



# Industry code of practice for track access application consultations

November 2017

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## Purpose

1. This code of practice sets out a clear and transparent consultation process which Network Rail and access beneficiaries (beneficiaries) should follow when seeking a new track access contract (also known as a framework agreement) or amendments to an existing contract. This includes all applications made under sections 17, 18, 22 or 22A of the Railways Act 1993 (the Act), including new contracts and amendments to existing contracts proposed to be made pursuant to a general approval where prior consultation is required.
2. Compliance with this code of practice is an important and integral part of the track access application process and ORR's application forms<sup>1</sup> require applicants to confirm that they have completed, where necessary, a consultation in line with it.
3. Applicants should note that Section 146 of the Act states that any person who, in giving any information or making any application under or for the purposes of any provision of the Act, makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, is guilty of an offence and so liable to criminal prosecution.

## Industry roles and responsibilities

4. In seeking access rights to operate trains, a beneficiary will negotiate terms with Network Rail. Whether or not the beneficiary is able to agree terms with Network Rail, any proposal to obtain track access rights or amended existing rights should be subject to consultation.
5. As infrastructure manager for the national rail network, Network Rail should take responsibility for consulting on proposed applications for all agreed new track access contracts and agreed amendments to existing contracts prior to submission to ORR for approval. Where requested, Network Rail should also undertake a consultation for proposals that a beneficiary proposes to submit under sections 17 or 22A of the Act.

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<sup>1</sup> <http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/forms-model-contracts-and-general-approvals>

6. ORR has issued general approvals<sup>2</sup> permitting the entry into specified types of new track access contracts and the making of specified amendments to existing access contracts without the need for ORR's specific approval. The entry into some of these contracts and the making of some of these amendments is conditional on Network Rail first completing a consultation of potentially affected parties and there being no resulting unresolved objections.

### **Informal discussions with potentially affected parties**

7. When developing new contracts or amendments to existing contracts, Network Rail and/or the beneficiary should (consistent with best practice) hold informal discussions with those operators who are most likely to be affected by their proposals. This should highlight any particular concerns before a draft contract/amendment is circulated for consultation and enable these concerns to be addressed at an early stage. This should reduce the likelihood of significant concerns being raised during the formal consultation process.

### **Purpose of a pre-application consultation**

8. The purpose of a pre-application consultation is to:

- (a) give other beneficiaries and interested stakeholders an opportunity to raise issues arising from a proposal which could affect their interests or those of other third parties; and
- (b) give an opportunity to resolve them prior to submission to ORR.

### **Principles and behaviour**

9. To ensure that the consultation process is as effective as possible, it is essential for all parties to co-operate and act in good faith.

10. ORR expects, as appropriate, all parties to:

- (a) have a shared understanding of the requirements of this code of practice;
- (b) work together in a pragmatic and constructive way to the benefit of the whole industry;
- (c) resolve, as far as is reasonably possible, any concerns and issues arising from proposed track access contracts and amendments;
- (d) share information as required, respecting each party's confidentiality as necessary;
- (e) act at all times in a timely and efficient manner; and
- (f) have due regard to the needs and requirements of all affected and interested parties. In particular, Network Rail should act in accordance with its own *Stakeholder Relations Code of Practice*<sup>3</sup>, which contains established procedures for dealing with third parties, including specific arrangements for train operators seeking new or amended track access contracts.

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<sup>2</sup> <http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/forms-model-contracts-and-general-approvals>

<sup>3</sup> <http://www.networkrail.co.uk/asp/1544.aspx>

Furthermore, when conducting consultations, Network Rail must act in a non-discriminatory manner consistent with its network licence<sup>4</sup>.

## Determining whether a pre-application consultation is necessary

11. ORR expects a pre-application consultation to be carried out for most proposed contracts or amendments that require specific approval under section 18 or 22 of the Act. Each general approval explains if a consultation is required depending on the nature of the contract or amendment.

12. However, there may be some circumstances where a consultation might not be necessary. This could be where the only changes are of a commercial nature between the parties and have no effect on anyone else. Similarly, if an amendment is of a type that could have been covered by a general approval (without consultation) except for the fact that it includes changes to charges in Schedule 7, then ORR would not expect Network Rail to conduct a consultation. If the applicants consider consultation unnecessary, this should be explained in the application form. If ORR considers the grounds cited are inappropriate, it may reject the application and advise the applicants to carry out a consultation before re-submitting it.

13. If Network Rail considers that a consultation is not necessary, it will discuss this with the Train Operator. If Network Rail and the beneficiary are unable to agree whether a consultation should be carried out, then Network Rail should conduct a consultation. If in doubt, it is better to err on the side of caution and carry out a consultation.

14. A decision not to consult industry parties does not remove any obligation for a franchised or concession passenger operator to consult its franchising/concessionary authority on any change to its track access contract. In the event that a pre-application consultation in line with this code of practice is not held, ORR will still expect a franchised/concession passenger operator to confirm in its application form that it has consulted the relevant authority (e.g. the Department for Transport or Transport Scotland).

## Who should be consulted?

15. Network Rail shall conduct a consultation in line with this code of practice. Consultees shall include:

- (a) all potentially affected **passenger train operators** (including existing and known potential open access passenger operators, as well as **London Underground Limited** where relevant);
- (b) all **rail freight operating companies**;
- (c) all holders of **freight customer** contracts;
- (d) any relevant **charter passenger train operators**;
- (e) the **Department for Transport**;

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<sup>4</sup> [http://orr.gov.uk/data/assets/pdf\\_file/0012/3063/netwrk\\_licence.pdf](http://orr.gov.uk/data/assets/pdf_file/0012/3063/netwrk_licence.pdf)

- (f) any **relevant passenger transport executives** (where services would involve the use of the network in a region for which a passenger transport executive has responsibility);
- (g) any relevant devolved bodies, namely **Transport Scotland** (for applications affecting Scotland), the **Welsh Assembly Government** (for applications affecting Wales) and **Transport for London** and the **Mayor of London** (for services within or passing through London);
- (h) **Transport Focus** and, if services would run through or within its boundaries, **London TravelWatch**<sup>5</sup>;
- (i) any '**interested person**' (see the following paragraph) of which Network Rail is aware; and
- (j) any other **relevant access option or access contract holder or potential holder** who may have an interest in the proposal.

Where there is any doubt as to whether a particular party should be consulted, that party should be consulted. For significant applications, this might mean that all operators, statutory bodies and funders are consulted.

16. Schedule 4 of the Act defines an interested person as “any person whose consent is required by the facility owner, as a result of an obligation or duty owed by the facility owner which arose after the coming into force of section 17 of the Railways Act 1993, before the facility owner may enter into...[a particular]...access contract”. In practice, there are rarely any persons who meet this decision.

## Length of consultation

17. Where the infrastructure manager does not impose an annual or multi-annual deadline (as in the case of Network Rail) and receives a request to conclude or modify a framework agreement, it should take reasonable steps to inform other potential applicants about its intention to conclude a framework agreement<sup>6</sup>. The consultation period for such framework agreements will be a minimum of one to four months to reply in order to have adequate time in which to consider and make representations<sup>7</sup>.

18. Where an infrastructure manager receives a request to make minor modifications to an existing framework agreement and the proposed modification does not impact other framework agreements, it is initially for the infrastructure manager to decide whether to inform and consult the other potential applicants of such a request.

19. What constitutes a minor modification to an existing framework agreement will be question of fact in each case. Substantive changes to a framework agreement, such as changes to access rights, would not constitute a minor modification. However, generally we would consider that non-substantive changes to provisions or schedules in the framework agreement, changes to contact

<sup>5</sup> <http://www.londontravelwatch.org.uk/about/>

<sup>6</sup> Please note that where an infrastructure manager does invite potential applicants to submit requests for framework agreements by an annual or multi-annual deadline, it must process all submitted requests without delay once the relevant deadline has expired.

<sup>7</sup> This is in accordance with the provisions of article 5(2) of [Commission Implementing Regulation \(EU\) 2016/545](#) of 7 April 2016 on procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity.

details, or changes to reflect updates or amendments to applicable legislation and general corrections to spelling and clause references, etc. would constitute minor modifications (provided that the change does not impact other framework agreements).

20. We would still expect an infrastructure manager<sup>8</sup> to conduct an industry consultation in respect of other types of access contracts; or where an infrastructure manager does set an annual or multi-annual deadline for framework agreements. In these circumstances we consider that the standard consultation period should be 28 calendar days. However, in exceptional circumstances and if reasonable, where an application is urgent, it may be appropriate to consult for a shorter period. However, where an infrastructure manager exercises this discretion, it must still give consultees a reasonable period in which to respond. It shall also give consultees the opportunity to object to the shorter period on the grounds that the consultee (acting reasonably) considers that the period is insufficient for it to assess adequately the likely impact on its interests.

21. If a consultee makes such an objection, the infrastructure manager shall discuss the matter with that party and agree with that party a reasonable time period for consultation. Where time is particularly tight, the infrastructure manager and train operators (as applicable) must speak directly with those consultees most likely to be affected to brief them in advance of the consultation and discuss any concerns they might have.

## Consultation procedure for agreed applications

### Prior to consultation

22. Before consultation can commence, sections 2 to 7 of the appropriate application form should be completed accurately and the draft contract/amendment produced. For agreed proposals, Network Rail and the beneficiary will do this jointly. (For section 17 and 22A applications, the beneficiary is responsible for preparing the application form and draft contract/amendment.)

23. Network Rail and the beneficiary should decide what, if any, information should be redacted from the draft contract/amendment and/or application form. Information should only be redacted where it is confidential.

24. It should be noted that, when considering what information should be redacted from a contract before it is placed on ORR's public register or published elsewhere, we must have regard to section 71(2) of the Act. In line with this, we will only redact information if we consider that publication would or might, in our opinion, seriously and prejudicially affect the interests of one or both parties. On the basis of this test, we normally only redact the following from passenger contracts:

(a) the figures in the column headed "Total Train Cost per Mile (Pence)" in Annex C to Part 3 of Schedule 4 (Payment Rate per train mile);

(b) where it exists within contracts (those approved from 1 April 2014 onwards) the figures in the column headed "Defined Service Group Revenue" in Annex D to Part 3 of Schedule 4;

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<sup>8</sup> Or a facility owner, as appropriate.

(c) the Performance Points, Payment Rates and Monitoring Point Weightings in Appendix 1 of Schedule 8; and

(d) the Sustained Poor Performance Thresholds in Appendix 3 of Schedule 8.

Requests for any other redactions must be fully justified.

25. For freight, freight customer and freight operating company contracts we normally only redact the train operator and Network Rail caps in Appendix 1 of Schedule 8.

26. It should be made clear in the consultation documentation where something has been redacted (for example, by using the “X” symbol). When we receive an application we will wish to be satisfied that the redaction of confidential information did not undermine the consultation. We will make the final decision on what information is redacted from the public register and documents placed on our website.

27. Network Rail and the beneficiary should have confirmed that they would be prepared to enter into the new contract or amendment to an existing contract before proceeding to consult on it.

### **Commencing a consultation**

28. Network Rail maintains a page on its website dedicated to track access consultations and should include:

- (a) the details of the proposal including a link to the completed application form and the draft contract or amendment;
- (b) the date that the consultation period will end; and
- (c) any other information Network Rail and the beneficiary consider appropriate.

29. Once the documents have been posted on its website, Network Rail shall email consultees and, where applicable, the Customer Relationship Executives/Customer Managers of consultees with:

- (a) a short explanation of the proposal including the name of the beneficiary;
- (b) a link to the website page containing the full details of the proposal;
- (c) the date by which any consultation responses should be sent; and
- (d) the contact details of those to whom consultation responses should be sent.

### **Consultees' responses**

30. Consultees should send comments, questions or objections on the proposal to the nominated representatives of Network Rail and the beneficiary before the end of the consultation period (or later with the agreement of Network Rail). Where a consultee is aware that it is likely to have significant concerns with a proposal, it should advise Network Rail and the beneficiary as soon as possible (even if the consultee requires the full consultation period to make its full response). This will allow dialogue to begin sooner.

31. All consultation responses should be sent by email and should:

- (a) explain any concerns the consultee has with the proposal and why the issue mentioned could adversely affect its interests or the interests of other relevant parties;
- (b) set out what, if any, assurances or measures could be undertaken to mitigate the consultee's concerns or lead to the removal of its objections; and
- (c) not be frivolous or time-wasting.

### **Consideration of consultation responses**

32. Network Rail and the beneficiary should respond to any issues using all reasonable endeavours to resolve the concerns raised. They should liaise with each other to discuss the concerns raised. They should also agree which of them is best placed to respond to the issue raised by the consultee. This party (or both parties in the case of a joint response) will then respond to the consultee in a timely fashion.

33. Where either Network Rail or the beneficiary considers that it is able to answer the concerns of the consultee without having first discussed it with the other, it may respond directly to the consultee. It must copy all correspondence to the other party. When making a solo response, neither Network Rail nor the beneficiary should purport to place a commitment on the other unless that party has agreed to undertake that commitment.

34. Where Network Rail and/or the beneficiary respond to a consultee they should allow a reasonable period of time for the consultee to make a further response.

### **Consultee consideration of applicant response**

35. On receipt of a response to its representations, the consultee will consider whether or not it is content with the response. The consultee should aim to respond within two days (excluding weekends and public holidays) and write to Network Rail and the access beneficiary advising:

- (a) whether the response has satisfied its concerns; or
- (b) whether it wishes to object, or maintain its objection, to the proposal, and the reasons for this and/or whether the response raises new concerns; or
- (c) of any concerns it continues to have with the proposal including details of any further reassurance it would require before it would be content with the proposal or relevant questions it would like answered.

### **Consideration of further consultee responses**

36. After receipt of any further representations made by a consultee, Network Rail and the beneficiary shall decide whether:

- (a) they are likely to be able to resolve the concerns or objections, in which case they must endeavour to do so and liaise further with the consultee as might be required; or
- (b) the objections or concerns are such that they are unable to resolve or mitigate them sufficiently, in which case, they shall decide whether:

- (i) to submit the application to ORR (i.e. as a draft contract or informal submission) for it to consider the issue and determine the outcome;
- (ii) not to proceed with the application and then produce a materially different revised proposal which would be subject to another consultation in line with this code of practice; or
- (iii) to withdraw the application completely. This might be because Network Rail no longer wishes to submit a joint application on the basis of an unresolved issue. In this case, the beneficiary may decide to make a section 17 or 22A application.

37. In the circumstances listed in (b)(i) to (iii) above, Network Rail should inform the consultees of its proposed action.

## **Consultation procedures for proposed new contracts and amendments to existing contracts to be made pursuant to a general approval**

38. Where a consultation is required to be carried out on a proposed new contract or an amendment to an existing contract that Network Rail and the beneficiary propose pursuant to a general approval, they shall follow the procedure for consultation set out in earlier in this code of practice. They should use the relevant application form and complete the first part (i.e. sections 2 to 7) to provide consultees with the information they will require to assess the likely impact of the proposal.

39. Following the consultation period, Network Rail and the beneficiary may only enter into the contract or amendment pursuant to the general approval if either:

- (a) no representations were made by any consultee; or
- (b) the issues raised by any consultee have been resolved to its satisfaction.

40. Where any unresolved issues remain, Network Rail and the beneficiary may either:

- (a) decide not to proceed with the proposed contract or amendment; or
- (b) make an application for ORR's specific approval of the contract or amendment under section 18 or 22 of the Act as appropriate, leaving ORR to determine whether the amendment should be made. In making such a submission, Network Rail and the beneficiary should send a completed application form with the details of the consultation and concerns raised by consultees, following the guidance set out later in this code of practice. The beneficiary may wish to consider making a section 17 or 22A application if, on the basis of the consultation responses received, Network Rail no longer wishes to enter into the proposed contract or amendment.

## **Section 17 and 22A applications**

41. Where the beneficiary has been unable to agree with Network Rail the terms of a new track access contract or an amendment to an existing contract for more extensive use, it has the right to make an application under section 17 or 22A for ORR to direct Network Rail to enter into a contract or an amending agreement. Where a beneficiary intends to do this, the applicant should discuss its plans with potentially affected third parties to identify any concerns that it may need to mitigate. Such discussions should facilitate the earlier resolution of third party concerns and help to keep the application period as short as possible.



42. If a beneficiary decides to make a section 17 or 22A application to ORR, we would normally expect it to request Network Rail to conduct a “pre-application consultation” in advance, in line with this code of practice. Alternatively, the beneficiary may conduct a pre-application consultation itself. Beneficiaries can also ask ORR to conduct a consultation at the same time it submits a section 17 or 22A application. However, ORR will follow the same procedures as Network Rail in most cases and beneficiaries should be aware that it is normally more efficient for Network Rail to conduct the consultation as Network Rail and the beneficiary are able to work together to resolve the concerns of consultees. Consequently, if a beneficiary asks ORR to conduct a consultation we will usually ask for the beneficiary to provide clear reasons as to why, in the circumstances, it considers it more appropriate for ORR to conduct the industry consultation.

43. Regardless of who carries out the consultation, it is expected that all consultations should be hosted on Network Rail’s track access consultation webpage<sup>9</sup>.

44. ORR will carry out the statutory consultation of ‘interested persons’ required by the Act, considering the representations made as well as any unresolved concerns raised in the pre-application consultation.

45. Where the beneficiary requests Network Rail to undertake a consultation, it must send Network Rail a draft contract and an accurate application form completed up to and including section 7. Upon receiving a request from a beneficiary for it to conduct a pre-application consultation, within seven days of receipt Network Rail shall commence the consultation, following the procedure set out earlier in this code of practice. ORR should be copied into the consultation notification email for information. In dealing with any consultation responses, Network Rail and the beneficiary shall follow the guidance set out above.

46. Where a beneficiary decides to conduct a consultation itself, it shall follow the guidance set out in this code of practice though where appropriate treating references to Network Rail as references to itself. Where it does not wish to request Network Rail to host the application documentation on the Network Rail website, it should place the documentation on its own website so that consultees can access this information from there. If this is not possible, it may conduct the consultation by emailing the documentation to consultees.

47. Where a consultee raises a question that the beneficiary is unable to answer without the assistance of Network Rail, or the question relates directly to something for which Network Rail is responsible, Network Rail must provide a timely reply when asked for a response. Following the end of the consultation, the beneficiary shall make its decision on whether to proceed with an application to ORR under section 17 or 22A.

## **Making track access applications to ORR following a consultation**

48. Where, following a consultation under this code of practice, an application is made to ORR, the applicant(s) shall detail in section 8 of their application form the results of the consultation. This shall include:

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<sup>9</sup> <http://archive.nr.co.uk/browseDirectory.aspx?dir=%5CTrack%20Access&root=>

- (a) a list of parties who were consulted;
- (b) confirmation of whether or not there were any concerns or objections raised during the consultation, and whether there are any outstanding objections;
- (c) details of all material responses received from consultees;
- (d) details of how any concerns or objections from consultees were resolved, including details of any assurances given by Network Rail or the beneficiary to the consultee; and
- (e) where there is an outstanding objection from a consultee, the applicant's or applicants' comments in respect of that objection (that is, why they consider the objection should not preclude ORR's approval of the application).

49. The application form requires applicants to certify that the information they have submitted to ORR is, to the best of their knowledge, true and complete.

50. Where there are unresolved consultation issues, ORR will normally expect to place the consultation correspondence on its website alongside the rest of the application documentation. This is to provide transparency so that consultees can see that their representations have been properly submitted to ORR. For this reason, consultees should assume that any responses they make may be put in the public domain, unless they specifically make representations against this and these meet the confidentiality test in section 71(2) of the Act.

### **Agreed applications**

51. Where a pre-application consultation has taken place in line with this code of practice and the applicants have confirmed that no concerns or objections were raised by any consultees, ORR will consider that consulted industry parties are content with the proposal and continue with any other aspects of its review necessary before it is able to make a decision on that application.

52. Where concerns were raised during a consultation which Network Rail and/or the beneficiary were able to resolve to the satisfaction of the consultee, ORR will briefly review how the issues were resolved before considering whether to approve the application.

53. Where the application form contains details of an unresolved issue, ORR will consider the representations of the consultees and the applicants. This information may be sufficient for ORR to make its decision, but if not, ORR may ask the applicants and the consultees for further information or arrange a meeting for further discussion.

### **Section 17 and 22A applications where a pre-application consultation has been carried out**

54. Where an application submitted to ORR under section 17 or 22A has undergone a pre-application consultation, the applicant must set out any issues arising from that consultation in section 8 of its application form.

55. ORR will then follow its statutory process for dealing with such applications as set out in Schedule 4 of the Act. This includes directing Network Rail to furnish it with a list of 'interested persons' (as explained earlier in this code of practice). ORR must then consult any 'interested persons'.

56. At the time ORR consults any 'interested person', it will also place the application on its website and copy it to any parties it considers should have been consulted in the pre-application consultation but were not. ORR would not expect those parties who were consulted in the pre-application consultation to make further representations (as they will have been able to raise concerns during the pre-application consultation). However, where a party was not consulted or it is unhappy with the proposal and it has not been listed in the application as a consultee with outstanding objections, it will then be able to notify ORR of any concerns it has.

57. When ORR carries out its review of the application it will have regard to any outstanding objections lodged by consultees during the pre-application consultation, any new objections arising from ORR's consultation and of course, the representations of Network Rail and any other representations received through its statutory consultation.

58. Section 17 or 22A applications may be submitted before a pre-application has been concluded. We do not normally recommend this unless there is a good reason. ORR would expect an industry consultation to be started very soon after the conclusion of the pre-application. ORR will not conclude its review of the application until the consultation has been concluded in line with the principles set out above. We may also give Network Rail additional time to make its representations, where appropriate, to enable it to react to the industry consultation.

## List of contact details

59. Network Rail shall maintain an up-to-date list of industry contact details to use when publicising consultations. Those industry parties wishing to be consulted on proposals by Network Rail (see list above) should inform Network Rail of any changes to their contact details so that Network Rail can maintain an accurate list of consultee contact details. Changes in contact details should also be notified to ORR.



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