Association of Train Operating Companies

Periodic Review 2013: Consultation on implementing PR13

04 September 2013

Introduction

ATOC provides a national voice for Britain's passenger train companies, helping to create, inform and shape the rail environment in Great Britain. We bring together all train companies to preserve and enhance the benefits for passengers of Britain's national rail network, which jointly we do by providing the following key services:

- A central clearing house for the train operators, allowing passengers to buy tickets to travel on any part of the rail network, from any station, through the Rail Settlement Plan
- A customer service operation, giving passengers up-to-the-minute information on train times, fares, reservations and service disruption across the country, through the National Rail Enquiries (NRE)
- A range of discounted and promotional rail cards, cutting the cost of travelling by train for groups including young people, families, senior citizens and people with disabilities
- Operational and engineering expertise, promoting safety, setting standards and encouraging excellence across the sector.

ATOC's mission is to work for passenger rail operators in serving their customers and supporting a safe, reliable, attractive and prosperous railway.

The ATOC Response

The challenge and opportunity for the UK rail industry in CP5 should be seen against a backdrop of increasing passenger numbers, rising levels of satisfaction and improved financial efficiency. It is important that there is an appropriate contractual framework in place to take the industry forward.

We have reviewed the proposed amendments to provisions in the model track access contracts and include an Annex providing comments on the legal drafting.

While these raise some issues of principle, the majority are intended to help improve clarity and address possible consequences of proposals and linkages with other industry arrangements. A number of these points have already been discussed with ORR during the consultation period by our adviser Simon Coppen from Burges Salmon. We recognise that some further discussion may be helpful.

The main issues we wish to raise in terms of implementation are in relation to:

Indexation – We do not believe there is merit in changing the basis of indexation and incorporating a true-up mechanism. This adds complexity and exposes operators to additional risk. Further work should be undertaken with DfT to coordinate indexation mechanisms between track access agreements and franchise agreements.

Schedule 4 – We raise a couple of drafting points and also propose a tighter relationship between the EBM costs calculation and the look-up table in Appendix B.

Schedule 7 – We identify a number of questions for ORR to consider in relation to the Network Rail Rebate and REBS. Clarification is sought in terms of REBS opt-out especially at a time of franchise change.

Schedule 8 – We question the timing of the ETCS Amendments that appear to us to be quite wide-ranging. There are likely to be further transitional measures necessary and these should be addressed through the ERTMS Part G processes.

Traction Electricity Rules – We propose some clarification on metering and also on the application of regenerative braking discount.

Our response to the PR13 Draft Determination is submitted separately. We would obviously expect to have an opportunity to review further drafting changes that arise from any adjustments that flow through the PR13 Final Determination.

Enquiries

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Annex

1 Indexation

1.1 There is a proposal across the documents for the basis of indexation to be revised, with an altered definition of RPI, a move to an averaged calculation of RPI through the year and the addition of a true-up mechanism.

1.2 We reject this for the following reasons:

(a) The current mechanism is long-standing and in line with other arrangements across the industry and common in commercial practice;

(b) The new mechanism adds complexity;

(c) The new mechanism adds risk into the industry by exposing operators to the risk of difference between the outcome from the new mechanism and the established indexation mechanisms applying to payments under franchise agreements through which track access charges are funded;

(d) While these objections apply generally, it is also inappropriate to apply the new proposal to adjust payments which are intended to reflect TOC revenues (noting that regulated fares are adjusted with reference to a simple RPI indexation factor) and TOC costs (for example under Schedule 4 and Schedule 8). Having established that these should be subject to a different indexation approach, it is questionable that the agreement should contain different indexation methodologies;

(e) The assumption made by ORR in the consultation that franchise agreement change mechanisms would flow through the consequences of the changed methodology is incorrect. The standard franchise agreement charge variation change mechanism will require the impact of the change to be forecast and then the value reflected in the relevant Financial Models, deflated to the prices relevant for use in that Financial Model and then reflated using a simple RPI indexation formula. This transfers risk of difference to the train operator; and

(f) The examples given to support the change do not indicate that there is a material issue to address. Furthermore, we suspect that Network Rail controls many of its costs through contracts and price reviews which operate simpler indexation mechanisms, such that any apparent greater accuracy from the revised mechanism is likely to be misleading.

1.3 In summary the proposal has questionable benefit, with any that there is outweighed by the inappropriate transfer of indexation risk onto train operators.

1.4 One route to increase industry efficiency would be to coordinate the indexation mechanisms applied between the track access agreement and the franchise agreement, so that the differences in mechanisms were minimised. We note that DfT is currently engaged in standardising franchise agreement payment indexation arrangements around a simple yearly January RPI index adjustment.

2 Schedule 4

2.1 Paragraph 2.9(d): We consider the relationship between paragraph 2.9(c) and paragraph 2.9(d) would be better expressed by opening paragraph 2.9(d) with the words "Notwithstanding paragraph 2.9(c)..."

2.2 Paragraph 4.2: We consider the EBM costs formula is intended to provide a formulaic approach to the calculation of EBM costs calculation with reference to the look-up table in Appendix B. With the addition of the no bus replacement category, Appendix B needs to be supplemented to identify where no bus replacement is required and in paragraph 4.2 after the words "If there is no bus replacement" should be added "as set out in Annex B of this Part 3 of Schedule 4".

2.3 Definition of Restriction of Use: There is a bracket to close after "D-26".

3 Schedule 7

3.1 Default Charges: It is assumed that the structure of the Default Charges will mean there is no room for doubt as to which charges apply to what vehicles. This should be kept under review as the price list is developed and if necessary a mechanism may be required to address how the relevant default charge is identified for any particular vehicle.

3.2 Efficiency Benefit Share: It is noted that the changes proposed may be ineffective in relation to an existing operator where the relevant access agreement is terminated or transferred prior to the Charges Review taking effect. However we have not identified any material practical concerns arising from this.

3.3 Capacity Charge: We note the need to check retention of appropriate definitions, e.g. for Service Coded Group.

3.4 Supplements to rate and price lists: The proposed process envisages an ADRR stage in the absence of agreement, with changes still requiring ORR approval (quite properly) and with ORR reserving the ability to determine what the supplement should provide. While recognising the theoretical benefit of keeping ORR at a stage removed from the setting of the supplement rates, in practice we expect that it would be more efficient for disputes over amounts to be able to be referred direct to the ORR (in a manner analogous to a section 22A application).

3.5 Network Rail Rebate: We note the need to confirm the manner of operation of this provision with the corresponding franchise agreement flow through provisions. With the rebate now being paid in a lump sum in the following year, it is necessary to address:

(a) The circumstance where there is a change in train operators over the relevant year or between the end of the relevant year and the payment date. Should payment be made on a time apportioned basis with regards to the fixed charge actually paid by each relevant train operator when they were a party to a track access agreement or should the intent be to return the rebate to the then franchised train operator such that it is picked up by a then current franchise agreement mechanism to pass the rebate back to the relevant Authority?

(b) The current franchise agreement flow through mechanism does not cater for lump sum adjustments in arrears and is likely to require modification to work with the proposals.

3.6 REBS Formula: The allocation of REBS payments is made using the value V. Where there is a value for D in the relevant period, for completeness this should also be taken into account in the calculation, where applicable after any reconciliation adjustment.

3.7 REBS Opt Out notices: There is scope for clarification of some points:

(a) If a new track access contract is entered into after an opt-out notice has been served, is the new track access contract automatically opted in or does it stay opted out?

(b) Does entering into a new franchise agreement always provide a fresh opportunity to opt out where the new franchisee was not previously the operator, but no fresh opportunity to opt in?

(c) The drafting suggests that entering into a new franchise agreement could also lead to an opt out opportunity if it results in new services being operated. However this would not permit a franchisee under a single tender extension franchise agreement to opt out as typically it would be the same legal entity supplying the same services as previously. DfT policy is understood to be that franchisees in such situations should be able to (and will be mandated to) opt out.

3.8 REBS Apportionment: Is it the case that where a track access agreement is not terminated but schemed to a successor operator during a year (or at the end of a year), that Network Rail will deal with the successor operator which is a party to the track access contract when the calculation is made? It will then be for that successor operator to address any apportionment of the entitlement or obligation to make payment with the outgoing franchisee under the terms of the supplemental agreement and any other handover terms agreed in the context of the relevant transfer scheme. In contrast where the track access agreement has terminated and been replaced (potentially with a change of identity of operator, for example in the context of a franchise replacement), Network Rail will deal separately with the train operator under each of the terminated and ongoing agreements.

4 Schedule 8

4.1 Paragraph 4.1(f) – charter data: The deletion of the obligation on Network Rail to provide data on arrival times at Charter Destination Points should be subject to confirmation either that such data is no longer required in any cases to support train operators in meeting their reporting obligations or that there is an adequate alternative means to ensure the continued availability of this data.

4.2 Paragraph 17A, ETCS Amendments: The industry is making good progress in putting in place mechanisms, including through a Major Projects notice process, to address the implications of ETCS. Against this background, the proposal for such a wide-ranging and un-focused provision in respect of ETCS is unhelpful. The changes to Schedule 8 should continue to be addressed through the ERTMS Part G processes, recognising that there is likely to be a requirement for significant transitional provisions associated with the changes which will be needed. If any facilitative mechanism is to be retained in Schedule 8, then this must be significantly developed

to address in more detail how it will work and be applied to work with the Part G process development.

4.3 MRE and Societal Rate: We note the need to have regard to any franchises which continue to make use of MRE and Societal Rate values and what corresponding franchise agreement adjustments may be required.

5 Traction Electricity Rules

5.1 Paragraph 7: This provision applies an OTM Incentive Charge with reference to where specified percentages of infill data are exceeded. The percentages are set to recognise that on first introduction of meters there may be a period over which the need to make use of infill data will reduce. The provision currently assumes that it applies only from the On-Train Metering Commencement Date, when metered data is first used. It should be amended so that where an operator introduces metering on part of its fleet or routes, and then subsequently extends metering to other of its fleet or routes the increased allowance can also be claimed in relation to the commencement of metering on the further fleet or routes.

5.2 Paragraph 8.2: This provides that existing operators receiving regenerative braking discounts will continue to receive "such discount". It should be confirmed whether this refers to a discount at the existing rate or at the new rates established under the rules.

5.3 Paragraphs 8.3 to 8.5 and 9: These refer to application of regenerative braking discount to "entitlement" and to what is "appropriate". The terms may benefit from some further definition. Presumably the entitlement should be treated as established and to be appropriately applied where (in accordance with the definition of Regenerative Braking Discount) the train operator is operating a system and the allocated type of infrastructure/service frequency remains correct. So entitlement might cease (or change) if there is a change in the service details (perhaps on fleet re-deployment) which means a different rate of discount should be applied under the Regenerative Braking Discount table of rates or a significant reduction in the operation of the system. The test on entitlement or what is appropriate should not be raising larger policy issues over the nature and appropriateness of the discount or whether the rates established under the rules are indeed the right rates, but be applied using the structures as established by the Rules.

Given the prospects for different rates of discount to apply in accordance with the Regenerative Braking Discount Table, paragraphs 8.3 to 8.5 should not be limited to dis-application of discount, but address changes which are more proportionate or entail changing discount rates (whether to a higher or lower rate).

5.4 Paragraph 9.23: Unless disputes over an audit are resolved by agreement the audit is final and binding. We recognise the benefit of achieving certainty from audits, however we question whether there should be an appeal possibility at least in the case of a material difference or manifest error, as in such cases the party gaining from the error will have no incentive to agree the correction.

5.5 Paragraph 18.2: In the definition of Etmog, query whether this should refer to "that train operator ώ" rather than "each train operator", i.e. so that it relates to the relevant one train operator of each of the train operators in respect of which the calculation is being made.