



To interested parties

17 March 2006

ORR's Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005

1. The Office of Rail Regulation (ORR) has today published the above guidance setting out its approach when considering appeals under The Railways Infrastructure (Access and Management) Regulations 2005 (the Regulations). This letter also addresses the responses received during the recent industry consultation.

Background

2. The intention of the Regulations, which came into force on 28 November 2005, is to ensure that a railway undertaking operating a rail transport service has full access to the rail network and to a range of services and facilities. The Regulations provide a right of appeal to ORR for any applicant that feels aggrieved and considers it has been wrongly denied access to a facility or service, or that the terms for obtaining access are unreasonable or discriminatory.

3. Due to the tight timescale for implementation of the Regulations by the Government, ORR published for consultation the initial guidance document in parallel with the Regulations coming into force. To assist in the preparation of this document, ORR held informal discussions with key industry stakeholders, which facilitated the development of ORR's thoughts on how best to fulfil the purpose of the First Package of EU Directives¹ (the Directives), as implemented by the Regulations. Responses were invited from the industry by 19 February 2006.

¹ The Railway (Licensing of Railway Undertakings) Regulations, which transposed Directive 95/18/EC as amended by Directive 2001/13/EC, and the Railways Infrastructure (Access and Management) Regulations, which transposed Directive 91/440/EEC, as amended by Directives 2001/12/EC and 2004/51/EC, and Directive 2001/14/EC as amended by Directive 2004/49).

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Consultation responses

4. We received a total of five responses to the consultation, copies of which can be viewed on our website². Consultees were broadly supportive of our proposals with only three parties making specific comments on the initial guidance. We are grateful for the industry's helpful comments, the majority of which have been taken on board in the published guidance document. However, we set out below the substantive points made and ORR's response to them.

Network Rail Infrastructure Limited's (Network Rail) views

5. Network Rail made several clarification suggestions, the majority of which have been incorporated in the guidance document. On the issue of ancillary service appeals, Network Rail said that it had difficulty understanding how there could be a sustainable appeal in relation to charging matters relating to such services, given that these are provided at the discretion of the facility owner. ORR notes that infrastructure managers have the discretion to supply ancillary services under regulation 7. However, once they have done so they must charge according to the principles set out in the Regulations (see Schedule 3(1)(7) of the Regulations). As such, an appellant could appeal to ORR, under the Regulations, if it felt it had been unfairly treated or discriminated against, in relation to the charging framework set by the infrastructure manager.

6. Network Rail also questioned the appropriateness of adopting the same appeals criteria, as in other appeals under the Regulations, when considering appeals on charging matters for ancillary services. We consider that to give effect to the Regulations and to assist transparency and consistency, we would expect to apply similar criteria as in other appeals. We are aware of, and will consider, the different basis for reviewing charges (we have specifically acknowledged this in paragraph 3.9 of the guidance document). In these circumstances, we are not inclined to change the wording in the guidance document at this time.

7. Thirdly, Network Rail queried whether it would be appropriate, in the context of regulation 6 on access to ports and terminal facilities or services, to require the facility owner to make enhancements to facilitate access where capacity is constrained. ORR considers that the Regulations do not impose a general obligation to enhance the network or build new facilities. There may be very limited circumstances in which the cost to the access seeker of providing the service/facility itself would be so disproportionate, to the cost of the facility owner providing it, that we may consider that the facility owner should provide the service/facility even though it does not currently exist. We believe that the last sentence in paragraph 2.34 of the guidance document addresses this issue, but have amended paragraph 2.16 of the final document to re-enforce the position.

² The responses are available at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.7887>.

8. Finally, Network Rail suggested that it would be helpful if ORR provided timescales for the appeal process. Whilst we understand the benefits to the industry of providing such timescales, ORR has not yet received any appeals under the Regulations and thus has not had the opportunity to ascertain what these might be. As such, we are not in a position to commit to timescales at this time. We will, of course, attempt to process appeals in a timely manner and will review the position after we have dealt with a number of appeals under the Regulations.

Union Railways Limited (URL) views

9. URL considered that the initial guidance document did not specifically address ORR's approach to appeals that may arise in respect of the Channel Tunnel Rail Link (CTRL) and requested further guidance from ORR to aid its understanding of how ORR will deal with appeals in relation to the CTRL.

10. ORR is aware that the guidance document does not specifically focus on the CTRL or any other facility owner. The document was deliberately drafted so as not refer to specific facility owners or to specific infrastructure managers. We consider that the broad drafting of the guidance document is necessary so as not to restrict the appeals process to any one facility owner or infrastructure manager. It is our intention that the appeals process covers the entire GB rail network. Accordingly, we have not made any amendments to the guidance document regarding this matter.

11. URL also requested further clarification on the following two questions.

(a) Who was responsible for establishing the charging framework for the CTRL under the Regulations? URL pointed out that paragraph 3.2 of the initial guidance document stated that the Department for Transport (DfT) is responsible for establishing the charging framework for the CTRL, whilst clause 12.4 of the Regulations states that it is the responsibility of the Secretary of State.

(b) Who would be the appeal body if an applicant felt a facility owner had not applied the correct charging framework and therefore been unfairly discriminated against?

12. In relation to the first question on paragraph 3.2 of the initial guidance document, we have amended the DfT reference to "Secretary of State" to take account of URL's comments. On its second question, we have amended paragraph 3.3 of the guidance document to clarify that ORR would be the appeal body if an applicant felt a facility owner had not applied the correct charging framework and therefore been unfairly discriminated against.

The Go Ahead Group plc's (Go Ahead) views

13. Go Ahead sought clarification on:

(a) whether ORR would consult as widely on appeals, under the Regulations, as it currently does for track access applications;

(b) whether the limitations on the duration of track access agreements, under the Directives, would equally apply to contracts made through an appeal to ORR under the Regulations; and

(c) the meaning of the term “constrained capacity” in paragraph 2.17 of the initial guidance document.

14. As any appeal will be the result of a dispute between a beneficiary and a facility owner, ORR will consult, under the Regulations, using the same criteria and procedures as it currently follows when processing track access applications under sections 17 and 22A of the Railways Act 1993 (the Act)³. As such, ORR will consult all bodies potentially affected by the determination of the appeal. Furthermore, all appeals documents, unless confidential, will be placed on ORR’s website for public inspection (see paragraph 4.5 of the guidance document).

15. When considering appeals, ORR will take into account the provisions of the Regulations, in relation to the length of any contracts determined under the appeals process. It will not direct a party to enter into a contract which runs contrary to the Regulations and does not consider that it is necessary to make specific reference to this point in the guidance document.

16. In relation to the term “constrained capacity” in paragraph 2.17 of the initial guidance document, we do not consider that it is appropriate to provide specific comment on the definition. We consider that in some situations contracted capacity may be more relevant than in others and as such, we require the flexibility to make our own judgement, as the appeal body. As such, ORR will need to consider each appeal on a case-by-case basis.

17. We will keep the published guidance under review and update it as necessary in the light of experience gained from the consideration of actual cases submitted on appeal. To ensure that the guidance document is accurate, up-to-date and remains a valuable aid for appellants, it will be available in an electronic form only on the ORR website at www.rail-reg.gov.uk. The industry will be notified of any updates to the document via email, in the usual way.

Brian Kogan

³ This is available on the ORR website at <http://www.rail-reg.gov.uk/upload/pdf/258.pdf> and <http://www.rail-reg.gov.uk/upload/pdf/257.pdf>.