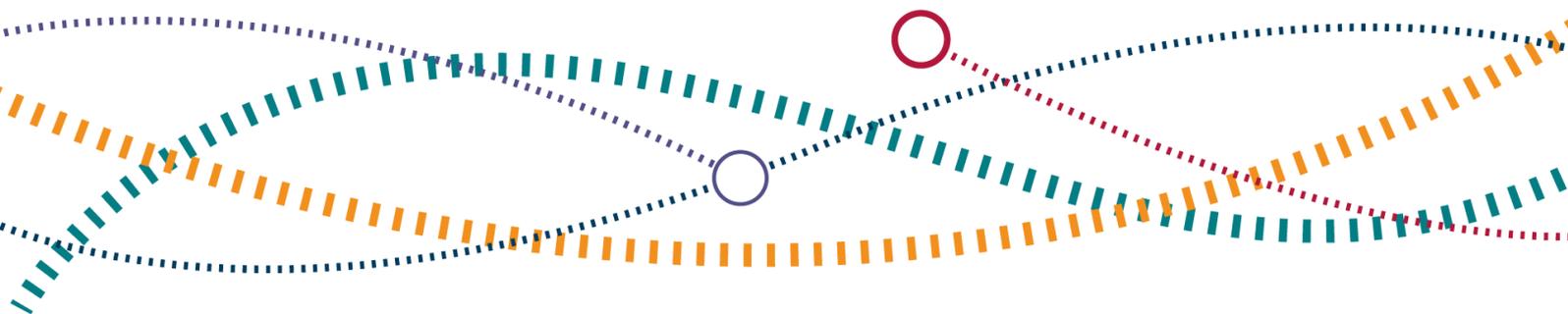




# **Consultation on The Passenger Access (Short Term Timetable and Miscellaneous Changes) General Approval 2009**

## **Proposals for change**

05 September 2022



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# Background and context

This consultation provides a review of the scope and definitions for the General Approval for Passenger Track Access. It proposes amendments which will help ORR and industry now and will remain relevant to support changes which may result from industry reform.

The needs and demands placed upon industry have changed since the General Approval and the accompanying explanatory note for passenger track access were last reviewed in 2009. With further change likely during the transition from Network Rail to Great British Railways, in line with our existing duties this review aims to:

- simplify the process of amending the TAC in circumstances where the proposed revisions are low-risk and low-impact;
- reflect the changed nature of industry since the General Approval's introduction;
- anticipate the need for greater flexibility in the future access application process;
- and  
make clear and unambiguous the circumstances in which the General Approval can be used.

This consultation contains ideas generated by ORR as well as some suggested by Network Rail (System Operator and Regions). ORR has independently tested all the ideas for their feasibility, legal compliance and accord with our duties.

Before implementing any changes from this consultation, we will take account of industry reform developments or industrial relations in industry. In particular, the Better Timetabling for Passenger and Freight (BTPF) programme may entail changes to the length of a timetable period and the number of timetable changes per year, which may in turn affect the proposals we are making in this document. Any implementation will require changes to our guidance and/or model access contracts, which needs to be factored in.

## Seeking your views and next steps

We are keen to hear your views on the ideas in this consultation document. A draft of the revised General Approval is available separately.

**Part 1: Proposals** sets out the proposed changes we want to make now, on which we welcome your feedback.

**Part 2: Proposals not currently supported** sets out proposals where we are not currently content to make the suggested changes, but we would still welcome any views on whether we should revisit our position in the future and under what circumstances.

We also invite wider feedback on how the drafting of the General Approval could be improved.

When you are considering your response, please refer to the full list of questions in the consultation proforma. We strongly encourage you to use this in your submission, but if you prefer to respond in another way we would still ask that you ensure you have provided all the information that the proforma requires. Please also make any colleagues aware of this consultation if you think they would be interested in adding to the discussion.

The deadline for responses is 5 October 2022.

# 1. Proposals

## Changes relating to definitions

### *1. Added/improved definitions of “service” and “additional” in part 2(1)*

1.1 During PCD 2021, a difference of opinion arose between ORR and Network Rail customer teams on the definitions of the words “service” and “additional”. Network Rail believed that adding a new station call (where a TOC had not previously held calling rights there) constituted a “service” in its own right, whereas we did not.

1.2 Network Rail also questioned the definition of “additional”. For example, can it refer, variously, to a physical (rather than temporal) extension of a current service A to B, to a point C further along the route; an entirely new service which did not exist before; and a new station call, as outlined in point 1.1?

1.3 ORR does not agree that a station call is a service in its own right, nor that it can be defined as an “additional” service. At most, it can only be an additional call. Network Rail’s interpretation of the guidance was a result of some ambiguity in the wording of the General Approval which led to the belief that it was within the scope to serve a purpose that was not originally intended. As additional station calls can affect third parties and funders, we strongly believe that it is vital to be clear in the boundaries and definitions of these terms to avoid any ambiguity and confusion.

1.4 We therefore propose to insert a new definition of “additional” in Part 2.1 of the General Approval and to amend the definition of “service” slightly. We will also address the inclusion of station calls as a separate consideration in paragraph 3 of this document.

**Amended text: “additional” means, in the context of services, either a new service that was not previously in the contract, or a physical (not temporal) extension of an existing service to a further start/end point; in the context of station calls it means an extra call at a station for which the beneficiary already holds calling rights or a new call at a station that the beneficiary does not currently serve.**

**“services” means services for the carriage of passengers by railway, comprising a journey from one station to another with a number of station calls between the start and end points; not all services need call at each potential calling point.**

## *2. Official definition of a General Approval and its intended purpose*

2.1 The General Approval appears to have been used by Network Rail and Operators as an emergency fallback option where they have failed to secure the access rights they need in time for their required start date. We do not believe that this use should be its main purpose, nor that it should be a substitute for good planning and adherence to the proper application timescales.

2.2 We therefore propose to amend the explanatory note to a smaller explanation which clarifies the primary purpose of the General Approval. The option to use it to cover failures of procedure is to be framed in terms of passenger benefit and continuity of services, minimising the impact of these failures on the timetable.

**Text:** The General Approval is primarily intended to effect small-scale changes which are of low risk and low impact to the parties to the access agreement and other potentially affected parties. ORR anticipates that it will be used to support industry efficiency in cases where greater regulatory oversight is not required. We do not expect that it will be regularly used to compensate for late-notice changes which have been directed without giving sufficient notice to implement the full supplementary agreement process; however, when the General Approval is the only option in such cases we would envisage that the primary benefit will be to limit the impact of such failures of procedure on the running of the timetable and on passenger experience.

## **Changes relating to additional functions for inclusion**

### *3. Temporal service extensions*

3.1 Network Rail requested the option to extend rights that are due to expire by using the General Approval. This has been much disputed. The relevant clause of the General Approval itself seems to allow it, or at least be open to interpretation, while the explanatory note states firmly that it is not a valid use of the General Approval. Network Rail believes that this is a misinterpretation of the fact (not disputed by any party) that the General Approval cannot be used to extend rights which were themselves put in place by a 90-day General Approval.

3.2 The main benefit of allowing temporal extensions is a saving in time and paperwork to enable a relatively simple amendment of the TAC. Network Rail has consistently argued that

there is much less risk involved in extending existing rights than in instigating new ones, which the General Approval does allow already.

3.3 The risks are that there is a potential lack of transparency, and that the option is removed for other operators to challenge the extension of rights which they believe have had a negative impact on their own operations. It is also often the case that the rights in question were originally consulted as being time-limited, and extending these beyond that time without further consultation would assume the agreement of other operators where it may not exist.

3.4 To mitigate this risk, we propose to amend the General Approval to allow temporal service extensions, but only for contingent rights and only for a period of 90 days. If the access party wishes for the rights to remain in place for longer, it must start a standard application for a supplemental agreement to formalise them within the TAC after the General Approval has expired. It will still not be possible to use the General Approval to extend rights that were put in place or extended with one previously.

See Paragraphs 6(1)(c), 6(2)-(4) of the General Approval.

#### *4. Station calls*

4.1 ORR was asked to consider whether or not additional station calls could be considered as an explicit provision. Due to the differences in interpretation of “service”, there has been a subsequent difference of opinion over the application of the term to include station calls. This is dealt with in more detail in paragraphs 1.1-1.4, but ORR’s overall view is that it does not, and that therefore the General Approval does not currently cover them.

4.2 The obvious risk is that allowing a General Approval with no caveats also allows the circumvention of regulatory processes which apply mainly to the provision of station calls, such as licensing and economic tests. Such changes may be contested during industry consultation and we believe that it is important to preserve the transparency of the process where it can directly affect third parties. We must also differentiate between an “extra” call at a station to which the TOC already has calling rights, and a new calling point which the TOC has not previously held rights for.

4.3 Our proposal is again to allow contingent station calls (in the additional station calls section of Table 4.1 of Schedule 5) to be instigated by General Approval, but only for 90 days and while the full process is carried out to instigate permanent rights into the TAC. We are conscious that once rights have been granted by whatever means, it is more difficult to

remove them if objections arise, so the wording of this clause is explicit that rights can and must be removed from the TAC if steps have not been taken to make them permanent.

4.4 We recognise that there is potential for misuse of this provision (and others) if it is allowed, and that ORR will need to monitor any such General Approvals we receive to ensure, primarily, that all the conditions have been met. As protection against this potential misuse, we propose that ORR will in future, introduce an audit regime where we review a randomly selected 20% of all General Approvals received during any given timetable period, or five applications where the total received is less than ten.

See Paragraphs 6(1)(b), 6(2)-(4) of the General Approval.

### *5. Bringing the TAC in line with clauses in the model contract*

5.1 This inclusion would allow a TOC to bring their contract in line with the published model, in cases where the TAC was established before certain standard clauses were brought into the model. These clauses include such items as standard On-Train Metering for Traction Electricity, which currently has to be consulted and submitted as a standard s22 application, when it has no impact on any other operators and ORR carries out no meaningful review of the application once received.

5.2 During our consideration, it was suggested that there was a risk of bespoke clauses being submitted for inclusion as General Approvals under the guise of model clauses, but the risk was felt to be quite low. It was also pointed out that the model contract for Open Access operators was different from the standard, and that this inclusion may not apply to them. We therefore include this suggestion in the proposed new General Approval, with the provision that it may not be used by Open Access operators. On-Train Metering has been included as a separate provision in the existing paragraph 12, which deals specifically with Schedule 7 amendments.

See Paragraph 13.

### *6. Amending or inserting footnotes to effect temporary service reductions*

6.1 Currently, service reductions which have a fixed time limit are dealt with by Specific Approval. They can generally be effected by means of a footnote which reduces the service quantum on a specific line in Table 2.1 or 2.2 between two dates. This may be due to a Part

J temporary surrender of rights, or it may account for an anticipated reduction in passenger demand at particular times of the year.

6.2 We believe that this could be a provision in the General Approval, but that further consideration needs to be given to how any reduced rights will be reinstated and whether this would require industry consultation ahead of their reintroduction. The issue to be considered is that, after a certain amount of time where the rights in question have not been running, their reintroduction could be seen to constitute new rights rather than reinstated rights that were temporarily suspended. Our proposal is therefore to impose a 90-day limit on the reduction period, meaning that a full section 22 application will be required to reinstate any rights that have been reduced for a greater period.

See Paragraphs 9(1)(d), 9(2)-(4).

#### *7. Schedule 4 VTP tables*

7.1 Amendments to the VTP (Viable Transfer Point) tables in Schedule 4 of the TAC are currently made by Specific Approval only. This adds an extra “layer” of process which we do not believe is necessary, as ORR does not carry out a review of these types of application before approval; we work on the basis that, as long as the details have been agreed between Network Rail and the TOC, we have no objection to make. We believe that including VTP amendments in the General Approval is a sensible, time-saving measure that will present a low-risk benefit to both the TAC parties and ORR.

See Paragraph 11.

#### *8. Amendments to Schedule 8 Appendix 1*

8.1 Column J of Appendix 1 to Schedule 8 deals with Monitoring Points, which again is a matter that ORR does not currently review in a way that adds value. As with VTP tables, amendments of Monitoring Points have no impact on other operators and, as long as they are agreed between the TAC parties, there is no reason why they should not be included in the General Approval.

See Paragraph 15.

## Changes relating to removed elements

### 9. Remove explanatory note section

9.1 The explanatory note that is appended to the General Approval (which can be found at the end of the General Approval Document) was intended to set out how the provision can and cannot be used. While there is some value to having an explicit statement of the General Approval's primary purpose (referred to in paragraph 2 of this document), much of it seems to be redundant, and it should not be necessary to explain the document if it has been drafted clearly enough.

9.2 There have also been occasions when Network Rail has disagreed outright with parts of the explanatory note, such as in paragraph 6, where it states that the General Approval cannot be used to extend rights that would otherwise have expired. Network Rail's argument is that this is a misinterpretation of the relevant clause which states that the General Approval cannot be used to extend rights *that were themselves put in place by a General Approval*. Without knowing the reason for this specification, the guidance becomes another element that is up for debate, rather than something that makes the General Approval easier to use.

9.3 We tentatively propose that the explanatory note should consist of a brief explanation of what the General Approval is for and how it is to be used, but that the detailed breakdown of each paragraph should be removed and the wording of the General Approval itself should be simplified and clarified to remove any ambiguity.

[See Explanatory Note appended to document.](#)

### 10. Remove ability to use General Approval for a timetable period (with a consultation)

10.1 Currently, under Paragraphs 14 and 15, it is possible to use the General Approval to instigate rights for one timetable period and to facilitate train driver training respectively, but only following an industry consultation and only if there are no objections arising from this. We cannot think of an occasion when this provision has actually been used; it would not seem to save much time and it would be rendered pointless in the event that an objection was raised during the consultation. In addition, we believe that it is necessary to have regulatory oversight of any changes intended to last for more than the standard 90 days. We propose removal of this clause as something which may have been useful at some point in the past, but which no longer serves a reasonable purpose. We also note that removing this provision entails the deletion of a large portion of text from the General

Approval, and we ask all consultees to consider whether there are any potential undesired consequences of this.

See deleted Paragraphs 14 and 15.

## 2. Proposals not currently supported

### *1. Change the 90-day time limit to 1 x TT period; change the allowance for GA with consultation from 1 x TT period to 12 months*

This suggestion was put forward by Network Rail representatives. We considered this and although there may be some merit to the changing of the 90-day time limit, we want to wait for the outcome of the BTPF workstream before considering this further. If Network Rail changes from two to three timetable periods per year a timetable period would then change. If the proposed changes do not go ahead for any reason, a timetable period would consist, as it does now, of anything up to seven months, which is a considerable period of time to instigate changes with no regulatory oversight. Please refer to paragraph 6 the General Approval which shows the wording that could be incorporated if the proposals are adopted.

### *2. Changing references to PCD/SCD into equivalent dates*

As part of the BTPF discussions, Network Rail asked whether the General Approval could be used to directly change any references to “Principal/Subsidiary Change Date” to its equivalent actual calendar date. There is no obvious provision for such amendments in the General Approval at the moment. This seems a reasonable and valid use of the provision as long as the amendment is to a direct equivalent date and does not have the effect of lengthening the expiry date of a TAC or any rights therein. However, the issue this tried to address can be resolved quicker through agreed changes to TACs. Also, without a firm outcome from the BTPF project, we do not want to make definite proposals in this area yet. Please refer to paragraph 18 of the General Approval document, which would be included in the final draft proposal only if the outcome of the BTPF project would call for it.

### *3. Special/seasonal events*

There is already a provision for this within paragraph 2.8 of the TAC itself, although the reference to this in the General Approval is out of date and has been amended to reflect the model contract.

### *4. Rollover of contingent rights on East Coast Main Line/Castlefield Corridor in accordance with Network Rail policy*

This was another suggestion by Network Rail, to which we gave careful consideration, as it initially seemed to be a low-risk amendment; these changes will already have been approved by the Sale of Access Rights (SoAR) panel according to Network Rail policy, and

the ability to deal with them by General Approval would lessen the influx of cases ORR receives for cases that are generally uncontested and which require little regulatory input from us. However, on further reflection, it was decided that it would be difficult to contractualise what is meant by “Network Rail policy”, as it can be changed without recourse to law and it has no legal standing. It is also the case that objections have sometimes been raised during consultation and, although there have not been any occasions where these were upheld and the application was rejected, it is important that the process remains open to scrutiny.

#### *5. Responding to passenger demand, i.e., unexpected increase in passenger numbers*

We believe that there is already adequate provision for dealing with predictable seasonal demand, special or one-off events, and surrender of unused access rights due to reduced demand in the General Approval, the TAC and the Network Code. Anything that does not already fall within these parameters would be more complex and we would expect that it required consultation. We therefore decided not to consider this as an inclusion.

#### *6. Correction of administrative errors*

We have had previous experience of Network Rail trying to correct what they believed were “admin errors” but which turned out on further inspection to be amendments to Schedule 5 that constituted changes to the service quantum. Even though these may have been rights that had been removed in error during, for example, consolidation of the TAC, such an application requires more scrutiny than a General Approval allows. There is too much scope for such a provision to be misused or for further errors to be introduced by means of poorly-worded General Approvals. We decided that including this would present too much of a risk.

#### *7. Transfer of services/station calls between TOCs with the same funder, or within the same TOC’s TAC*

This proposal was given serious consideration during the process of drafting and finalising the consultation document, as the risk initially appeared low. However, further reading of Reg. 19(10) of the Access, Management and Licensing of Railway Undertakings Regulations prohibits any such transfer or trade of capacity and access rights. We therefore cannot proceed with this proposal.



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