Katherine Goulding
Senior Executive, Access and Licensing

OFFICE OF RAIL AND ROAD

19 February 2018

To: all Freight Operating Companies (FOCs), Service Facility Owners, Freight Customer Track Access Contract holders and potential holders of such contracts, Infrastructure Managers and Train Operating Companies (TOCs) by e-mail

New General Approval and guidance for facility access agreements

1. On 24 July 2017 we consulted on a new General Approval (**GA**) and guidance module for facility access agreements (**FAA**). We received seven responses, from DB Cargo (**DBC**), Freightliner, Geldard Consulting Limited (**GCL**), Great Western Railway (**GWR**), Network Rail, Rail Freight Group (**RFG**) and the Welsh Government. We are grateful for the time taken by respondents to comment on our proposals.

2. We will now publish both the new GA[1] and guidance module[2] on our website. This is alongside our consultation responses and documents, including this conclusions letter[3]. This letter sets out a high-level summary of the changes from the previous GA, the consultation questions asked, a summary of the responses received, our comments, and any actions that we have taken or will take in response.

Summary of changes

3. The changes in the new GA are:
    - Expanding the definition of "Railway Facility" to include a wider range of facilities.
    - Removing the limitation that required parties to apply for specific approval for a new agreement if their existing agreement was entered into under the GA.
    - Updating of Office of Rail Regulation to Office of Rail and Road throughout.
    - Refinement of the definitions to remove those included in the Act, the 2016 Regulations and Network Code.
    - Removal of the explanatory notes.
    - Changing the format of the GA so it is more like the style we have adopted for other GAs.

[1] http://orr.gov.uk/rail/access-to-the-network/track-access/forms-model-contracts-and-general-approvals
[2] http://orr.gov.uk/rail/access-to-the-network/track-access/guidance
[3] http://orr.gov.uk/rail/consultations/closed-consultations/policy-consultations/new-general-approval-and-guidance-for-freight-facility-access-contracts

Question 1: Is the proposal to allow agreements of longer duration under the proposed GA suitable? If not, how long a duration should be allowed and why?

4. Five responses supported allowing longer agreement durations, and one response raised concerns over allowing longer agreement durations.

5. Freightliner supported the proposal, and noted that in practice, it would be unlikely that anyone would enter into ten year agreements due to the corresponding track access contracts (**TAC**) having less than ten years to run. It said that the proposal recognised the practical realities of the market.

6. GCL supported the proposal. It said that in general, there is no need to overly restrict the duration and five years with a possible extension to ten years seemed about right. GCL also noted that for a service provider operating multiple sites with a portfolio of contracts, there could be practical benefits for having a common expiry date.

7. GWR supported the proposal, as the justification of longer duration would be provided by the related TAC's specific approval. GWR asked if the corresponding TAC should be one approved by ORR.

8. Network Rail supported the proposal, as it fitted well with the Railways (Access, Management and Licensing of Railways Undertakings) Regulations 2016 (**2016 Regulations**) and its provision on framework duration. It noted that the proposal allowed ORR to retain oversight through the corresponding TACs with the Infrastructure Manager (**IM**), and ensure that the parties have mainline network capacity for the duration of the agreement.

9. RFG supported the proposal.

10. DBC accepted in certain circumstances FAAs with durations of longer than five years can be warranted, such as for supporting specific investment. However it did not support expanding this in a GA and it should remain five years, as it considered specific regulatory scrutiny as essential to ensure capacity at a facility is not being unduly reserved for long periods of time, possibly up to ten years. DBC said that as there is no ORR approved model contract for FAAs, this meant that contracts could be entered into with little oversight from ORR under the proposed GA.

11. DBC also noted that the GA itself does not mention standard access terms, and seemed to trust consultees would raise relevant concerns. DBC said that there appears to be no limit on the quantum of capacity allowed under the GA, and a beneficiary could conceivably agree to retain the majority of capacity up to ten years and prevent future use by other beneficiaries.

12. DBC was concerned that there is no ORR approved model FAA that could form the basis of any new GA. DBC considered that the absence of such a model contract resulted in additional legal and management time costs, particularly for service providers not experienced in railway access. It therefore urged ORR to consider developing such a model contract, in collaboration with relevant facility owners who wished to be involved.

13. In its response to Question 2 of the consultation, DBC said there was a potential issue with a FAA with a duration of longer than five years in connection with a framework agreement with an IM. DBC said this did not take into account facilities that do not directly connect to an IM's network, but instead connect with an intermediate facility before the IM's network. DBC also stated that this connected the FAA with the TAC and not the duration of the relevant rights in the TAC, and therefore DBC considered it should be made more explicit in the GA that the duration, if longer than five years, is connected with the specific access rights to that facility, and that there should be a mechanism for the FAA to terminate or be amended if the supporting rights are surrendered, lost or transferred.

14. We met with DBC in November 2017 to discuss further the issues it had raised, including FAAs being approved under the GA for longer than five years. DBC expanded on the points it raised in its response. It was concerned by the potential to reserve capacity for long periods of time without regulatory oversight, and that if contracts expired in five years, it would give a natural break point for the parties and the industry to look at the contracts again. If there were no concerns, the new contract could be in effect a renewal. We asked DBC if this would potentially add burden to it. DBC said a consultation on a new contract would be no more onerous than the other consultations train operators must consider, such as the Periodic Review documents.

15. DBC was also concerned that the corresponding access rights on the mainline network that would allow for duration of up to ten years would not be closely tied enough to the contract. There would need to be a clause in the contract to terminate the contract if the access rights moved to another FOC's TAC, which would add extra complexity to the contracts. DBC also noted that the duration of up to ten years did not take into account facilities where there was another facility between it and the mainline network, and the access required to use that intermediate facility.

Our view

16. After consideration of the points above, we have decided not to extend the duration of agreements that can be approved under the GA, keeping it at five years. This is a reasonable balance between providing certainty for the industry and requiring parties review their agreements on a more regular basis to make sure the agreement still fits their requirements. This does not prevent any specific applications for facility access agreements of longer than five years, and we will review each application on its own merits[4].

17. We note DBC's concerns over capacity being reserved and not used over long periods of time, and that this is not necessarily solved by agreements being limited to five years only under the GA. The 2016 Regulations state that standard access terms, such as use-it-or-lose-it, are included in any access agreements. This should alleviate concerns over capacity being unduly reserved over long periods of time. As this is a legal requirement, we have not included any extra requirements for standard access terms in the GA, as all parties to a contract must follow the law.

[4] "Duration of Framework Agreements", http://orr.gov.uk/rail/access-to-the-network/track-access/guidance

18. Beneficiaries who have been denied access to a facility have a right to appeal to us, either under sections 17 or 22A of the Act, or under regulation 31 of the 2016 Regulations for those facilities excluded from the Act's access provisions[5]. We also can issue directions under the 2016 Regulations to correct distortions in the market[6].

19. We note DBC's specific comments on developing a model contract for facility access, alongside Freightliner's comments in response to Question 2.

Question 2: Do you have any comments on the other proposed changes to the GA, or any amendments we have not included which you think we should consider?

20. Three consultees made comments on the proposed changes and on amendments we should consider. The other consultees either agreed with the changes or did not make any comment.

21. DBC noted it was correct for LMDs to be excluded from the scope of the GA. However it noted that it has become increasingly common for freight terminals to offer a limited range of light maintenance activities (such as refuelling). DBC considered that this development should not be discouraged due to the potential efficiency savings, and suggested that freight terminals that offer a limited range of light maintenance services should be included in the GA, as their prime purpose is operation as a freight terminal. DBC said the depot access contracts are not designed for these sites and require significant modification, which would imply that all such access contracts would require specific approval and therefore reduce the benefits of the GA.

22. Freightliner noted there is currently no model contract developed by ORR for facility access and that it would support the development of such a model contract alongside the GA. Freightliner also would support the inclusion in the GA of freight terminals where some light maintenance activities take place (not only refuelling) but are not the main focus of the business.

23. RFG supported the changes to the consultation clause and the refinement of definitions. RFG said that it supported the aims of creating a wider GA, including sidings, but noted that several service providers at port and inland terminals provide static refuelling facilities and must have an LMD licence or licence exemption. RFG said that this conflicts with paragraph 6 (which noted that LMDs are out of scope) and must be clarified.

Our view

24. Under the Act, sites which offer static refuelling are LMDs and will continue to require an LMD licence or a licence exemption. We are aware that for freight terminals whose sole LMD service is static refuelling, depot access contracts require substantial modification from the standard terms, and that this is an issue for such sites.

25. We are considering if it would be suitable to create model contract clauses for such sites which only offer static refuelling. Any sites which offered other light maintenance services,

[5] "The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016", http://orr.gov.uk/rail/access-to-the-network/track-access/guidance
[6] Regulation 34 (c)

such as wagon maintenance, would continue to require a depot access contract instead. These clauses could be included in the FAAs for such sites and would regularise their arrangements. However we would not expect such agreements to be approved under a general approval at this point, as we would want to make sure that the model clauses were being used appropriately.

26. This work-stream needs to be developed further and we do not wish to delay the GA while we give it our consideration. For now freight terminals which offer static refuelling are excluded from the GA.

27. We will also look into the potential to develop a model contract for facility access, however this will need to take into consideration the limited resources of both the wider industry and of ORR, particularly with the demands of the current Periodic Review. We also do not want to restrict the flexibility currently available to parties in regards of their FAAs, and if we were to develop a model contract, it would be an option and not a requirement to use it to use the GA.

Question 3: Would the proposed guidance be useful to you when making an application or when considering the regulatory regime for your facility? Are there any changes or additions to the guidance you think we should consider?

28. All respondents either commented that they found the proposed guidance useful or did not comment on the guidance.

29. DBC noted that the guidance did not include any reference to confidentiality exclusions or the public register, and suggested that these could be added to the guidance.

30. GCL and RFG noted that the terms facility access contract and facility access agreement were used inconsistently. They noted that paragraph 11 of the guidance answered their question about if FOCs must enter into access agreements, and that excluding freight terminals with refuelling points was unwise. GCL and RFG also noted that the point that using Access Dispute Resolution Rules would require paying a levy was well made.

Our view

31. We have added reference to confidentiality exclusions and the public register in paragraph 17 of the guidance.

32. We note GCL and RFG's comments, which we have considered jointly as both parties raised similar points. We have updated the guidance to use "facility access agreement" throughout. We will look at the guidance again, once we decide on how to proceed on the issue of freight terminals with refuelling facilities, as discussed above.

Other questions

33. Several consultees raised additional questions alongside the consultation questions above.

34. GCL asked if a facility is not excluded under the Railways (Class and Miscellaneous Exemptions) Order 1994[7], if it was now mandatory for a FOC to enter into an access agreement with a facility owner. GCL noted this was not the case three years ago and the FOC in question had still not entered into an access agreement with two separate service providers. RFG also raised this point.

35. GCL noted that some of the standard access terms were not included in the widely used Associated British Ports-style template and that it would be wise to incorporate use-it-or-lose-it and non-use provisions, especially for situations when there is limited capacity and optimising usage is an issue. In reality, GCL felt that service providers are usually able to accommodate services providing there is some timing flexibility. GCL noted that principles of transparency and non-discrimination meant it was agreed that terms and conditions should be standardised to all access beneficiaries at a facility, and asked if this covered the comment above about it being mandatory.

Our view

36. While both GCL and RFG noted later in their responses that the guidance appears to clarify the question of wherever a FOC can be compelled to enter into an access contract with a facility owner at a facility which is not exempt, it is worth clarifying. We cannot compel a beneficiary to enter into an access contract with a facility owner, however we strongly recommend that beneficiaries enter into such contracts. If they do not, they run the risk of losing their access to the facility if another party applies for access, either through the Act or the 2016 Regulations.

Business Impact Survey

37. We received one completed Business Impact Survey. Several consultees mentioned the business impact of the proposed changes in their responses. We appreciate the comments made and have considered them in assessing the impact of these changes.

Next steps

38. We have now issued our revised GA and new guidance module, which can be found on our website. The new GA can be used to generally approve freight facility access contracts from 2 February 2018. Any generally approved contracts and amendments must be sent to ORR at track.access@orr.gov.uk within 14 days of being signed to be placed on our public register.

Yours sincerely

Katherine Goulding

[7] http://www.legislation.gov.uk/uksi/1994/606/contents/made