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To industry colleagues by email only

Dear colleagues

Consolidation and revision of freight general approvals

Purpose

1. The purpose of this letter is to:
 - (a) issue formally the consolidated freight general approval on which we consulted you in July 2011; and.
 - (b) respond to your comments made as part of that consultation .

The new freight general approval (“GA”) will provide our prior approval of certain, specified, changes to, and entry into, freight operator and freight customer track access contracts held with Network Rail Infrastructure Limited (“Network Rail”). The new GA is available to view at <http://www.rail-reg.gov.uk/server/show/nav.2006> .

Background

2. In July 2011 we consulted stakeholders on consolidating the:
 - (a) Freight Access (Changes to Track Access Contracts) General Approval 2009 issued on 23 March 2009 (which superseded the 2008 version);
 - (b) Freight Access (New Track Access Contracts) General Approval 2009 issued on 10 July 2009;



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- (c) Freight Access (Model Contract Amendments) General Approval 2008 issued on 23 January 2008; and
- (d) Freight Customer General Approval 2011 issued on 15 March 2011.

These four freight track access general approvals relating to access to Network Rail's network and permitted freight operators and freight customers to enter into or amend track access contracts with Network Rail without the need for ORR's specific approval.

3. We also consulted on further changes to the GA which would allow the freight operator and Network Rail to amend the contract without the need for specific approval under certain circumstances. In many instances we proposed that other operators would still need to be consulted and if there were no remaining objections to the application then it could be submitted under the GA.

Consultation responses

4. After reviewing the consultation responses we have decided that further changes are needed to address consultees' concerns, however we welcome the broad support for many of the proposals in the consolidated GA.

The effect of generally approved amendments or new access contracts to existing access rights and aspirations for access rights

5. Many consultees were concerned that some elements of the GA would allow parties to track access contracts far more freedom to make changes to existing firm rights and incorporate new firm rights and that this could have an adverse effect on existing access rights. We recognise these concerns, but it was very much our aim in developing the GA to allow the industry more freedom and responsibility and, more generally, to speed up the change process. However, to address consultees' concerns we have concluded that the incorporation of new time limited firm rights should be subject to industry consultation. Ultimately, it will be for Network Rail to satisfy itself that it can meet these contractual obligations without adversely affecting other operators' rights before it enters into amendments to access contracts.

6. First Group raised concerns about the impact of generally approved access rights on potential passenger and freight services. We consider that where operators have sufficiently advanced plans about potential new services which it is discussing with Network Rail, then we would expect Network Rail to consider carefully any impact on another operator's aspirations when granting or amending access rights under the GA.

7. GB Railfreight raised concerns about what would happen where Network Rail had granted rights in error under the GA. We accept that there is a remote possibility that access rights may be granted in error, however we have included in the GA a requirement to consult for many of the changes relating to amending or adding entries to the rights table and this will reduce further the likelihood of this occurring. Network Rail and a freight operator would of course be able to use the GA to remove any rights which were granted in error.

Extensions to track access contracts

8. Both First Group and Network Rail commented on our proposal to allow contracts which did not contain any level 1 rights to be extended by up to one year. Network Rail said that it was unclear whether the circumstances where we envisaged that this provision might be used had actually occurred and whether this would apply to all the rights for which a freight operator had an ongoing commercial need. First Group was opposed to this proposal because it was concerned about the effect on decisions about network capacity through granting firm rights under the GA.

9. Our intention behind this proposal was to provide freight operators with some certainty that they could extend their contract in the event of limited timescales before expiry of the contract. That could be where a freight operator expected to need to meet its customer requirements beyond the term of its existing contract. In light of the consultation responses, we have considered this issue further and we have not included this provision in our new GA because it does not meet Regulation 18(7) of the Access and Management Regulations 2005. This regulation stipulates that framework agreements are to be, in principle, for a term of 5 years and therefore we would need to give specific approval for any term longer than five years. Under our original proposals this would not have been the case.

Level 2 rights under the GA

10. Freightliner welcomed our proposals to allow generally approved time-limited level 2 rights but considered that we had not addressed the issue of what happens once the 2 year period for these rights is over. Our intention was that this provision would allow freight operators to obtain quickly firm rights to meet the requirements of any new business that it may have won and allow the freight operator to submit access proposals for the next timetable. After 2 years they will expire and the freight operator will no longer have those firm rights. To secure longer term grant of the access rights, a freight operator will need to either:

- (a) submit another GA amendment for level 2 access rights granting up to a further 2 years, or

- (b) submit a section 22 for specific approval to convert the level 2 rights to level 1 rights;
- (c) submit a section 22 application for specific approval to extend the duration of the level 2 rights for the remainder of the contract term; or
- (d) in the event of a dispute with Network Rail, the freight operator may submit an section 22A application.

11. We have considered further the issue in respect of granting level 2 rights without consultation and have decided that Network Rail will be required to carry out a consultation where an application includes Level 2 rights for up to 2 years under the GA.

12. We note Freightliner's question about whether new level 2 rights should be included in its package of changes to access rights or whether it should use the GA. We consider that the freight operator and Network Rail are best placed to decide how to combine using the mechanism under the GA and the usual section 22 process according to what best meets the freight operator's commercial requirements.

13. GB Railfreight asked if we would be looking at the issue of simplifying the process for approving level 2 'Y' rights. We considered including level 2 'Y' rights, however we noted in our consultation that due to the complicated nature of 'Y' rights and the potential impact on capacity, it would not be appropriate for us to include these in the GA. We will want to understand how these rights interact with others prior into their approval and so we will retain the ability to specifically approve them.

14. Freightliner raised in its response the issue of a lack of consultation and transfer of site leases. It said that where an access right is granted and Network Rail is the freeholder at a particular location, the holding of an access right for that location would prevent Network Rail from serving a termination notice. We note Freightliner's concerns and consider that our decision to include a consultation requirement will address its concerns.

Changes to firm access rights

15. First Group made a number of comments relating to amending the arrival and departures times of slots and the differing consultation arrangements that we had proposed and South West Trains was also concerned that our proposals to allow any changes to an access right without consultation would allow material changes to be made.

16. We have looked again at our proposal in light of industry comments and also the letter we published on 23 September 2011 which set out our approach to the approval of firm rights beyond the Principal Change Date 2013.¹ In this letter we said that we would no longer approve firm rights beyond this date whilst we considered the conclusions of the Rail Value for Money study and the impact on the degree of specification of access rights and had sought the industry's views on developing a way forward. We have since published a consultation document² seeking the industry's views on the degree of specification of access rights and to what extent could this general approval be improved. Whilst this work is continuing, our original intention for the GA would not be consistent with our 23 September letter and as such the GA does not include this provision.

17. However we consider that there are still ways in which the industry can have more control over some of the changes to access rights which would be consistent with this policy. Many of the changes that we are asked to approve relate to amendments that reflect the working timetable and are within the amount of flex in track access contract, therefore we have decided that freight operators and Network Rail should have the ability to make such changes without consultation. We have also permitted the freight operator and Network Rail to make changes to the total/maximum services per day or week provided there is no net increase in quantum granted under the track access contract. Any such changes would be subject to industry consultation.

18. Freightliner was also concerned that it would not be aware of changes to access rights being made. The GA does not contain a requirement for consultation mainly for deletions or 'downgrading' of access rights. However Network Rail will be required to send ORR any supplemental agreement entered into under the GA which we would place on our website and library, which all operators can view.

Specified equipment and loading gauge

19. First Group proposed some drafting changes to the provisions which allowed FOCs to make changes to the specified equipment because it was concerned that it would ultimately be necessary for the Vehicle Change process to be completed by which time the firm rights may have already been included. First Group also said that freight operator's ability to amend loading characteristics (RA number, gauge and maximum length of train) should be subject to consultation as such changes might affect engineering strategy and diversionary routes.

¹ Available at <http://www.rail-reg.gov.uk/upload/pdf/proposed-extens-to-train-operators-current-access-contracts.pdf>

² Available at <http://www.rail-reg.gov.uk/upload/pdf/reform-of-access.pdf>

20. We note First Group's comments and have proposed that where a change is proposed that does not require the Part F process to be completed then this will require a consultation to be carried out. This will ensure that adequate consultation either under the GA or the Network Code is carried for such changes. Any deletions or reduction will not require consultation.

21. Network Rail also said that the GA should take the duration of RT3973 dispensations into account. We agree with Network Rail's comments and the GA contains an ability for a freight operator to amend the 'Special Terms' column and we would expect any entry for RT3973 to also contain the date of expiry of the RT3973.

Contract miles

22. We agree with First Group's suggestion that contract miles changes should not be subject to consultation and this ability has been included in the GA.

Other issues

23. The responses to the consultation raised a number of issues which do not directly relate to the GA.

24. Network Rail said that the previously approved bespoke elements of the performance regime for new freight operators and said that this should be included in the GA as otherwise the GA is unlikely to be used for new track access contracts. We consider that it is necessary to approve any bespoke drafting as we would want to understand the impact of this drafting on a new freight operator and ensure that it was being treated fairly by Network Rail against other operators.

25. Freightliner Group said that the process for agreeing new vehicle charges should be made less onerous. This is being picked up through our consultation on the reform of access contractual arrangements..

ORR's approach

26. We believe that the GA will help to achieve our goals of:

- (a) providing the industry with greater responsibility for, and control over, its contractual relationships;
- (b) ensuring that ORR remains focused and effective in its regulation of track access contracts, concentrating our efforts on those areas where we can provide most value and benefit;

- (c) promoting the principles of Better Regulation; and
- (d) meeting the objective of theme one of our published corporate strategy “Promoting safety and value in Britain’s railways: Our strategy for 2009-14” in focussing on (passenger and) freight customers, now and in the future.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Carey', with a long, sweeping underline.

Paul Carey