

**A more focused approach to
stations and depots access -
Consultation conclusions**

June 2009



OFFICE OF RAIL REGULATION

Contents

INTRODUCTION	1
SUMMARY OF RESPONSES RECEIVED AND OUR COMMENTS	3
Extension of general approvals to cover most new and amended depot access contracts and most new station access contracts	3
Amendments to station access contracts	8
Diversionary agreements	10
Enforcing requirement to send documents to ORR	14
ORR's role in checking contracts on behalf of parties	16
Other ideas for changes to our processes.....	18
Contracts on ORR website	19
Redaction of depot access contracts on public register	19
Other website comments.....	20
General questions	20
NEXT STEPS.....	21

Introduction

- 1 In October 2008 we published our consultation “*A more focused approach to stations and depots access*”. We are now reporting on the responses we received, and setting out our conclusions.
- 2 The overall aim of our proposals was to create an environment in which the rail industry could take greater responsibility for managing its station and depot access contracts. This would in turn enable us as regulator to focus our resources on areas where we could contribute the greatest value.
- 3 To achieve this, we proposed using our “general approval” powers so that nearly all straightforward access contracts that had been agreed by the parties would be automatically approved – this would happen without our involvement, other than receiving a copy of the contracts for our public register. We proposed to make our general approvals much wider, and simpler to understand. Whilst doing this we also proposed to preserve, where appropriate, standardisation of contract layout – this was to enable easier comparison for all industry parties, and enable us as regulator to take a less active role in scrutinising and intervening in the industry’s contractual processes. We also proposed some measures to improve the standard of document management and also the quality of information sent to our statutory public register.
- 4 Most respondents were supportive of the overall thrust of our proposals.
- 5 We are pleased that nearly all respondents expressed support for our use of wider and simpler general approvals; we will now begin the process of implementing the changes. Our first step will be to issue draft all purpose general approvals, accompanied by the necessary amendments to our standard contract templates. We are keen to invite comments on these drafts so that we can draw on the expertise within the industry. These few general approvals will replace the large number of general approvals currently applying to stations and depots access contracts.
- 6 In the responses to the consultation, the greatest reservations were expressed about our proposal to require a consolidated reference document for each access contract. We are very committed to improving the quality of the documentary information describing each facility’s access contracts – at the moment the overall description is often confusing or incomplete. However, as explained in the relevant section below, we will delay our final decision for a short period to see whether the rail industry can propose a workable alternative.
- 7 Some reservations were also expressed about our intention to reinforce the legal requirement to send contracts to us for our public register. However, for

A more focused approach to stations and depots access
Consultation conclusions

the reasons given later in this document, we do not consider that this amounts to an additional burden, or that this creates unacceptable risk, and we shall now take steps to introduce those proposed changes.

8 The following organisations responded to the consultation:

- Arriva Trains Wales
- Associated British Ports (APB)
- Association of Train Operating Companies
- DB Schenker Rail (UK) (formerly EWS) and Rail Express Systems
- First Group (on behalf of First Capital Connect, First Great Western, First ScotRail, First Transpennine Express, First Hull Trains and First GBRf)
- Govia (on behalf of London & South Eastern, New Southern Railway and London & Birmingham Railway)
- Jarvis Rail Limited/Fastline Limited
- London Overground Rail Operations Limited
- National Express Group (on behalf of National Express East Anglia, National Express East Coast and c2c Rail Limited)
- Network Rail Infrastructure Limited
- Northern Rail Limited
- Stagecoach Group (on behalf of Stagecoach South West Trains and East Midlands Trains)
- Transport for London
- (Virgin) West Coast Trains Limited
- XC Trains Limited

This amounts to 15 responses directly representing 27 organisations.

9 We are very grateful for the thoughtful and detailed comments given in response to our proposals. In response to question 1, all respondents gave permission for us to publish their responses and these can be found on our website at <http://www.rail-reg.gov.uk/server/show/nav.62>.

Summary of responses received and our comments

Layout of this section

- 10 We asked several questions about the possibility of extending our general approvals so that they covered nearly all new stations and depots contracts and amendments to such contracts. In the sections below we summarise the responses to each question. We also include in this summary some other general comments we received that are relevant to these issues.
- 11 In view of the similarity of responses relating to the proposals for depots and stations, after summarising responses to each question, we give our comments and conclusions to questions 2, 3, 4 and 5 together. We then lay out our summary of responses to questions 7, 8 and 9 (about amendments to station contracts), and give our comments and conclusions.

Extension of general approvals to cover most new and amended depot access contracts and most new station access contracts

Question and summary of responses

Question 2: Do you think we should, through a general approval, automatically approve all new and amended depot access contracts that follow our standard templates?

- 12 No respondents opposed the proposal and the clear majority positively agreed with the proposal, some saying the changes would reduce time and administration costs. Some added that their support was on the condition that templates were followed properly.
- 13 The following are some of the points expressed by individual respondents:
 - Concern that contracts could be rendered invalid for technical non-compliance with the general approval and it was suggested instead that general approval be given as long as the agreement did not “materially depart from the template agreement”.
 - That the standard templates should be amended to make sense of the different circumstances of freight and charter train businesses.

A more focused approach to stations and depots access
Consultation conclusions

- Concern as to whether the proposed clause asserting the precedence of the Depot Access Conditions (DACs) was “workable or necessary”.
- Concern that some provisions within existing general approvals would not be captured by the new wider general approval described in the consultation. Also that many depots have non-standard DACs and that these would therefore not benefit from the proposed general approval.
- One respondent believed that only certain aspects of contracts should be automatically approved. It believed that those aspects that are subject to customisation should continue to receive ORR scrutiny.

Question and summary of responses

Question 3: Do you think our proposal will succeed in removing nearly all depot access contracts from the need for specific approval by us?

- 14 In response to the question as to whether the proposal would reduce the need for specific approval:
- One respondent did not agree because it considered that many depot agreements depart from the template and so would still need specific approval.
 - All other respondents who commented agreed that specific approval would not normally be necessary as a result of the proposals.
 - One respondent said that success depended on ORR being clear what “following the standard template” means [that is, that leeway is required].

Question and summary of responses

Question 4: Do you think we should automatically approve, through a general approval, all new station access contracts that follow our standard templates?

- 15 The responses to this question were similar to those received to question 2, which concerned a parallel proposal for depots.
- 16 No respondents opposed the proposal and the clear majority positively agreed with the proposal, some saying the changes would reduce time and administration costs. Some added that their support was on the condition that templates were followed properly.
- 17 The following are some of the points expressed by individual respondents:

- That “minor deviations” of the template wording should also be approved under the general approval.
- That the standard templates should be amended to make sense of the different circumstances of freight and charter train businesses.
- Concern that some provisions within existing general approvals would not be captured by the new wider general approval described in the consultation.
- Only certain aspects of contracts should be automatically approved. Those aspects that are subject to customisation should continue to receive ORR scrutiny.

Question and summary of responses

Question 5: Are there risks in approving most new station access contracts by general approval? If so, what are they?

- 18 About a third of respondents made no comment on this question. Another third considered there would be no risks, most commenting that either the requirement to follow templates, or the power to suspend the right to use general approvals, would mitigate risks.
- 19 Risks identified were as follows:
- A facility owner might insert extra clauses after getting beneficiary consent.
 - Personnel new to the process may not understand the importance of accuracy for the general approval to apply (with a higher risk during refranchising).
 - There would be a potential change to liability under competition law for parties with the move away from specific approval and “direction” of new access contracts.
 - It would be more likely parties would erroneously think matters were covered by general approval, leaving their contracts invalid: clear guidance and monitoring from ORR would lessen this risk. It was also suggested that ORR should give clear warning (30 days notice) when it is going to change the contract templates on which the general approvals will rely.

General comments relating to stations and depots contracts

- 20 Two respondents were concerned at the comment in our consultation, at paragraph 3.10, that specific approval would only be given if there were a

“very good reason” for departing from the template. This was seen as too restrictive and did not allow parties freedom to negotiate.

- 21 One respondent objected to the proposals because it considered that the current system itself, of detailed recording of items at stations, was unnecessary. In its experience as an operator it has always taken a station on an “as is” basis without interest in the fine detail of what items are recorded. All that was needed was “a robust mechanism for controlling any changes to those assets”, which it considered already existed.
- 22 One respondent wanted clarification on the proposed clause to ensure the DACs and SACs are not overridden (paragraphs 2.10 and 3.11 of consultation). It wanted confirmation that any previous customisations would apply to any new depot access agreements it enters into.

ORR comments and conclusions on this area of the consultation

- 23 In this section we respond on the issue of generally approving new and amended depot access contracts, and new station access contracts. (We comment separately, in the next section, on questions 6, 7, and 8 relating to the issue of amendments to station access contracts.)
- 24 We note the suggestion of one respondent that the current system of detailed station annexes be abolished. However we do not agree that this would be appropriate. The scope and method of recording facility assets has been the subject of review through the development of the proposed Stations Code. The previously agreed Stations Code is now under review. We do not consider that it would be appropriate at this stage to open up further the question of whether the current system of annexes should be fundamentally altered.
- 25 It was suggested that there is a greater risk that access contracts might be unilaterally amended after beneficiaries have given their consent. We do not accept that the risk would be significantly higher than at present. All parties to the new or amended access contracts would still need to sign to confirm agreement, and the normal rules of contract law would apply to any changes not agreed. Our requirement under the new general approval for contracts to follow our templates, in order for contracts to be valid under our general approval, will further safeguard against abuses.
- 26 We acknowledge the risk that minor errors and variations leave the contract at risk of being declared void, should a dispute on its terms reach court. However, this risk already exists where an amendment is approved under general approval. It is a consequence of the fact that, under the Railways Act 1993, an access contract is void unless approved by ORR. Any amendment that does not comply with the terms of our current general approvals is void (unless specifically approved). For parties to benefit from the use of the general approval we are requiring the use of our templates and will permit

additions, deletions and substitutions in the areas clearly intended within the templates. We want to be certain that this new freedom does not lead to clauses that might (inadvertently or otherwise) override the established framework set out in the main body of the DACs and SACs.

- 27 We note the comment from one respondent that any aspect of a contract that is subject to customisation should not be automatically approved and should receive ORR scrutiny. It is our proposal that only those amendments that follow our standard templates would be automatically approved. Customisations to the templates will need our specific approval. However, we do not consider that our proposed changes restrict parties from freely reaching the agreement that best suits their business needs. Where these are not covered by general approval, we would in most cases expect to give specific approval – as long as the contract does not raise wider concerns for us as a regulator when considered against our criteria and procedures. We will also give sympathetic consideration if there is a good reason for an ongoing customisation.
- 28 One of our aims in bringing in these wider general approvals is to move away from detailed analysis of pricing and service levels in individual agreed contracts. If to achieve their legitimate business requirements, parties need to depart in some way from the standard templates, we will consider these for specific approval. However, in framing the proposed general approvals, and in stating our preferred format for specifically approved access contracts, we wish to retain a structure of similarity in the way the industry's access contracts are laid out. This should enable easier comparisons, and comprehension, for current and future industry parties.
- 29 In view of the general support for our proposals, we will now develop new “all-purpose” general approvals which will put into effect our proposals in this area. We will ensure that the new general approvals also incorporate any matters covered by current general approvals, as far as this is possible.
- 30 We accept that our new approach may mean that a few minor changes would no longer be covered by general approval. This is because there are technical and legal difficulties in defining a wide ranging general approval that allows very wide freedom to the industry whilst protecting the integrity of the current system of standardised contracts. Where anomalies are revealed we would aim to adapt further the general approvals and standard templates wherever appropriate.
- 31 As a first stage, we aim to publish a draft of the new general approvals in the coming months and to invite suggestions for improvements. We would value the experience of industry colleagues to help us refine this work. We will also produce detailed guidance to assist industry colleagues in operating the new system, particularly to help provide clarity on what is covered by the new general approvals.

- 32 We will in any case review the effect of the new general approvals after several months of proper operation. With such a significant change in our process for approval, it is likely that further amendments will be necessary in the light of experience. For instance, this may happen if we discover that we have to specifically approve certain minor items not caught by the general approval. Or we may find that we are receiving several queries arising from a lack of clarity in our general approval (or the guidance).
- 33 We also intend, in the next year, to start a program of systematic review of our templates and will invite suggestions for other changes at that time.

Amendments to station access contracts

Question and summary of responses

Question 7: Do you think we should extend general approvals so that we automatically approve all amendments to station access contracts (as long as they follow our standard templates)?

- 34 Eleven respondents agreed with the overall proposal. Three respondents made no comment.
- 35 One respondent believed that only certain aspects of contracts should be automatically approved. It believed that those aspects that are subject to customisation should continue to receive ORR scrutiny.

Question and summary of responses

Question 8: Are there risks in approving most amendments to station access contracts by general approval? If so what are these?

- 36 The risks identified were the same as given in response to question 5, above (see paragraphs 18 and 19).
- 37 It was suggested that risks would be lessened if ORR brought in its proposed power to suspend use of the general approval, and the other document management proposals; and if ORR insisted on proper use of templates.

Question and summary of responses

Question 9: Are there any s.22 amendments you think should not be approved by general approval? If so, what are these?

- 38 Most respondents did not suggest items that should be excluded from general approval. Those respondents who did raise concerns referred principally to a desire for ORR to specifically approve changes to charges.

- 39 Several respondents wanted certain changes with financial implications to be specifically approved by ORR. One thought that long term charge (LTC) increases should not be included in the general approval unless they are “accompanied by a breakdown of the calculation and have the consent of a significant majority of SFO/ passenger beneficiaries”.
- 40 One respondent considered that the current upper financial threshold for increases to LTC should be retained (so that increases of more than £50,000 would need specific approval). The same respondent also suggested that, when a beneficiary “appeals” against a facility charge, the general approval should not apply. Several other respondents said that LTC increases, especially significant increases, should be specifically approved for similar reasons.

ORR comments and conclusions on this area of the consultation

- 41 We note the comment from one respondent that any aspect of a contract that is subject to customisation should receive ORR scrutiny. It is our proposal that only those amendments that follow our standard templates would be automatically approved. Customisations to the templates will need our specific approval.

Long Term Charge increases

- 42 Under the terms of the current general approval, any change to the LTC must not involve an increase (or decrease) of more than 50% of the existing amount - nor must the LTC increase be more than £50,000. Any change that does not fall within this formula requires specific approval.
- 43 We consider that the current station change mechanism in the SACs provides sufficient protection for beneficiaries who oppose changes. However, we will retain the main threshold of the current general approval on LTC increases. We have reached this decision because of the comments made about changes that may have significant financial impact on beneficiaries, and because for the time being we wish to retain regulatory scrutiny of large investment schemes that result in significant changes to the LTC.
- 44 We have therefore decided that, at this stage, the general approval will not cover any change that results in an LTC increase of more than £50,000 p.a. Such changes to the contract will need to be specifically approved by us. We will keep this under review and may in due course adapt the £50,000 p.a. threshold, or remove it altogether, if it appears it does not contribute effectively to our regulatory functions.
- 45 We will not however retain the “50%” aspect of the current general approval – in practice this unnecessarily excludes many minor changes where the LTC is already low.

Facility charges

- 46 Over the past year we have been asked to approve a number of “facility charges” relating to station enhancements. These are typically charges paid by only one party at a station, and which are ring-fenced so that they have no impact on the LTC paid by other current or future beneficiaries.
- 47 Access agreements, that include such facility charges, will need to be sent to us for specific approval. However, we expect in due course that standard models for dealing with these within access contracts will develop. We will keep under review the question of whether we should change our general approvals and standard template contracts, to enable facility charges, and changes to them, to be automatically approved.

Diversionsary agreements

Question and summary of responses

Question 6: Are our proposals, on generally approving certain diversionsary access agreements, sensible and reasonable?

- 48 No respondents disagreed. Approximately a third of those who responded actively agreed with the proposal and another third made no comment.
- 49 One respondent thought we should go further and not require diversionsary agreements. It said that instead Network Rail should compensate station facility owners for additional costs when diverted trains stopped at stations due to Network Rail engineering.
- 50 It was pointed out that open access operators would not benefit from the longer period covered by the general approval as described in the consultation document.

ORR comments and conclusions on this area of the consultation

- 51 Our current practice has been normally to approve diversionsary agreements for 6 months.
- 52 We feel it is appropriate to extend the period for franchised operations as the parameters are reasonably predictable, and requiring new agreements several times over the period of a franchise is inefficient. We accept that a similar dispensation should be allowed for open access operators and will adapt the proposed general approval to allow this. Other than this slight change, we will put the proposal into effect when we publish our new general approvals.

Suspending right to use general approvals

Question and summary of responses

Question 10: Do you agree that we should have the option to suspend for a period the right of certain parties to use general approvals for stations and depot access?

- 53 Nearly all the respondents supported this proposal. Additional comments were made expressing the importance of ORR acting proportionately, giving proper guidance on how this power would be used, and explaining what warnings would be given.
- 54 One respondent thought it would be better if the misuse of the general approval led to retrospective cancellation of the changes, with compensation being payable to the other parties.
- 55 Another respondent was concerned that exercising this power would mean that non-compliers had the advantage of specific approval; also that this would affect other parties wishing to enter into contracts with the suspended non-compliers.

ORR comments and conclusions on this area of the consultation

- 56 The mechanism established by statute for approving access contracts through general approval, does not allow for ORR to retrospectively cancel changes properly agreed and approved. However, a new or amended access contract that did not comply with the general approval (and which had not been separately specifically approved) would in any case be invalid. And a purported agreement that had not been agreed by the parties would have the same effect as any other improperly executed contract. This is why, as with any commercial contract, all parties must be properly vigilant in ensuring that their commercial interests are protected with a valid agreement that reflects their intentions.
- 57 We acknowledge that this power to suspend, if ever used, will require other innocent parties to wait for specific approval. But we consider that the existence of this power will help improve contractual management for the whole industry in the long run, and lessen the risk of accidental non-approval through misuse of the general approval. It will help protect parties when entering into agreements with “suspended” companies.
- 58 We will therefore implement this proposal, but make sure that we set out our procedures clearly and give guidance on the criteria we would apply.

Consolidated reference documents

Question and summary of responses

Question 11: Do you agree with the proposal that all amendments to contracts should be accompanied by a reference document which brings together all the current elements of a contract?

- 59 All 15 respondents commented.
- 60 Four respondents agreed to the proposal without major reservations.
- 61 However several respondents rejected the proposal believing there was no need for consolidation, and that current provision is adequate. One respondent believed that it was a function of the ORR library to update annexes. It considered that the expense of consolidation could not be justified, especially in view of the resources used preparing for the Stations Code, and implementation should be delayed until the Stations Code (or its successor) is implemented.
- 62 Six respondents agreed in principle with the proposal, but several were concerned about the practical difficulties and administrative cost of implementing the proposal.
- 63 One respondent said that creating and updating consolidated agreements for all 2500 stations and all depots was a good idea but “no small task” and that many documents are old or lost.
- 64 Another respondent considered that the consolidated reference document should be simple and user friendly with information in it “limited to that relevant to the current elements of the contract”.
- 65 Network Rail said it is committed to working with the industry to improve processes, including encouraging a move to electronic documents. However, it thought the costs would outweigh the acknowledged benefits. It said it is arguable that parties do manage under the current system. And that parties gain greater value from the consultation stage during the station change process, rather than from the contract changes themselves. It also said that there would be situations where an SFO would have no interest in updating a consolidated reference document to reflect a minor change proposed by another party. The proposal might also discourage small station changes and cause problems where there are “multi-station projects where bulk station change is envisaged”.
- 66 Network Rail said that if the proposal for consolidated reference documents is implemented, there should be proper lead in time and dispensation for certain

current major projects. If the Stations Code does not go ahead the work done on drawing up Code-style particulars might be adapted for station annexes.

- 67 Several respondents assumed that all access contracts, for all stations, would need to be “consolidated” at the same time, rather than just when an amendment is made.

ORR comments and conclusions on this area of the consultation

- 68 It was not our proposal that all stations would need to have a consolidated reference document drawn up. Instead the proposal was to apply only to those stations where there were new access contracts, or amendments were made to existing access contracts. At that point we envisaged parties sending us a consolidated document that incorporated all previous amendments (that had not themselves been subsequently amended).
- 69 We consider that the state of access contracts at many stations is so confusing that it undermines the intention of the Railways Act 1993 in creating open information. This may have a detrimental effect on the efficiency and working relationships of current industry members, and on parties seeking access to certain facilities.
- 70 Since consulting on these matters in October 2008, the likely future of the Stations Code has become clearer. On 10 February 2009, Network Rail and ATOC wrote to ORR, to pass on the Industry Steering Group view that the Stations Code should no longer be implemented. We shall be separately consulting on their proposals concerning the Stations Code.
- 71 One of the benefits of the Stations Code would have been a better system of contract management. This would have addressed many of the concerns that gave rise to our proposal for consolidated reference documents. The letter of 10 February acknowledges that the proposal for consolidated documents would have a similar effect as the Stations Code in this area. However, they would want to develop a more workable version of the consolidated documents.
- 72 Network Rail and ATOC expressed their commitment to working with the industry to resolve the difficulties we have identified, and to modernise contract management. We are encouraged by this. In view of the reservations expressed by many respondents about our proposal for consolidated documents, we will postpone our decision on this. We will, in the meantime, write to Network Rail and ATOC and ask that they put forward alternative ideas, and that they agree to a firm timetable over the coming months for developing any such ideas. We will then consider any alternative ideas when deciding whether to implement our original proposals on consolidated agreements.

Question and summary of responses

Question 12: Do you have any comments on the proposal to make these documents available on our website and in our public library alongside our public register documents?

- 73 No one objected to the consolidated reference documents, should they come into existence, being posted on the ORR website.

Enforcing requirement to send documents to ORR

Questions and summary of responses

Question 13: Do you agree with the proposal to make ineffective any contracts, or amendments, that are not sent to us within a certain time limit?

Question 14: Do you have any comments on how this may work in practice?

- 74 Of the 14 respondents who commented, six fully supported the proposal. Some respondents said the timescales should be realistic, and with flexibility in extenuating circumstances. One respondent said that also adopting the ORR track access process of inviting formal submission of agreements previously sent as draft would ensure that specifically approved agreements are available for the public register.
- 75 One respondent said that the ability to make electronic submissions would make compliance easier.
- 76 One respondent considered the proposal would be self-defeating because, if an amendment were not sent to ORR, ORR would not know to “declare it as being ineffective”. It also said that delays might mean that the facilities are in place before the contracts are finalised meaning that in “such cases it cannot be formally declared that the proposal is ineffective”. It suggested instead a daily penalty regime “akin to the abatement regime” until ORR receives the documentation.
- 77 Some respondents said that a beneficiary should not lose out, with their contract being void, because the facility owner did not send in a copy to ORR.
- 78 Alternatives suggested were that:
- ORR is given rights to enforce a contractual term requiring the facility owner to send the document.
 - ORR instead imposes the sanction of withdrawing the right to use general approvals.

- ORR uses the threat of finding the SFO in breach of its licence.
- 79 One respondent doubted whether the threat of a contract being made void would change the behaviour of non-compliant parties, in view of the fact that the threat of criminal sanction did not work on such parties. The effect of a contract being void would create contractual difficulties and lead to the need for resubmission. This would be made more difficult if a requirement to also submit consolidated reference documents is introduced.

ORR comments and conclusions on this area of the consultation

- 80 We do not accept the premise of the objection that the proposal prevents ORR from declaring a contract “ineffective”. The question, of whether an access contract or amendment has achieved validity through regulatory approval, is a matter of law: it has either been approved (through general or specific approval), or it has not. When the general approval applies, there is no scope for ORR to declare a contract “ineffective”. A general approval allows parties to an access contract to decide that their contracts, or amendments, have been automatically approved, and the regulator has no active part in this. This happens when the terms of the contract, or amendments, fall within the strict definitions of the general approval.
- 81 The primary intention of this proposal is to ensure that contract information is publicly available as envisaged by s72 of the Railways Act 1993. Although a criminal sanction exists, for failure to comply with s72 (5) of the Railways Act, there are many practical considerations before prosecution can be brought successfully. Similar barriers would exist if we created a contractual right for ORR to enforce the requirement to send in the contract and amendments. Instead, we consider that the proposal to stop contracts becoming valid until sent to ORR, gives the parties a direct incentive to comply.
- 82 As the duty to send in the contract already exists, we do not consider that this proposal increases the burden on parties. We therefore intend to proceed with our proposal, with the slight change that we amend the template access agreements to incorporate a “condition precedent” which:
- allows any party to send the contract or amendments to ORR;
 - allows submission of only the full text of the final contract or amendment and at least one party’s signature: that is, the contract or amendment will not at that stage need to be signed by all parties. This will allow the first signing party to send a copy to ORR and thereby comply with the “condition precedent”. Should there be any later legal dispute over the terms of the contract the disputing parties will need to show that their signed contract has the exact same terms as the copy held by ORR. ORR will keep on its public register all versions of the contract sent to it.

- 83 We will also allow submission of scanned copies by email, as long as this is done in compliance with the guidelines that we shall issue.
- 84 It should be noted that the overriding duty arising in s72 of the Act, for the facility owner to send in the documents, still remains – although the failure to comply has potential criminal sanctions, rather than the contractual consequences arising from our new mechanism.

ORR's role in checking contracts on behalf of parties

Question and summary of responses

Question 15: Do you agree that we should not check the detail or validity of contracts (including whether a general approval applies) and do you agree that this should instead be the responsibility of the parties to the contract?

- 85 Of the 12 respondents who commented, six agreed without reservations.
- 86 One respondent said that ORR should be available to examine contracts in more detail if any party (including a third party) believes that it is being excluded from the market and requests that ORR looks into the matter.
- 87 One respondent said that ORR should tell affected parties when ORR's sampling identifies problems. It said there would be a danger that parties not responsible for preparing the document and submitting it to ORR, may not realise that a general approval condition has been breached, making the contract void. Instead it was suggested that change proposals should "state the position regarding the application (or not) of general approvals": also there would be a lower risk of errors if the proposed consolidation of agreements were "completed first to provide a more accessible reference for parties proposing further changes".
- 88 It was proposed that ORR's withdrawal from the checking process should be delayed for a year to allow current change proposals to complete their passage through the current system.
- 89 Another respondent thought that allowing "invalid" contracts to be publicly available would mislead third parties.
- 90 Two respondents did not support the move. One considered that it had been a major function of ORR's Stations and Depots team, since privatisation, to check contracts and the applicability of general approvals. It said it is not feasible to get legal advice for each new agreement and amendment.
- 91 One respondent said that ORR should instead take a proportionate approach to scrutiny, similar to track access e.g. "baseline checks" for significant

problems, and a more detailed check for those of regulatory significance. It said that an application form would make it easier for ORR to determine the appropriate level of scrutiny.

ORR comments and conclusions on this area of the consultation

- 92 The ultimate responsibility for ensuring that contracts reflect the negotiated agreement, and for avoiding errors, lies with the companies who are parties to the contract. These parties must bear the same risks as any other independent commercial enterprises in this respect.
- 93 In the case of agreed stations and depots access contracts, we do not consider that the current level of regulatory risk justifies us routinely checking the integrity and accuracy of these contracts. We therefore confirm that this is not a role we will actively carry out. Even when we occasionally point out errors we have spotted, parties should not assume that their entire contract has been checked by us. When we approve an agreed station or depot access contract, we do so from the point of view of assessing regulatory risk – we are not commenting on the integrity or effectiveness of the contract, not least because this is the responsibility of the parties who have reached the agreement.
- 94 However, if a party believed that it was being excluded from the market and had evidence to support this, ORR would take the necessary steps to look into the matter.
- 95 We will monitor the use of general approvals, and where appropriate inform parties if we spot errors. However, this will chiefly be a random sampling process – and our focus will be on whether the general approvals have been complied with, and are working in policy terms, rather than whether the contracts make proper sense or are enforceable.
- 96 We agree that it would be good practice that proposers of station and depot contract amendments notify parties when a general approval will be used. This should also happen when a new access contract will be covered by a general approval. We will therefore recommend this in our guidance documents. We will also expect parties to confirm to us that this information has been given to parties: we may use our new general approval suspension process where this has not happened.

Other ideas for changes to our processes

Questions and summary of responses

Question 16: In what way should we make our processes for stations and depots similar to those we follow for track access?

Question 17: Are there other changes to our stations and depots processes that would be helpful?

- 97 Of those respondents who offered a comment, most were supportive of aligning processes, although some said this should only be done where appropriate rather than for the sake of it.
- 98 Other individual respondents, variously:
- actively supported the idea of common forms and templates where possible;
 - approved of the idea, floated in the consultation, of applications for specific approval being submitted initially as a draft;
 - suggested a consultation process similar to the one used with track access applications, where Network Rail conducts consultations, via its website, on new track access agreements.
- 99 One respondent also said there should be further progress towards the Stations Code, and some aspects of the Code could be incorporated into the current regime. Another respondent said that if the Stations Code is not implemented there will need to be changes to the stations contractual regime.
- 100 One respondent considered that the processes for proposing track access agreements would be “totally inappropriate” for station and depot access agreements. This is because of the nature of the underlying documents and the considerations taken into account when reaching these agreements.

ORR comments and conclusions on this area of the consultation

- 101 In the next year, we will explore ways of aligning our processes where appropriate, as well as improving our guidance documents and our template documents.
- 102 Where these require a change in the processes that industry colleagues must follow, we will consult where appropriate and in any case announce the changes well in advance.

Contracts on ORR website

Question and summary of responses

Question 18: Do you have any views on whether we should publish stations and depots contract details on our website?

- 103 A few respondents did not comment, but the rest supported the proposal, some enthusiastically.
- 104 One respondent said “we consider that this would be advantageous to the Industry, in that the level of payments would be made public and as such would assist parties negotiating new arrangements to reach fairer and more consistent settlements.”
- 105 Another respondent said that this proposal was important if ORR was no longer specifically approving the majority of contracts.

ORR comments and conclusions on this area of the consultation

- 106 We will explore the technical and resource implications, and intend to implement this proposal in due course.

Redaction of depot access contracts on public register

- 107 One respondent commented on our announcement (at chapter 6 of the consultation document) that ORR would implement its earlier decision not to automatically redact depot access contracts when placing them on the public register. The respondent described this as withdrawal of “all rights to parties to exclude commercially sensitive information”, and expressed concern that “retrospective publication of previously excluded information may cause problems.”

ORR comments and conclusions on this area of the consultation

- 108 We wish to reassure the industry that the change in practice will not be retrospective. Only new, and newly amended, depot access contracts will be affected. For these we will start to apply the same policy that we currently apply to stations access contracts, and we will start to assume that all information will be sent to the public register without redaction. This is instead of our current practice which is to automatically redact certain information in depots access contracts, even if no request is made to us. However, we will still carefully consider any request for redaction. We consider that this practice will help us to comply better with our duties under sections 71 and 72 of the Railways Act 1993, which concerns information that should be available on the public register.

Other website comments

Question and summary of responses

Question 19: Is there any other information about stations and depots matters that you would like to see on our website?

109 The following suggestions and comments were made:

- That the ORR website at present is not user friendly and is not easy to navigate and suggested a review of the guidance and advice documents available.
- That we make available the contact details of individuals in the Stations and Depots team.
- That more details of depot facilities should be available on the ORR website.

ORR comments and conclusions on this area of the consultation

110 Our website was significantly changed in the late autumn of 2008 and we think that this has made it much easier to find content. We recognise that some of our guidance documents on stations and depots could be improved. In the coming year we intend to bring together much of our guidance in a single document describing our procedures and the criteria we apply; and initially we shall be publishing a plain language guide to accompany our new general approvals. We also intend to improve the background information given on the stations and depots web pages, and to simplify the pages where possible.

111 We do not give individual Stations and Depots team contact details as we encourage industry colleagues to initially make contact through our team email address on all new matters. This helps us allocate our resources more efficiently. Once a specific matter is allocated, that team member will make contact directly. Our team email address is: stations.depots@orr.gsi.gov.uk.

General questions

Question and summary of responses

Question 20: Do you have any comments on whether or not, overall, these proposals will benefit your operations?

112 Of those who commented, the majority said that the intention of using wider general approvals would benefit their operations.

113 One respondent however believed there would be an overall disbenefit from the combined proposals “with particular potential for extended negotiation with other parties to achieve sufficiently robust arrangements”.

Question and summary of responses

Question 21: Do you have other comments on what we say in this document? And do you have any other suggestions?

114 The following suggestions and comments were made:

- Plain English guidance documents and possible training would be helpful.
- More visits by Stations and Depots staff to better understand train company operations.
- ORR should have the power to direct a beneficiary to enter into a station agreement – this is to deal with a situation where a beneficiary is using a station facility but has no access contract.

115 Network Rail said that it wants to work with the industry to resolve any issues arising from the proposals – in particular the proposal for consolidated agreements.

ORR comments and conclusions on this area of the consultation

116 We are pleased that the main thrust of our proposals has been generally acknowledged as a positive step. We will bear in mind all comments made as we take these and other proposals forward.

NEXT STEPS

117 Over the coming year we will continue reviewing and revising our processes, guidance and standard documents. We will inform the industry in advance of changes, where appropriate consulting the industry before deciding on certain matters. The timing and nature of these reviews will be affected by decisions taken by the industry on the future of the Stations Code: many of the templates would in any case have been superseded by the Stations Code’s standard documents.

118 More immediately, in the next few months, we will issue draft “all purpose” general approvals for stations and for depots, along with draft guidance. We will also issue draft amendments to the current standard template documents, to reflect changes needed in parallel with the new general approval. We will encourage industry colleagues to contribute their comments based on their experience and knowledge.

A more focused approach to stations and depots access
Consultation conclusions

119 We would envisage then publishing a final version of the general approvals, and amended templates, with a view to them coming into effect 3 months later (with nearly all existing stations and depots general approvals being revoked on the same date).

120 We shall also, in the near future, write to Network Rail and ATOC and ask that they work with the industry to develop alternative proposals to our preferred system of consolidated reference documents. We will ask them to agree to a firm timetable over the coming months for developing any such ideas. We will then consider any alternative proposals when deciding whether to implement our original proposals on consolidated agreements.

121 In summary, the next key steps are as follows:

- Write to Network Rail and ATOC inviting alternative proposals on consolidated documents;
- Issue for consultation the draft general approvals on station and depots access contracts, and any related amendments to standard template contracts;
- Following consultation, publish the new stations and depots general approvals and amended standard template contracts, announcing the date when they will come into effect;
- Implement general approvals and revoke old general approvals;
- Taking into account the outcome of the forthcoming Stations Code consultation, start a more systematic review of standard templates with a view to publishing them as model contracts under the Railways Act 1993;
- After a period, review the effect of the new general approvals to see whether the general approvals need further adaptation.