helpful if they could say why and what change, if any, they would like to see. Consultees should also comment on whether it would be appropriate for any review of Part F to be taken forward by the Part G IWG.**

Freightliner is not convinced of the need to retain Part F of the Network Code in its current format. As you point out in 5.8 Part F is concerned with the commercial impact of vehicle change, yet this is largely taken care of in other areas as the commercial impacts are more

linked to timetable changes. Providing a new vehicle meets the criteria laid out for a route, this should be the main criterion for allowing its introduction.

There is currently confusion with many operators about the role of Part F and the compatibility consultation process, these processes should be amalgamated.

**Question 18: Consultees are invited to comment on the issues they have experienced during the network change process which would need to be addressed as part of a review.**

Freightliner acknowledges that whilst some NR routes have made improvements in their handling of the Network Change (NC) process recently, a number of issues still remain. Far greater attention seems to be paid to large scale “mega projects” where more consultation is taking place in advance of the NC notice being issued - as the process is supposed to work. However, for smaller schemes the advance consultation is often still lacking. We think that a major revamp of Part G is required as this is the most important part of the Network Code to change.

Freightliner has the following detailed comments to make about the current Part G process:

- 1) NR are not obliged to consult before a formal NC proposal, which undermines our ability to object to a proposal (or elements of it) given the stage at which the associated project may be at, e.g. project due for implementation shortly after closure of consultation period - too late to make changes without substantial abortive cost. This also covers instances where we do not wish NR to progress a proposal *at all*. As an alternative solution, it may be better to align NC to the GRIP process to ensure buy-in from stakeholders at all stage-gate reviews.

The lack of advance consultation to some NC proposals can mean that when a consultee responds with a rejection or proposes an alternative solution or design, NR can be reluctant to accommodate such changes due to the additional costs that will be incurred in re-designing the scheme, at a late stage in the development process.

- 2) NR are obliged to propose a NC - however, we have had numerous experiences of changes being made to the Network that have taken place without consultation or retrospective NC's being placed after an infrastructure change has been made. Recent examples include changes to the published loop length in the Sectional Appendix at Marsden with no prior NC and gauge clearances in the Western route area.
- 3) There is a perception that NR often appears to treat the NC process as a “tick box” exercise, with little or no attention given to properly deal with operators concerns or objections that are raised during the consultation process.
- 4) “No Material Effect” notices - these are not actually part of the process, and frequently lead to disputes about whether a change is material or not. It would be better for all changes to the Network to go through the process, and materiality only needing to be demonstrated when claiming compensation.
- 5) NR's criteria for future use are too narrow and no longer fit for purpose. Instead, we believe that they should be taking a more strategic view to consider the potential future use when looking at specific locations subject to NC. This can particularly be the case for the recovery of infrastructure. In these examples, the removal could lead to a risk on performance (such as the recovery of a loop for example), yet there is no mechanism to quantify the future financial risk that could be incurred by the operator as a result of the change.

- 6) No defined timescales for NR to respond to rejections, or conversely for an Access Beneficiary to respond to NR. This can result in slowing down the whole process and then result in pressure being put on a stakeholder to agree to a NC when infrastructure works are due to commence. It is often the case that NR will not reply to an objection letter for over 6 months, this is unacceptable and is frequently just a tactical move to put pressure on an operator to agree to a change.
- 7) No tracking mechanism for whether NR actually carries out a proposal - notice of withdrawal or completion of works required, perhaps coupled with a time-out period similar to planning permission? In some recent cases, we have had to rely on spotting changes in the Sectional Appendix to find out when a change has been made.
- 8) The content of proposals can often be lacking particularly for smaller scale NC proposals - e.g. business case, effect on running times and/or capacity, other options discounted, etc.
- 9) Understanding the impact on capacity is particularly important and this information should be provided according to a clause in the Access and Managements Regulations 2005 which states that, "The infrastructure manager must provide, to any interested party, information about the infrastructure capacity allocated to applicants". As explained in the previous point, the lack of this information can make it more difficult to understand the benefits that will be delivered by a NC and is often the cause of non-agreement to the NC.

We often request information on the effect on capacity as a result of the change being proposed. This is rarely forthcoming and leads to the biggest percentage of disputes. In our view, this is largely due to the fact that there is not a close enough link between the project teams and train planning in NR. Understanding the impact on capacity is a fundamental output of most NCs and a greater focus should be placed on assessing this.

- 10) There is no process or timescales for agreeing the costs and losses incurred by the affected party as a result of a NC proposal. Frequently NR takes many months to process NC claims, when the costs have already been incurred by the operator. We have seen some improvement here but there should be laid down timescales for the processing of claims to improve this process.

Freightliner believes that a solution to many of the problems outlined above could be found in the form of a clear Code of Practice setting out some guidelines over the NC process, what information should be provided and timescales for the duration of the whole process (not just the time for a consultee to respond). It may also to speed up the process if there was a mechanism allowing a consultee to agree some form of "conditional acceptance to a NC" providing certain conditions were met or information was provided. Currently, if a consultee is not fully satisfied with a proposal their only option is to submit a rejection, thus delaying the process and giving NR no flexibility to progress a scheme in the meantime.

**Question 19: Do consultees have any comments on the use of Part H? Would Part H benefit from a general update and refresh to take account of current circumstances?**

Freightliner has no comment to make.

**Question 20: Do consultees believe that Part K adds value to the contractual regime? If not, should it be reviewed or removed altogether from the network code?**

Whilst not used on a regular basis, Freightliner believes that Part K serves a useful purpose

in setting out what information is to be provided between access parties and sees no useful benefit in altering or removing this section of the network code. Part K provides a useful backstop for operators.

**Question 21: Do consultees feel that Part L would benefit from a general update and refresh to take account of current circumstances, including the addition of FIPs, and the opportunity taken to move TOCs using LOCs to JPIPs?**

Freightliner has no specific comment to make here other than that we are currently working with NR on the development of a JPIP. Given that Freight Operators are not contracted by the Government to provide any services, the involvement in JPIPs should not be a regulatory condition and therefore any amendment to the Part L should make it clear that any such regulation should only apply to franchised TOCs.

**Question 22: Do consultees agree that issues such as network availability and JNAPs should be incorporated into the network code?**

Freightliner would support any move that would formalise NR's commitments to Network Availability and JNAPs although some further detail would be welcomed as to what aspects would be included in the Network Code.

**Question 23: Do consultees believe that there are other parts or individual conditions of the network code that would benefit from review? If so, please say which, how and why. Are there any aspects of the current access contractual regime which should be incorporated into the network code?**

Freightliner has no comment to make.

**Question 24: Do consultees have any comment on the format, structure and content of our new application forms, and do you have any other suggestions for improving them further?**

Freightliner has no specific comment to make here other than that following the changes, the current forms should be used for a reasonable period to see how they work, before further changes are considered.

**Question 25: Do consultees consider that the changes we have made to the access and network code webpages have made them more user friendly and accessible? Are there any further improvements consultees would like to see to our website (not necessarily confined to the access and network code pages)?**

Freightliner feels that the changes made to the webpages have made the site more difficult to access. For external users, not familiar with the site layout, locating pages is still not straightforward. In particular, finding previous access applications and current rights tables can be difficult. As discussed earlier in this response, a tracker of the status of current applications would be very useful. The data portal is very user unfriendly and the data is often incomplete.

**Question 26: Do consultees have any views on further changes which could be made to the model contracts to ensure that they remain accessible, clear, useful and fit for purpose?**

Freightliner has no comment to make.

**Question 27: Do consultees agree with our approach to allow the industry to continue to develop its own approach to the format of access contracts for access to facilities off Network Rail's network?**

Freightliner has no comment to make.

**Question 28: Consultees are invited to provide specific examples of their experiences of Network Rail's sign-off process for applications, together with any suggestions as to how the situation can be improved.**

Freightliner has no comment to make.

**Question 29: Consultees are invited to comment on whether Network Rail should be making more extensive use of declarations of congested infrastructure, including removing the 'congested infrastructure' label if it is appropriate to do so.**

Freightliner is in full agreement with this proposal that NR should be doing more to declare congested parts of the Network. In our opinion, NR appears to be reluctant to make this declaration, despite the fact that a large percentage of the network more than likely fulfils these criteria. On routes where access applications cannot be approved due to there being insufficient capacity, Freightliner questions why these routes are not then being formally declared as "congested", presumably as this will then trigger a requirement for NR to find a solution to resolve the problem.

As previously mentioned, the Access and Management Regulations 2005 clearly set out the obligations required of Network Rail in this area. Going forward, Freightliner would like to see the Regulator seek to enforce NR's responsibilities more rigorously to ensure that it adheres to them.

Freightliner also agrees with the view that there are instances where the congested infrastructure "label" should be removed now that capacity enhancements have been made (for example, Gospel Oak to Barking).

If you require any further input from Freightliner or require any clarification relating to the points raised please let me know.

Yours sincerely

Tim Jackson  
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Freightliner Group Limited