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By email to: all FOCs, Freight Customer Track Access Contract holders and potential holders, Network Rail and CRRWG.

Dear colleagues

**Improving Schedule 5 of the Model Freight Track Access Contract:
ORR conclusions**

1. On 6 November 2015 we consulted you on some changes we proposed making to schedules 4 and 5 and the Rights Table in the model freight track access contract (the contract). We received 7 responses which we have published on our website alongside our consultation letter and this conclusions letter¹. I am grateful for the time taken by respondents to comment on our proposals. The responses raised several relevant issues, summarised below. Our comments and our views on subsequent changes to schedule 5 and the Rights Table are provided alongside.

2. Annex A identifies the changes we have made to the proposed version of schedule 5 we consulted on and Annex B is a 'clean' version that forms the new schedule 5. Annex C is the revised version of the Rights Table. Annex D is a 'clean' version of the appropriate extracts of schedule 4 (which remains as consulted upon).

3. We will shortly publish a revised contract including the amended schedules 4 and 5 and Rights Table on our website².

London Overground Rail Operations Limited (LOROL)

4. LOROL said it would be interesting if the commodities carried were published.

ORR response

5. The contract contains no provision for capturing the identity of goods being moved, which could of course vary over time. Neither freight operating companies (FOCs) nor Network Rail have suggested it would be useful, and we see no advantages to introducing such a provision.

Great Western Railway (GWR)

6. GWR supported the approach we proposed to take.

Merseytravel

7. Merseytravel said it was generally content with our proposals but expressed concern that departure time windows would need to take into account passenger requirements as well as those of freight operators. It understood the need for time-critical

¹ <http://orr.gov.uk/what-and-how-we-regulate/track-access/current-work/industry-reform>

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

freight paths for certain commodities and the commercial imperative for them in terms of efficient and cost effective operations. Sixty minute arrival and departure time windows had attractions, it said, especially to facilitate standard hour timetables for passenger and freight services. Merseytravel referred to the flexibilities contained in Network Rail's new Access Rights Policy³. Merseytravel sought assurances from Network Rail and ORR that such windows would not constrain provision of attractive, frequent and regular interval passenger services with consistent journey times and optimised interchange opportunities necessary to realise the benefits of North West and Transpennine electrification schemes and the Northern Hub strategy. This was particularly important given planned increased services over the routes concerned.

ORR response

8. Merseytravel's comments raise important issues, but they relate mainly to the potential impact of the detailed specification of freight access rights when populated rather than the structure of the revised Rights Table itself. In our consultation we proposed no detailed specification of access rights themselves which is something we will cover in our revised guidance module. We are aiming to consult on our revised guidance in the next few weeks. We note that Merseytravel is generally content with our proposals to improve schedule 5 of the contract.

9. The issue of any detailed specification attached to future freight access rights has already arisen as part of our on-going consideration of applications under section 17 of the Railways Act 1993 (the Act)⁴. All these applications have already been the subject of our industry consultation and we have invited comments on them which we will take into account in making our decisions.

Network Rail

10. Network Rail referred to its active role in industry Contracts and Regulatory Reform Working Group (CRRWG) sub-groups⁵ looking at schedule 5 for freight (and passenger) operators to identify improving or simplifying changes. It supported the changes proposed to schedule 5 and the Rights Table. In particular, it noted the inclusion of the proposed new reopener provision at paragraph 5 of the revised schedule 5 which introduces a mechanism to propose changes to timing windows. Although wary of reopeners generally, Network Rail thought its inclusion would be pragmatic given it anticipated ORR would decide window sizes case-by-case. Network Rail also supported changes to enable e-mail notices⁶.

ORR response

11. We note Network Rail's support and its view on the proposed reopener.

GB Railfreight Limited (GBRf)

12. GBRf supported the proposals. It acknowledged the high level of discussion on freight track access rights that had occurred over the last two years as part of the CRRWG workstreams. The proposals outlined in our consultation took account of all that good work. GBRf said it supported the principle of time windows which, along with other details in the new Rights Table, would help Network Rail's timetable planners understand the

³ <http://www.networkrail.co.uk/Network-Rail-Access-Rights-Policy.pdf>

⁴ Paragraphs 7 and 8 of our consultation letter.

⁵ Referred to hereafter as the Sub Group.

⁶ See paragraph 30 below.

parameters within which they needed to work. GBRf referred to the agreement by all FOCs to remove some current contractual restrictions, so improving Network Rail's future timetabling flexibilities⁷. It considered window size for specific freight commodities was the main issue, in particular, those for time-sensitive bulk products such as biomass.

ORR response

13. We note GBRf's support for the proposals, especially a move to time windows and the inclusion of details in the Rights Table. Since our consultation we have again considered the extent to which information should be included in the column headings in the Rights Table and have revised it. We comment on that issue below given that DB Schenker Rail (UK) Limited (DBSR) proposed a different approach. The option to complete rows of details as "Non-contractual comments" remains.

DBSR

14. DBSR said its involvement in the sub-group meant it was clear on most of the changes being proposed, which it supported (subject to its representations). DBSR said moving relevant definitions into the Rights Table could not be fully achieved. They might be better placed within paragraph 1.1 of schedule 5 thereby reducing the number of places where definitions were expressed in the freight model contract. ORR's proposal to include definitions in the Rights Table could achieve the opposite effect, which could, unintentionally, lead to greater complexity and less clarity. Additionally, the majority of terms in the (current) Rights Table are self-explanatory and should be easily interpreted by Network Rail's train planning staff without the need to import definitions. As such, DBSR supported retention of definitions in paragraph 1.1 of the new schedule 5.

15. DBSR also commented on the detail of several definitions and text in schedule 5 and proposed clarifying changes. It also suggested the Rights Table columns headed "Arrival Window" and "Departure Window" should be split to cater for the start and finish time of each window.

ORR response

16. We note DBSR's general support for the proposed changes. We have considered DBSR's reasons for retaining definitions in paragraph 1.1 of schedule 5 and, on reflection, we agree. Therefore we have moved the definitions back to paragraph 1.1 of schedule 5. Other defined terms used in schedule 5 which are not included in paragraph 1.1 are contained in clause 1.1 of the contract.

17. In light of DBSR's comments, we have taken the opportunity to re-express certain definitions and we have made other text in schedule 5 and the Rights Table clearer. However, we have not included a new definition of train reporting number in the definition of "Y Path", given that it is a non-contractual term in Column C of the Rights Table.

Alliance Rail Holdings (Alliance)

18. Alliance recognised that the proposed changes had been discussed and developed by the CRRWG workstreams and identified where Network Rail could be given greater flexibility for the timetable development process. It referred to its letter relating to ORR's proposed changes to the passenger schedule 5 model contract which raised similar issues. As there was an overlap between the two consultations it suggested commonalities and improvements could be made to both model contracts. Although standardisation

⁷ Paragraphs 3 and 4 of our consultation letter and see paragraph 24 below.

between both contracts had not been considered by the sub-groups, the consultations provided some opportunity for a more consistent approach.

19. Alliance said the proposed changes gave significantly more protection to FOCs compared to the move to “quantum rights” for passenger operators. There appeared no presumption of “quantum only” for freight operators and rights above that need not be justified by FOCs. Network Rail’s Access Rights Policy⁸ supports multiple protections for freight operators when compared to passenger operators. As such, Alliance suggested the freight access rights policy should be broadly similar to the position taken on passenger access rights. Alliance proposed how completion of certain columns of the Rights Table could equate to “quantum only” with greater specification only where commercial justification had been provided. Network Rail’s Access Right Policy for passenger operators said that any additional specification (above “quantum only”) could be detrimental to the optimisation of timetables offered to other operators, thereby raising questions of consistency between operators. The policy for passenger operators identified that interval *and* journey time protection could severely restrict the scope of timetable development which meant that normally only one of these protections would be given, if any. Alliance thought additional specification in the Rights Table might even hardwire the timetable. Such specification should therefore be subject to the same justification as that for passenger operators. Even so, Alliance agreed that the window size for freight should normally be “+/-30 minutes”.

20. Alliance proposed descriptors which related to aspects of freight and passenger access rights which, it argued, should be consistent and standardised so that the same level of protection existed for both types of operators. It also supported replacing “Levels” of access rights with “Firm” or “Contingent” Rights.

21. Alliance referred specifically to our previous comments on the lesser prescription of access rights and improvements Network Rail agreed it needed to make to improve train operator confidence in timetabling. Alliance said there had been a significant downturn in Network Rail’s ability to manage the timetabling process and, as such, it was not meeting its obligations. Alliance did not support Network Rail’s Track Access Policy and there were other outstanding items from the sub-group workstreams to address.

22. Alliance supported the changes to the model contract subject to ORR adopting a consistent approach between freight and passenger contracts, where possible.

ORR response

23. We do not agree that the proposed schedule 5 necessarily provides greater protection for freight operators than for passenger operators. The revised Rights Table has been agreed through industry processes during which it was recognised that its completion would be the key issue. The detailed specification of freight access rights was never intended to be part of this consultation. Our consultation was about the framework of schedule 5 and the Rights Table, which needs to be dynamic enough to cater for various levels of prescription. We consider the proposed Rights Table continues to provide options for the specification of access rights, and Network Rail will negotiate such specification, as it will do for passenger operators, under its Access Rights policy. We also consider that there would be no real benefit for Network Rail or FOCs in changing industry-agreed

⁸ <https://www.networkrail.co.uk/Network-Rail-Access-Rights-Policy.pdf>

descriptors in the Rights Table to those used by passenger operators, which do not necessarily have a comparable meaning or purpose.

24. In accepting the format of the revised schedule 5, FOCs have agreed to the removal of the restrictive (on Network Rail) timetabling flex provision which tied any train slot to within 30 minutes of where it was in the previous timetable. They have also given up the right to timings at Intermediate Points. These measures will increase Network Rail's timetabling flexibilities. And to enable Network Rail to have other and, potentially greater flexibilities in future, we have introduced a reopener provision in the new schedule 5 at paragraph 5. Passenger operators are not subject to such a reopener and part D of the Network Code contains protections for *all* operators in the way that timetables are constructed under the usual timetabling processes.

25. The frequency of freight services can be low in any one day, with one right per pathway, whereas passenger operators will normally have multiple access rights throughout the day, with an expectation of broadly standard timings each hour. As such, passenger access rights tend to create greater prescription of service patterns. In those circumstances, a quantum only approach assists Network Rail's timetabling process.

26. FOCs and Network Rail are in agreement that the size of windows can vary. They could be anything from 24 hours to 60 minutes or, exceptionally, even smaller. We will be reflecting on this and other issues relating to the specification of access rights when we revise our guidance.

27. However, we note that Alliance is supportive of 60 minute windows for freight services which are, in effect, +/-30 minutes, the flex provision mostly associated with current Level 1 rights.

Other ORR comments

28. No one commented on the proposed changes to schedule 4 of the contract so we have adopted these as proposed. Also, no views were expressed on the inclusion of the hidden row which will contain non-contractual comments and would need to be identified as "Non-contractual comments". We will leave it to the parties to agree on this matter.

29. During our consultation additional issues arose, some of which were suggested by DBSR. We have made a few more changes to the text, as follows;

- amendment of the definitions of "Route Availability", "Maximum Length of Train" and "Loading Gauge" to clarify the circumstances when we expect the respective Rights Table columns to be populated. (They should only be completed where the values involved are outside the Operating Constraints);
- a reordering of the definition of "Y Path", for clarity;
- replacement of the word "services" in paragraph 4.1(a) with "Freight Access Right" which appears in the Rights Table, rather than "services";
- changing the definition of "Days per Week" so that it can apply to the circumstances where the "Departure Window" crosses from one day to another;
- amending the definition of "Minimum Dwell at Intermediate Point" so that it refers to "Planned" rather than "Scheduled" (a term that is used only in passenger access contracts); and

- revision of certain references to “Contingent Rights” to remove repetitious text as to how it is identified in the Rights Table, as this is covered in its definition.

30. We have also taken the opportunity to change the provision at clause 16.1.2 of the contract to enable notices to be served by e-mail. There is a consequential change to clause 18.4.3. Similar changes have been made to the passenger track access contract.

Next Steps

31. The revised model contract will be placed on our web site shortly. We will also update the Freight Customer model contracts to reflect the changes.

32. We will now turn to updating our Track Access guidance. We will amend the Form F and the Freight General Approval. We will be consulting, in the usual way, on these proposed changes.

33. As we are currently handling a number of applications for new freight access contracts under section 17, we will use the revised contract when we make our decision in respect of each application.

34. We note that several FOCs and some Freight Customers hold track access contracts based on our current model contracts which do not contain Firm Rights. Should any of these parties seek Firm Rights for inclusion in their track access contracts, we will expect the appropriate changes to be made to them to incorporate the revisions we are making to the model track access contract.

Yours sincerely

A handwritten signature in black ink that reads "Bill Hammill". The signature is written in a cursive style with a long horizontal stroke at the end.

Bill Hammill