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OFFICE OF RAIL AND ROAD

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To: all FOCS, Service Facility Owners, Freight Customer Track Access Contract holders and potential holders of such contracts, Infrastructure Managers and TOCs by e-mail

New General Approval and guidance for freight facility access contracts

- 1) We are consulting you on a proposal for a new General Approval (GA) for freight facility access contracts. It will replace the Freight Facility (Ports and Terminals) General Approval 2011 (Ports & Terminals GA). The proposed update incorporates changes in the relevant legislation, expands the scope to cover networks not owned by an Infrastructure Manager within Great Britain and includes modifications to make the GA more user friendly.
- 2) We will also publish a new guidance module for freight facility access alongside the new GA. A draft of our GA for freight facility access contracts and the proposed guidance module are available on our website¹. The existing Ports & Terminals GA is also on our website².
- 3) Please email your comments on these new documents to Track.Access@orr.gsi.gov.uk by **5pm on 24 September 2017** so that we can take them into account before publishing the final versions.

Background

- 4) Access contracts relating to access to and the provision of services at many freight facilities do not require ORR's approval given the exemption provided from that requirement by The Railways (Class & Miscellaneous Exemptions) Order 1994. Where that exemption does not apply, access contracts will need approval from ORR. If they are not approved, they will be void.

Expansion from ports and terminals to all freight facilities

- 5) Our Ports & Terminals GA provides our approval without requiring a specific application to us, of access contracts and amendments to them, under certain conditions, at such facilities. In light of applications we have received for our specific approval of access to sidings where our Ports & Terminals GA does not apply, we propose to introduce a new, wider-ranging, freight facility GA. We also need to revise it

¹ Consultation link

² <http://www.orr.gov.uk/rail/access-to-the-network/track-access/forms-model-contracts-and-general-approvals>

to take into account recent legislative changes. The new GA will replace the current Ports & Terminals GA. It will provide greater flexibility for freight facility owners and their customers to enter into access contracts at freight facilities, reducing the associated transaction costs and timescales.

- 6) Light Maintenance Depots and Heavy Maintenance Depots are not in the scope of the proposed GA. Light Maintenance Depots have a different access regime³ and Heavy Maintenance Depots are outside the scope of the Railways Act 1993 (the Act).

Proposed changes

- 7) We have also taken the opportunity to consider whether certain terms within the Ports & Terminals GA should be brought forward into the proposed GA. These are identified below and we explain our reasons for these changes.

Duration of contracts

- 8) We are considering whether freight facility access contracts approved under the proposed GA should be allowed to have long term durations. Currently, we allow for the duration of these contracts under our Ports & Terminals GA for up to five years. We took our lead for this maximum duration from provisions on the duration of framework agreements in The Railways Infrastructure (Access & Management) Regulations 2005. These Regulations are superseded by The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the 2016 Regulations).
- 9) The 2016 Regulations create a distinction between Infrastructure Managers and service providers. Infrastructure Managers are bodies such as Network Rail Infrastructure Limited (Network Rail), HS1 and Crossrail. Regulation 21(1), (7), (8) and (9) of the 2016 Regulations relate to the duration of framework agreements between an Infrastructure Manager and an 'applicant' seeking infrastructure capacity. There is no similar restriction on freight facility access contracts between a service provider and its access beneficiaries, but we apply our existing policy of requiring justification for long term access contracts⁴.
- 10) Therefore we are proposing that longer contracts can be generally approved, with certain restrictions. There will be a limit of ten years and for contracts longer than five years there must be a corresponding track access contract with the Infrastructure Manager (in most cases that will be Network Rail) of the same or greater length of the freight facility access contract. This is to ensure that the parties have mainline network

³ <http://www.orr.gov.uk/rail/access-to-the-network/station-and-depot-access/depot-access>

⁴ Our policy on duration of access contracts is available at <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance>.

capacity for the services for the whole of the contract. This also allows ORR to retain our overview of longer access contracts through track access contracts we approve.

Q1. Is the proposal to allow contracts of longer duration under the proposed GA suitable? If not, how long a duration should be allowed and why?

Consultations

11) We updated the provisions for consultations in the proposed GA to make it clearer and to refer to our established policy on track access consultations⁵. While this policy refers to Network Rail's obligations, it gives a framework for facility owners to use for their own consultations.

Office of Rail and Road

12) We have updated references to "Office of Rail Regulation" to "Office of Rail and Road" throughout the GA. This reflects our change of name, which came into effect in October 2015.

Refinement of definitions

13) Definitions given in the Interpretation clause as being the same as in the Network Code and model freight contracts have been removed to reduce the number of definitions in the GA itself. The new paragraph 4 states that all terms used which are defined in the Act, Network Code and model freight contracts have the same meaning in the GA.

Explanatory notes

14) We removed the explanatory notes as in our view, they did not add any value to the GA, and would expect applicants to refer to our guidance⁶ when using the GA.

Redactions

15) We have not included in our proposed GA a reference to confidentiality exclusions. We will consider any requested redactions to any and all contracts before placing them on our website and public register under section 71(2) of the Act.

Q2. Do you have any comments on the other proposed changes to the GA, or any amendments we have not included which you think we should consider?

⁵ <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance>

⁶ <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance>

Terms in freight facility access contracts

- 16) While there is no model contract for freight facility access contracts, we would expect such contracts to include standard access terms such as conditions precedent, expiry date, charging and performance regimes, a use-it-or-lose-it provision, and termination provisions for non-use.
- 17) We expect the same terms and conditions to be offered to all access beneficiaries at the same facility or for there to be good reasons where a service provider differs from that approach. Where agreement over terms of access and the provision of services cannot be reached between a service provider and a prospective access beneficiary, an application can be made to ORR under section 17 of the Railways Act 1993 (the Act) or, where the Act does not apply, regulation 32 of the 2016 Regulations⁷.

Proposed guidance module

- 18) We have also taken this opportunity to consult on a new guidance module for freight facility access contracts, as we do not currently have guidance for such contracts. This guidance sets out how we will deal with applications for new contracts and amendments to existing contracts.

Q3. Would the proposed guidance be useful to you when making an application or when considering the regulatory regime for your facility? Are there any changes or additions to the guidance you think we should consider?

Business Impact assessment

- 19) We are required to review the impact of any regulatory changes on businesses. We have included a short survey for consultees to help us assess the potential impact of these proposals on businesses. We also welcome any additional comments on how these proposals would affect your business.

Yours faithfully

Katherine Goulding

⁷ Further information can be found in our guidance module "ORR's guidance on The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016" which is available at <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance>