Responses to ORR's September 2024 consultation on summary guidance on rail open access applications

Link to consultation webpage: https://www.orr.gov.uk/search-consultations/summary-guidance-rail-open-access-applications

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FirstGroup

We have proposed a new routine approach to monetising the costs and benefits associated with open access in Chapter 3 of the draft guidance. What are your views on our proposed approach?

FirstGroup agrees with the ORR that the use of TAG to monetize social, economic, environmental factors and indirect tax transfers is the most appropriate way of evaluating a proposal where the NPA test result is marginal.

However, we would like to see the provision of any inputs to this test to form part of an "as required" supplementary request to the applicant as that provision could be quite an onerous task, especially for new or smaller service applicants.

There is an element of "past trend" in using TAG which might not be relevant in some cases and the need to fully evaluate such items as sustainability and carbon reduction may well produce varying results between the parties. Therefore, we would like to see the results of any such analysis to be fully discussed with the applicant before any determination is made.

We have proposed removing the benchmarking stage of the NPA test. This is because the Passenger Demand Forecasting Handbook 5 introduced more robust ways to account for large changes in journey times. This change is reflected in Chapter 4 of the draft guidance. What are your views on our proposed approach?

FirstGroup agrees that the elasticities in PDFH5 and the use of gravity models is a more robust method of adjusting MOIRA than the use of comparative modelling. We support the removal of the benchmarking stage.

But we would still wish to see comparative modelling retained for simple additions to existing paths, where the more extensive analytical approach would not be justified.

We would also recommend that benchmarking evidence is used in the calibration of any gravity model, to validate the inputs.

This draft guidance is intended to support new operators who are less familiar with ORR decision making. We therefore included additional explanations and signposting to our either guidance. What are your views on the explanations we have provided? Are there specific areas that need further clarification? Or areas that we have missed?

We are pleased to see the draft guidance and agree that it is a comprehensive document that will prove very useful to applicants.

We would like to see an addition in 2.5 (Business Plan) to include Track Access and other Infrastructure Charges. We are also pleased that 3.12 mentions absolute abstraction as although we have been aware since 1999 that you consider this, it has been missed by other applicants since then.

The reference to NR approval procedures and timescales still does not address the mismatch between the requirement of the applicant to contract rolling stock and mobilize, at best, a year or two out from the start date with the ability of the infrastructure provider to opine within those required timescales.

Do you have any further comments?

As a very minor point, it would have been useful, for internal discussion purposes, for these questions to have been appended to the letter, rather than embedded in the reply link. This consultation is welcome, but it is taking place at a time of great change within the industry. Open Access operators tend to plan on longer timescales than Government owned operators and reacting to fundamental change also takes time. Therefore, the future shape of the Access & Management Regulations and indeed the structure of GBR itself - so that OAO can establish relationships, is key and an early resolution of the future industry framework is now required. The revised guidelines make it clear that the regulatory hurdle to obtain access is not a low bar. Much work always needs be undertaken to satisfy the ORR and rightly so, to prove that Open Access is not just abstractive, as so often (wrongly) alleged. Open Access continues to be "the outsider" in terms of UK Rail operation and should always have to prove its case to an independent determination body.

Esther Sumner
Head of Access Reform Delivery
Office of Rail and Road

By email.

31st October 2024

Dear Esther

Consultation on guidance on open access (OA) – making a track access application and ORR decision making

Thank you for the opportunity to comment on the Office of Rail and Road's (ORR) consultation on its proposed guidance for assessing new OA applications.

Grand Central (GC) is an OA operator which has been operating since 2007 bringing significant benefits to the communities it serves through new direct services to London and additional fares competition which has led to lower fares growth at stations it serves, compared to stations which do not benefit from the same levels of competition.

As an OA operator which has been through the process of access rights applications a number of times, both successfully and unsuccessfully, GC welcomes the opportunity to comment on the proposed guidance.

1. *We have proposed a new routine approach to monetising the costs and benefits associated with OA in Chapter 3 of the draft guidance. What are your views on our proposed approach?*

With regards to the proposal to establish a routine approach to monetising the costs and benefits associated with the introduction of new OA operators, GC welcomes this approach. Historically, wider economic benefits have been given little or no consideration in the application appraisal process and it is therefore positive that ORR is proposing to ensure it has more information available in order to fully assess applications. That being said, this additional analysis must not lengthen what can often be a protracted application process and clear timescales should be established with applicants early in the process.

Whilst it is positive to the see the approach standardised with DfT TAG guidance, the ORR must also not lose sight of the potential for TAG to understate some of these wider economic benefits associated with potentially transformational service changes which could see significant benefits to the communities proposed to be served.

2. *We have proposed removing the benchmarking stage of the NPA test. This is because the Passenger Demand Forecasting Handbook 5 introduced more robust ways to account for large changes in journey times. This change is reflected in Chapter 4 of the draft guidance. What are your views on our proposed approach?*

Whilst we can appreciate the rationale to rely more heavily on modelled techniques which are now more robust in terms of accounting for larger changes in journey, we believe benchmarking can still be a useful element of the NPA test, especially in relation to smaller incremental changes for existing operators.

Benchmarking has historically been discounted by the ORR in undertaking the NPA test, even where operators provide significant detail and evidence to suggest levels of generation, especially at destinations where a transformational service change is introduced, have been larger than the initial modelling has demonstrated.

We note the ORR's comment that benchmarking may still be relevant in smaller service applications, however we would urge the ORR to provide clarity on the size and shape of applications for which it would consider the use of benchmarking. Similarly, it would also be helpful to understand what requirements it may have in relation to the submission of the any benchmarking evidence to ensure applicants do not waste time effort and resource producing detailed analysis and evidence only for it not to meet ORR requirements or be discounted from the application process.

We would also question the removal of benchmarking from stages of the NPA test, given ORR has suggested it may still be considered in assessing applications. We would propose an alternative where by benchmarking is still mentioned, perhaps in stage 4 as an 'other relevant factor'. This would confirm the possibility of considering benchmarking information, as opposed to it being completely removed from the test, as the guidance is currently worded.

3. *This draft guidance is intended to support new operators who are less familiar with ORR decision making. We therefore included additional explanations and signposting to our other guidance. What are your views on the explanations we have provided? Are there specific areas that need further clarification? Or areas that we have missed?*

We welcome the additional clarity that is included within the revised guidance; however the guidance very much focuses on the process following submission. Whilst we appreciate there is other guidance in relation to the process for industry consultation and making an application, it would be helpful if this specific guidance was widened to include an overview of the pre application process without full duplication.

Timescales associated with both pre and post application submission are often a significant area of challenge for operators, and therefore it would be helpful if the guidance provided some signposting to the expectations on all parties involved specifically in relation to timescales.

4. *Do you have any further comments?*

OA Operators, bring significant benefits to the network and for the communities they serve. We are fully supportive of the ORR's intention to further clarify the process through enhanced guidance. ORR must however ensure that the post application submission phase of the process is dealt with in a timely manner. A lengthy approvals process for new service applications has the potential to increase operator mobilisation costs, miss rolling stock and commercial contract opportunities and prevent early introduction and delivery of the benefits the new services will bring.

Yours sincerely,

Chris Brandon
Interim Director

Office of Rail and Road: Consultation on Summary guidance on rail open access applications

Representation submitted by Heathrow Airport Limited

8th November 2024

Heathrow Airport Limited (HAL) supports the Government's exemption of open access operators (OAOs) from public ownership because of the high standard of service they provide passengers and the unique value they provide the network. Heathrow also supports the ORR's summary guidance for future open access applications and the intention to provide a clear route for future operators to successfully apply for a new service.

The Heathrow Express (HEx) is the largest open access operator by passenger volume with over 16,000 business, leisure and colleague passengers a day and c.5 million passengers a year. Operating four services per hour from two platforms in Paddington to platforms at Heathrow Central Terminals and Terminal 5, HEx provides the quickest and easiest rail connection to Heathrow Airport and delivers effective competition to the Elizabeth and Piccadilly Lines. This is fundamental to the role open access operators play in the UK and across Europe in creating the positive competition that drives performance standards and service levels, fulfilling the ORR's duty to promote competition for the benefit of rail users.

Passengers see this benefit through the Heathrow Express' bespoke airport passenger trains which deliver a high frequency, high standard, and express journey between central London and Heathrow. This is demonstrated in the 94% passenger satisfaction which is higher than coach, Elizabeth Line and Piccadilly Line, and it is reflected in the quality and reliability of service that retains the highest level of ridership of any open access operator.

The other key benefit of successful competition is that rail to Heathrow now carries more passengers to the airport than ever before. This has enabled our public transport mode share to increase from 40% to 44.6% since 2018, the number of people within a 1.5hr journey time of Heathrow to increase by 36%, and our surface access carbon emissions to reduce by 25%. This is vital to Heathrow and the UK's efforts to decarbonise whilst growing the economy and investing in public transport.

The Heathrow Express also supports the ORR's duty to promote the use and development of the network whilst having regards to the funds available to the Secretary of State. It does this by delivering financial resilience in the network through payment of additional access charges which reduce the financial burden on taxpayers. It also delivers operational resilience in the network during major event periods, such as COVID, when rapid adjustments are necessary to maintain service for passengers to reach critical national infrastructure. At the same time, it ensures rail connectivity to Heathrow in the event TfL alternatives are offline, which periodically occurs and would otherwise leave passengers and colleagues without access.

HAL has invested £1bn of private investment in rail to the airport, actively supporting the ORR's duty to promote improvements in railway service performance, and it is this

investment which has delivered the benefits for rail users. Together with Heathrow's annual investment in bus and coach to support colleagues and passengers to travel more sustainably, the quality, reliability, resilience, and volume of public transport services continues to rise through HAL ownership of HEx.

Under the Overarching Agreement with Government, however, HEx will, in 2028, either continue as an OAO (our preference) or be taken into public ownership. The ORR's summary guidance is an important step in formalising where the ORR sees value in open access, and by monetising more costs and benefits associated with it, the ORR will help quantify the wider societal and economic benefits which flow from more and better rail services.

We would also welcome a separate conversation to discuss these points and the future regulation of the Heathrow Express in the weeks to come.

Heathrow Express Operating Company

We have proposed a new routine approach to monetising the costs and benefits associated with open access in Chapter 3 of the draft guidance. What are your views on our proposed approach?

Heathrow Express Operating Company (HEOC) acknowledges the ORR's proposed routine approach to monetising the costs and benefits associated with open access. This approach has the potential to enhance transparency and predictability for new entrant operators, as it aligns with ORR's commitment to providing clear guidance. However, it is crucial to clarify how this approach would affect HEOC as an existing operator, particularly in the context of a potential future conversion to a regulated Agreement.

HEOC is supportive of a methodology that accounts for the factors set out in the Draft Guidance, with additional emphasis on the wider socio-economic and environmental benefits that open access services can bring. For example, the approach should consider impacts such as job creation, development opportunities, road decongestion, carbon reduction, and local economic gains that come with rail expansion. This is especially pertinent for airport rail services like Heathrow Express, where enhanced connectivity offers a significant potential to shift travellers from private cars to public transport.

HEOC would also support the inclusion of specific considerations for airport rail services, recognising the unique operational context and competitive dynamics these services operate under. The example of HEx, which serves over 16,000 passengers daily and has contributed to Heathrow Airport's public transport mode share increases from 40% to 44.8% (MMA for October 2024), highlights the importance of metrics tailored to reflect airport rail's distinct contribution to the network. Additionally, ORR should ensure that these monetisation measures do not prolong application processes or impose excessive administrative burdens, particularly for smaller amendments or applications with strong cases for approval. A balanced approach would ensure the ORR's assessments capture the benefits of open access without unnecessary delays for applicants.

We would also request clarity on what "indirect tax transfers" are and how they relate to open access applications? We have proposed removing the benchmarking stage of the NPA test. This is because the Passenger Demand Forecasting Handbook 5 introduced more robust ways to account for large changes in journey times. This change is reflected in Chapter 4 of the draft guidance. What are your views on our proposed approach?

HEOC broadly supports the removal of the benchmarking stage of the NPA test, as it aligns with the advancements introduced in the Passenger Demand Forecasting Handbook 5. This change should streamline the assessment process and allow for a stronger focus on actual demand impacts rather than comparative benchmarks.

Given Heathrow Express's high-frequency, express services and its 94% passenger satisfaction rate, it is crucial that the NPA test remains relevant to real passenger choices and behavioural changes. As the ORR implements the new methodologies, HEOC recommends that these are rigorously tested to ensure they fully capture demand shifts, particularly in response to significant service changes or disruptions. The HEx service's operational resilience during the COVID-19 pandemic further illustrates the need for methodologies that adapt to fluctuations in passenger behaviour.

Additionally, it would be beneficial for ORR to clarify when the benchmarking approach might still apply, for instance, in minor applications. This clarity would help ensure that assessments are based on robust methodologies best suited to each specific case. Given the unique characteristics of airport rail services, HEOC suggests that ORR provide clear guidelines on the types of applications for which benchmarking might be retained versus those for which newer, more flexible methodologies like gravity models may be more appropriate. This type of model would allow the ORR to assess how new services might create demand by making certain destinations more accessible, especially if no direct route previously existed. These models can also predict whether a new rail service would primarily generate new trips or mostly attract riders who would have otherwise travelled by different routes or modes, such as road transport.

This draft guidance is intended to support new operators who are less familiar with ORR decision making. We therefore included additional explanations and signposting to our either guidance. What are your views on the explanations we have provided? Are there specific areas that need further clarification? Or areas that we have missed?

HEOC appreciates the ORR's efforts to enhance clarity by including additional explanations and signposting to other guidance. This added detail is valuable for operators like HEOC, who may lack familiarity with ORR's decision-making processes.

However, the guidance could be strengthened by providing more information on the pre-application process and expected timelines, which can often be a key challenge for new entrants. Outlining more clearly what is required at each stage would reduce uncertainties, particularly regarding business case development and stakeholder engagement. HEOC would also benefit from further information on how existing operators' interests are protected within the regulatory framework, especially in scenarios where existing operators are transitioning to regulated agreements.

To further improve clarity, ORR could consider including case studies or examples illustrating successful applications and regulatory decisions. These could provide practical insights into how the guidance has been applied, particularly in contexts similar to Heathrow Express', and help both new and established operators understand the regulatory framework in practice.

Additional HEOC-specific questions / comments arising from the Guidance:

Clarification of the NPA Test Criteria:

HEOC would welcome further details on how "large journey time savings" are defined within the NPA test, as these are critical for assessing services like HEx that focus on express travel to the airport. Clear thresholds or metrics specific to airport rail services would ensure that unique service characteristics are effectively evaluated.

Revenue Generation vs. Abstraction:

HEOC seeks clarification on how ORR ensures that revenue generation expectations align with the realities of the competitive market on the Heathrow Branch. It would also be helpful if ORR's approach considers that a portion of HEx revenue is derived from abstracting passengers from other transport modes (e.g., private vehicles), which contributes to environmental and congestion relief benefits.

Operational Viability Assessment:

ORR could elaborate on the specific performance metrics used to evaluate operational viability in high-quality services like those provided by HEx. Understanding how these metrics will be weighted in decision-making would provide operators with greater insight into the ORR's evaluation process.

Regulatory Framework for Heathrow Express:

Given the unique context of Heathrow Airport services, HEOC would benefit from clarification on any regulatory considerations that will apply beyond 2028. Specifically, ORR's guidance on whether there would be any **exemptions or tailored requirements** for airport-focused services would help ensure that high standards of service and investment, critical to the airport's growth and sustainability, are maintained.

Encouraging Investment through Longer Access Contracts:

HEOC would support policies that promote investment security and long-term planning, such as longer track access contracts. This would significantly reduce risk for operators making substantial capital investments, for example, in new trains or service enhancements. For operators like HEx, which require certainty over extended periods to support their high operational standards, longer contracts would facilitate sustainable growth.

Regulatory Stability under Rail Reform:

HEOC recognises the importance of ORR's independent role within the track access framework. As government rail reform progresses, it is essential that ORR continues to provide stable and consistent regulatory guidance. A robust and transparent framework will ensure that current and future operators have clarity on the regulatory landscape, thus supporting ongoing and future investments in open access services.

Do you have any further comments?

None

CAUTION: This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear sir/madam

Thank you for providing us with the documents on the new open access guidance. We appreciate the opportunity to input into the process and would welcome further conversations to provide clarity, if required.

During the past 24 months, London TravelWatch has become increasingly concerned at what is perceived to be a lack of joined up approach when open access consultations are considered. Consultations appear to be in isolation, and we cannot see that other infrastructure issues are considered at the same time as track access. Consideration appears to be primarily for the consultee and not the end user.

In section 2 of the document, Making an application for track access, London TravelWatch would like to see a requirement for either Network Rail or the applicant to include impact assessments on stations with either (or both) high passenger numbers or multiple TOC provision. In addition, consultations submitted from Network Rail should indicate all other consultations received to start/end at the particular station or to call at stations which already have high passenger numbers and/or have multiple TOC provision. An assessment of stations is listed in performance and operations (3.1) but there does not appear to be any suggestion that consideration be made on the current situation and how any new operator would mitigate the impact of additional passengers.

An example of this issue would be London Euston. In 2024, four open access operators requested to start/terminate at this station, an incumbent TOC wanted to increase services, and another TOC was to

use London Euston during blockades at London Paddington. All of the information and consultations to London TravelWatch were made in isolation. We have not yet seen any evidence of a joined-up approach to the evaluation of the many access requests at Euston, just outside of Euston (also impacted by an increase of freight requests), the station infrastructure itself and whether or not London Euston is able to safely accommodate any increase in passengers.
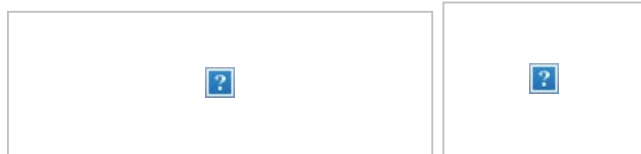
London TravelWatch would like to see the table on pages 19-23 expanded for the ORR to comment beyond track availability and consider the provision of all aspects and impacts that increasing services would bring.

Kind regards

Trevor Rosenberg
Policy and Advocacy Officer

London TravelWatch, Europoint, 5-11 Lavington Street, London, SE1 0NZ

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From: ████████████████████████
Sent: 12 September 2024 15:39
Subject: ORR consultation on new open access guidance

Dear colleagues,

We have just launched a consultation on new open access guidance. The new draft guidance:
- Explains how to make an open access application and how ORR makes decisions,
- Introduces a new routine approach to monetising the costs and benefits associated with open access, and
- Removes the benchmarking stage of the NPA test.

This revised guidance follows on from the conclusions and recommendations of our report, *Assessing the costs and benefits of new open access services – initial findings and next steps*.

The consultation will be open until Friday 1 November. You can submit your response by online form or by emailing ████████████████ . Please include "Open access guidance" in the email header.

I've attached a letter about this consultation and a copy of the draft guidance.

Best wishes,
Esther

Esther Sumner
Head of Access Reform Delivery
T: 020 7282 3797 | M:07597399952

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ORR protects the interests of rail and road users, improving the safety, value and performance of railways and roads today and in the future.

Network Rail

We have proposed a new routine approach to monetising the costs and benefits associated with open access in Chapter 3 of the draft guidance. What are your views on our proposed approach?

Could the proposed changes to monetising the costs and benefits make it harder for Open Access entrants to get access applications approved?

We would also request clarity on what "indirect tax transfers" are and how they relate to open access applications? We have proposed removing the benchmarking stage of the NPA test. This is because the Passenger Demand Forecasting Handbook 5 introduced more robust ways to account for large changes in journey times. This change is reflected in Chapter 4 of the draft guidance. What are your views on our proposed approach?

Network Rail has no comments on the proposed removal of the benchmarking stage of the NPA test.

This draft guidance is intended to support new operators who are less familiar with ORR decision making. We therefore included additional explanations and signposting to our either guidance. What are your views on the explanations we have provided? Are there specific areas that need further clarification? Or areas that we have missed?

We would suggest including a subheading to Table 4.2 'Assessing IM contribution to operations and performance' (page 25) that specifies that the applicant needs to submit inputs of sufficient quality to the IM before the ORR can start assessing the IM contribution to operations and performance.

The current title may give the impression we would be able to demonstrate the impact on Capacity, Rolling Stock and the other categories regardless of the outputs provided by the applicant, so we think it's important to note we would need accurate information and certainty on that information from the applicant. For example, we can only determine the capacity impact of an application if the assumptions provided by the applicant on rolling stock, paths in the timetable etc are complete and specific.

We would also suggest including 'Safety' as an additional category in Table 4.2, because we highlight safety risks as part of our assessment process. A suggested 'ORR Consideration' for the table could be "The IM should show whether there are any safety risks associated with the submitted application."

Do you have any further comments?

NIL

Rail Partners' response to the Office of Rail and Road's consultation on *Summary guidance on rail open access applications*

About Rail Partners

Rail Partners represents private passenger train operating company owning groups and freight operating companies – providing policy and advocacy functions on their behalf. We also provide technical services to train operating companies in both the public and private sectors. This submission is on behalf of our owning group members.

Introduction

Rail Partners supports the steps taken by the Office of Rail and Road (ORR) to develop its new *Summary guidance on rail open access applications*. This new guidance will provide further clarity to existing and prospective open access operators, reflecting feedback that Rail Partners, owning groups, and open access operators have shared with ORR, including through the cross-industry open access summit facilitated by Rail Partners in November 2023.

However, refining guidance is only one part of the framework required for open access to succeed, and consideration needs to be given to wider issues if passengers, communities, and local economies are to yield the benefits of open access passenger operations.

Open access operators deliver significant benefits for passengers

Although open access operators only provide a small proportion of passenger services, they bring significant benefits to passengers, communities, and the wider economy.

- **Open access connects underserved communities -** Open access operators have a proven track record in developing new journey opportunities for passengers. For example, in communities such as Beverley, Cottingham, Halifax, Hartlepool and Howden, only open access operators offer direct services to London.
- **On-rail competition encourages lower fares -** ORR's monitoring of open access over recent years has observed evidence of fares competition on the East Coast Main Line (ECML),where several open access operators compete with state-owned LNER, with open access operator Lumo offering fares a third cheaper on some routes compared to LNER.[1] Additional evidence from Europe shows that fares decreased by an average of 28% on routes where on-rail competition was introduced to the market.[2]
- **Open access innovates to improve the customer offer -** Open access operators have delivered innovative services to attract customers. For instance, recognising that travellers value the certainty of being able to book their travel early, Grand Central extended the booking period beyond the industry standard of 12 weeks, allowing customers to book tickets up to 26 weeks in advance.
- **On-rail competition drives growth across an entire route -** Since the pandemic, passenger numbers in the long-distance market have recovered faster for operators on the ECML (including state-owned LNER) where there is on-rail competition, than for operators on comparable routes. Open access operators Hull Trains and Grand Central have also achieved the largest recoveries in passenger volumes of all operators nationwide when compared to pre-pandemic levels.[3]
- **Open access helps to drive modal shift and other wider benefits -** These new journeys help support economic growth and modal shift on long-distance routes. For example, the market share of rail (compared to air travel)

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[1] Office of Rail and Road (2022). *Monitoring the impact of, and response to, open access: 2022 update*.
[2] European Commission (2024). *Study on passenger and freight rail transport services' prices for final customers*.
[3] Office of Rail and Road (2024). *Monitoring open access: 2024 update*.

between London and Edinburgh grew from 35% in 2019 to 57% in 2022, partly driven by the introduction of additional services by Lumo.[4]

Open access operators deliver these benefits without any direct subsidy from taxpayers, and government is not exposed to any of the commercial risk associated with these services. Open access operators pay charges that cover the wear and tear costs they create on the network, and contribute towards the wider fixed costs of the network through the infrastructure cost charge.

Given these benefits, and that the new government has stated that there will be an ongoing role for passenger open access operators under its reform plans, it is vital that the right conditions are created for open access to continue growing and thriving for the benefit of local economies and passengers.

Open access operators continue to face challenges to growth

Despite the potential for open access to grow and deliver further benefits across the railway, prospective open access operators and those operators expanding services continue to face barriers.

It remains difficult to identify available capacity on the network, despite Network Rail's expectation that traffic will be 12% lower during Control Period 7 when compared to pre-Covid levels. Network Rail can be overly conservative in its assessments, so it is important that ORR continues to hold it to account for making best use of available capacity. This should include, but is not limited to, ensuring that Network Rail provides transparent information on available network capacity as part of its Network Statement.

The time and resource required to create a business case, engage with Network Rail to find access, submit an application to ORR, and provide additional information remains long and costly – putting off prospective entrants or those seeking to expand services. ORR's guidance suggests allowing a 12-week period for their review of an open access application. However, in practice the overall process for applying for access can take much longer, given the challenges of identifying capacity during the pre-application process, which ultimately makes it harder for ORR to review an application that does not have collective 'buy-in'. This can make the process of launching new operations or services unattractive when applicants are expected to put significant capital and resource at risk.

There are currently a number of applications for new or expanded open access services which have been submitted to ORR for its consideration. It is important that these applications are assessed in a timely manner to ensure that the benefits of those services can be realised for passengers, local communities, and the wider economy.

More broadly, the ongoing uncertainty around rail reform and the role of open access under a new model risks undermining market confidence – particularly given the long lead times associated with developing a new open access proposition. While there are positive signals about the role open access can play within a reformed system, it remains unclear how Great British Railways (GBR) will be set up to encourage the growth of passenger open access.

Crucially, without the right safeguards, there is a risk that GBR as a public sector monopoly will be naturally incentivised to prioritise the interests of its own passenger services. Protections for non-GBR operators will be even more important, including a regulated access regime and retaining key elements of the current protections in *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016* and the *Railways Act 1993*. These protections provide long-term certainty for operators, which is crucial for building a business case.

Within this challenging context, providing clarity and certainty to prospective open access applicants is a key enabler to any future growth in passenger open access services. That is why we broadly support ORR's work to clarify the

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[4] First Group (2022). *Rail now preferred choice over air travel between Edinburgh and London as 1 million passengers pick Lumo*.

application process for open access operators through this draft guidance. We set out our detailed responses to ORR's consultation questions in the following sections.

Rail Partners' response to ORR's consultation on the draft guidance

1. *We have proposed a new routine approach to monetising the costs and benefits associated with open access in Chapter 3 of the draft guidance. What are your views on our proposed approach?*

Rail Partners supports ORR's proposal to monetise the wider costs and benefits associated with prospective open access operators. As explained in ORR's draft guidance, ORR considers all of its statutory duties when making decisions on open access applications. However, currently only some of these duties (most notably the impact on government funds) are monetised. ORR has proposed that it will monetise economic, social, and environmental benefits, as well as indirect tax transfers, in line with the Department for Transport's Transport Analysis Guidance (TAG) to give a better overall picture. Taking steps to monetise these benefits is a welcome step in the right direction, and TAG is a widely understood methodology that provides a consistent basis for assessing benefits.

Monetising these will help ORR's board take into consideration the wider benefits that open access operators can bring to the network. Recognising natural biases in decision making, there could be a risk today that quantified costs are given more weight than wider benefits which are only described qualitatively, but may nonetheless be substantial. Providing additional quantified information on wider costs and benefits to ORR's board will help inform more holistic decisions on open access applications - particularly in cases where the result of the not primarily abstractive (NPA) test is marginal.

A number of issues need to be considered, however, when monetising wider benefits. Firstly, ORR should ensure that this additional analysis does not lengthen the application process and minimises the resource and information burden on applicants. ORR has stated that it will use this information for cases where the NPA test is marginal. For small-scale applications (e.g. small amendments or additions to existing services), or where the results of the NPA test clearly show that an application either has a very strong or weak case for progressing, we would expect ORR to consider whether the administrative work associated with monetising benefits is necessary.

Secondly, while using TAG to quantify the benefits of open access will help ORR make more informed decisions in the interest of passengers and taxpayers, we also note that TAG can have some limitations. Open access has a proven track record of driving modal shift from more carbon intensive modes, but these benefits can be understated when forecasted through TAG which can focus on historic trends and underestimate behavioural changes when new transport services and connections become available. Although environmental benefits are considered in the appraisal analysis, and we recognise this does capture road decongestion well (through improved journey times for road users), the carbon benefits from modal shift to rail can be undervalued by TAG.

Furthermore, some of the wider economic benefits from new rail services (including job creation and Gross Value Added) can also be understated in TAG. As open access typically connects historically underserved communities, these benefits can be particularly transformative at a local level and help contribute to government objectives to reduce regional inequalities.

Research shows that the wider benefits of open access operators can be substantial. For example, Lumo recently commissioned Arup to undertake economic analysis of the past and future benefits of Lumo's services, valuing these at £470-740m between 2021-33.[5] These benefits are the result of £9-19m in passenger journey time savings, £21-43m in direct employment, £130-365m in mode shift benefits related to the environment, £125m related to reducing road congestion and accidents, and fare savings to Lumo's passengers of £185m. Similarly, Hull Trains have delivered an estimated £185-380m in monetised benefits since their launch c. 20 years ago.[6] Arup estimates this will increase to £325-700m in economic benefits through to 2032.

As ORR develops its detailed approach to monetising costs and benefits and begins to deploy TAG in practice, it should keep its methodologies under review and ensure that the full range of benefits are being captured. Where the benefits

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[5] Arup (2024). *Lumo: Economic impacts study*.
[6] Arup (2024). *Hull Trains: The economic impacts of an open-access operator*.

of open access services are not wholly captured by TAG, ORR should continue to consider additional qualitative information to inform its decision.

2. *We have proposed removing the benchmarking stage of the NPA test. This is because the Passenger Demand Forecasting Handbook 5 introduced more robust ways to account for large changes in journey times. This change is reflected in Chapter 4 of the draft guidance. What are your views on our proposed approach?*

Rail Partners supports ORR's proposal to remove the benchmarking stage of the NPA test for larger open access applications, in favour of using other methodologies to adjust its forecasts of demand such as the elasticities introduced in Passenger Demand Forecasting Handbook 5 (PDFH 5) and gravity models. However, we note that benchmarking may still be of some use in calibrating those gravity models, and that benchmarking can be a useful methodology for assessing some types of smaller-scale applications. ORR should also consider the substantial body of evidence from Britain and Europe that open access services have a significant generative effect on demand, and we await the results of ORR's ongoing work to evaluate the evidence base on abstraction.

Given the centrality of the NPA test to ORR's decision making on open access applications, it is important that ORR's methodology best reflects the available evidence on the extent to which applicants will generate new demand. Benchmarking in the NPA test applies analysis of how previous open access services have impacted revenues, and uses this to refine the estimated revenue impact of the proposed new service. However, benchmarking comparisons may not be robust where there are substantial differences in the routes being proposed, or in the business model approach and target market of proposed services. We therefore agree with ORR's proposal that using the new elasticities introduced in PDFH 5, as well as direct demand forecasting methods such as gravity models, are more robust methods for assessing demand where an application includes significant changes. However, these gravity models need to be calibrated to an acceptable level of validity, and benchmarking may still be of some use in this process.

We also note that ORR may continue to use benchmarking for small-scale applications, such as for introducing an additional service, and we support the role benchmarking can have in assessing some smaller-scale applications. However, benchmarking may not be appropriate for evaluating every type of small-scale change. For instance, introducing an additional station stop into a service pattern may appear to be only a small change, but a comparative approach may not accurately capture how passenger behaviour changes in response to a completely new journey opportunity. We would welcome additional clarity on the thresholds at which ORR will consider an application to be 'small-scale', and ORR's guidance should expand further on which methodological approach it considers most suitable for assessing different types of applications.

More broadly, in considering the generative effect of new open access services, ORR should review the body of evidence from Britain and Europe that open access operators have generated significant new demand. For instance, the European Commission has recently published a report that shows open access leads to lower fares, cost savings to taxpayers, increased service frequency, and improved service quality (including improved amenities onboard, in stations, and new rolling stock).[7] This wider evidence could suggest that open access services are attracting more new passengers to rail (including from other, more polluting modes) and are more generative and less abstractive than is commonly believed.

Finally, we understand that ORR has commissioned work to review the evidence base on abstraction as committed to in its April 2024 report, *Assessing the costs and benefits of new open access services*. When available, ORR should publish the findings of that work to give industry clarity and confidence on the detailed analytical basis on which revenue generation/abstraction will be assessed.

3. *This draft guidance is intended to support new operators who are less familiar with ORR decision making. We therefore included additional explanations and signposting to our other guidance. What are your views on the*

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[7] European Commission (2024). *Study on passenger and freight rail transport services' prices for final customers*.

explanations we have provided? Are there specific areas that need further clarification? Or areas that we have missed?

Rail Partners supports ORR's intent to provide clarity around the open access application process through its draft guidance. However, the guidance focusses mainly on the process following submission to ORR. In order to make this guidance even more useful for prospective open access operators, it would be helpful to expand the summary guidance to draw out additional key points on the pre-application process as well (including timelines and expectations of all parties), noting this can often be the main area of challenge for applicants.

Much of the work required to progress an open access application takes place before submission to ORR. Developing business cases, engaging with Network Rail, and the need to sometimes take applications forward without Network Rail's support can make applications a lengthy process. The lead times to introduce a new service are substantial, and analysis and decisions need to be made well in advance of the relevant timetable change. Prolonged application processes increase the start-up costs for new operators and can risk undermining the business case for a new service if delays securing approval push back the introduction of services. Uncertainty around the time and resource requirements of the application process can also itself be a deterrent to new entrants, particularly as they are putting significant capital and resources at risk.

ORR's other guidance, *Making an application (for track access)*, outlines the stages an application must go through before submitting formally to ORR. Without fully duplicating this separate guidance, it would be helpful to bring additional key points into this new summary guidance to supplement the information at the start of section 2. For instance, summarising how much time applicants should allow for each stage of the process and what information applicants will need to be able to provide, including the format that information should be provided in, (e.g. which version of MOIRA should be used in applications) would make the summary guidance a more useful 'one-stop shop' for applicants.

ORR could also explore further opportunities for simplification of its track access guidance, and these various documents will need to be kept under review – particularly in the context of rail reform which could lead to changes to the track access framework.

4.   Do you have any further comments?

Longer access contracts would encourage investment

Longer track access contracts would significantly reduce risk for operators and encourage private sector investment, such as for new trains or improvements to stations. This is particularly important given services may not start for several years and may be loss-making at the start.

ORR publishes separate guidance on *Duration of track access agreements (framework agreements)*. ORR should keep its policy position under review, but could also consider incorporating elements of that document into this summary guidance, given it is a key issue for prospective and current open access operators.

Regulation under rail reform is important for open access

Although beyond the scope of this consultation, it is important that ORR's independent role in the track access framework is safeguarded in the future. We understand that the government proposes to retain open access in the future, and a fair and stable regulatory framework is a key enabler for future investment in open access passenger services.

While the new government's rail reform proposals are still being developed, it is possible that there will be changes to ORR's role and the legal framework for track access. If so, it will be necessary to update this (and other) guidance to ensure industry continues to have clarity on how the legal framework for track access works, ORR's role within the framework, and how ORR will make decisions on access applications.

ORR consultation on summary guidance on rail open access applications: response from the RMT

The National Union of Rail, Maritime and Transport Workers (RMT) is responding to the ORR's consultation to share our views about the draft guidance as well as the ORR's approach to open access more broadly. In the rail sector we have members at all of the existing open access operators and Government managed and owned rail operators. The ORR's decision making on open access therefore impacts directly on RMT members.

We understand that the draft guidance currently being consulted on follows on from the ORR report published in April 2024 on 'Assessing the costs and benefits of new open access services' which in itself was undertaken as a result of an instruction by the previous Government in December 2023 to 'undertake several areas of work to reduce barriers to open access'[1]. Since this work commenced, there has, of course, been a General Election, with the election of a new Government that has significantly different policies and goals for the rail sector than its predecessor. The Labour Government has committed to bringing the UK's railways into a nationally integrated rail network in public ownership. It has started this process with the Passenger Railway Services (Public Ownership) Bill which is making its way through Parliament and will enable the Government to bring all private rail franchises into public ownership as contracts expire. This will be followed by future legislation which establishes the future integrated national railway company Great British Railways (GBR).

Labour's plan for rail[2] states that open access will be able to continue where *'there is a case that open access adds value and capacity to the network'* and crucially that *'ORR will continue to make approval decisions on open access applications on the basis on an updated framework and guidance issued by the Secretary of State'*. This is a notable shift from the previous Government's desire to expand open access.

Our understanding is that the Secretary of State's updated framework and guidance has not yet been issued to the ORR. The current Secretary of State guidance was last updated in 2017, and therefore does not reflect current Government policy. In light of this, we believe that the ORR's work in this area, including the production of this new guidance, should be halted, alongside any decisions around whether to authorise new applications for access rights, pending the updated guidance and framework from the Secretary of State. To not do so risks making decisions around open access operations that we believe will directly be at odds with the Government's goals.

Furthermore, RMT believes that the current system is skewed in favour of the open access operators and that if the playing field were levelled, it would be unlikely that it could be demonstrated that they add capacity and/or value to the network.

The Government's wider rail reforms include the creation of a publicly owned and integrated national rail network and work towards this is already underway with the Passenger Railway Services (Public Ownership) Bill making its way through Parliament. Further legislation will be tabled to establish Great British Railways (GBR).

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[1] https://www.orr.gov.uk/sites/default/files/2024-04/costs-benefits-new-open-access-services-april-2024_0.pdf
[2] https://labour.org.uk/wp-content/uploads/2024/04/GETTING-BRITAIN-MOVING-Labours-Plan-to-Fix-Britains-Railways.pdf

The Government's vision for its rail reform is to 'deliver a unified and simplified rail system that relentlessly focuses on securing improved services for passengers and better value for money for taxpayers'.

RMT believes that continuing, and possibly even expanding, open access operations is incompatible with Labour's goal of creating a unified and simplified rail system that works for passengers and taxpayers. We also believe this would restrict rail network access for the new publicly owned operator and make integrating timetabling and fares significantly more complex.

Value for money and revenue abstraction

RMT believes that the 'Not Primarily Abstractive' (NPA) test undertaken by the ORR when deciding whether to approve applications from open access applications is inherently flawed because the threshold is set so low. Under the test, ORR will not normally approve applications that return a ratio under 0.3:1, meaning that for every £1 abstracted from other operators, the open access operator only needs to generate 30p of new revenue. This means in fact that they **are** primarily abstractive, and significantly so.

The vast bulk of revenue abstraction by open access operators is from Government managed operators. Already many of these are publicly owned, and all are publicly funded, with the Government holding revenue risk under the National Rail Contracts. Once GBR is established, all will be publicly owned. This means that the vast majority of all revenue abstracted is being taken from the public purse. This is clearly at odds with the ORR's statutory duty to have regards to the funds available to the Secretary of State.

Furthermore, the NPA is clearly a highly subjective measure. As ORR will be aware, the aspirant open access operators and incumbent operators often produce significantly different NPA ratios from their modelling.

Open access operators also argue that these services run at no cost to the taxpayer, but this is simply not true. As well as abstracting revenue from publicly owned/managed operators, open-access operators receive a significant indirect subsidy, as unlike the traditional train operators, they do not pay fixed track access charges for accessing the rail network. Fixed track access charges account for 25% of the GB franchised rail operators' expenditure.

We note that ORR now permits Network Rail to levy an Infrastructure Cost Charge on some open access operators, but as this is only levied on those classed as 'interurban' services, the only existing open access operator that will pay an ICC in Network Rail Control Period 7 (2025 – 2029) is Lumo, and because the implementation of the charge is phased, it will not pay the full ICC until 2026/27. Even where the ICC is levied, the rate is significantly less than the fixed access charges paid by franchised rail operators and is set at such a level as to ensure the operators remain profitable. Indeed, in its formal objection to Hull Trains' proposed expansion, LNER argued that '*given the level of abstraction and lack of contribution to NR network costs, we would suggest that the Infrastructure Cost Charge be set higher for inter-urban open access operators so there is more of a benefit sharing between the taxpayer who funds the network and First Group's shareholders.*'

Capacity

Following ORR's letter to the rail industry in April 2024 which stated that you had, or expected to, receive a higher than usual number of access applications, we understand there were 11 applications from new or existing open access operators for new contracts or amendments to existing contracts. There is clearly insufficient capacity to accommodate all of these requests.

The competing track access applications highlight the significant additional complexity introduced into the rail network by open access. Given that one of the Government's goals for GBR is to introduce integrated timetabling, it seems to us that the continuation of open access operators, who would be competing with GBR for track access is completely at odds with this goal.

We also do not believe that it is a coincidence that recent months have seen this ramping up of applications from aspiring open-access operators in the run-up to the general election, given Labour's stated intention of bringing the privately operated rail contracts into public ownership. It is not implausible that the private rail operators, aware of the Government's plans for renationalisation are turning to open-access in order to retain a profit-making stake in the railway. We would argue that this is less about delivering benefits to passengers and much more about generating dividends for private shareholders.

The absurdity of the open access sector, and the extent to which is functions primarily as a mechanism for generating profits, is exemplified by the recent sale of Grand Union's Euston to Stirling open access operator to rival First Group. Grand Union, now owned by First Group, will operate on the West Coast Main Line in direct competition with First Group's DfT contracted operator Avanti West Coast, which creates a clear conflict of interest. This is because the open access Euston to Stirling operations will be abstracting value from Avanti's operations, which are currently subsidised by the Government. The open access operator is due to commence from June 2025, and therefore could be running in competition with Avanti for over a year until its core term expires in October 2026 and it is brought into public ownership. The absurdity is further highlighted by the fact that Avanti West Coast objected to Grand Union's application for track access when it was owned by a competitor "*on the basis that it would abstract unacceptable levels of revenue from existing operators. They also raised capacity and performance concerns.*" [3]

Permitting First Group to run an open access operation that directly abstracts value from its DfT managed operation, and thus the public purse, cannot be in-line with the Government's goals for an integrated rail network and ORR's duty to have regard to the funds available to the Secretary of State. RMT has urged the Government to urgently introduce provision that if ownership of an open access operator that has secured access rights transfers, the track access rights should be paused and reviewed in light of this.

Furthermore, the long contracts sought by and often awarded to open-access operators, often up to 10 years long, will significantly cut across the establishment of GBR and hinder the Government's ability to design and deliver an integrated rail network. RMT believes that ORR should not be granting open-access contracts now that will hinder GBR's ability to design an integrated timetable and that could potentially remain in place for years after the formation of GBR.

Cost benefit analysis

ORR is seeking views on its proposal to undertake monetisation of costs and benefits, based on the DfT's Transport Analysis Guidance (TAG), to inform decision making and states that they 'expect this to be most relevant in cases where the NPA test result is marginal'. As already detailed, RMT has significant concerns about the NPA threshold of 0.3 and believe that this in fact permits open-access operators to be primarily abstractive. Whilst the ORR's guidance is vague around how it might take CBA into consideration in its decision making, for the avoidance

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[3] https://www.orr.gov.uk/sites/default/files/2024-03/2024-03-07-grand-union-london-stirling-decision-letter.pdf

of doubt, RMT would oppose any use of CBA which made the ORR more likely to approve access applications or permit access where operators did not meet the (incredibly low) 0.3 threshold. Furthermore, any CBA that was undertaken prior to the creation of GBR would need to be weighed against the benefits for passengers and taxpayers that will be delivered as a result of the creation of an integrated and publicly owned national railway. Benefits that open access operators may argue they will deliver in the current fragmented and largely privatised rail network could be much harder to demonstrate in an integrated and publicly owned railway that can deliver an integrated timetable and ticketing.

The impact assessment for the Government's Passenger Railway Services (Public Ownership) Bill states that the Bill will deliver benefits including 'reduced fee payments to private operators, the ability to take integrated decisions and align operator behaviour with government and passenger objectives'[4]. It seems completely at odds with this goal if work to 'break down barriers' to open access, instigated by the previous Government, continues simultaneously to the public ownership Bill's progress through Parliament.

RMT believes that the publication of the guidance and any other work associated with the previous Government's instruction should be paused by ORR pending an updated framework and guidance from the current Government.

ORR's statutory duties

RMT disagrees with the ORR's assertion that evidence shows that open access operators have introduced competition to the rail network to the benefit of passengers. Instead, we believe it is clear that open access operators are only able to function because the system is skewed heavily in their favour. They do not pay fixed track access charges, they abstract significant revenue from existing operators, they can 'cherry pick' attractive routes and do not have to worry about delivering a whole network and they have much lower overheads than contracted rail operators. In short, they are not operating in a level playing field.

We understand that ORR has to take its statutory duties into account when making access decisions and that primary legislation is required to change its duties. However, there are already duties on ORR to consider funds available to the Secretary of State, as well as guidance issued by the Secretary of State, so these should be key considerations in the decision making process, pending further changes that may be introduced by the GBR legislation. It appears as though the ORR already has sufficient flexibility to decide how to weigh its duties in its decision making, and it is clear now that the duty to foster competition is incompatible with the Government's plans for rail reform, and therefore, ORR's decision making should reflect this.

Taking steps to limit the prevalence of open access on the rail network would be, in our view, consistent with many of ORR's existing economic duties, including the duties to promote improvements in railway service performance; protect the interests of users of rail services; contribute to the development of an integrated system of transport of passengers and goods.

Industrial relations

Whilst the ORR does not have a direct role in industrial relations between rail operators and their staff, the approach to industrial relations of open access operators should be considered by the ORR in their decision making, especially in the context of the potential impacts on passengers and the Secretary of State of poor industrial relations.

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[4] https://bills.parliament.uk/publications/56457/documents/5187

Open access operators do not voluntarily recognise trade unions, suggesting an attempt to restrain staff pay and conditions. The former Rail Minister Huw Merriman as good as admitted this, stating that "*There's no industrial action on open access operators, perhaps because it's a fresher way of working with the workforce rather than on an old rule book basis.*" Lumo does not recognise the RMT, and only recognised Aslef for drivers after an application to the CAC by Aslef after the union met the statutory recognition threshold, which was disputed by the company.[5] Hull Trains, also owned by First Group has recently made the decision to close its final salary pension scheme to new entrants, making its hard-working employees worse off in retirement.

This again reinforces how the primary goal of open access is to maximise profits at the expense of passengers, taxpayers and staff. RMT believes that one way to level the playing field between open access operators and publicly owned/managed operators is to require, under the terms of their access licence, all open access operators to recognise the relevant trade unions.

Conclusion

We see the production of this draft guidance as the continuation of a workstream instigated by the previous Government which is no longer consistent with the current Government's policies and priorities. We believe, for the reasons set out in our response, the ORR should pause all work, including the production of this guidance, pending the Government's updated guidance and framework.

We believe that before any further open access applications are considered by ORR, there needs to be significant changes to the framework to level the playing field including by levying equivalent fixed track access charges on all open access operators, significantly raising the NPA threshold so that any operators are genuinely not primarily abstractive (i.e. they generate more new revenue than they abstract) and requiring all open access operators to recognise trade unions.

Overall, RMT believes that open access has no role in a publicly owned and integrated railway and we will be continuing to make representations to the Government to this effect.

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[5] https://www.gov.uk/government/publications/cac-outcome-aslef-east-coast-trains-limited-trading-as-lumo/application-progress

TfGM Response to ORR Open Access Guidance Consultation

October 2024

1. We have proposed a new routine approach to monetising the costs and benefits associated with open access in Chapter 3 of the draft guidance. What are your views on our proposed approach?

TfGM support the consistent inclusion of monetised social, environmental or economic impacts as part of OA application process. We welcome this renewed clarity on the ORR's approach to the overall process.

2. We have proposed removing the benchmarking stage of the NPA test. This is because the Passenger Demand Forecasting Handbook 5 introduced more robust ways to account for large changes in journey times. This change is reflected in Chapter 4 of the draft guidance. What are your views on our proposed approach?

TfGM support the approach that is outlined within the document.

3. This draft guidance is intended to support new operators who are less familiar with ORR decision making. We therefore included additional explanations and signposting to our either guidance. What are your views on the explanations we have provided? Are there specific areas that need further clarification? Or areas that we have missed?

The additional explanations and glossary are welcomed within this document, and we would encourage this as 'best practice' for any future ORR and industry-wide publications.

It is noted that the term 'railheading' was used along with an explanation in Section 4: *Process for conducting the NPA.* The explanation does not clarify whether railheading applies specifically to motorists who drive to a further station for parking facilities or other factors (as is typically the case), or if the ORR uses this term more widely to apply to passengers of all modes (e.g., bus, active travel, etc). Some clarification on the modes which this term applies to would be appreciated.

4. Further Comments

It is noted that the ORR requires OA applicants to evidence that they will utilise the capacity (paths) that they are granted. We would appreciate further guidance on how the ORR determines whether there is sufficient capacity in the timetable (paths) to accommodate new services without being at the detriment of existing services and performance. Although this is noted within the guidance, we would like to see the guidance being more explicit on how the ORR will handle such issues, and also how Local Transport Authorities such as ourselves should respond to this. This is particularly pertinent in GM at the moment where we are seeing a sudden influx of interest from OA applicants; but we have not necessarily seen sufficient evidence that there is the required capacity within our existing network to operate these services without negatively impacting performance.

We also request that the ORR does not undermine the business case for investment schemes by allowing OA applicants to use white space created in advance of major scheme delivery. In many cases, complex programmes will create some spare capacity in early phases of delivery, which cannot be used for the intended outcomes until the completion of the whole programme. If this capacity is used by OA applicants, it may subsequently impede delivery of the intended scheme outputs.

We would also like to see a requirement for OA applicants to work with local authorities to develop opportunities for improvements to stations that are receiving a service uplift as a result of OA operation. For example, if an OA applicant plans to serve a station that is not accessible, we would like to see the applicant be required to commit to funding accessibility improvements should their application be accepted.

To conclude, TfGM recognises the benefit that OA services can bring to the railway, and we encourage opportunities to work more closely with OA operators. However, we have a duty as a Local Transport Authority to ensure that any new operations are not to the detriment of performance upon the existing network, and that all new operators provide benefits to both our region's residents and visitors alike.

ORR Open Access Guidance consultation – West Yorkshire Combined Authority response

> **Executive Summary**
>
> *The Combined Authority is broadly supportive of any moves to improve the accuracy of the modelling used by ORR to estimate the expected impact of new open-access train operations on patterns of rail demand and finances. However, in our view there are much wider questions of critical importance that will need careful thought as rail industry reform gathers pace, in particular how open-access operations fit with a far more integrated core passenger network in public hands, such that new approaches seem very likely to be needed. This wider context is not reflected in the present consultation. Even while the present arrangements continue, it is also legitimate to question whether the competition-based "not primarily abstractive" test, which allows up to 70% of the revenues of a new open-access service to be abstracted from those main existing train services rather than being new-to-rail demand, does not attract excessive weight within ORR's decision-making, as against other pertinent strategic, economic, financial and network utilisation criteria.*

Introductory comments and background

We thank you for consulting on this matter and allowing the Combined Authority the opportunity to comment on the ORR's proposed changes to the assessment of Open Access (OA) services, and in particular the appropriate use of the "not primarily abstractive" (NPA) test.

The Combined Authority recognises the value that many of these services bring – not only to West Yorkshire, but beyond as well: in particular, our region has benefitted significantly from the Grand Central Bradford – London service, which has provided several centres in Calderdale, Kirklees and Wakefield districts with their first direct London trains in many years, and substantially upgraded the offer for the city of Bradford. This service is highly valued and demonstrates how there can be cases where OA operators can identify and fill gaps in rail's existing offer, with very real benefits.

Against this, however, there are naturally arguments in relation to the efficient use of rail network capacity that is often extremely constrained; to the potential adverse financial impacts on the principal (formerly franchised) operators and therefore to railway finances as a whole; to the ability of the railway to be planned against a coherent strategy and with a simple, passenger-friendly timetable; and to the risk of adverse impacts on network performance.

Beyond this, it is clear that the railway's regulatory, policy and economic landscape is changing significantly, such that the environment in which OA operations are considered is likely to be radically different in, say, five years' time. We appreciate that this consultation arises out of a previous one, which gave rise to the report published in April, and so predates the change of Government and the new commitment to radical reform of the rail industry.

We appreciate therefore too, in this context, that the ORR's current remit as regards OA operators is a rather circumscribed one, largely laid down under the still current (at present) Railways Act 1993, and with a strong presumption in favour of "on-rail" competition being a "good thing". With the migration of the former TOC franchises into public hands, in parallel with wider industry reform to provide much greater integration, both vertical and horizontal, it appears inevitable that this framework will change, as, we expect, will the overall regulatory

framework within which the railway operates. Government has indicated that it still sees a role on the reformed, largely nationalised, passenger railway for OA operations, but it seems highly probable that the criteria on which OA operations (certainly prospective new ones) are assessed will themselves need to change.

For example, we believe it is likely that such wider questions will include:

- Is NPA still the right primary test for prospective OA services?
- Or should there for example be some form of overriding social / economic / financial [etc.] test to the value a new OA service would add?
- Or might a combination of the above be appropriate?
- If so, what should be the balance between purely financial and wider social / economic criteria in assessing OA applications?
- How will OA operations in future contribute to the overall strategic approach that Government has indicated it wishes to achieve through its "directing mind"?
- If NPA remains appropriate, whether as a primary test or as a component of a wider appraisal, is the current 30% threshold the right one? (It is of course self-evident that with this threshold, the term NPA is a misnomer, as up to 70% of an OA service's prospective revenues can in fact be abstracted from existing rail services and the test remain satisfied – and it may be felt that 70% abstraction is somewhat high.)

These matters are evidently outside the scope of this current ORR consultation, but in a sense their overriding nature to an extent renders the questions in the consultation (which largely centre on _how_ the NPA test should be applied) secondary in nature. We would be keen to learn ORR's thinking on these wider matters; is ORR planning to carry out consultation on such questions, or is the intention that any such consultation should await a steer from Government as to what the overall approaches to OA should be, and indeed as to ORR's future wider role in railway governance and regulation?

Even in advance of rail industry reform, however, there is a widespread view that the ORR's approach now does not necessarily achieve the right balance between its existing duties, in particular that excessive emphasis is possibly being placed on the promotion of competition as being _per se_ advantageous on the railway (as opposed to competition between rail and other modes). This can lead to undue weight being placed, it may follow, on the NPA test (aside from the question of the appropriateness of the 30% threshold), and possibly insufficient on issues such as network capacity and performance, strategic fit, and the risk that OA operations take paths that result from significant public investment in rail infrastructure that was designed for other purposes – potentially putting at risk the delivery of the benefits on which the case for such investment was based. To take an example of the last point, it is likely to be necessary to leave paths available around places like Manchester, Leeds and York for future services on which the business case for the current Transpennine Route Upgrade is based, and it is therefore essential that such paths should not be allocated elsewhere before TRU itself is complete and allows the capacity to be used in full as intended – otherwise the case for TRU itself could risk being undermined. It has been suggested too that there have been instances where insufficient weight may have been placed on evidence from Network Rail as to potential adverse capacity / performance impacts of a new OA operation, as against, for example, evidence on this point from the applicant itself.

Against this background, while we can understand why ORR nonetheless would wish to optimise the current overall system so long as it continues, clearly such efforts do need to be

viewed as time-limited in nature, given the likelihood that different approaches to the regulation of OA operations might render some of the specifics obsolete. And equally, we would wish to highlight in any event the above questions as to the balance of the NPA test against other factors.

While we have nonetheless sought to provide below our views on the specific questions asked in your consultation, we therefore feel it important to set out the above points by way of context for, and qualification of, those answers. In that sense, our more detailed observations below should be regarded as "without prejudice" to our overall views on the wider questions regarding rail regulation in general, and OA operators in particular, in the context of rail industry reform.

We have proposed a new routine approach to monetising the costs and benefits associated with open access in Chapter 3 of the draft guidance. What are your views on our proposed approach?

We have set out above our misgivings regarding the balance between the ORR's various duties, and the resultant risk that excessive weight may be placed on the NPA test – regardless of the threshold value chosen – as against the wider matters that are, even under the existing legislative and regulatory framework, also within the ORR's remit. It appears that there is a good case for a wider analysis to be undertaken routinely, rather than by exception, as appears to be recommended here – noting that in any event, as described above, industry reform may well drive a move towards such a more strategic approach to OA applications.

On a specific point (3.21 et seq.), we are disappointed that the role of sub-national transport bodies such as Transport for the North is not also referred to.

3.25 and 3.26: Again we believe that this approach places too much emphasis on the NPA test and not enough on the wider costs and benefits (including those that are not monetised) of OA operations, reflecting excessive weight placed on the assumed desirability of competition. In any event, we consider it less than clear what would constitute a "marginal test result" on the NPA criterion: is it one where there is low confidence in the modelled results? Or perhaps one where the modelled result is within [X] pence of the "30p in the £" threshold? To the extent that this approach to carrying out a wider appraisal is appropriate, we suggest that greater clarity would be useful on what is meant by "marginal" in this context.

We have proposed removing the benchmarking stage of the NPA test. This is because the Passenger Demand Forecasting Handbook 5 introduced more robust ways to account for large changes in journey times. This change is reflected in Chapter 4 of the draft guidance. What are your views on our proposed approach?

To the extent that the NPA test retains a role in deciding on OA applications – which overriding question is discussed elsewhere in this response – it is clearly sensible that it should be measured and applied in a way that is as likely as possible to give plausible and robust results. It therefore follows that the adoption of best modelling practice should be followed, in whatever technical form that modelling might take – and in that context we agree that, with PDFH widely considered to summarise current industry thinking on best modelling practice, it is sensible to follow what PDFH prescribes in any given situation where the NPA test falls to be applied. As such, we would be neutral on specific suggestions such as the appropriateness or otherwise of benchmarking: it is for modelling experts to decide what the best approach is to applying the test and informing ORR's decision-making.

This draft guidance is intended to support new operators who are less familiar with ORR decision making. We therefore included additional explanations and signposting to our either guidance. What are your views on the explanations we have provided? Are there specific areas that need further clarification? Or areas that we have missed?

We have no particular observations to make on this point, other than to suggest that, whatever specific approaches are ultimately adopted, it would likely be helpful to applicants and wider stakeholders if the guidance were to give specific examples as to how the tests and measures might apply in the real world.

Michael Sasse and Matthew Stoddart, West Yorkshire Combined Authority, 1 November 2024