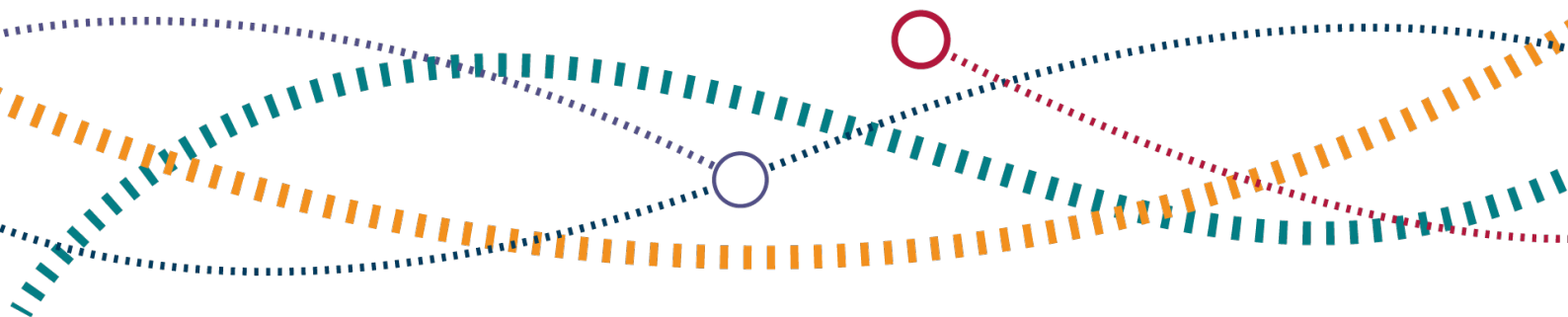




Assessing the costs and benefits of new open access services

Initial findings and next steps

24 April 2024



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1. Executive summary

ORR is reviewing how we assess the costs and benefits of new open access services. We are undertaking this work in three parts.

Firstly, we have considered when to conduct economic testing and how this should inform our decision-making. Our initial finding is that economic testing is necessary to support our weighing of the impact an open access service may have on the Secretary of State's funds and the benefit to passengers associated with the application, together with our other relevant duties. We are planning to consult industry on proposed revisions to our guidance. The revisions are intended to more fully explain the role of the Not Primarily Abstractive (NPA) test and the approach we take to weighing our duties. We expect this to be particularly useful to new open access operators and their investors.

Secondly, we have considered whether the NPA test remains appropriate. In particular we considered whether we should use Benefit Cost Ratios (BCRs) either to replace or supplement the NPA test. We consider that more routine quantification of costs and benefits (in addition to the NPA test) could usefully inform our decision making, but we are not minded to adopt BCRs for non-competing applications. We are concerned that adopting a BCR would create uncertainty for industry. We will consult with industry on our proposal to quantify more costs and benefits on a routine basis before drafting updated guidance.

Finally, we have separately commissioned a review of our previous modelling of generation and abstraction which underpins the NPA test. We will consider the results of this work and whether further changes are necessary later this year. We welcome feedback on our initial findings and next steps.

- 1.1 In December 2023 the Minister of State for Rail asked for DfT, ORR and Network Rail to undertake several areas of work to reduce barriers to open access. This included, *“A review by ORR of the ‘Not Primarily Abstractive’ test, which ORR is now undertaking, to ensure that value for money is fully and appropriately considered when making access decisions.”* This follows a clear public statement from DfT, in response to feedback on the draft rail reform bill, that open access operators have an important role to play in the current and reformed railway.
- 1.2 We regularly review our access policies, and last year we expanded the scope of our planned review of our primary form of quantitative economic testing, namely the Not Primarily Abstractive (NPA) test, to consider the possibility of replacing or

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supplementing the NPA test with an alternative economic test such as a Benefit Cost Ratio (BCR). This review considered:

- a) Our policy on when to conduct economic testing, and our policy and guidance on how the results of economic testing inform our decision-making and what other factors are considered;
- b) The NPA test;
- c) The potential to develop an alternative economic test to either replace or supplement the NPA test.

1.3 Our review was informed by engagement with open access operators, aspirant open access operators, Rail Partners, Network Rail, Great British Railways Transition Team and government colleagues.

1.4 We developed evaluation criteria to support our consideration; they are:

- a) Enable the consideration of our duties, in particular value for money, the impact on the funds available to the Secretary of State and passenger benefit;
- b) Predictable;
- c) Transparent and explainable;
- d) Timely, efficient and proportionate.

1.5 Having determined our initial findings, we now plan to consult formally on our proposed updates to our NPA test guidance, and on the principle of undertaking further quantification of the relative magnitude of costs and benefits of open access applications in order to build up an evidence base with which to supplement our decision-making, particularly where the NPA results are marginal.

Background

1.6 There are currently three open access operators on Network Rail's network: Hull Trains, Grand Central and Lumo. A new operator, Grand Union Trains, is expected to start services from December 2025.

1.7 In the last ten years, we have determined ten new open access applications. Of these, we approved five and declined five. Network Rail opposed all but one of these applications, and DfT either opposed or did not respond to the consultation.

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- 1.8 We must determine track access applications in accordance with our duties under the Railways Act 1993. We developed the NPA test in 2004 to help us weigh our duties to consider the Secretary of State's funds, the promotion of competition to benefit passengers and value for money.
- 1.9 The test is described in our [NPA test guidance](#). The test considers the expected impact of a new open access service proposal. It creates a ratio between income generated by services attracting new passengers to rail (referred to as generation) and income which results from passengers switching from existing services (referred to as abstraction). It is a simple representation of value for money.
- 1.10 We have not set a strict pass/fail threshold for the NPA test, but our [guidance on the use of capacity](#) says that "generally we would not expect to approve applications with ratios of generation to abstraction below 0.3 to 1". We refer to this as an 'indicative threshold' in this report. The results of our NPA test are indicative in the sense that the test is an important input into our decision-making but not the sole determining factor.
- 1.11 We monitor the impact of open access and the competitive response to open access, and produce an annual monitoring report. This monitoring has highlighted the benefits of open access which include competition on fares and wider economic benefits.

Policy options on when to conduct economic testing and how to use the results

- 1.12 We considered policy options on when to conduct economic testing and how the result should be used. These included options to exclude some applications from the requirement to conduct economic testing, options which articulated an acceptable level of abstraction and options focused on improving our guidance to support robust decision-making.

Our initial findings and next steps on policy options

- 1.13 We considered options to not conduct economic testing in certain circumstances but these were discounted due to the need to robustly weigh our duties. We also considered options to articulate an acceptable level of abstraction and these were discounted as they were not practical to implement.
- 1.14 We are minded to expand our NPA guidance to more fully explain the role of economic testing in our open access decision-making and to clarify the indicative nature of the result.

- 1.15 It is open to us to consider revising the indicative threshold for the NPA test. This would require us to reassess the emphasis we place on our different duties. We are not minded to do this.

Evaluating the NPA test

- 1.16 The [NPA test](#) is a relatively simple calculation that produces a ratio of the expected new revenue associated with an application ('generation') to the revenue which is expected to be 'abstracted' from existing services.
- 1.17 We use rail industry demand modelling software, MOIRA and the Passenger Demand Forecasting Handbook (PDFH) as the basis for forecasting generation and abstraction. Where appropriate, we apply adjustments to the MOIRA outputs in order to correct for known limitations. For example, MOIRA was developed as a tool to project the impact of iterative changes rather than the sort of transformational service changes often proposed by open access applicants.
- 1.18 Demand forecasting necessarily involves a forecast of the fares that will be charged by market players. Our demand forecasting adopts a proportionate approach to considering incumbents' likely competitive responses to new entry.

The NPA test and weighing our duties

- 1.19 The NPA test informs our consideration of the impact on the Secretary of State's funds and the benefit of competition to rail users. These are important considerations in our decision-making, but the NPA test is not determinative as we must take **all** of our duties into account in our decision-making. This is why we already consider other relevant information to support our weighing of our wider duties, for example the impact on train performance.
- 1.20 The weight we place on particular duties is determined by the specifics of the application and the wider context at the time. We provide our Board members with information on relevant considerations under our duties, and guidance from the Executive as to how much weight should be given to particular considerations. For example, environmental factors, carbon emissions and sustainable development may be given more weight where rail has the potential to compete with air travel.

Abstraction

- 1.21 Some stakeholders have argued that our approach to demand forecasting systematically overstates the level of revenue abstraction. One stakeholder was of the view that open access does not abstract revenue at all over the medium and longer term. We last reviewed the [evidence of revenue generation and abstraction](#)

[from historical open access entry and expansion](#) in 2016. This review suggested our projections of abstraction and generation which are used in the NPA are reasonably accurate. The rail market has evolved since then and so we have decided to review the accuracy of our abstraction and generation forecasting again. We have recently commissioned this work and intend to publish the results. We will consider whether any changes are necessary when we have this additional evidence. We would expect to consult on any changes we propose to our guidance.

Generation and passenger benefits

- 1.22 The NPA ratio is the only quantified economic test which we routinely apply to all open access applications. The generation element of the NPA test encapsulates our duty to promote the use of the railway network in Great Britain for the carriage of passengers. Generation may also, by reflecting the impact of open access on fares and journey times, serve as an indirect proxy for the passenger benefits resulting from open access.
- 1.23 Alongside the quantitative NPA test, our assessment in the round considers a range of other evidence on the impact of new services. For example, our assessment may note improvements to regional connectivity and the associated local economic benefits or the provision of new direct services to previously unserved destinations.
- 1.24 We consider service quality proposals made by applicants, for example, proposed innovations in ticketing, seating or arrangements for on-train catering. However, such factors are given a relatively low weight in our decision-making, since we cannot enforce elements of the train service proposal that are not defined within the scope the track access contract we approve.

Value for money

- 1.25 As noted above, the generation element of the NPA test acts as an indirect proxy for the benefits of open access competition. Abstraction reflects the cost to the Secretary of State, in the sense that abstraction increases the future need for subsidy. We also consider this cost to government both in a relative (to generation) sense through the NPA test and in absolute terms by taking into account the total level of abstraction associated with the application.
- 1.26 While these are the component pieces of a consideration of value for money, we have not attempted to directly quantify value for money in our decision-making

other than where we are considering multiple applications in competition for the same capacity.

- 1.27 Our decision-making on non-competing applications has individually considered evidence on the availability of capacity, performance impacts, benefits to passengers and costs to the Secretary of State. In the absence of competing applications, the counterfactual to the open access proposal is no additional services and so it is not possible to compare the relative value of the propositions.
- 1.28 We consider quantified evidence on value for money when determining competing applications. This is because where it is not possible to approve all the competing applications for capacity we need to consider the relative merits of each application and consider which would offer the greater overall benefit. We also do this in situations where passenger and freight operators are in competition for the same capacity.

Our initial findings and next steps on the NPA test

- 1.29 We have found the NPA test continues to be a useful tool in weighing our duties to consider the impact on the Secretary of State's funds and the benefits to rail users to inform our open access decision-making. Our initial engagement with industry found that the test was well understood, and that open access operators valued their familiarity with the test.
- 1.30 Our discussions with stakeholders suggested that it would be helpful to provide more information about how the NPA test is used to inform our decision-making. This related in particular to what other factors we take into account and strengthening our description of the status of the test in our decisions. We are therefore planning to propose revisions to our NPA test guidance to explain more fully how the NPA test is used in our decision-making, how we weigh duties and our approach to competing applications. We plan to consult on our proposed revisions to our guidance.

Alternative forms of economic testing

BCRs

- 1.31 Cost benefit analysis is used across government to appraise policies, programmes and projects. We consider that if we were to develop a BCR assessment, analysis to support our open access decisions should follow an approach consistent with [HM Treasury's Green Book](#) and [DfT's Transport Analysis Guidance \(TAG\)](#).

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- 1.32 We consider that a BCR based on DfT's Transport Analysis Guidance has the potential to support our decision-making either in place of the NPA or as a supplement to it.
- 1.33 As with the NPA test, we would undertake passenger demand forecasting modelling using the industry standard approach of PDFH and MOIRA. Like the NPA, BCRs quantify new and faster journeys based on generation. A BCR would also quantify external benefits such as reduced road traffic and CO₂ impacts.
- 1.34 Our initial discussions with stakeholders did not find enthusiasm for routine use of BCRs as a key element of our approach to access decisions. Some stakeholders were worried about the potential to create additional barriers, while others felt that the background of BCRs as a public sector tool meant they were unlikely to sufficiently reflect private sector innovation. It was, nonetheless, acknowledged that a BCR would capture a wider range of factors than our current NPA test.

Establishing a threshold

- 1.35 If we were to adopt BCRs as a replacement for the NPA test, we would need to determine an appropriate threshold that we would expect applications to meet, and to consider how determinative that threshold will be in our decision-making.
- 1.36 The majority of DfT's approved spending has been on projects with a High (between 2:1 and 4:1) or Very High (more than 4:1) BCR. While this gives an indication of government's use of BCRs, some projects with lower BCRs are approved because government also considers wider policy objectives, value for money, commercial viability, affordability and achievability.
- 1.37 Given that we weigh a number of different duties (and not just those reflected by the NPA or a BCR), if we were to use BCRs, we would expect to adopt an indicative threshold rather than a strictly determinative one.

Quantifying value for money

- 1.38 A BCR based on DfT's TAG methodology would quantify more factors in monetised terms than our current NPA test. The formula would divide the net social, economic and environmental impacts by the net public accounts impact. For example, it could monetise the costs and benefits associated with reduced road congestion and the CO₂ associated with diesel trains. The cost associated with rolling stock would also be included.
- 1.39 A detailed BCR could also potentially include costs and benefits associated with use of capacity, train performance and local economic benefits. Further

development work is needed to determine whether this would be feasible and appropriate. We are cautious of introducing subjectivity which is then embedded into a quantified metric, or of introducing spurious accuracy into the assessment process at the expense of pace or administrative efficiency for applicants.

- 1.40 We consider that there is value in the (preferably monetised) quantification of the relative magnitude of benefits and costs, without necessarily completing a full BCR. Providing the ORR Board with details of the various inputs to a BCR would support them in deciding what weight should be given to the various factors in accordance with our duties. This monetisation of costs and benefits would enable the Board to weigh each factor, which could be more effective than being presented with a single BCR ratio.
- 1.41 We already quantify costs and benefits to support our Board's decision-making in some cases, most commonly in case of competing applications. We are minded to formalise our approach to this such that we routinely monetise costs and benefits for all open access applications.

Our initial findings and next steps on alternative forms of economic testing

- 1.42 A BCR would quantify more aspects of the benefits and costs of open access in monetised form than the NPA and could therefore be seen as offering a fuller reflection of our duties. However, this quantification would not absolve us of the need to weigh our duties in the round and ultimately to consider what is in the public interest. Like the NPA, a BCR would produce a ratio of benefits and costs with the expectation that we set an indicative threshold. Like the NPA, we consider that a BCR test would be indicative rather than determinative.
- 1.43 Adopting a BCR in place of the NPA could create some unpredictability in our decision-making because of the change in test and the need for operators to familiarise themselves with the new approach. Unless we chose to weigh our duties differently, adopting a BCR would not necessarily change the likelihood of an open access application being approved. We are therefore not minded to replace the NPA test with a BCR assessment currently.
- 1.44 We consider that there is value in quantifying the factors we consider without necessarily completing a full BCR. This would support our Board in weighing their duties and would allow the consideration and weighing of relevant factors. As noted above, we will continue to use comparative BCR ratios to inform our decision-making where multiple applications are competing for the same capacity.

- 1.45 We propose to undertake routine monetisation of benefits and costs associated with open access applications based on the DfT's TAG methodology. This would quantify user (lower fares, shorter journey times) and non-user (less traffic, lower total emission) benefits and costs (abstraction). These speak to our duties to promote the use of the rail network, promotion of competition for the benefit of rail users, to have regard to the effect on the environment of activities connected with the provision of railway services and the impact on the funds available to the Secretary of State.
- 1.46 We will use these monetised benefits and costs to supplement our decision-making and support the weighing of our duties, particularly where the NPA results are marginal. We intent to consult on this proposal before drafting revised guidance. Over time we plan to use these monetised benefits and costs to build an evidence base on the likely impact of using BCRs in order to minimise uncertainty should we wish to make greater use of them in the future.

Next steps

- 1.47 We plan to propose updates to our guidance on the NPA test and consult on these proposed revisions. The proposed revisions will include:
- a) Expanding the guidance to explain the role of economic testing in our decision-making and what other factors we consider in accordance with our duties.
 - b) Reiterate and clarify that the NPA test result as an indicative input in our decision-making, not a pass/fail.
 - c) We will also seek to address some technical issues raised by stakeholders.
- 1.48 We also propose to undertake routine monetisation of benefits and costs associated with open access applications based on the DfT's TAG methodology. We will use this to supplement our decision-making and support the weighing of our duties, particularly where the NPA results are marginal. We will consult on this proposal before drafting revised guidance. We plan to use these monetised benefits and costs to build an evidence base on the likely impact of using BCRs in order to minimise uncertainty should we wish to make greater use of them in the future.

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- 1.49 We have recently commissioned a review of forecasting of abstraction and generation and plan to publish the results. We will consider what further actions may be appropriate once we have this new evidence.
- 1.50 We will continue to update our stakeholders and our website as our work on this area develops. We already publish additional information on compliance with agreed industry processes. We will continue to monitor the wider open access market and the behaviours within industry.
- 1.51 We welcome feedback on our initial findings and next steps.

2. Project objectives and scope

- 2.1 This review is part of our regular cycle of reviewing our access policies. In planning the review, we intended to ensure that our decision-making is as timely, robust and efficient as possible, in accordance with our statutory duties.
- 2.2 The scope and timing of this work was adjusted in response to the request from the Minister of State for Rail in December 2023 for the Department of Transport, ORR and Network Rail to work together to reduce barriers to open access operators. The Minister asked that we review the NPA test and ensure that value for money is fully and appropriately considered when taking access decisions.
- 2.3 The Minister also asked for a review of unused access rights held by DfT contracted operators; options to incentivise the release of unused rights and for timescales for the consideration of open access applications to be agreed. We have supported the identification of unused rights, advised on incentives and worked with DfT and NR to agree timescales. The outcomes of these other workstreams will be reported separately, and we will continue to publish information on access decision-making on our website. These issues are not addressed further in this report.
- 2.4 This review considers the type of economic testing we undertake to inform our open access decision-making, and the policy framing of this economic testing. These workstreams were undertaken in parallel rather than sequentially.
- 2.5 The policy element of our review considered:
- a) The development of our NPA test and open access policy;
 - b) How we apply our duties, and can most clearly explain this;
 - c) Comparisons with the operation of the Economic Equilibrium Test (EET) in Europe;
 - d) Consideration of alternative policy options, including whether there was scope to not conduct economic testing in certain circumstances or whether the result could be used differently to inform our decision-making; and
 - e) Improvements in the way that we explain the role of economic testing in our decision-making, and in particular how to address the perception of our 0.3 to 1 generation to abstraction threshold as a ‘pass mark’.

2.6 Our review of our economic testing included:

- a) A review of previous work on the NPA test and the associated modelling;
- b) Consideration of how our duties inform our economic testing and subsequent decision-making. We considered in particular what bearing our duties may have on adopting a wider BCR and what factors would be considered;
- c) Consideration of what factors should be included in our evaluation of the impact on the Secretary of State's funds and value for money; and whether these factors should be quantified;
- d) A review of potential approaches to economic testing and value for money. This considered HMT Green Book guidance;
- e) Consideration of alternative approaches to economic testing to either replace or supplement the NPA test; and
- f) Initial consideration of improvements to the modelling underpinning the NPA test.

2.7 We welcome comments from industry and government colleagues on our findings and proposed next steps. Any proposed changes to our policy and guidance will be subject to a public consultation.

3. Context

- 3.1 There are currently three open access passenger operators on the GB mainline network:
- a) **Hull Trains** – Hull Trains is the original open access operator. It has been operating since 2000. It runs services from London to Beverley and Hull. Hull Trains has been part of First Group since 2003.
 - b) **Grand Central Trains** – Grand Central has been operating since 2007. It runs services from London to Bradford and London to Sunderland. Grand Central has been part of the Arriva Group since 2011.
 - c) **Lumo** – Lumo has been operating since 2021. It runs services from London to Edinburgh. Lumo is part of First Group.
- 3.2 An application from Grand Union Trains for London to Carmarthen services was approved in December 2022 and services are expected to start operating in December 2027. Another application from Grand Union Trains to run services from London to Stirling was approved in March 2024. Grand Union Trains is an independent company.
- 3.3 In the last ten years, we have determined ten new open access applications. Of these, we approved five and declined five. Network Rail opposed all but one of these applications, and DfT either opposed or did not respond to the consultation. Not all of the open access applications we approved have gone on to operate. This may reflect the challenges highlighted by our open access monitoring work which include procuring rolling stock, driver recruitment and the impact of the COVID-19 pandemic.

Table 3.1 Open Access applications results and decisions (2021-22 prices)

Date	Applicant	Route	NPA ratio	Abstraction	Outcome
Dec 2014	Great North Western Railway Company Ltd.	Blackpool North to London Euston	0.28:1	~£41m p.a.	Rejected
Aug 2015	Great North Western Railway Company Ltd.	Blackpool North to London Euston	0.30:1	~£25m p.a.	Approved

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Date	Applicant	Route	NPA ratio	Abstraction	Outcome
May 2016	Great North Eastern Railway Company Ltd.	Edinburgh Waverley to London King's Cross	0.41:1	~£159m p.a.	Rejected
May 2016	Great North Eastern Railway Company Ltd.	Cleethorpes/West Yorkshire to London King's Cross	0.37:1	~£53m p.a.	Rejected
May 2016	East Coast Trains Ltd. (FirstGroup)	Edinburgh Waverley to London King's Cross	0.81:1	~£29m p.a.	Approved
Jun 2018	Great North Western Railway Company Ltd.	Blackpool North to London Euston	0.30:1	~£15m p.a.	Approved
Aug 2018	Grand Southern (Alliance Rail Holdings)**	Southampton Central to London Waterloo	0.22:1	~£9m p.a.	Rejected
Jan 2021	Grand Union Trains Ltd.	London to Carmarthen (6 trains per day subset)	0.45:1	~£29m p.a., net of ICC	Rejected
Nov 2022	Grand Union Trains Ltd	London Paddington to Carmarthen	0.44:1	~£19m net of ICC	Approved
March 2024	Grant Union Trains Ltd	London Euston to Stirling	0.38:1	~24.4m p.a	Approved

ORR's access decision making

3.4 Our approval is required for all track access contracts between Network Rail and train operators. We apply our Railways Act 1993 Section 4 duties when determining track access applications. These require us to weigh relevant considerations, which in the case of open access applications, usually include the funds available to the Secretary of State, promotion of competition and train performance as well as performance and other factors.

3.5 The NPA test was developed in 2004 as a tool to understand the impact of an open access operator's service proposal on the incumbent franchise and therefore the Secretary of State. The NPA test is an important consideration in our open access decision making, but as illustrated by the table above, is often not determinative.

Open access market monitoring

- 3.6 In [December 2018](#) we announced that we would be monitoring the impact of open access and the competitive response to open access. We conduct research and engage directly with open access operators to produce annual monitoring reports.
- 3.7 Our [first report in February 2020](#) established a baseline which we have monitored over time. Our research uses complaints, delay compensation claims, passenger satisfaction and punctuality as proxies for service quality. We also monitor the age of rolling stock and level of fares.
- 3.8 Our monitoring has highlighted the benefits of open access. For passengers this has included competition on fares between open access and franchised operators. An [economic appraisal of the impact of open access operators in 2022](#) concluded that open access operators had been beneficial to the UK economy, and that this was particularly apparent for flows not already directly served by a franchised operator. Our 2023 report noted the particularly strong post-pandemic recovery for open access operators.
- 3.9 Our monitoring also considers challenges faced by open access operators. Our [2023 report](#) highlighted the following challenges:
- a) Uncertainty on rail reform and the risk this could pose to open access;
 - b) The track access application process, with concern expressed that it takes longer than 12 weeks for us to reach a decision. Some operators also reported that there was a discrepancy in the type of analysis required for open access applications and that required for franchised operators and suggest this creates an unlevel playing field;
 - c) The availability of rolling stock; and
 - d) Driver recruitment.
- 3.10 We will continue proportionate monitoring of the open access market.

Rail Reform

- 3.11 DfT has been developing a policy proposal to create Great British Railways, a combined infrastructure manager and franchise authority. In February 2024 DfT published a [draft Rail Reform Bill](#) along with the [government response](#) to the June

2022 [consultation on primary legislative changes required to deliver structural reform of the railways](#).

3.12 The Ministerial foreword in government response explained that:

We see an important role for open access in some areas, with improved connectivity and choice for passengers as key parts of rail reform. Open access operators can offer clear benefits to passengers in the regions that they serve through making use of spare capacity and providing more direct links that may not be offered by other services. We will continue to work with the Office of Rail and Road, Network Rail and wider industry to develop a sustainable position that balances benefits to passengers against fair and reasonable costs to taxpayers.

3.13 The elements of the draft Bill most relevant to open access policy are:

- a) A proposal for ORR to have an additional duty “to have regard to any access statement approved by the Secretary of State and published by the IRB”. The [explanatory notes](#) explain that “the purpose of this duty is to ensure that ORR gives appropriate weight to policy decisions made by the IRB regarding best use of the network”
- b) A proposal to amend ORR’s current duty “to promote competition in the provision of railway services for the benefit of users of railway services” by adding “so far as such competition does not unreasonably increase the cost to public funds of providing railway passenger services.”

3.14 The draft Bill does not include any further changes to ORR’s role in approving and directing track access contracts. ORR’s Competition Act functions are also unaffected.

3.15 We [responded to the consultation in July 2022](#), and explained:

We cannot confidently anticipate the impact of the proposed recasting of ORR’s duty to promote competition until we come to apply it to a decision.

The impact will depend on the duty’s exact wording and is likely to change over time, as the circumstances and priorities of funders evolve.

Furthermore, ORR already has duties requiring it to take into account funders’ guidance and the impact on the funds available to Secretary of State in our decision-making, thus the proposed addition to the competition duty is likely to make the existing framework more complex.

Ultimately, ORR decisions will continue to be independent judgements based on all our statutory duties. We also note that our Competition Act functions will not be affected by this change and will continue to apply. We understand stakeholders are likely to be concerned that the revised duty could make it less likely that ORR will approve or direct additional passenger open access services.

- 3.16 Although we have engaged with DfT, GBRTT and Network Rail as part of our policy development process, we have not taken any potential changes to government policy or legislation as a result of rail reform into account in our policy development or analysis as there is insufficient certainty to do so.
- 3.17 Wider legislative, structural and policy changes may require us to revisit our policies and approaches in the future.

4. ORR's current policies and approach

- 4.1 Our current policies on approving track access contracts for new competing services are set out in our [Review of Access Policy November 2010](#) and guidance on [how we conduct the NPA test](#).
- 4.2 This section explains what our current open access policy is and how it is applied. It also provides some background information on how that policy developed in the period since privatisation.

Current Policy

- 4.3 We have a long-standing policy of not approving access rights for new competing services, including open access services, where the primary impact and intention of the new service would be to abstract revenue from incumbent operators without compensating benefits. Compensating economic benefits must be beyond proposed or potential lower prices for existing customers. To assess this, we conduct the NPA test. If an application passes this test and is also accepted against our other standard criteria for considering new track access rights, then we would expect to approve the rights sought.
- 4.4 The test is applied in three circumstances:
- a) A new open access service which would compete with franchised services;
 - b) A new franchised service which would compete with an existing franchised service, where we would expect to focus the test on areas where the competing franchised services are operated on behalf of different funders or where for some other reason there are particular concerns over the impact on a funder's budget; and
 - c) A new service, which might be open access or franchised, which would compete with an existing open access service and which, if it caused the existing open access operator to withdraw from the market, could reduce overall competition on the network.
- 4.5 This report is primarily focused on the first circumstance for the application of the NPA test: where a new open access service would compete with a franchised

service. The other two circumstances: competition between different franchises and where a franchised service or a new open access service may compete with an existing open access service, remain important considerations. The protection of existing open access from abstraction is an important protection against a reduction in competition. We expect to consider these other circumstances of the NPA test more fully as part of future reviews of our guidance.

4.6 The NPA test comprises of five stages. The first stage uses industry tools to make an initial broad estimate of the likely level of revenue abstraction and generation. Stage two reviews that broad estimate in light of additional information provided by the proposing operator, the incumbent operator, and funders. The remaining stages provide further refinements based on benchmarking, consideration of the impact of the proposed new service over time, and other relevant factors.

4.7 The guidance explains that:

Having completed the five-stage process, we will then consider whether the proposed rights are primarily abstractive in nature. There will necessarily be a large degree of judgment involved in this decision. We will need to strike a balance between a number of our statutory duties, in particular to promote: the use of the railway network; competition for the benefit of rail users; whilst enabling persons providing railway services to plan with a reasonable degree of assurance and having regard to our duties in relation to funders.

4.8 We explain in our [guidance on the use of capacity](#) that:

In addition to applying the five-stage test we also consider our statutory duties, but generally we would not expect to approve applications with ratios of generation to abstraction below 0.3 to 1. Our experience is that net economic benefits are likely to diminish or not arise when the ratio is below that level.

4.9 Our guidance also sets out that we may decide to decline a track access application should we deem the absolute level of revenue abstraction to be too great. This gives us the ability to give greater weight to the impact on Secretary of State's funds than is implicit in the NPA test. This was given as one of the reasons for rejecting GNER's application to run services between Cleethorpes/West Yorkshire and London in May 2016, and the 2020 Grand Union application.

Infrastructure Cost Charge

4.10 As part of the 2018 periodic review final determination, we confirmed that we would levy additional charges on some open access operators in control period 6

(April 2019 to March 2024) to recover some of Network Rail's fixed network costs. This charge is a mark-up over directly incurred costs and is called an infrastructure cost charge (ICC). The ICC is deducted from the abstraction, and we consider it increases the likelihood of an open access application being granted.

$$NPA\ ratio = \frac{revenue\ generated}{revenue\ abstracted - ICC}$$

4.11 We confirmed the continuation of this policy in our 2023 periodic review final determination.

Background on the development of ORR's approach to the moderation of competition

- 4.12 At privatisation there was a concern at the potential scale of unrestricted inter-operator competition, and the impact that extensive open access competition with franchised services might have. In particular, there was a desire to avoid such possibilities being perceived as a significant business risk by franchise bidders, hence reducing the value of those bids and impacting on the Secretary of State's funds. In order to protect against this risk, the initial track access contracts (TACs) were approved by the then Rail Regulator with provisions providing contractual protection to the holder from on-rail competition. This was known as the Moderation of Competition policy.
- 4.13 There were various developments to the rail market between privatisation and 2004. These included increased specification in the services a franchise was obligated to operate, a reduction in the number of franchises (fewer franchise overlaps and opportunities for competition), and a decreased franchise duration (less potential for the services specified in a franchise to become out-of-sync to demand and create opportunities for Open Access competition).
- 4.14 As a result of these developments, the then Rail Regulator published a revised Moderation of Competition policy in 2004. This recognised the limited scope for on-rail competition to develop in the foreseeable future and largely brought an end to contractual protection from competition. Such contractual protection was not affected where it existed in then current contracts. It was also explained as only being appropriate in exceptional circumstances for new contracts (for example where it was linked to investment).

- 4.15 The Regulator set out the 5 stage assessment process that would be used in order to understand the revenue effects of new applications. That process was the basis of the NPA test that is used today.

Where there is clear evidence that revenue abstraction may be a material concern, the Regulator's assessment will also look specifically at whether the new competing services would be primarily abstractive of the revenue of existing operators. The expression 'primarily abstractive' is not intended to imply a rigid benchmark. The Regulator considers that such a test would be unrealistic, given the uncertainties about forecasting future revenue effects, and would not allow all relevant factors to be taken into account. Instead, the Regulator will consider whether the overall effect of approving the proposed rights is likely to attract sufficient new patronage to rail such that this could be considered the primary impact of the proposal. If an application passes this test and is also acceptable against the Regulator's usual criteria for considering new track access rights, the Regulator would expect to approve the rights sought.

CMA Passenger rail services competition policy project

- 4.16 In 2015 the Competition and Markets Authority (CMA) started a project to consider [how the industry framework could be adapted to promote more in-market competition](#). We supported this work. The CMA noted that there was competition for the market through franchise bidding and some competition within the market as a result of overlapping franchises, but that open access operators accounted for less than 1% passenger rail miles.
- 4.17 The CMA identified a number of factors limiting in-market competition:
- a) Historic policy choices of the Strategic Rail Authority and later DfT to limit overlapping and parallel franchises;
 - b) Limited spare capacity on the network where there is passenger demand for services, and the extensiveness of the franchised services; and
 - c) ORR's statutory duties which included both the promotion of competition and the consideration of the funds available to the Secretary of State.
- 4.18 The CMA noted potential benefits associated with increased competition and the growth of open access. These included competitive fares, innovation and improved efficiency. The CMA also noted barriers including rolling stock and operational challenges.

4.19 The CMA proposed four principal options:

- a) Increasing the role of open access operators by amending track access charges so that open access operators would pay towards fixed infrastructure costs and also towards a universal service levy;
- b) Awarding franchises to two bidders rather than one;
- c) Designing franchises to overlap so that franchise holders would compete with each other; and
- d) Replacing the franchise system with a new system in which train operators would be given much greater freedom but provided with obligations, such as operating particular socially valuable services. The CMA report referred to this as “licensing”.

4.20 None of the options suggested by the CMA were ultimately adopted by the DfT. The ICC which was introduced in 2018 delivers part of the first option but without wider legislative and policy changes, or the creation of a universal service levy. The type of changes to the franchising regime envisioned by the other three options are for government to determine.

4.21 The three overarching factors that the CMA identified as limiting on-rail competition (franchise design, limited capacity and ORR’s statutory duties) remain similar today.

5. Issues

- 5.1 Our policy review and discussions with stakeholders have highlighted a number of issues which we have sought to address.

Consideration of value for money

- 5.2 We have a number of duties which speak to financial considerations when determining open access applications. These include value for money, the impact on the funds available to the Secretary of State and the benefit of competition to railway users.
- 5.3 We consider value for money and the total cost to government through the NPA test, absolute abstraction and by weighing these against wider benefits. Our access decision letters explain these considerations. Our guidance on the [statutory and contractual framework](#) and [making a track access application](#) explain the bearing of our duties on our decision-making. [Our guidance on the NPA](#) test is focused on the five stages of the NPA test and does not currently speak directly to value for money or affordability considerations. We plan to widen our NPA guidance to explain how we weigh our duties and the role the NPA plays in this.
- 5.4 We have previously used Net Present Value (NPV, see chapter 8 for details) calculations to inform our assessment relative merits of competing open access applications, for example in 2016 when there were several competing open access applications on the East Coast Mainline. We have also used these tools to compare the benefits of competing freight and passenger applications.
- 5.5 We have considered whether a wider BCR would be a suitable alternative or supplement to the NPA test. Rather than adopting a BCR, we propose to undertake routine monetisation of the benefits and costs associated with open access applications and use this to support the weighing of our duties.

Passenger benefits

- 5.6 The NPA ratio is the only quantitative measure which we routinely apply to all open access applications. The generation element of the NPA test encapsulates our duty to promote the use of the railway network in Great Britain for the carriage of passengers. Generation may also, by reflecting the impact of open access on fares and journey times, serve as an indirect proxy for the passenger benefits resulting from open access.

- 5.7 We also describe passenger benefits qualitatively to inform board decision-making.
- 5.8 Several open access operators highlighted service quality as a significant part of their offering. But the quantification of such factors would pose significant challenges, and we are cautious about placing weight on factors which cannot be reflected in a track access contract.

Benefit of competition

- 5.9 We have a duty to promote competition for the benefit of rail users.
- 5.10 Our wider market monitoring highlights that competition is of wider benefit to the railway, wider economy and to service users. We consider that the threat of competition is important in incentivising efficiency and service quality.
- 5.11 Open access operators have helped to provide innovative services for passengers and grow rail markets, often generating excellent passenger satisfaction scores. The additional competitive pressure generated by open access operators can also help improve the experience of passengers of franchised services.
- 5.12 The NPA test was developed to help inform our decision-making where there is a tension between our competition duty and our duty to consider the impact on the funds available to the Secretary of State. Our NPA test considers the specific benefits (generation) associated with an open access application. Revenue does not capture all of these beneficial impacts, but it is indicative of the value passengers put on the new services.

Decision-making

- 5.13 ORR's decision-making must accord with our duties, and be robust, evidence based and timely.
- 5.14 Open access applications can be contentious, and it is important in these cases that we demonstrate our reliance on evidence and the appropriate weighing of relevant our duties.
- 5.15 We are also mindful of ensuring that access decision-making is as timely as possible. We want to ensure that applicants understand the process for track

access applications and the basis of our decision-making. Transparency and as far as possible, predictability, are important in supporting investment decisions.

Constituting a threshold for economic testing

- 5.16 The NPA is an important input into our decision-making but is not the sole determinant as we weigh other factors in making our decision. We have therefore not formally set a strict threshold or ‘pass mark’ for the NPA test in our guidance.
- 5.17 Over time a precedent has been established that those applications with NPA results greater than our 0.3 to 1 generation to abstraction threshold are more likely to be approved, and those with a lower result are less likely to be approved. This is reflected in our [guidance on the use of capacity and](#) published decision letters. We think it could be helpful to explain this position within our NPA guidance.
- 5.18 We are not currently minded to amend the indicative threshold for the NPA test. If we were minded to rely on BCRs in our decision-making either an alternative or a supplement to the NPA test, we would need to describe a threshold for that test and the status of that threshold.

Passenger demand forecasting

- 5.19 We use established industry modelling to project passenger demand as part of the NPA test. This utilises the Passenger Demand Forecasting Handbook, MOIRA and MOIRA2.
- 5.20 MOIRA is a tool that models rail patronage and revenue based on changes to a timetable. The limitation of MOIRA is that it applies uplifts to existing patterns of transport demand. What it is less good at capturing are the transformative effects that applicants suggest new services can generate. For example, if a new service connects two places that did not previously have direct services and we think it will change commuting patterns and people’s choice of where to locate, then an analysis based on MOIRA might not capture that impact. We apply additional overlays to correct for these known issues with MOIRA.
- 5.21 We last reviewed the [evidence of revenue generation and abstraction from historical open access entry and expansion](#) in 2016. Since that time, new open access operations have started, and the rail market has changed. Some stakeholders challenged elements of the underlying modelling, and we think it is appropriate for us to revisit this issue. We are content that sufficient time has

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passed since the pandemic to undertake this work. We have recently commissioned this work and intend to publish the results.

6. International comparisons

- 6.1 European rail regulation includes the Economic Equilibrium Test (EET). This requires regulators, on request of a relevant party, to consider whether a new open access passenger service would compromise the economic equilibrium of a passenger service obligation (PSO).
- 6.2 This test is contained for international services within GB domestic legislation through The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2015. Additional details were contained in Implementing Regulation 2018/1795 which was revoked in Great Britain by the UK Parliament in March 2024, but which continues to apply in the EU.
- 6.3 We have never conducted the EET and consider it extremely unlikely that we would need to for an international operator because an international passenger operator would be unlikely to interact with a domestic franchise given the passport and customs controls required for UK/EU travel.
- 6.4 We were interested to draw on the experiences of EU regulators as the test has a similar purpose to our domestic NPA test.
- 6.5 Our research showed a variety of policy approaches in EU, but few examples of the test being conducted. It is interesting that despite the EU Commission's focus on liberalising rail markets, there is nonetheless a recognition that some member states may need to protect the value of their passenger service contracts. Conversely, some member states have chosen not to protect their PSO from competition.
- 6.6 Having considered the approach to the EET by European regulars, we noted:
- a) Some regulators explicitly weigh broader passenger benefits against the impact on the PSO. This is not dissimilar to the approach we take to weighing our duties, but in a different legislative context;
 - b) Regulators have found the EET provisions complicated to implement. We are aware from having previously prepared our own EET guidance that the provisions are more complicated than our NPA test;
 - c) Some regulators have considered the cumulative impact of several competing applications on a PSO and awarded access to the most beneficial proposal. When we were faced with competing open access applications in 2016, we

made use of NPV calculations in order to inform our assessment of public interest as defined by our duties in addition to the NPA test;

- d) Regulators have given examples of not conducting the EET because the open access services were known before the PSO contract was signed or of having policies not to conduct the EET within a certain period of the PSO expiry. We have considered whether there are similar opportunities to not conduct economic testing if proposals are made for the period after the expiry of a franchise, but concluded this would create significant challenges within the Great Britain context due to our presumption in favour of the continuation of access rights, and the cross-subsidy embedded in franchising; and
- e) Some EU governments did not implement the EET and do not limit competition. Others are now proposing to remove the directive. Our duties coupled with the government's franchising policy mean that we need to weigh the benefits of competition and the impact on the Secretary of State's funds.

6.7 A summary of the approach taken by selected EU member states is included at Annex 2.

7. Policy options on the use of economic testing

- 7.1 This chapter explains the outline policy options we considered and how they were evaluated. This policy work was developed in parallel with our consideration of the NPA and alternative forms of economic testing. The options have been subject to iteration as our thinking on the NPA and a wider BCR emerged.
- 7.2 As discussed in Annex 1, we developed evaluation criteria to support our review. The criteria we used are:
- a) Supports weighing of our duties, in particular: value for money, impact on Secretary of State funds and passenger benefits;
 - b) Predictable;
 - c) Transparent and explainable; and
 - d) Timely, efficient and proportionate.
- 7.3 We have also considered the expected impact of these policy ideas on the level of open access and the wider industry.

Options which limit our use of economic testing

- 7.4 This group of options reflects our exploration of whether it is always necessary and appropriate to conduct economic testing to inform our open access decision-making. It should be noted that we would still need to weigh all our relevant statutory duties in all cases, with or without the assistance of economic testing.
- 7.5 We are mindful of findings from our open access market monitoring which emphasise the importance to stakeholders of timely processes and decision making.

Option 1 – Economic testing will not be conducted if the proposed open access services are planned to start after the end of the current franchise, or within a certain period of its expiry

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- 7.6 This option was based on the policy in Italy where the Economic Equilibrium Test (EET) is not conducted if the open access services are due to start within a year of the expiration of the Public Service Obligation (PSO). However, the policy has never been used because the policy applies to intercity lines where there are currently no PSO operators.
- 7.7 This option acknowledges the potential for government to choose to commission different or fewer services as a result of the open access services. This option would require us to amend our policy on the presumption of the extension of access rights (contained in [our Guidance on the duration of track access agreements](#)). This would be a substantial change to the access policy framework.
- 7.8 The impact of this policy would be difficult to predict, but it could result in open access operators anticipating the end of a franchise and making applications to run services in its place. This could result in 'cherry picking' of profitable services by open access operators. It could also conversely result in government changing its approach to franchising to limit the impact of this policy. Our experience to date is that there is a significant gap between open access operators securing rights and starting operations. If this were to continue, it would be logical for open access operators to only apply to start operating after the end of a franchise.
- 7.9 Adopting this policy would be a fundamental shift towards a market oriented approach and away from considering the Secretary of State's funds. Not conducting economic testing would limit the evidence we would have to draw on when making our decisions. Given ORR's duties to consider factors including the impact on the Secretary of State funds and value for money, this would not be a useful policy for us to adopt.
- 7.10 While this option seems likely to support a much greater level of open access than currently, this could be at significant detriment to the franchise system which includes a degree of cross-subsidy between profitable and loss making services. It is not appropriate for us to pursue an option that runs counter to government policy. Such an option might require new mechanisms for greater cost recovery from open access services.

Supports
weighing of our
duties

This would limit the evidence we would be able to draw on in weighing or duties, and we do not consider this would allow us to appropriately discharge our duties.

Value for money - Low – limited evidence

Secretary of State funds – Low – limited evidence

Passenger benefit - Medium – although this element would not be weighed against cost considerations as in the NPA now, we could still consider passenger benefits when determining an open access application.

Predictable Low – This policy would require us to remove our presumption in favour of the continuation of rights which in itself creates uncertainty. In granting access rights we (and IMs) consider other factors such as performance. This would be harder to predict in the absence of continuation of rights. The market and government response to this substantial policy change is unpredictable. A ‘new normal’ for the development of train service proposals and for our decision-making would take time to emerge.

Transparent and explainable Medium – The policy itself would be simple to explain but the consequences would be unpredictable and potentially open to ‘gaming’ by both the private and public sectors.

Timely, efficient and proportionate Medium – Removing the NPA and presumption of the continuation of rights could speed up this element of our decision-making but the uncertainty could create additional friction such as through the challenge of modelling capacity and performance.

Expected policy impact The impact of this policy is unpredictable and would depend on the market and government responses. This policy could result in a much higher level of open access as franchises end. This could be at the expense of more profitable franchise services which are used by DfT’s franchising approach to cross-subsidise socially beneficial services. It is conceivable that DfT could adopt a policy to limit this negative impact. This policy would also require a change to ORR’s policy on continuation of rights. This would create significant uncertainty.

Summary This is not an appropriate policy for us to pursue as it limits the evidence we would have to draw on when considering the impact on Secretary of State funds and value for money. This could be an area to revisit if there were a substantial change in government policy on franchising.

Option 2 – Economic testing will not be conducted if relevant parties agree that the expected financial impact is acceptable

7.11 We considered whether we could revise our policy on the economic testing to enable the need to conduct the NPA or other economic testing to be set aside if relevant parties agree the likely impact on the Secretary of State’s funds or the value of the franchise is acceptable. The relevant parties would most likely be the Secretary of State and the impacted franchise operator. This could have the potential to speed up decision-making for some open access applications.

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- 7.12 As we have a duty to have regard to the funds available to the Secretary of State, this policy change would need to be in circumstances where the Secretary of State confirmed the level of abstraction (according to their own calculations) would be acceptable. A policy change like this could have particular relevance in cases where the DfT have expressed support for an open access application.
- 7.13 While this policy could in theory remove the requirement for us to conduct the economic test, DfT may be unwilling to commit to determining that the impact was acceptable without doing their own form of economic testing. Historically we have taken a more generous view of the impact of open access operations than DfT (possibly due to the additional overlays that we apply to MOIRA forecasting). It is plausible that some open access operators could find themselves engaging extensively with DfT, only to find themselves repeating the exercise with us should DfT not support the application or fail to reach a conclusion in a timescale acceptable to the applicant.
- 7.14 We have concluded that it risks introducing greater levels of uncertainty and potentially conflicting precedents as the view of different Secretaries of State can be expected to change over time.
- 7.15 We are already able to give less weight to the impact on the Secretary of State funds where the Secretary of State has said the level of abstraction is acceptable. This is not currently explained in our NPA guidance, and expanding our guidance so that this is clearer to applicants and funders is discussed as part of Option 7 below.

Criteria	Evaluation
Supports weighing of our duties	<p>An element of decision-making could potentially be outside of our control which is unlikely to be appropriate.</p> <p>Value for money – this policy would rely on the Secretary of State’s assessment in the event that the impact was felt to be acceptable. In other cases, we would conduct economic testing to determine the impact.</p> <p>Secretary of State funds – as above.</p> <p>Passenger benefit – the NPA test (and a BCR) monetise elements of passenger benefit through generation associated with new services. New passenger services are generally felt to be beneficial to passengers so this duty is currently weighed alongside the impact on the Secretary of State’s funds and value for money.</p>
Predictable	<p>Low – has the potential to create inconsistent precedents. Aspirant operators would not know how the Secretary of State would be likely to respond, or could find that the view of the Secretary of State or different</p>

	Secretaries of State changes over time. This undermines the value of independent regulatory decision-making, which is valued by the industry. Inconsistent precedents could erode the industry’s understanding of likely decision-making over time.
Transparent and explainable	Low – although the policy itself is simple, an element of the decision-making would be with the Secretary of State rather than us. We would not be able to hold the Secretary of State to account for timeliness or transparency.
Timely, efficient and proportionate	<p>Medium – this option would have the potential to speed up decision-making for some applications but this would be unpredictable. There is also a risk that our progression of economic testing could be delayed by prolonged Secretary of State consideration.</p> <p>Some stakeholders may be disappointed that we propose to continue to conduct economic testing where the Secretary of State has indicated they are content with potential abstraction. We think that it is important to retain robust, evidence based decision generally, but particularly in respect of open access decision-making as it can be a controversial and difficult area. In this context, we think that conducting economic testing is proportionate. We will continue to consider how to tighten processes for conducting economic testing to ensure that decision-making is as timely as possible.</p>
Expected policy impact	This could speed up decision-making for some open access applications. Although government have signalled policy interest in increasing open access, this position could change. Historically, DfT have supported open access in principle but expressed concerns about specific applications. If this were to continue, this policy may be infrequently utilised. We are most concerned by the potential for inconsistent precedents and the negative impact on independent regulation.
Summary	<p>This option would create uncertain precedents and unclear timescales for decision-making. It is not considered appropriate as ORR still needs to consider all its relevant duties, even in the absence of economic testing.</p> <p>As an alternative, we can already give less weight in our decision-making to the impact on Secretary of State funds in circumstances such as the Secretary of State indicating this was not a concern. We will consider explaining this in our guidance.</p>

Option 3 – Economic testing will not be conducted when a service is changed but there is not significant cumulative impact

7.16 We have considered whether it would be possible to amend the criteria for the test such that small changes to existing open access services could be excluded. It does not appear to be practical to implement due to the need to assess the impact of a change in order to exclude the application from the test. The process of considering whether a change (such as an additional stop) would materially impact

on the levels of abstraction (or indeed benefits) would amount to conducting the modelling associated with the NPA test.

- 7.17 We also consider that such a policy could be open to ‘gaming’ or the perception of gaming in the event operators were to introduce a series of small changes which were each individually insignificant, but taken together as a package would have been subject to economic testing.
- 7.18 This option has not been developed further.
- 7.19 We hope that other policy options, such as explaining more fully in our NPA guidance that the NPA is an input rather than the determining factor (Option 7) and making it clearer that there is not a strict ‘pass mark’ (Option 8), will help to reduce re-running of modelling for small scale applications. This would be a clarification of our existing policy.

Options to articulate ‘acceptable level’ of abstraction

Option 4 – Establish a floor below which abstraction is more likely to be acceptable

- 7.20 We considered whether it would be helpful to establish a floor for absolute abstraction and state that applications with lower levels of abstraction would be more likely to be approved.
- 7.21 Although this initially sounded simple to articulate and understand, we are concerned it could become unworkable when applied to successive applications. This is because multiple applications where the abstraction was below the floor could cumulatively result in a high overall level of abstraction. It could also potentially encourage operators to break down their intended services into multiple small applications, each which is individually below the floor.
- 7.22 We considered whether this could be remedied by articulating a floor over a set period of time, but considered that this could prove unfavourable to later applicants. We also note that this approach would not support a consideration of value for money. This option has not been developed further.

Option 5 – Establish a ceiling above which abstraction is unlikely to be acceptable

- 7.23 We considered whether it would be helpful to establish a ceiling for absolute abstraction and state that applications with higher levels of abstraction would be unlikely to be approved.
- 7.24 In common with Option 4, this option does not support a consideration of value for money. We think this option is particularly problematic in this regard as it could inappropriately discourage some applications which could provide benefits to rail users and the economy. It could also be perceived as not being supportive of open access applications.
- 7.25 This option has not been developed further.

Option 6 – Introduce a sliding scale in which a poor NPA (or BCR) ratio is permitted in cases of lower absolute abstraction

- 7.26 This option reflects a desire to simplify decision-making for smaller scale applications, including amended applications. However, in attempting to develop this option and consider how it could be used, we become concerned that it would add additional complexity and be harder for stakeholders to understand and predict. We are already able to weigh different factors in reaching our decisions.
- 7.27 This option has not been developed further.

Options to improve guidance and support decision-making

Option 7 – Revise our NPA guidance to more fully explain the role of the NPA test in our open access decision-making. This should include the approach we take to weighing our duties. This would reposition the NPA guidance so that it takes a wider approach to explaining open access decision-making, rather than just how the NPA test is conducted. The guidance will be clear and accessible to aspirant open access operators and investors, including more effective signposting towards information and guidance.

- 7.28 Our access guidance is divided into different modules. There is a specific guidance module which addresses the NPA test. This guidance describes the circumstances in which the test is conducted and the five stage process of the test. Our [Making an application \(for track access\)](#) guidance explains that we

consider every application on its merits and in accordance with our statutory duties.

- 7.29 This option would not change our policy, but seeks to ensure that is clear, accessible and signposted within a single document for the benefit of applicants. From our discussions with stakeholders, we think this is particularly important for aspirant open access operators and potential investors who are less familiar with access decision-making than established operators.

Role of economic testing

- 7.30 We think it would be helpful to provide more information on how economic testing is used to inform the weighing of our statutory duties. Industry participants are aware that we consider the result of the NPA test, and that we consider absolute abstraction to inform our consideration of value for money. Our access guidance and our decision letters explain that we weigh all our other relevant duties. Explaining these considerations more fully in our NPA guidance would provide additional clarity for new operators and investors.
- 7.31 ORR's guidance does not set a strict 'pass mark' for the NPA. The NPA test is not intended to be used as a strict pass/fail as it is an input into decision-making which takes account of other factors. Over time precedents have developed and it is broadly understood that applications with a ratio greater than 0.3 to 1 are more likely to be approved, and those with a ratio below this threshold are less likely to be approved. We think it would be helpful to explain this within our NPA guidance, and this is developed further in Option 8.

Passenger benefit

- 7.32 The NPA test uses generation as a proxy for passenger benefit. This is because the MOIRA modelling and the overlays we apply quantify new journeys and journey time savings. We also provide a narrative description and qualitative assessment of passenger benefits to support our board's decision-making.
- 7.33 We propose to further explain how benefits to passengers are reflected within the NPA test and how this is used in our decision-making in revised guidance which we will consult on.

Secretary of State's funds

- 7.34 In considering the impact on the Secretary of State's funds, we are mindful of the total impact on railway funders (represented by absolute abstraction) as well as wider value for money. The current NPA provides a simple ratio of benefits

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(generation) vs cost (abstraction) and therefore provides some indication of value for money. This is supplemented by consideration of absolute abstraction.

- 7.35 We take the views of consultees into account when determining track access contracts. The view of the Secretary of State is relevant (but not necessarily decisive) in our consideration of the impact on the Secretary of State’s funds. We also have a duty to have regard to guidance from the Secretary of State about railway services or other matters relating to railways. We weight these alongside other relevant duties.
- 7.36 Building on the discussion of Option 2, we think it could be helpful to clarify our policy to confirm that where the Secretary of State has confirmed the impact of an open access application is acceptable, that we will take this into consideration, just as we take the view of the Secretary of State into consideration when concerns about abstraction have been expressed.

Criteria	Evaluation
Supports weighing of our duties	<p>This policy would provide some additional information to applicants in our guidance about how the NPA is used in our decision-making and our approach to weighing our duties.</p> <p>We could also explain our approach in cases where the Secretary of State has indicated they are content with potential impact of abstraction. We would take account of the view of the Secretary of State without committing to a policy which would fetter our discretion and negatively impact on our regulatory independence.</p> <p>Value for money – As now, conducting economic testing allows transparent consideration of the value of a proposed service.</p> <p>Secretary of State funds – As now, conducting economic testing and considering absolute abstraction allows transparent consideration of these issues, and indicators how these are weighed against the benefit to passengers.</p> <p>Passenger benefit – As now, we would continue to assess passenger benefit through generation (captured by the NPA or wider BCR) as well as providing qualitative information about any other relevant passenger benefits.</p>
Predictable	<p>Medium – We hope that providing more information about ORR’s approach will support applicants understanding of the process.</p> <p>ORR’s economic testing is an important input into ORR’s open access decision-making but it is not the sole</p>

	<p>determinant. We weigh a range of different factors (beyond those assessed by the NPA or a BCR), and in marginal cases this can be impactful. This judgement rather than a mechanistic approach means there is a limit to how far ORR's decisions can be made highly predictable as some factors are weighed on a case by case basis and can be contextual. We think that it would be helpful to clarify how we take the views of the Secretary of State into account as it improves the understanding of applicants and consultees of how we make decisions in the round.</p>
Transparent and explainable	<p>High – Expanding our guidance on the NPA test so that it explains how the test is used in decision-making, and how it is weighed together with other factors (including the view of the Secretary of State) would aid transparency and understanding of our decision-making.</p> <p>The NPA guidance is focused on the mechanics of the test. We have other guidance which explains access decision-making more generally. We think it would be helpful to provide a single document which explains the inputs into our determination of open access applications.</p>
Timely, efficient and proportionate	<p>High – This option is a proportionate approach to clarify how we make decisions and ensure that stakeholders are well informed about this. Our intention is that the guidance should be accessible for applicants and investors.</p>
Expected policy impact	<p>We think this additional explanation of how we weigh our various duties, and specifically the impact on the Secretary of State's funds, in making decisions on open access applications will be helpful and informative to applicants. We do not think this additional clarification will have any impact on the likelihood of open access applications being approved. We intend that revisions to our guidance support aspirant open access operators in preparing applications and provide additional clarity for potential investors.</p>
Summary	<p>We are minded to provide additional information in our guidance to explain how we weigh our duties, and in particular, how we take into account the views of the Secretary of State on the level of abstraction. This will largely draw on existing guidance on track access decision-making. We will consult on updates to our guidance.</p>

Option 8 – Revise our guidance to reassert and clarify our policy position that the NPA test is an input into our decision-making rather than a pass/fail indicator.

7.37 We have not set a pass/fail mark for the NPA, but a 0.3 to 1 generation to abstraction threshold has emerged over time through the accumulation of decision-making and has been subsequently reflected in our [guidance on the use of capacity](#). The ratio is not included in our NPA guidance, and our The Moderation of Competition final conclusions (May 2004) said:

"The expression 'primarily abstractive' is not intended to imply a rigid benchmark. The Regulator considers that such a test would be unrealistic, given the uncertainties about forecasting future revenue effects, and would not allow all relevant factors to be taken into account. Instead, the Regulator will consider whether the overall effect of approving the proposed rights is likely to attract sufficient new patronage to rail such that this could be considered the primary impact of the proposal. If an application passes this test and is also acceptable against the Regulator's usual criteria for considering new track access rights, the Regulator would expect to approve the rights sought."

7.38 Nonetheless, the previous precedents have led to a strong presumption of 0.3 to 1 as a 'pass mark' for applications. While simple rules of thumb can be useful for those considering making open access applications, we are concerned that too strong a focus on a specific threshold distracts attention from the way the way the NPA test is used in our decision making i.e. that it is one factor we consider alongside others (including performance and absolute abstraction) as we weigh our duties.

7.39 A clear pass mark might also lead an excessive focus on 'passing' the test. Such an approach could incentivise parties to invest disproportionate analytical resources, particularly in instances where initial test results were marginal.

7.40 We intend to be clearer that the NPA test score is not the sole determining factor. We would like applicants to understand that because we weigh our duties and take all relevant factors into account, not just the NPA result. There have been examples of applications with higher score being rejected, and lower scores being approved.

Criteria	Evaluation
Supports weighing of our duties	Value for money – reasserting and explaining our judgement rather than adopting a pass/fail approach should support value for money considerations as it will explain current policy within the NPA guidance so it is easily accessible to applicants.

	<p>Secretary of State funds – as above, the weight given to the impact on the Secretary of State’s funds is context driven, and is informed by the level of absolute abstraction as well as the NPA ratio.</p> <p>Passenger benefit –the NPA test captures some elements of passenger benefits, particularly those associated with new or faster journeys. Some open access operators have suggested that this modelling does not fully capture the impact of new services and have also highlighted issues of service quality. We apply overlays to standard industry modelling to correct some known issues in the modelling. We also describe the passenger benefits to allow our board to take decisions in the round.</p>
Predicable	<p>Low – We exercise judgement in weighing our duties and there is an element of unpredictability for applicants.</p> <p>Setting a clear ‘pass mark’ could increase predictability in terms of those applications which are unlikely to pass. This could be at the detriment of applications which may not have a strong NPA but should nonetheless be subject to further consideration due to the wider social and economic value they deliver.</p> <p>A NPA score in excess of our 0.3 to 1 generation to abstraction threshold is insufficient to guarantee that an application will be approved because we consider other issues such as absolute abstraction and passenger benefit, as well as weighing our other duties.</p> <p>Adopting a clear line pass/fail would require a policy change – and this does not seem to support us in fully weighing all our relevant duties.</p> <p>The articulation of an indicative threshold would clarify the current position and explain that we exercise judgement in weighing our duties. Clarifying how the NPA test is used would help applicants to understand ORR’s decision-making and anticipate what other factors may be given particular weight. This recognises the complex judgements that we make in weighing our duties.</p>
Transparent and explainable	<p>Medium – There are two parts to consider: the inclusion of the approximate ratio in the NPA guidance (as it is not currently), and then how this threshold should be articulated and explained. Including an explanation of the accumulated precedent and the approximate ratio would add transparency, particular for applicants who are new to rail. It is our intention that our revised guidance is clear and informative to all those involved in open access applications, including investors.</p>
Timely and efficient	<p>Medium - It is ORR’s intention that reasserting the NPA test as an input into our decision-making, and scores of above or below the threshold being more or less likely to be approved will reduce the time and costs associated with repeat modelling runs.</p>
Expected policy impact	<p>We do not expect this improvement to our guidance to change the likelihood of us approving open access applications, but we hope that it will support small improvements in the speed of decision-making by reducing repeat modelling time. We intend for this policy to support more productive conversation about the impact of proposed services.</p>

Summary

We intend to consult on revised guidance which clarifies and explains that the 0.3 to 1 mark is an ‘indicative threshold’ and not determinative as we weigh all our relevant duties, not just those which are quantified by the NPA. This will include adding clarity about the factors we consider when declining applications that exceed the indicative threshold, and approving applications that do not.

Option 9 – Consider the appropriate threshold for economic testing and how this is articulated. For the NPA test, this would be whether 0.3 to 1 remains appropriate. For an alternative economic test, such as a BCR, a new threshold would need to be developed.

- 7.41 We have not set a formal threshold for the NPA test, but an indicative threshold of around 0.3 to 1 has emerged over time through the accumulation of precedents from our decision-making. There is strong perception, expectation and practice that the acceptable ratio is around this level. There are however examples of applications which exceeded this ratio which were nonetheless declined, and a recent example of an application slightly below this threshold which was nonetheless approved.
- 7.42 Our guidance says:
- Having completed this five stage process, we will then consider whether the proposed rights are primarily abstractive in nature. There will necessarily be a large degree of judgment involved in this decision. We will need to strike a balance between a number of our statutory duties, in particular to promote: the use of the railway network; competition for the benefit of rail users; whilst enabling persons providing railway services to plan with a reasonable degree of assurance and having regard to our duties in relation to funders*
- 7.43 It is open to us to review the indicative threshold that has emerged, including lowering or increasing it.
- 7.44 Any adjustment of the ratio would require us to clarify our policy intention in doing so. ORR’s view is that a ratio in the region of 0.3 to 1 is broadly appropriate, and this view appeared to be shared by stakeholders. We are not minded to give more or less weight to either the Secretary of State’s funds nor the benefit to passengers from competition that we do currently.
- 7.45 If were to seek to amend the threshold, we could find ourselves adopting a stronger line on that revised threshold. This would be a move away from our

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current approach whereby the NPA is an input into our decision-making rather than a definitive indicator. We would need to ensure that we were clear on the status of any amended threshold in our decision-making process, and how it is considered alongside other relevant duties

Criteria	Evaluation
Supports weighing of our duties	<p>Value for money – adjusting the NPA ratio would change the emphasis between the impact on the Secretary of State’s funds (abstraction) and benefits to passengers (generation). The NPA ratio is an important element in considering value for money, but other factors are also relevant.</p> <p>Secretary of State funds – the NPA ratio is considered alongside absolute abstraction when we consider the impact on the Secretary of State’s funds. In very general terms, a higher ratio (for example 0.5 to 1) would place a greater emphasis on the Secretary of State’s funds, whereas a lower ratio would reduce the emphasis on the Secretary of State’s funds.</p> <p>Passenger benefit – some elements of passenger benefit are captured by the NPA test, but not all. Some passenger benefits are better quantified by alternative tests such as the BCR or may necessarily be qualitative or matters of judgment. In general terms, a higher ratio which increased weighting on the Secretary of State’s funds would conversely de-emphasise the passenger benefit of new services.</p>
Predicable	<p>Low – The impact of adjusting the threshold is unpredictable. While we might expect that a lower indicative threshold could result in more applications, we do not know what proportion of potential applications are suppressed by the current threshold. A higher threshold could reduce the number of applications.</p> <p>As ORR’s decision-making is informed by but not determined by the threshold, the impact on the proportion or absolute number of applications which are ultimately approved is also unpredictable.</p>
Transparent and explainable	<p>Medium – We currently consider 0.3 to 1 to be appropriate. We would need to consider and explain what our policy intention would be in adjusting the ratio.</p> <p>Revising the ratio may require a less ambiguous articulation. This could be seen to increase transparency. However as the NPA test is one input into our decision-making rather than the single determining factor, it would be important to explain this. A more helpful approach maybe for us to more clearly explain the role of economic testing in our decision-making, and how it is weighed together with other factors.</p> <p>Our NPA guidance does not currently explain the indicative threshold of 0.3 to 1. This is understood by existing industry participants, and it would be helpful to articulate this in the NPA guidance for those considering entering or investing in the open access the rail market.</p>

Timely and efficient	Low – Once the policy work had been completed and the new policy had settled, we expect that there would be no impact on the time taken to conclude open access decisions. However adjusting the indicative ratio (either up or down) is likely to be highly contested and review significant industry and funder input and analysis.
Expected policy impact	Setting a lower threshold than 0.3 to 1 may increase the number of open access applications approved but the impact is difficult to predict as we do not know the extent to which the current policy is having a suppression effect. We would likewise expect that setting a threshold of higher than 0.3 to 1 could reduce the number of open access application as it would set a higher barrier and potentially cause operators to make different judgments about profitability. The ultimate impact on the number of approved open access applications is difficult to predict as the NPA ratio is not the sole determining factor.
Summary	<p>We consider that the current indicative threshold of 0.3 to 1 is appropriate, and we have understood from our initial discussions with stakeholders that this view accepted. We are not minded to pursue a policy intended to either increase or decrease the likelihood of open access applications being accepted.</p> <p>We exercise judgement in weighing our duties. While it would be helpful for us to articulate the indicative ratio, we do not think it would be helpful to adopt an absolute approach to the required threshold as this would unhelpfully fetter our discretion to weigh up all relevant duties.</p>

7.46 If we were minded to develop a different economic test, we would need to consider whether to set a threshold, how flexible that threshold might be and how it can be best communicated to applicants. This would be likely to be a substantial piece of policy work that will require detailed engagement with funders, franchise operators and open access operators.

7.47 If we were to adopt a BCR approach, we consider it would be appropriate to base on approach on DfT’s Transport Analysis Guidance. Although we are not proposing to adopt BCRs, we concluded as part of our considerations that this approach would require an indicative rather than a determinative threshold. Given that there is an existing approach to BCRs, we consider that any threshold we considered would likely to be informed by this. While previous transport decisions provide an indication of what return on investment government expects, there are nonetheless cases where projects have been approved by relatively low BCRs or have not been approved despite strong BCRs. DfT and wider government uses BCRs as tool to inform decision-making, but the BCR ratio is not necessarily determinative and there are cases where wider policy objectives such as commercial viability, financial affordability or achievability are given greater weight.

7.48 As discussed in Chapter 8, we think that routinely monetising the costs and benefits associated with open access applications could be a useful input into our decision-making, particularly when the NPA test result is marginal. We already do this for competing applications. We expect to consult on the principle of formalising this approach.

Other policy issues that could be considered in future

- 7.49 **Charges** – We have not considered charges as part of this work on the NPA, but we note that the introduction of the ICC improves NPA ratios. Several stakeholders commented on the possible role of charges in supporting more open access operations. The AMRs provide for a charging structure based on costs directly incurred. If government were minded to pursue significantly more competition in rail, it may be worth exploring options such as prices which reflect demand.
- 7.50 **Presumption in favour of the continuity of rights** – We have a presumption in favour of the continuation of access rights. There are mechanisms under the Network Code for operators to make a case for better use of rights owned by another operator, but these have been very rarely used. Continuity of rights is intended to support stability and return of investment. However this approach also means that once services are established by one operator, it is difficult for others to enter that market. Changing this policy would require a substantial re-think of the contractual and regulatory framework.
- 7.51 **Best use of capacity** – The overarching principle for capacity allocation is that an infrastructure manager should sell available capacity. This is tempered only by the application of our duties when determining access applications. The infrastructure manager undertakes a reactive process for capacity allocation. A more proactive approach to capacity allocation (for example as anticipated as part of the GBR Access & Use Policy) could enable upfront consideration of best use, and depending on the policies it enacts, could potentially support the allocation of capacity specifically for open access operators.
- 7.52 **Creation of windows of opportunity** - If so minded, DfT could consider specifically creating opportunities for open access applications when developing the franchise procurement programme. Such a programme would likely need to be a number of years in the planning and implementation.
- 7.53 **Reduction in access rights held by franchised train operators** – DfT have already commenced a process of requiring their franchised train operators to

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surrender unused access rights. As well as continuing this process, if so minded, DfT could consider whether there are services which do not add value either in generating revenue or social outcomes. This would free up further capacity for potential use by open access or freight operators.

8. Alternative forms of economic testing

Introduction

- 8.1 As noted in Chapter 2, a core element of our brief was to consider alternatives to the NPA test which offered, *“to ensure that value for money is fully and appropriately considered when making access decisions”*.
- 8.2 As explained in Chapter 4, the NPA test:
- a) is the only part of our overall approach to applications which involves routine/mechanistic quantification; and
 - b) provides only an initial screen to identify those services which we are unlikely to approve, providing a de facto ‘necessary but not sufficient’ condition for granting access.
- 8.3 In this section we discuss the use of quantified measures which could be used to supplement or potentially supplant the NPA test.
- 8.4 NPA has the advantage of being a relatively simple process that does not require more outputs than changes in revenue. However it does create a risk that an application may be rejected without fully taking all of the benefits of a new service into account.

Cost benefit analysis – overview

- 8.5 Cost Benefit Analysis (CBA) is widely used across government as a means of appraising policies, programmes, and projects. CBA increasingly involves the presentation of as many impacts as possible in monetary terms.
- 8.6 The primary advantages of the use of quantified CBAs include objectivity and transparency. Appraising multiple projects on the same basis, including component elements and timeframe, can facilitate comparability.
- 8.7 Set against this, decision makers may in some instances face considerable challenges in assigning monetary values to all costs and benefits. A fully quantified CBA may in some instances entail significant time and resource commitments. Further risks and downsides may include a potential ‘quantification trap’ whereby

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focusing on point estimates or even ranges of CBA estimates, can risk overstatement of the certainty of calculations¹.

- 8.8 Detailed guidance on CBA is provided through [HM Treasury's Green Book](#) and [DfT's Transport Analysis Guidance \(TAG\)](#).
- 8.9 The BCR is a widely used metric used in reporting CBA results. A BCR is typically calculated by dividing a monetary estimate of the *net* benefits (positive impacts minus negative impacts), of a project, by the outlay by government. BCR calculations facilitate comparisons between, and ranking of, projects in contexts where underlying budgets are constrained. A BCR is analogous to, in the private sector, a [profitability index](#). BCRs are most commonly calculated on a multi-year/present value basis.
- 8.10 The two sets of guidance referenced above describe how monetisable benefits and costs can be calculated within a number of categories. Within TAG, the key elements of the CBA/BCR proforma are as summarised below. A BCR typically calculates the ratio of net socio-economic impacts of a project to its net impact on the financial position of the relevant government department(s). Within DfT's TAG this means:
- a) Numerator - social, economic, and environmental impact (including noise; local air quality; greenhouse gases; journey quality; passenger journey times; and the impact on business), plus the impact on indirect tax revenues; and
 - b) Denominator – impact on the transport budget.
- 8.11 Other things being equal, a higher BCR strengthens the case for proposed spending to be approved by government. Whilst we are not aware of any published 'bright lines' used by government as thresholds against which to measure BCRs, data published by DfT [regarding past decisions](#) show that transport spending, across all modes, has in the past been most often approved with BCR ratios in excess of 2.0, i.e. falling into at least a 'high' value for money category.

¹ See e.g. *Transport For Humans*, 2021, <https://www.transportforhumans.com/> for a discussion of the quantification trap. See also *Thinking, Fast and Slow* (2011) for a discussion of cognitive biases themed 'What You See Is All There is' (WYSIATI).

Application to our open access decisions - introduction

- 8.12 The NPA ratio is in effect a very simple form of BCR, which measures the ratio of one measure of 'benefit', namely revenue generation, to a key form of 'cost', namely abstraction. Generation may, by reflecting the impact of open access on fares and journey times, serve as an indirect proxy for the passenger benefits resulting from open access, but we nonetheless recognise that the NPA test does monetise these explicitly. A fuller CBA applied to open access decisions could more routinely quantify the social, environmental, and economic impact of open access.
- 8.13 We have in the past, notably in [our May 2016 decision regarding a series of applications for access to the East Coast Main Line \(ECML\)](#), carried out what we termed 'Net Present (Social) Value' (NPV) calculations in order to inform our ranking of multiple applications which had passed the NPA test. We did follow this approach recognising a need for greater scrutiny, and the more difficult decisions that we faced, in instances where multiple applications had passed the NPA test.
- 8.14 These NPV calculations estimated the **net** change in societal welfare arising from new services, using a similar list of constituent parts to that outlined at paragraph 10 above. Our NPV calculations treated abstraction neutrally, as simply a transfer between two parties rather than a net gain or loss to society.
- 8.15 We could in theory at the time of our May 2016 decision have translated our NPV results into a BCR using the formulation summarised at paragraph 8.10 above, though we did not do so.

Using CBA to supplement or supplant the NPA test - issues

- 8.16 The paragraphs below summarise some of our key considerations.
- 8.17 A CBA for open access would follow the list of components summarised at paragraph 8.10 above. Any BCR which we were to calculate in an open access context would similarly measure the ratio of net socio-economic impacts of an application to its net impact on the DfT's financial position.
- 8.18 As with our NPA test, revenue abstraction would represent the principal component of any BCRs denominator, i.e., the impact on the DfT's financial provision, reflecting our duty to have regard to public funds.

8.19 The BCR's numerator would contain more elements than under the NPA test. Its key components would be as listed in the numbered bullet points below. All of these elements reflect our statutory duties and are factors that our decisions currently take account of, whether through the NPA test or, more often, our wider assessment:

- a) Impact on business (open access operators) – the numerator of our BCR would include both, as a positive item, the revenue impact of open access (generation and abstraction combined) and, as a negative item, the cost impact in terms of the additional staff and rolling stock costs incurred as a result of the new services;
- b) Impact on rail users - we would estimate time savings and fares benefits accruing to passengers using standard TAG parameters where applicable; and
- c) Impact on non-users:
 - i. We would estimate the road congestion and environmental benefits arising from reduced road travel, using standard TAG parameters; and
 - ii. We would estimate the change in indirect tax revenues arising from the application.
- d) We might also consider the case for the inclusion of further items within our estimates, including monetised estimates of the impacts of open access on:
 - i. Rail performance – the impact of applications on rail performance is a standard part of our approach to assessing open access applications, although it is not included within the NPA test. It is possible that a quantification of such effects could form a part of any BCRs that we estimated. The methods required to quantify the social welfare impacts of performance are relatively well established within e.g. the PDFH and Schedules 4 and 8;
 - ii. Rail capacity – it was argued to us during our stakeholder engagement that, where the network is operating close to capacity, any CBA of new access rights should take into account the associated opportunity costs. Stakeholders acknowledged, however, the practical difficulties inherent in measuring such costs; and

iii. Local economies – open access applicants have over time argued that our decisions should take into account the wider impact of open access. The monetary value of such benefits can be potentially significant, however they:

- May not be ‘additive’ from a macro perspective, in the sense that that they may have the effect of moving economic activity round the country rather than generating it;
- Are not a standard part of transport appraisal, at least for non-transformational change. They are not included in the ‘core’ benefits within TAG; and
- Do not in our view map clearly to those of our statutory duties which have been the focus of our previous decisions.

8.20 We would on balance therefore be unlikely to treat such effects as sitting within any BCR metric, though it is possible that they might form part of the broader strategic case.

8.21 We do not consider that a BCR calculated on the basis of items (a) to (c) inclusive in the previous paragraph need have very significant resource applications for us or for other stakeholders. None would require a new standalone modelling exercise that was on a par, in resource terms, with the demand forecasting exercise which we already undertake as part of the NPA test. The inclusion of items within category (d) would, however, be more resource intensive and/or challenging.

8.22 A key issue for the use of BCR calculations in open access policy would be the setting of a threshold below which, analogous to our current NPA test there, might be a presumption of denying or approving access. Such a threshold could be set with reference to BCR estimates calculated for other rail, or wider transport, projects, and for historic open access applications. Since the application of BCRs would be a new approach to open access policy, analogous to our earliest open access decisions carried out using the NPA test, it would not be appropriate for us to immediately publish pass/fail BCR thresholds at outset, pending the accumulation of greater experience. This would lead to a period of significant uncertainty for industry participants. Primarily as a result of uncertainty of this kind, our stakeholder engagement revealed no support within industry for a BCR approach that replaced the NPA test.

- 8.23 We have not attempted an extensive review of the BCRs that would have been calculated for past access applications had we adopted this approach at that time. During our stakeholder review we shared some indicative calculations derived from the NPV estimates. This exercise showed a degree of unpredictability in the relationship between NPA and BCR estimates, with considerable variation in BCRs for applications with similar NPA results, depending on variables including the underlying profitability of the open access service.
- 8.24 The cost benefit analysis commissioned as part of the [CMA's 2016 competition policy project](#) included an [impact assessment](#) (e.g. see Tables 40-42) from which it is possible to derive implied BCRs, using the general formulation summarised at paragraph 8.10 above. The 'central case' results in this analysis, averaged across all three routes which were assessed by Arup Oxera (East Coast; West Coast; and Great Western), imply BCRs which, according to our calculations:
- a) exhibit considerable variation, from 1.5 for Great Western to 9.5 for the West Coast, showing the importance of case-by-case assessment;
 - b) average out at 3.2, i.e. comfortably within the DfT's 'high value for money' category per the [published guidance](#) referenced above; and
 - c) are crucially dependent on the PSO levy which was at the time proposed by the CMA, and which was the subject of industry consultation during the late 2010s². Without a PSO levy, the average BCRs referenced in the previous paragraphs would range from 1.3 to 1.8, with an average of 1.6.

Using CBA to supplement or supplant the NPA test – summary and findings

- 8.25 Returning to the evaluation criteria set out in Annex 1, we have considered the merits of role for BCR calculations in our assessment of access applications.
- a) **ORR's duties:** A BCR test would be significantly more comprehensive than the NPA test in terms of its ability to provide us with a single monetised measure of multiple statutory duties. Set against this, there are a number of reasons for caution:
 - (i) Under the status quo, our full assessment of open access applications already takes into account, albeit not in a mechanistic, and not always

² See e.g. <https://assets.publishing.service.gov.uk/media/5acb424c40f0b64ff0e69319/putting-passengers-at-the-heart-of-the-railway-supporting-sustainable-competition.pdf>

monetised, fashion, a number of the candidate factors for inclusion within a BCR. As noted above, some potentially relevant considerations, such as local economic impacts, would be non-standard from a BCR perspective.

- (ii) It would not be appropriate for us to consider the results of a BCR test as, alone, providing sufficient (rather than necessary) evidence that we should grant access to an aspirant open access operator. Such an approach would risk granting access to applications which generated unacceptable amounts of absolute abstraction. We would therefore only be able to use BCR results as a means of informing our overall judgement rather than determining it.
- (iii) Returning to the drivers of this review, the calculation of BCR estimates would not in itself promote on-rail competition. The promotion of competition would depend on the results of our BCR calculations and, crucially, the threshold that we set for 'passing' a BCR test. Any such promotion of competition would mean an implicit rebalancing of the weight that we place on our duties to promote the interests of passengers on the one hand and taxpayers on the other. Such a rebalancing could relatively easily be carried out without the calculation of BCRs, most obviously by adjusting our NPA threshold downwards.

- b) **Predictability and transparency** – the uncertainty associated with a new test was unattractive to all of the potential open access operators who we consulted during our stakeholder review.
- c) **Timeliness, efficiency, and proportionality** – The additional time and resource requirements involved in the calculation of a number of elements of a BCR would in our view be relatively modest given that the NPA test already requires us to expend time and resources in demand forecasting exercises. Some would, however, be more challenging.

8.26 In summary, we do not believe that the potential advantages of a BCR are sufficient to immediately justify, particularly in the light of the loss of certainty and transparency that such a change would entail, its use as the primary determinant of our access decisions.

8.27 Our preferred approach is to retain the NPA test in its current formulation and with our current indicative threshold of 0.3 used in the way described in previous chapters.

8.28 We intend, however, to begin to support our decision through routinely arriving at monetised estimates of the benefits of access applications, in addition to their costs, as a matter of course. The components of these calculations will include some or all of the elements to those listed at paragraph 8.19 above. This will be provided with quantified evidence which will speak to our duties to:

- a) promote the use of the railway network;
- b) promote competition in the provision of railway services for the benefit of users of railway services;
- c) have regard to the effect on the environment of activities connected with the provision of railway services; and
- d) have regard to the funds available to the Secretary of State.

8.29 Such analysis will enable us to build up an evidence base with which to better inform the balance of our duties particularly in the cases where the NPA test result is marginal and/or where we have received competing applications. As time goes by, the availability of a body of evidence on the monetised costs and benefits of open access would reduce the level of uncertainty associated with BCR's as described in the preceding paragraphs and perhaps allow us to put more weight on such indicators in the future. We plan to consult with industry on this proposal.

9. Stakeholder engagement

- 9.1 We engaged with stakeholders to inform our options development. Although we sought a variety of views, this engagement was an initial step and we have not spoken to all interested parties. We therefore welcome feedback on this report, and will consult on our proposals.
- 9.2 The stakeholders we engaged with included current open access operators, aspirant open access operators, Network Rail and the GBR Transition Team and government. This built on the discussions at the recent open access summit convened by the Rail Minister.
- 9.3 Our initial engagement included 1:1 discussions with individual stakeholders to capture some of the business specific issues, detail and nuance which are challenging in group sessions, and a wider group discussion with train operators facilitated by Rail Partners. We used these sessions to:
- a) Gather industry feedback on our initial options. We wanted to understand stakeholder perspective to support our judgment on the merits of alternative proposals;
 - b) Seek further information on any concerns or issues that we had not sought to address (or not addressed sufficiently); and
 - c) Ensure that stakeholders understood our review and the likely timescales for any changes.
- 9.4 As an independent regulator, it is important that our policy-making process is transparent, evidence-based and accessible. We will therefore conduct a public consultation and share wider communications so that stakeholders we may not have engaged with have the opportunity understand and contribute to our policy process.

Key messages we shared

- 9.5 We weigh our Railways Act 1993 Section 4 duties when making decisions about open access applications. These include considering the benefits of competition, improving passenger services and having regards to the funds available to the Secretary of State.

- 9.6 The NPA test is an input in our decision-making process – it is not the sole determinant because we need to consider all our relevant duties, not just those quantified by the NPA test.
- 9.7 An alternative test, such as a wider BCR could likewise be an input in our decision-making, and not the sole determinant. A wider BCR could perhaps be given greater weight than the NPA, because it includes more factors. A BCR could also be used as a supplement to the NPA rather than a replacement.
- 9.8 We have considered options for a BCR, and if we were to develop this proposal, we consider that a BCR based on DfT’s Transport Analysis Guidance would be most appropriate. There would need to be further work on the formulation of the BCR and what an appropriate threshold would be.
- 9.9 Early in our stakeholder engagement, we thought that a BCR would require more data inputs than the NPA. We were concerned that this would require more effort for industry and us. We were keen to understand if this would be good use of resource. As our work progressed we concluded that the inputs and work required to produce a BCR instead of the NPA would be marginal.
- 9.10 We have considered policy options for the trigger and use of the NPA test. The application of our duties and our desire not to disrupt the franchising model have constrained how radical the options we have progressed are. We are minded to reiterate the indicative rather than determinative nature of the ratio and more clearly articulate how we weigh other factors alongside NPA.
- 9.11 Our research shows that there is benefit to competition on the railway. There benefits accrue in terms of the new services themselves, but we also think that the ‘threat of competition’ is important.
- 9.12 We want to engage with operators and aspirant operators at an early stage in a policy making process. We value industry’s perspectives.
- 9.13 We will conduct a public consultation on any proposed changes to our policies.

What we heard from stakeholders

- 9.14 We are grateful to those who took the time to share their perspective with us. Stakeholder expressed a range of views which we have sought to summarise:
- a) Stakeholders valued ORR’s independence and recognised that our decision-making based on our duties;

b) NPA test:

- (i) We did not hear a strong push to move away from NPA. Although some stakeholders don't believe the impact of abstraction is sustained over the long term, it was nonetheless acknowledged that we have a duty to consider impact on Secretary of State funds;
- (ii) There is a desire to improve underlying modelling. Issues including suppressed demand, gravity model, elasticity, the ability to forecast the impact of unusually timed services, the accuracy of the Passenger Demand Forecasting Handbook (PDFH), station choice model, time horizons and new stations were raised;
- (iii) Stakeholders saw benefit in NPA being simple and well known; operators feel they are able to anticipate results;
- (iv) There was support for reiterating and clarifying the NPA result as input into our decision-making rather than a strict pass/fail at 0.3 to 1;
- (v) Operators seemed to feel that the indicative 0.3 to 1 ratio was reasonable, with several highlighting the importance of open access operators being able to demonstrate they are growing the market and bringing benefits;
- (vi) A number of stakeholders (particularly those who challenged the underlying modelling) felt that there would be value in reviewing past results; and
- (vii) Some operators would like to see us make greater use of stage 3 (benchmarking) of the NPA test.

c) Using a BCR based on DfT's Transport Analysis Guidance:

- (i) Some concerns about disruption and uncertainty associated with change of test;
- (ii) Recognised a BCR could monetise wider benefits and costs – for example where private sector picking costs like purchase of rolling stock;
- (iii) Some operators were concerned that the application of a very 'public sector' model did not chime well with private sector innovation; and

- (iv) We did not detect much enthusiasm for a change. In response to the possibility of using a BCR as a supplement to NPA, some stakeholders saw it as an additional possibility of demonstrating the value of their proposition (perhaps where the NPA result had been poor) but others felt it would be an additional barrier.
- d) Policy and guidance:
- (i) Strong support for reiterating the indicative rather than determinative status of the NPA test result, rather than a pass/fail;
 - (ii) It would be helpful for guidance explain how we consider other factors (such as absolute abstraction, passenger benefits, service quality and performance) alongside NPA. There was acknowledgement and support for us using our judgment on these issues;
 - (iii) Any review of the guidance should address issues with underlying modelling;
 - (iv) Some stakeholders were keen for us to take service quality and innovation into account in our decision-making. It was recognised that we are cautious about placing too great a weight on factors which cannot be guaranteed by a track access contract; and
 - (v) Importance of guidance being understandable by investors.
- e) We also heard a number of views on the potential for changes to the charging framework to support open access, and in particular that the ICC helps open access both in terms of the NPA test result but also in terms of perception; and
- f) We heard that there is frustration with Network Rail's pre-application process. Stakeholders reported that Network Rail take too long to conduct their analysis.

Responding to stakeholder messages

9.15 In response to stakeholder queries on the underlying modelling for the NPA test we have already commissioned a review of the forecasting of generation and abstraction. This will be an update of the 2016 report. We will publish the report and determine any further actions at that time. If we are minded to make changes, we will consult on our proposals.

9.16 We will review our guidance on the NPA test and consult on our proposals. This will include:

- a) Improving the explanation of how we weigh other factors such as passenger benefit and absolute abstraction;
- b) Reiteration and clarification of the status of the 0.3 to 1 ratio such that it is clear that it is not an absolute requirement. We will explain that while an application with a ratio that exceeds 0.3 to 1 is more likely to be approved, the consideration of other factors means that an application with a ratio of slightly less than 0.3 to 1 could still be approved; and
- c) Ensuring that the guidance is understandable by those less familiar with railway processes and decision-making, particularly investors.

9.17 We do not intend to revisit the 0.3 to 1 ratio at this time as we consider this strikes the right balance, and we understood that stakeholders agreed.

Public consultation

9.18 We will consult on proposals to change our guidance.

9.19 We also plan to seek stakeholder views on our proposal to move to routinely monetising the costs and benefits associated with open access applications prior to drafting proposed guidance.

10. Initial findings and next steps

10.1 The general assumption that Infrastructure Managers should sell available capacity is moderated by our consideration of our duties when determining access applications. In accordance with our duties, we consider a range of factors when considering open access applications, and have given particular weight to the impact of the funds available to the secretary of state, the benefit to rail users, as well as the availability of capacity and performance impacts.

Policy and guidance

10.2 We reviewed our policy approach and drew on international comparisons. We considered whether it was possible and desirable to narrow the trigger for conducting economic testing, and whether we could use the result differently.

10.3 Given that we have statutory duties to consider the funds available to the secretary of state, we do not think we are able to set aside the need to conduct the NPA test or another economic test as they help inform our considerations. Our approach to weighing our duties already allows us to assign less weight to the impact on the Secretary of State where they have indicated their support for the application. We think there is scope to clarify this within our guidance.

10.4 We considered whether we could simplify the use of the result, for example by setting a ceiling for abstraction above which we were unlikely to approve or a floor below which we were more likely to approve. We concluded that these approaches would be unhelpful as they would not support wider value for money considerations. A ceiling could send a negative signal, while a floor could break down in the face of multiple small-scale applications. More radical approaches, such as moving away from the concept of continuity of rights, could be highly disruptive to the franchising system and where therefore not developed further.

10.5 We have therefore focused on more iterative improvements to our guidance.

10.6 We are minded to review and improve our guidance. We intend to:

- a) Reiterate that the NPA test is an input into our decision-making, not the sole determinant. We will explain that this reflects our consideration of all relevant duties, not just those quantified by the NPA;
- b) Clarify that while we are more likely to approve an application with a NPA ratio of more than 0.3 to 1, the consideration of other factors such as

passenger benefit mean that we may still approve an application with a less favourable NPA ratio. Our intention is that will reduce the effort and resources put into making adjustments to applications in order to deliver a ratio of at least 0.3 to 1;

- c) Help stakeholders (including investors) understand what factors we take into account in our decision-making. We will explain how we consider the NPA test result, and other relevant factors such as absolute abstraction, passenger benefits and performance. Our intention is for the basis of our decision-making to be clear and understandable. We are conscious that some aspirant open access operators are new to rail, while others may be backed by investors who are not familiar with access decision-making; and
- d) Respond to some technical issues raised by stakeholders, in particular on our use of gravity model. Our intention is to reflect industry best practice.

10.7 We will consider whether any further update on the guidance on the underlying modelling is appropriate once we have the outcome of our review of the evidence of abstraction and generation forecasting. This approach could result in iterative improvements to our guidance.

Not Primarily Abstractive test

10.8 We find the NPA test to be a useful tool to inform our decision-making as it speaks directly to two of our duties. Established industry models (MOIRA and MOIRA2) are used to forecast expected generation and abstraction.

10.9 Engagement with our stakeholders has told us that the test itself is well understood and applicants seem reasonably confident that they can predict the outcome of the test. Stakeholders did raise some challenges on the underlying modelling; and we intend to review the evidence base for abstraction and generation forecasting.

10.10 We consider that the level of indicative ratio, namely 0.3 to 1, remains appropriate, and our initial discussions with stakeholders suggested they agreed. We agreed with stakeholders that there could be value in reiterating the status of the NPA test as an input into our decision-making rather than a strict pass/fail test. The status of the NPA test reflects both the need for us to consider the full range of our statutory duties and also the inevitable degree of uncertainty inherent in any quantitative forecasting exercise.

10.11 In addition to the results of the NPA test our decisions also weigh the available evidence on absolute abstraction; performance impacts; passenger benefits; and any other factors that could be relevant to the consideration of our duties. We have in some instances made use of estimates of the monetised benefits when considering competing applications, since such analysis can enable us to compare the relative value for money of competing applications.

Alternative forms of economic testing.

10.12 We considered that if we were to use a BCR, it would be most appropriate to base our BCR on the Department for Transport's Transport Analysis Guidance (TAG).

10.13 We consider that a wider BCR test could be a useful tool in our decision-making. Using a BCR test would monetise more of the benefits we consider and could support a robust evaluation of these factors. As we have to weigh all our relevant duties, a BCR test result would not be determinative. We would still need to consider what weigh to assign to our relevant duties.

10.14 Our initial engagement with stakeholders found that those we engaged with were reasonably content with the NPA (although some issues with the underlying modelling were raised), and there were some concerns that a BCR could present an additional barrier.

10.15 We consider that adopting a BCR in place of the NPA could reduce certainty as it would be a change to our decision-making process. The policy impact of adopting a BCR would depend on the threshold adopted. As there is not a direct correlation between the NPA and BCR, defining a threshold for the BCR would likely rebalance the weighting given to our duties.

10.16 We consider that there is value in formalising the processes for monetising the costs and benefits associated with an open access application. We have previously used NPVs to do this in cases of competing applications. Monetising costs and benefits is done as part of the process of producing a BCR, but this could also be done without producing the final BCR or without placing weight on the BCR result. We consider that formalising the processes for monetising the costs and benefits could support our decision-making, particularly in cases where the NPA result is marginal.

10.17 This would also allow us to build an evidence base on use of BCRs and how the results compare with the NPA test. This would reduce the uncertainty in the event that we were minded to consider placing weight on BCRs in the future.

Next steps

- 10.18 **We will propose updates to our guidance on the Not Primarily Abstractive test and consult on these proposed revisions.** Building on our initial work and the conversations we've had with stakeholders, we are intending to:
- a) Reiterate the NPA test result as an input in our decision-making, and explain that it is not a pass/fail and is not the sole determining factor;
 - b) Explain the other factors that we consider (for example, value for money, absolute abstraction, performance and passenger benefit) and the approach we take to weighing our duties;
 - c) Explain the approach we take to competing applications; and
 - d) We will also seek to address some technical issues raised by stakeholders.
- 10.19 **We plan to consult on our intention to routinely monetise the benefits and costs associated with an open access application before drafting updated guidance.** This will inform the weighing of our duties, particularly in cases where the NPA test result is marginal. Such analysis will inform the balance of our duties, particularly in the cases where the NPA test result is marginal. Over time this approach will result in the development of an evidence base on the monetised costs and benefits of open access. This would reduce the level of uncertainty associated with BCRs in the event that we were minded to use BCRs in the future.
- 10.20 **We have already commission of a review of forecasting of abstraction and generation.** Our evidence base was last reviewed in 2016 and stakeholders rightly suggested it would be helpful to update this. We believe that sufficient time has now passed since the pandemic to allow a meaningful review. We will consider what actions maybe appropriate once we have this new evidence.
- 10.21 **We will continue to update our stakeholders and our website as our work on this area develops.** We are already publishing additional information on compliance with agreed industry processes. We hope that this information is useful to industry. We will continue to monitor the wider open access market and the behaviours within industry.
- 10.22 We welcome feedback on our findings and next steps.

Annex 1: Evaluation Criteria

We weigh our relevant duties (from section 4 of the Railways Act 1993) when making access decisions. Relevant duties generally include: railway service performance, protecting the interests of service users, promotion of economy and efficiency in the provision of railway service, enabling persons providing railway services to plan their business with a reasonable degree of assurance, promotion of competition for the benefit of service users, the funds available to the Secretary of State and value for money.

In considering our approach to economic testing and how this supports our track access decision-making, we are particularly mindful of promotion of competition for the benefit of service users, the funds available to the Secretary of State and value for money. We currently use the NPA test alongside absolute abstraction to inform our considerations of the impact on the Secretary of State's funds and value for money.

In reviewing the test and our policy, we have not set out with the goal of changing the likelihood of open access applications being approved (although it is possible this will change if the test or the use of the result is changed). Our approach is one of improving our decision-making.

We have used the following evaluation criteria to support our review of the options:

- a) **Enable the consideration of ORR duties** - We weigh our duties under Section 4 of the Railways Act 1993 when determining access applications. The policies we develop and the economic tests we use must speak to these duties. We consider a range of evidence to support our considerations. Our economic testing supports us in weighing our economic considerations, so they should speak to:
 - i. Value for money;
 - ii. Impact on funds available to the Secretary of State; and
 - iii. Passenger benefits.
- b) **Predictable** – any approach should be reasonably predictable in its outcome. This is important to support open access operators and their investors in developing their business proposals;
- c) **Transparent and explainable** – the basis of our decision-making and the workings of any economic test should be transparent. Applicants should be able to understand the way the test works and how it is used in our decision-making. This supports predictability and industry confidence; and
- d) **Timely, efficient and proportionate** – Our decision-making should be timely and make efficient use of resources (both our own and those of industry). Any

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requirements for additional information or greater input from industry or us must be justified.

We have also considered what the likely impact of the change would be on the decisions we take. We are mindful of considering the impact alongside the effort required for industry in assimilating any changes to our policies.

We will need to test any emerging ideas with industry and government colleagues. Any proposals to change our policy will be subject to public consultation.

Annex 2: Economic Equilibrium Test

In December 2023 we asked IRG Rail members about their approach to the Economic Equilibrium Test. We submitted a questionnaire to the regulators asking for their responses to the following:

- a) How many Open Access operators have you had to consider access rights for? Please provide some examples of decision documents setting out how you reached the decision in each case.
- b) What criteria do you use to identify benefits associated with a proposed open access service? How are these benefits quantified? How do you use any identification or quantification of benefits in your decision-making?
- c) What impact has your EET policy had on the number of open access applications you have received, and number of open access operators operating? What elements of your policy do think have supported the development of open access, and what elements may be a barrier?
- d) How does your methodology address the assessment of the economic impact of a new service on PSOs and the relevant authority? Is this defined as revenue, profitability, cost etc?
- e) How long does it take from receiving a request from an Open Access application to reaching a decision? Do you have response times in place and are they adhered to by all parties?
- f) Do you consider that any particular element/s of your EET methodology provide a particular challenge to applicants?

Summary of Responses

Austria

No EET procedure has been completed. It is not possible to assess the impact of the EET or provide details of the timescales required.

Belgium

No EETs have been requested.

They do, however, carry out an ad-hoc social cost benefit analysis the result of which is considered besides that of the impact and ratio analysis. In a first phase, an impact analysis is carried out for the expected turnover. This includes the possible impact on

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revenue from domestic passenger transport and subsidies. This involves an analysis of total turnover per category to be able to estimate the impact on the entire PSO contracts.

In a second phase, accounting analysis of profitability is performed. In this phase the impact on expected profitability is projected onto sales, assets, equity capital, etc.

This way, based on analytical accounting, a clear picture can be obtained of the potential economic impact of the new service on the PSO contracts entered into.

Finland

There have been no EET cases. The net benefits noted in international assessments are, for example, a lower price, more frequent traffic and faster travel times. When net benefits are substantial, they can be taken into consideration as a factor, mainly, when setting the limit, at which point the impact on economic equilibrium could be considered so substantial that it will lead to denying the new service entering the market.

Greece

There are two Railway Undertakings that have been granted Public Service Obligations for 15 years. No EET has been requested. The EET was thought to be a potential barrier to open access.

Italy

As of 11 January 2024, ART has received notification of new services from five different open access operators, only two of which have requested an EET.

When a PSO contract is approaching expiry (within 12 months), the estimated loss of revenues compared to the total revenues gained over the entire duration of the contract (usually 10 years or more) is likely to be limited so that the economic equilibrium of the contract is deemed not to be compromised.

Netherlands

Only one EET has been carried out by the regulator.

In 2023, 1 open access notifications were received from 7 railway undertakings (some provided multiple notifications) for services to start between 2025 and 2033. All were starting in the during the lifetime (2025-2033) of the new PSO for the main rail network. Most EETs were requested by the PSO owner, NS. We concluded these requests were 'not admissible' because the notification of the open access service was done before the new PSO was signed (21-12-2023). These decisions are all appealed by NS. The appeals are pending.

Norway

Norway have received three notifications for new passenger services and two requests for EET. We consider that the economic equilibrium faces a potential threat if the service will have a significantly negative impact on either:

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- a) The revenue and/or profitability of services of a railway company who operates under the public service contract.
- b) The net cost for the relevant authority (Jernbanedirektoratet) awarding the public services, in particular increased subsidies.

Poland

The Polish regulator had granted open or limited access to 15 railway carriers. An EET is only conducted to determine whether the proposed new rail passenger services would pose a risk to the economic equilibrium of the public service contract.

Portugal

In Portugal, AMT (the regulator) approved a regulation containing the procedures for carrying out the EET.

The procure includes analysis regarding the capacity of the railway network to accept new services proposed by a new operator and an economic analysis assessing impacts on existing PSO contracts, whether from public or private operators.

An EET was carried out for new services for 2025. The outcome was negative due to the lack of network capacity to accommodate the number of new requested services on the requested routes.

Romania

As of January 2024, the Romanian regulatory body (CNSDF) has not received notifications from any applicant regarding their intention to operate a new rail passenger service.

However, in the case of examining several requests for access, the CNSDF may take different decisions regarding the requests received, based on an analysis of the impact of each of them on the economic equilibrium of the public service contract (PSO), the effects on competition, the net benefits offered to customers and the impact on the network, as well as their cumulative effects on the economic equilibrium of the PSO.

If the CNSDF receives several access requests affecting the same route of the railway network, the joint impact of the proposed new rail passenger transport services on the economic equilibrium of the PSO will be considered.

If the proposed new rail passenger services individually pass the economic equilibrium test, but together it is concluded that there is a substantial adverse effect on the public service contract, the new rail passenger service will be granted access which generate the greatest net benefits for consumers and for the railway network, also considering the effects on the level of competition.

Slovakia

The regulator has decided on rights of access to the railway infrastructure for 11 open access cases. It decided to carry out an EET for 5 of those new service proposals.

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Regardless of whether a EET is conducted, the regulator takes the benefits of a new service into account, these include:

- a) extension of the number of stops on the route,
- b) going to stops where public service trains do not stop yet
- c) time savings in passenger transport;
- d) reduced overcrowding of trains on the line.

Slovenia

The regulator has proposed the deletion of provisions on EET as part of amendments to the Railways Transport Act.

Sweden

The rules about Economic Equilibrium Test in Article 11 of Directive 2012/34/EU have not been implemented in Swedish law, neither for domestic nor for international passenger services. There is open access for both international and domestic passenger traffic in Sweden. Commercial and publicly funded railway undertaking operate on the Swedish rail market on equal terms; publicly funded traffic is not protected from commercial traffic. There are no further national rules preventing commercial traffic from competing with publicly funded traffic. The Swedish regulator believes there are benefits in not having the test; and believe that it's crucial for market opening to make sure that the EET test does not prevent new actors from entering the market.

Summary

Although most regulators are obliged to carry out an EET when requested, it can be seen from the feedback that the number of such requests are low. It is clear the regulators are very much focused on the benefit a new service will bring to customers and weigh this against the impact on the Public Service Contract. They believe that a valid assessment is possible without bringing in the extra checks of the EET. In terms of some of the challenges, the main one was the timescales and the accessibility of data required to make a valuable assessment.

Annex 3: Background information

Legislation

We have drawn up on duties and responsibilities under the [Railways Act 1993](#), [The Railways \(Access, Management and Licensing of Railway Undertakings Regulations 2016](#) and [The Competition Act 1998](#). A list of our duties is included at Annex 4.

ORR policy development

- 1.1 [2004 Moderation of Competition](#)
- 1.2 [2010 Review of access policy](#)
- 1.3 [2016 CMA work on open access, ORR impact assessment](#) and [government response](#)
- 1.4 [2016 Evidence of revenue generation and abstraction from historical open access entry and expansion](#)
- 1.5 [Not Primarily Abstractive test guidance](#)

ORR open access monitoring.

We publish monitoring reports on the impact of open access operators on the rial market and the competitive response to them.

- 1.6 [2018 ORR's plans to monitor the impact of and response to open access](#)
- 1.7 [2020 Monitoring the impact of and response to open access](#)
- 1.8 [2021 Monitoring the impact of and response to open access](#)
- 1.9 [2022 Monitoring the impact of and response to open access](#) together with an [economic appraisal](#)
- 1.10 [2023 Monitoring the impact of and response to open access](#)

ORR track access decisions

We publish our track access decisions on our [website](#).

Annex 4: ORR's duties

We have wide-ranging statutory duties derived from legislation, including the Railways Act 1993.

Economic Duties

For economic regulation our duties are set out under section 4 of the Railways Act 1993.

These duties include the duty to:

- promote improvements in railway service performance;
- otherwise to protect the interests of users of railway services;
- promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;
- contribute to the development of an integrated system of transport of passengers and goods;
- contribute to the achievement of sustainable development;
- promote efficiency and economy on the part of persons providing railway services;
- promote competition in the provision of railway services for the benefit of users of railway services;
- promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;
- impose on the operators of railway services the minimum restrictions which are consistent with the performance of ORR's functions under Part 1 RA 1993 or the RA 2005 that are not safety functions;
- enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;
- protect the interests of users and potential users of services for the carriage of passengers by railway provided by a private sector operator, otherwise

than under a franchise agreement, in respect of the prices charged for travel by means of those services, and the quality of the service provided;

- protect the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of the prices charged for such use and the quality of the service provided;
- in exercising functions that are not safety functions:
 - take into account the need to protect all persons from dangers arising from the operation of railways;
 - have regard to the effect on the environment of activities connected with the provision of railway services;
 - have regard to any general guidance given to ORR by the Secretary of State about railway services or other matters relating to railways;
 - have regard to any general guidance given by the Scottish Ministers about railway services wholly or partly in Scotland or about other matters in or as regards Scotland that relate to railways;
 - in having regard to guidance given by Scottish Ministers, give what appears to ORR to be appropriate weight to the extent to which the guidance relates to matters in respect of which expenditure is to be or has been incurred by the Scottish Ministers;
 - act in a manner which ORR considers will not render it unduly difficult for persons who are holders of network licences to finance any activities or proposed activities of theirs in relation to which ORR has functions;
 - have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways or railways services;
 - have regard to any notified strategies and policies of the National Assembly for Wales, so far as they relate to Welsh services or to any other matter in or as regards Wales that concerns railways or railway services;
 - have regard to the ability of the National Assembly for Wales to carry out the functions conferred or imposed on them by or under any enactment;

- have regard to the ability of the Mayor of London and Transport for London to carry out the functions conferred or imposed on them by or under any enactment;
- in exercising its safety functions, other than its functions as an enforcing authority for the purposes of the Health and Safety at Work etc Act 1974, to have regard to any general guidance given to it by the Secretary of State;
- have regard to the interests, in securing value for money, of the users or potential users of railway services, of persons providing railway services or of the persons who make available the resources and funds and of the general public;
- have regard, in particular, to the interests of persons who are disabled in relation to services for the carriage of passengers by railway or to station services.

Other railway duties

- Section 21 of the Channel Tunnel Rail Link Act 1996 provides that ORR shall have an overriding duty to exercise its regulatory functions in such a manner as not to impede the performance of any development agreement.
- Section 22 of the Crossrail Act 2008 provides that section 4(1) of the Railways Act 1993 shall be treated as including the objective of facilitating the construction of Crossrail. It also provides that ORR shall consult the Secretary of State about this aspect of the duty.
- Regulation 31 of The Railways (Infrastructure Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016 sets out the various duties to which ORR must have regard when carrying out its functions under these Regulations.

General duties

Section 72 of the Regulatory Enforcement and Sanctions Act 2008 requires us to keep our functions under review and ensure that in exercising these functions we do not:

- impose burdens which we consider to be unnecessary, or
- maintain burdens which we consider to have become unnecessary.

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We have a duty under the Natural Environment and Rural Communities Act 2006 to have regard to the purpose of conserving biodiversity.

We have a further duty under section 6 of the Environment (Wales) Act 2016 to seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions.

We also have an equalities duty under section 149 of the Equality Act 2010 which requires us to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it (relevant protected characteristics are – age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation);
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Annex 5: Glossary

Term	Explanation
Benefit Cost Ratio	A BCR is the ratio of the value of benefits and the value of costs.
Competition and Markets Authority (CMA)	The CMA is a non-ministerial department. It is focused on prompting competitive markets and tackling unfair behaviour to support the UK economy, businesses and people.
Department for Transport (DfT)	DfT is a ministerial government department. It leads the planning of transport infrastructure in the UK. In rail, DfT set the strategic direction for the rail industry in England and Wales. It funds investment in infrastructure through Network Rail, awards rail franchises and regulates rail fares.
Economic Equilibrium Test (EET)	The EET was introduced by the EU to allow certain open access applications to be denied where they impacted on the economic equilibrium of an existing PSO. Specific requirements for carrying out the test are described in Commission Implementing Regulation 2018/1795 . This requirement no longer applies for domestic services in Great Britain,
Final determination	The final determination a document which sets out the overall package of decisions on what Network Rail must deliver during next control period and how much it can charge for access to its network. It the culmination of the periodic review which includes detailed technical assessment as well as stakeholder engagement.
Franchise	Franchising is the system of government contracting train operators to run passenger services in Great Britain. The system was developed as part of privatisation. The type of contracts were altered substantially during the COVID-19 pandemic, but the overarching system and legal framework remains.
Gravity model	A tool that is widely used in various analytical fields including transport planning in order to predict the flow of people (or goods or information) between two locations.
Green Book	The Green Book is the guidance issued by HM Treasury on how to appraise policies, programmes and projects. The Green Book guidance is available online .
Infrastructure Cost Charge (ICC)	This is a charge paid by some open access operators to recover some of Network Rail's fixed costs. They are a mark-up over directly incurred costs. These charges are included in the NPA test and are removed from the abstraction figure.
MOIRA	MOIRA is an industry model used for analysing changes in timetables and the impact these changes will have on passenger journeys and

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Term	Explanation
	revenue. There additional versions of MOIRA called MOIRA2 and MOIRA2.2 which include modelling of crowding on trains.
Not Primarily Abstractive Test (NPA)	The NPA test was developed by ORR to support the weighing of our duties to have regard to the funds available to the secretary of state and promote competition for the benefit of rail users. The test considers the expected impact of a new open access service proposal. It creates a ratio between income generated by services (referred to as generation) and income which results from passengers switching from exercising services (referred to as abstraction). It is a simple representation of value for money.
Open access operator	Open access passenger train operators are those who operate services purely on a commercial basis, not under either a franchise or a concession agreement. These are companies who identify an opportunity to run a service which is not currently being provided, and they apply to the ORR for the necessary track access rights and to Network Rail for train paths in the timetable.
Passenger Demand Forecasting Handbook (PDFH)	The PDFH provides industry guidance on preparing rail demand forecasts. It is collated by the Rail Delivery Group .
Periodic Review	ORR conducts periodic reviews every five years to determine what Network Rail must achieve over the following five year control period. The periodic review also sets the access charges paid by train operators. The most recent periodic review was periodic review 2023 (PR23) and this set requirements and charges for April 2024 to March 2029. This five year period is called control period 7 (CP7).
Public Service Obligation (PSO)	Public Service Obligation is term used within EU law to refer to the contracts established by member states with rail operators to provide public transport services which are the public interest but may not be commercially viable. This concept is well established in Great Britain and is referred to as franchising.
Rolling stock	Rolling stock refers to the locomotives, coaches and freight wagons used on the rail network. They are predominately owned by rolling stock leasing companies (ROSCOs) who hire them to train and freight operating companies.
Statutory duties	Statutory duties refer to things that public authorities or bodies must do in carrying out their functions. ORR's statutory duties are described in Section 4 of the Railways Act 1993 . ORR considers its relevant duties when making decisions.
Track Access Contract	Track access contracts (TACs) refer to the contract between the infrastructure manager, such as Network Rail, and train or freight operating companies which define the access rights held and the

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Term	Explanation
	conditions and obligations attached to these rights. ORR must approve all TACs.
Transport Analysis Guidance (TAG)	DfT publishes guidance on the conduct of transport studies. This guidance serves as a best practice guide. Projects or studies which require government approval are expected to use the guidance.
Net Present Value (NPV)	A metric that is widely used to evaluate investments or projects by measuring the difference between the present value of cash inflows (or other socio-economic benefits expressed in monetary terms) and cash outflows (or other socio-economic disbenefits expressed in monetary terms) over a given period of time.



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