

Railways Act 1993
Freight Facility (Ports and Terminals)
General Approval 2011

<i>Made</i>	<i>9 December 2011</i>
<i>Coming into force</i>	<i>10 December 2011</i>

The Office of Rail Regulation (ORR), in exercise of the powers conferred upon it by sections 18(1)(c) and 22(3) of the Railways Act 1993, gives the following general approval.

Citation, commencement and revocation

- 1 – (1) This general approval may be cited as the Freight Facility (Ports and Terminals) General Approval 2011.
- (2) This general approval comes into force on 10 December 2011.
- (3) The Freight Facility (Ports and Terminals) General Approval 2010 is hereby revoked.

Interpretation

2 – (1) In this general approval:

“the Act” means the Railways Act 1993;

“Consultation” means a consultation of Potentially Affected Parties carried out by the Relevant Facility Owner, in accordance with the terms set out in paragraphs 6 to 8;

“Facility Access Agreement” means an access contract under which a beneficiary obtains permission from a Relevant Facility Owner to use its Railway Facility for the purpose of the operation of trains in connection with the transport of goods;

“Potentially Affected Parties” includes all rail freight operators, any person with a permission to use the Railway Facility, and Network Rail Infrastructure Limited;

“Railway Facility” means:

- a) any network which is located within a port or railway terminal; and/ or
- b) any network which adjoins a port or railway terminal; and

“Relevant Facility Owner” means a facility owner of a Railway Facility other than Network Rail Infrastructure Limited.

(2) In this general approval:

- (a) unless the context otherwise requires, terms and expressions defined in the Act shall have the same meanings in this general approval;
- (b) the Interpretation Act 1978 applies to this general approval in the same

way as it applies to an enactment; and

- (c) unless the context otherwise requires, any reference to a numbered paragraph is a reference to the paragraph in this general approval which bears that number.

Duration

3. This general approval has no expiry date and will remain in force unless revoked by the Office of Rail Regulation.

Scope

4. This general approval does not have retrospective effect and is subject to the provisions of section 18 (7B) and section 22(5) of the Act.

Approval

5 – (1) The Office of Rail Regulation gives its approval to the matters set out in paragraphs 5(2) to 5(8).

(2) A Relevant Facility Owner may enter into a Facility Access Agreement provided that it complies with the requirements set out in paragraphs 5(3) to 5(5) and that the Relevant Facility Owner has complied with paragraph 6.

(3) The Facility Access Agreement must contain a condition precedent to the permission to use and other operative provisions coming into effect, that cannot be waived by the parties, that a copy of the signed Facility Access Agreement shall be sent by the Relevant Facility Owner to the Office of Rail Regulation within 14 days of the agreement being entered into. If the Facility Access Agreement was signed by the parties on or before 9 December 2011, it will be approved under the Freight Facility (Ports and Terminals) General Approval 2010. If the Facility Access Agreement was signed by the parties on or after 10 December 2011, it will be approved under this General Approval. The Relevant Facility Owner shall state under which General Approval the Facility Access Agreement was approved.

(4) Any Facility Access Agreement entered into pursuant to this general approval must have a duration of no more than five years.

(5) The Facility Access Agreement must contain a clause which provides that no amendment to the Facility Access Agreement shall have effect until a signed copy of the agreement making the amendment has been sent by the Relevant Facility Owner to the Office of Rail Regulation, and shall not have effect unless this is done within 14 days of the date on which the agreement making the amendment is signed. If the amending Facility Access Agreement was signed by the parties on or before 9 December 2011, it will be approved under the Freight Facility (Ports and Terminals) General Approval 2010. If the amending Facility Access Agreement was signed by the parties on or after 10 December 2011, it will be approved under this General Approval. The Relevant Facility Owner shall state under which General Approval the amending Facility Access Agreement was approved.

(6) The parties to a Facility Access Agreement that has been entered into in accordance with paragraph 5(2) may make any amendments to that agreement

provided that the amendments comply with the requirement set out in paragraph 5(7) and that the Relevant Facility Owner has complied with paragraph 6.

(7) No amendment to a Facility Access Agreement made pursuant to this general approval may have the effect that the Facility Access Agreement will have a duration of longer than five years from its original commencement date.

(8) This General Approval will not apply to any Facility Access Agreement or other amending agreement to a Facility Access Agreement, or multiple Facility Access Agreements or other amending agreements, whose effect is such that the same beneficiary receives permission from the same Railway Facility Owner to use the same Railway Facility for a total duration of more than five years. Any Facility Access Agreement or other amending agreement which has this effect requires specific approval from the Office of Rail Regulation.

Consultation Requirement

6. The Relevant Facility Owner may only act in accordance with paragraph 5(2) and 5(6) above if a Consultation in respect of that new Facility Access Agreement or amendment to a Facility Access Agreement has been carried out and there are no unresolved issues arising from that Consultation.

7. The Relevant Facility Owner shall be responsible for conducting the Consultation. The Relevant Facility Owner shall inform all Potentially Affected Parties of its intention to enter into or amend a Facility Access Agreement. The Potentially Affected Parties shall be given a reasonable opportunity to raise any comments or objections in respect of the proposal. The Relevant Facility Owner shall then make all reasonable efforts to resolve any comments or objections which were raised (and not withdrawn) in the Consultation.

8. The Relevant Facility Owner shall make the full terms of the proposed Facility Access Agreement or amendment thereto available to all Potentially Affected Parties, save for any material which, if made public, would or might in the opinion of the Relevant Facility Owner seriously or prejudicially affect the interests of a party to the Facility Access Agreement or a relevant third party.



BRIAN KOGAN

Duly authorised by the Office of Rail Regulation

9 December 2011



EXPLANATORY NOTE (this does not form part of the general approval)

Sections 18(1)(c) and 22(3) of the Act enables ORR to give its prior approval to the entering into of new, and amendment of existing, access agreements. If the entering into a new access agreement or an amendment to such an agreement falls wholly within the terms and conditions of a general approval, the parties to the access agreement in question may enter into or amend it without seeking the approval of ORR.

If a new or amended access agreement does not fall within the scope of the general approval, a specific approval under section 22, or directions under section 18 of the Act, must be obtained. New facility access agreements or amendments to such agreements which have not been approved by ORR – either under a general approval, a specific approval or pursuant to directions, are void.

Paragraph 3 explains that this general approval does not have an expiry date. Given the increasing industry requirement for longer term security of access to ports and terminals, and to ensure that parties can plan their businesses with greater certainty, this general approval will enable FAAs to be entered into for a duration of five years. It will also allow existing short term FAAs to be extended provided they do not exceed five years from the original commencement date. Issuing this general approval will continue to allow for ORR to undertake work to enable it to establish a long-term policy on access exemption in the ports and terminals freight facility market (which is covered by this general approval). The text in paragraph 3 allows for ORR to revoke the general approval at any time, which it may do, for example, should it introduce a long-term policy on access exemption.

Paragraph 4 sets out that the general approval cannot be used to gain approval for any agreements that were made before the commencement date of this general approval (i.e. the general approval does not have retrospective effect).

Section 72(5) of the Act provides that “where an access agreement is entered into or amended, the facility owner concerned shall send a copy of the access agreement or amendment to the Regulator (now ORR) not later than 14 days after the date on which the access agreement is entered into or the amendment is made....”

Paragraphs 5(3) and 5(5) of this general approval cover this point.

The condition in paragraph 5(7) of this general approval emphasises that the duration of a Facility Access Agreement entered into under this general approval must not exceed five years, thus providing the parties to Facility Access Agreements with necessary commercial stability and confidence. Paragraph 5(8) prevents parties from circumventing this rule by using multiple Facility Access Agreements or successive agreements to effectively gain rights which extend longer than five years. Any such agreement would need specific approval from ORR in order for ORR to comply with its obligations under section 18(8) of the Railways Infrastructure (Access and Management) Regulations 2005.

Any Facility Access Agreements entered into pursuant to this general approval must be compliant with the general law in relation to access including, in particular, the requirements of the Railways Infrastructure (Access and Management) Regulations 2005. Examples of some of the issues parties should be mindful of include the requirement to establish a performance regime, the obligations in terms of allocation of infrastructure capacity and the use of framework agreements. This is not a definitive list.

Whilst not expressly stated in this general approval, beneficiaries seeking access to freight ports and terminals will still be able to make track access applications to ORR under sections 17 or 22A of the Act, should they fail to reach agreement on the terms of access to a port or terminal freight facility with the Relevant Facility Owner. In addition, beneficiaries will also be protected from any potential discriminatory behaviour by the Relevant Facility Owner by virtue of the appeals mechanism available under Regulation 29 of the Railways Infrastructure (Access and Management) Regulations 2005.

Paragraph 6 sets out consultation requirements. In the interests of transparency, consultation with Potentially Affected Parties is required before any changes can be made pursuant to this general approval. This consultation requirement ensures that the Relevant Facility Owner will inform other interested parties of any issues which may impact upon them, particularly in terms of access to the Railway Facility. Paragraph 6 refers to 'unresolved issues' which, to clarify, means any issue arising from the consultation which has not been resolved to the satisfaction of both parties to a FAA.