ATOC'S response to the ORR consultation on a revised contractual regime at stations – Proposed changes to the Station Access Conditions and the Independent Station Access Conditions

General Comments

ATOC welcomes the opportunity to comment on the proposed changes to the contractual regime at stations. We have set out our detailed comments on the specific questions raised in the consultation document below; however in summary we would make the following general points:

- As we have stated in earlier responses, we are concerned that the proposed new Change Procedure will unfairly prejudice TOC interests. In general many of the proposals appear to have the effect of reducing the current levels of protection for affected TOCs while at the same time making the obligations on Network Rail less onerous. We believe these concerns merit serious consideration, particularly if the ORR is intent on pushing forward with these proposals.
- Whilst TOCs acknowledge the importance of encouraging third party investment at stations, we are concerned that the proposals appear to grant wide and potentially long-lived stakes in station developments to parties whose primary concern is not railway or station operation. A series of checks and balances therefore needs to be in place to ensure that third parties' legitimate interests are adequately reflected, but at the same time do not override or restrict the ability of operators or Network Rail to determine the future development of the station.
- The proposed new contractual regime contains very little material retained from the Stations Code. While ultimately aborted, some aspects of the Stations Code were broadly supported by the industry and there is a sense that more could have been salvaged from this process. For example we have highlighted the grounds for objection to a change as being one area where aspects of the Stations Code might be used.

We also believe that the emerging DfT policy of placing full responsibility for stations in the hands of train operators on the basis of 99 year Fully Repairing and Insuring (FRI) leases needs to be taken into account. The first of these new leases is due to come into effect on the forthcoming Greater Anglia franchise starting in 2012 with other new franchises following suit. The likelihood is that within two to three years around one third of the total station portfolio could be on an FRI lease basis. The main objectives of this new approach are to place the responsibility for stations with the party closest to the passenger, drive greater efficiency and encourage more station development.

In this context we would draw attention to the following:

- The new 99 year lease structure has not yet been tested in earnest and so far most TOCs (with the exception of franchise bidders) have had relatively limited visibility of the changes and how the new lease structure will work. While it is anticipated that it should be relatively straightforward to operate, the new

structure still presents a radical change from the existing regime with TOCs taking on a central role at stations.

- In particular, the new structure will see TOCs take on the responsibility for maintenance, renewal and development at stations with Network Rail taking up a more peripheral position. This is a significant reorientation and one that will see TOCs more likely to be proposers of change. Whilst we accept the principle that any proposer of a change – be it a TOC or Network Rail – should face the same obligations, the fact remains that the proposed new Change Procedure was not specifically developed with the new regime in mind. As such there remains a risk of unintended and/or unforeseen consequences arising from application of the proposed revised SACs in the context of FRI leases.
- A practical example of this is that, under the new leases, it is expected that TOCs will take forward more extensive development projects than has been the case to date. However, the revised narrow grounds of objection, combined with the removal of the 'unfair prejudice' proceedings, appears to provide insufficient checks and balances to protect affected beneficiaries where their businesses could be materially adversely impacted by such a development. Similarly Network Rail may undertake more discrete, large scale commercial developments in tandem with third party developers. These schemes may have little or no direct benefits accruing to the TOCs using the affected station and result in significant disruption at the station during the period of implementation. In this context it is important the SFO and beneficiaries continue to have sufficient grounds to object to such schemes where their business will be adversely impacted.

ATOC and individual operator responses

Our response is intended to reflect as much as possible the overall views of ATOC members. However we are aware that individual train operators may hold differing views on some detailed aspects of the proposals and in this context we strongly encourage that our submission be read alongside those of individual operators.

Specific Comments on the Consultation Questions

In this section, each consultation question has been replicated in italics and ATOC's response, where appropriate, is set out beneath each question in bold.

Differentiating between proposed changes to the national template SACs and specific Station Change proposals

6.1 The proposed modified change process differentiates between changes to the generic, national template SACs, and changes which are needed solely because of specific station projects.

Noted.

6.2 In the proposed draft, Part B will only apply to changes to the national template SACs. Although the need to hold Station Meetings has been deleted, the concept of majority approval has been retained, with a requirement that a change must be approved by no less than 80% of all relevant operators (which

retains the existing definition). There will be a consultation period, followed by a decision period, to allow relevant operators to consider consultation responses before voting. Network Rail retains its ability to veto a proposed change.

Noted.

6.3 *Part C (Part 3 in the ISACs) will apply to proposed physical changes to stations and to proposed changes to the SACs and annexes for specific stations. It may be that there are occasions when a change is required to Parts A to Q of the national template SACs (Parts 1 to 17 of the national template ISACs) solely because of physical works or the arrangements behind the delivery of enhancements at a specific station – in such cases, the intention is to use the Part C process rather than the Part B process, so long as the effect of that change is only applicable to the specific station (if it would have a more widespread effect in practice, then the Part B process, with its requirement for industry consensus, would remain the appropriate route). The detail of the proposed Part C process is discussed below.*

Noted.

6.4 *ORR will retain its existing right to initiate changes to the SACs (currently Condition B6), whether the national template SACs or station-specific SACs and Annexes.*

Noted.

6.5 *Respondents are requested to submit their comments on this proposed differentiation between Part B and Part C changes (Parts 2 and 3 of the ISACs). In particular, we would welcome comments on the following points:*

- *The retention of a voting process for changes to the national template SACs, and whether the 80% threshold for approving a change proposal is appropriate.*

  ATOC supports the retention of a Part B voting process for changes to the national template SACs.

  We believe that Network Rail should be required to demonstrate why the proposed change is likely to have a material and adverse effect on their interest in relation to the Network or any station or stations; i.e. they must be required to state in their objection notice their reasons for considering this to be the case.

  It is our view that a TOC objector should similarly be required to include in its objection notice reasons why the proposed change is likely to have a material and adverse effect on their interest in relation to any station or stations. We further believe that it should be possible to challenge the issue of an objection by any TOC consultee, as under the current draft they could reject the proposal for no reason at all, yet this could not be challenged.

  Although 80% is accepted as an appropriate figure, we believe that

TOCs should be given a weighted vote in accordance with the service levels they operate. It would not seem to be fair for every operator, irrespective of size, to be given a single vote.

- *The deletion of the need to hold Station Meetings (as currently defined).*

  ATOC supports this deletion. However, we support the retention of general Station Meetings provisions to enable a Station Meeting to be called and used where appropriate for dealing with other types of business.

Categorisation of Station Change proposals in Part C

6.6 The proposed modification divides Station Change proposals into four types: Exempt, Non-discretionary, Notifiable and Material. Each type has different consequences for an affected operator (in terms of an affected operator's entitlement to make representations or objections, or to receive compensation). Network Rail's attached paper at Annex B explains the reasons for differentiating between types of change.

Noted. We have concerns over the definitions of Exempt and Notifiable Change proposals, which are set out below in response to questions 6.8 and 6.17.

6.7 Respondents are requested to submit their comments on this proposed categorisation. In particular, we would welcome comments on the following points:

- *Is the £5,000 threshold proposed in the definition of "Financial Impact Test" for assessing materiality the correct threshold?*

  Overall we consider this is an acceptable default amount, although note that some TOCs believe the level might be set higher. In addition we believe the threshold should be the total amount incurred by a consultee as a result of the proposal and not an annual threshold to be met at any point during a five year period, as proposed. Otherwise this could for example result in a consultee incurring just under £25,000 in cost (i.e. £4,999 x 5), yet the test would still not have been satisfied.

  In addition, a single level may not be workable given the very different size and type of stations across the network; for example a £5,000 threshold may be a limiting factor at large stations but equally be too high at smaller stations. It may therefore be helpful to allow the relevant parties freedom to impose a different amount where this is appropriate.

  Further, if there is a material impact which cannot be quantified in monetary terms, this must also be taken into account (please see the response below).

- *Is there an alternative practical method of assessing materiality which respondents would favour?*

  Materiality needs to recognise that not all impact is calculable in terms of direct financial cost. Customer perception of the service provided is a significant factor for TOCs. A negative perception may impact on fare box revenue and/or adversely affect the brand. For this reason, the materiality test needs to ensure that important non-financial factors, such as these, are not ignored.

  In practice, where this impact is large, it may be possible to reflect this in the likely revenue loss arising from the scheme and which therefore would form part of the cost used in the threshold test. However, to ensure that this may be done, and for clarity, the definitions of 'Consultee's Costs' in the SACs and of 'MCC Costs' in the Co-operation Agreement would need to be re-phrased to include 'loss of revenue or profit'.

6.8 *It seems possible that an Exempt Activity may have the same substantial implications for an affected operator as a Material Change does; yet the classification of the change means that the affected operator has no right to make objections or representations, or to receive compensation for such an Exempt Activity.*

- *We invite respondents to set out their comments on whether it would be appropriate to allow operators to make representations (or even objections) in relation to an Exempt Activity, and/or to receive compensation in relation to the same.*

  ATOC is concerned with this proposed category of change. The proposal that an Exempt Activity be categorised by reference to a list means that a proposed change which exceeded the Financial Impact Test threshold, but which was included in the list, could still fall within this category, leaving affected parties with no right to be consulted, or to object, or to claim compensation.

  The impact of a proposal on a TOC must be explored prior to implementation of any proposal. This is particularly so where Network Rail is proposing a change; Network Rail does not operate trains and thus does not always have a full appreciation of the operational issues facing a TOC. Consultation is required to enable these issues to be identified and accommodated. Similarly, TOCs need to be able to make representations and object to schemes and methods of implementation that will impact on them.

  The definition of Exempt Activity itself includes 'works or activities of a routine or operational nature'. This is very wide and is potentially open to interpretation. Potentially significant works (in phased parts or as a single scheme) could be undertaken under the banner of 'operational works' without the need to undertake consultation or pay any compensation. We do not believe this is acceptable.

We are also particularly concerned with the inclusion within the list of the temporary closure of facilities. Under the current proposals there would be no ability for a TOC to object to this even where the temporary closure had a significant impact on its operation (e.g. the temporary closure of its traincrew accommodation at a station). Furthermore, there is no specification of how long a 'temporary' situation would be allowed to subsist. Nor is it clear whether the proposer would be obliged to provide the affected TOC with suitable alternative accommodation during the period of closure.

Similarly this category includes the substitution of facilities by more modern alternatives. However the substituted facility may not meet the needs of all TOC users (e.g. it may be too small) or may be more expensive to maintain, with the increased costs being put through Qualifying Expenditure.

We are further concerned with the definition of 'Notifiable Change'. This includes any proposal by Network Rail to change Excluded Equipment or to grant a new wayleave, dedication or easement affecting the station regardless of the Financial Impact Test being satisfied. This means that an SFO could incur several thousand pounds a year of cost as a result of the granting of a new wayleave over the station by Network Rail, yet the SFO would not be able to reclaim from Network Rail any of its costs incurred or to object to what was proposed. (See further comments on Notifiable Changes in the response to question 6.17 below.)

Therefore, we believe any proposed change (except for Non-discretionary Changes) having a potential material adverse impact on a TOC (including the relocation or closure of facilities – temporarily or permanently) or exceeding the Financial Impact threshold, should not be capable of being implemented without consultation having taken place, representations and objections being permitted and, where appropriate, compensation being payable; i.e. all such proposals must amount to a Material Change.

- *Would respondents benefit from Network Rail producing guidance in relation to what is covered by its proposed definition of "Exempt Activity"?*

  Yes. However, notwithstanding the inclusion of an item on the list, where there is a potential adverse impact on TOC, or the Financial Impact threshold is exceeded, the proposal must be re-classified as a Material Change Proposal.

Direct involvement of third party developers

6.9 The proposed change process provides for certain categories of third party developers to be allowed to propose station change schemes in their own name, without needing to persuade an industry party to do so on their behalf (as is the case under the current SACs).

Noted.

6.10 *In the proposed modification, in order to qualify as a Specific Contributor (with rights to make a proposal for a station change), a third party developer must meet a Relevant Contributor's Qualification of £50,000; a statutory authority, agency or local authority with responsibilities to promote or facilitate the use of public transport may qualify as a Strategic Contributor if it meets a Relevant Contributor's Qualification of £250,000.*

Noted.

6.11 *There is no end timescale in relation to a Strategic Contributor's interest, since this reflects its continuing interest and investment in the station portfolio. It also provides some comfort that where it has invested so substantially in the past, it will continue to have an interest once its funded works have been completed. In contrast, the nature and scale of a Specific Contributor's interest is considered to be more appropriate to a one-off involvement. Such funders are likely to have a limited interest in future changes to the station.*

We are concerned that a Strategic Contributor's interest is not time limited and that they will, going forward, be consulted on all station changes in their defined area of interest. Their investment may have been made a number of years ago and they should not be able to stop facilities they have paid for being altered in the future, where alterations are in the overall interest of the station and its users. Neither should they be able to use the fact that they once invested in a station as an opportunity to influence all future changes made at that station. A Strategic Contributor's priorities may not always align with the priorities identified by the station operators who are much closer to the needs of passengers and other users.

We believe that five years is appropriate for the period in which they will continue to be consulted and, during that period, as a default position they will only be consulted on proposed changes to or affecting their investment. Longer periods and/or potentially wider consultation rights could be agreed to apply, but only where the relevant parties are in agreement and where the circumstances justified this.

6.12 *Respondents are requested to submit their comments on the proposed direct involvement of third party developers. In particular, we would welcome comments on the following points:*

- *Is the direct contracting with third party developers satisfactory?*

  Overall ATOC is supportive of greater investment in stations by third parties and of ways to encourage this.

  In terms of direct contracting, where a third party has shown an interest in investing we believe that, wherever possible, it would always be beneficial for them to have reached prior agreement with the relevant SFO before a Change is proposed, and that they should be required to take all steps available to them to do so. This is because they may well be proposing a change that will incur ongoing costs for the SFO/beneficiaries and they will need to work with the

SFO (who will retain safety responsibility for the station throughout the period of implementation), if the proposal is to be implemented efficiently and to best effect.

In any event we believe it is imperative that third party developers are contractually bound into the full requirements of the Change Procedure and that each consultee has a direct contractual link with them so that the consultee can pursue the third party direct in the case of any non-compliance.

Where this may result in a third party having to enter separate Compensation Agreements with several beneficiaries – and where the SFO and all beneficiaries agree, at their respective discretion – we believe it may be helpful to provide the freedom to negotiate a single, collective compensation arrangement with the SFO and for all payments to be routed via the SFO.

- *Is the distinction between the **type** of developer who can qualify as a Specific and Strategic Contributor appropriate?*

  We agree with this distinction.

- *Are the proposed qualification thresholds appropriate?*

  We note the thresholds and consider them broadly appropriate. However we are aware that some TOCs with practical experience of projects funded by third parties consider the thresholds to be too low.

  In addition we believe it is important that the thresholds and related rights apply clearly to investment made in the stations themselves and not simply to spend on areas surrounding or adjacent to stations where there may only be limited or tangential benefit to the railway and passengers.

Grounds for objecting to a Material Change Proposal (C4.7 of the proposed SACs and 10.7 of the proposed ISACs)

6.13 Regardless of whether affected operators are entitled to object to all types of Station Change proposals or just Material ones, there are limited grounds for making a valid objection.

Noted. See comments on this point below in response to question 6.15.

6.14 In particular, failure to reach agreement on an appropriate level of compensation is not a ground for objecting to a Material Change Proposal. The intention of this is that affected operators will not be able to delay works from proceeding simply in order to seek higher amounts of compensation. All parties have the right to refer disagreements on compensation to dispute resolution.

Noted. See comments on this point below. However we would point out here – and similarly in relation to the Compensation Agreements for third

parties – that we are not convinced that third parties external to the industry could initiate and/or participate in proceedings governed by the rail industry ADRR and therefore we question whether it is appropriate to rely on these as a means of resolving disputes with third parties.

6.15 Respondents are requested to submit their comments on the proposed grounds of objection. In particular, we would welcome comments on the following points:

- *Are the grounds of objection as drafted sufficient?*

  No. Under both the current lease structure and the new 99 year lease structure to be implemented for new franchises going forward, Network Rail enjoy development rights, which it may employ to undertake major commercial developments either alone or alongside third parties. Although this may well benefit the single till, the TOCs at an affected station are likely to face significant disruption during construction whilst receiving little or no direct benefits.

  In addition, the 99 year lease structure will enable TOC SFOs to undertake more extensive development works than have occurred to date. These developments may also have a commercial element which may not directly benefit other TOC users. Accordingly, the Change Procedure needs to recognise the type of development works that these parties are likely to be proposing, both currently and in the future, and the impact of those works on consultee TOCs.

  Our concerns are also valid in the context of Managed Stations, where Network Rail have undertaken, and will continue to undertake, very large development projects (for example Gateway at Birmingham New Street station). If the Gateway scheme had been proposed under the new proposed Change Procedure, with the limited grounds for objection, the affected TOCs may well not have been able to require Network Rail to provide all of the essential operational protections that the TOCs were able to require them to provide under the current system.

  In all of these cases the current, narrow grounds for objection are not sufficient.

  The proposed grounds for objection are such that, provided the TOC has been compensated, that the paperwork is in order and that implementation would not result in the TOC being in breach of its franchise agreement, a licence condition or legal requirement, then any scheme should be allowed to proceed. We have a number of serious concerns with the currently proposed narrow list of objections, as follows:

  1. It is not clear that the SFO would be able to object to a proposal if it believed that implementation and/or the completed works would affect its ability to operate the station safely. Evidently, the SFO needs to be clear that it is able to object on these grounds.

2. **The current draft of the Co-operation Agreement is not a full indemnity and requires consultee TOCs to bear a potentially significant proportion of their costs and losses themselves. (We comment on this further below in the response to question 6.22.)**

3. **The station's primary function as a rail facility needs to retain priority, especially where the proposal is commercial in nature with little or no direct benefit resulting for the station in question. In our view, being able to continue to operate trains to and from the station should always be given priority. The scheme having a material adverse effect on an SFO's ability to operate the station is not a ground for objection appearing in the current list.**

4. **The proposal could seriously jeopardise the viability of a TOC's business as a train operator, yet under the current draft the TOC would not be able to object on this ground.**

5. **The needs of the passenger have not been given a status. Most or all passenger facilities may be removed altogether or relocated to different parts of the station (either temporarily or permanently) as a result of a proposed change, yet there is no basis to object on these grounds.**

6. **The current draft does not provide a ground for objecting to the manner in which the works are to be undertaken. Customer perception during building works is a sensitive issue. Customers will look to use other modes of transport unless care is taken to ensure that the station is able to continue to be operated to an acceptable standard during the works. If full details of the implementation methods are provided as part of the proposal, yet these are judged by the TOC to be inadequate in maintaining a station environment that is acceptable to customers, then this would not be a ground for objection under the current proposal.**

We have previously commented that the grounds of objection as contained in the Stations Code would be appropriate to use in the new Change Procedure. Of these, we believe that the following remain relevant (subject to the consultee being able to recover all of its net costs and losses via the Co-operation Agreement, which is not the case under the current drafts) and adequately cover the points made above:

- **(Paragraph (C)): that implementation of the proposal will result, or is more likely than not to result, in a material adverse effect, whether permanent or temporary, on:**

  (1) the operation of the Station or the Network;

(2) the use of the Station by any Relevant Operator's passengers;

(3) any Station Party or Relevant Consultee's respective:

(a) business;

(b) ability to perform any obligations or exercise any discretions which it has in relation to railway services; or

(c) ability to finance its business, the performance of any such obligations, or the exercise of any such discretions; or

(4) the interests of users and providers of railway services generally;

- **(Paragraph (F)) that, in a manner specified by the Relevant Stakeholder, the implementation of the proposal will, or will be more likely than not to, materially disrupt, interfere with, or otherwise be incompatible with the implementation of other specified works on or at the Station;**

In addition to the above, we believe that consideration could be given to the creation of a ground for objection where there is no overall net benefit of a scheme to the rail industry. For example, in the case of a Network Rail proposal, Network Rail must be required to demonstrate that the amount that they will invest back into industry as part of the single till will exceed the total value of the net compensation to be paid to the affected TOCs, plus the total of any costs/losses those TOCs themselves bear.

Outline consent: Condition C4.2 envisages that the information may be of an outline or generic nature and that accordingly a Material Change Proposal may comprise outline or generic details only. We support the concept of a process that enables 'in principle' or outline approval to be sought, but in our view, the currently proposed process needs to clearly allow for two distinct stages:

1. **Outline Material Change Proposal: To enable a party to make a proposal seeking outline or 'in principle' approval to a scheme. The consultee's approval would extend only to those details which have been provided.**

2. **Material Change Proposal: For approval of the full scheme. Consultees may object to new details provided and any previously approved details which have since been changed.**

- *Is this separation of financial compensation (and the provision of alternative accommodation) from the list of valid objections appropriate?*

Provided that a TOC is confident that its costs and losses incurred in connection with the proposal will be met, and in a timely manner (which is not the case under the current draft – see response to question 6.22), then separation of financial compensation from the list of valid objections would be appropriate.

However, if the proposal is allowed to be implemented before financial compensation has been agreed, we remain concerned that this removes the incentive on the proposer to behave reasonably or speedily in connection with the negotiation of the appropriate amount of compensation payable.

If works are to commence ahead of the figure being agreed, to incentivise the proposer to behave reasonably and quickly in negotiating the compensation settlement, we believe that a consultee must be able to claim costs it incurs on an emerging cost basis pending agreement of the compensation settlement. It is not acceptable for a consultee to be asked to fund its own costs whilst the settlement is negotiated, as these negotiations may be protracted.

Arrangements for alternative accommodation are key. TOCs need to be provided with full details of what is proposed for these, both during implementation and after completion of the works, as part of the proposal. TOCs must be allowed to object to a proposal where what is proposed is inadequate or unsuitable. (For example industrial action may result if proposed temporary or permanent traincrew/staff accommodation is not considered suitable by the trade union(s). This would incur significant costs and disruption for a TOC).

Registration and implementation of a proposed Station Change

6.16 The proposed modification provides that a Station Change proposal must be registered with ORR in order to be effective and before it can be implemented. There is a limit on how long a registered proposal can remain effective without being implemented, before it lapses.

- *Respondents are requested to submit their comments on the proposal that Station Changes should be registered with ORR.*

  We do not believe that this is necessary. Copies of all approved Change Proposals should be maintained on the Station Register, as currently required. However, should this proposal be taken forward, there is general support for any such registration system to be web-based.

- *Respondents are requested to submit their comments on the proposal that registered Station Changes cease to be effective if not implemented within a set period after registration.*

  We agree that proposals should lapse if not implemented within a set period, but that the clock should start from the date the Proposal has

been approved.

Proposed deletion of Condition G6 (Condition 47 in the ISACs) - wayleaves

6.17 The existing G6 (wayleave grants) has been deleted because this now falls within the procedure for a Notifiable Change. Since it only applies to Network Rail it has been deleted to avoid duplication and potential confusion in the treatment of the grant of wayleaves and easements.

The process contained in Condition G6 is more limited in its application than a Notifiable Change and includes a number of additional protections for TOCs that have not been replicated for a Notifiable Change. Omitted benefits are those contained in G6.2 (passing on of compensation paid by the grantee to an affected operator, parts of G6.3 (having due regard to the operational integrity of the station and an operator's existing and future plans for its use and enjoyment of the station) and G6.4 (terms of entry to be imposed by Network Rail on the grantee). These protections should all be replicated.

We do not agree that Network Rail should be allowed to grant a new wayleave or easement on any terms, and in particular despite the proposed new rights satisfying the Financial Impact Test (see paragraph (b) of the definition of 'Notifiable Change'). For example, this would allow Network Rail to grant a new right of way over the station to a developer of an adjacent housing development, for access to the works site during construction and for residents afterwards. This could result in the SFO having to employ additional staff at busy times on a temporary or permanent basis. Under the current proposal, there would be no right for the SFO to object to the terms of the proposed rights of way (even where this might compromise the safe and effective operation of the station), or to claim any compensation for costs incurred.

Under the proposal, Network Rail is only to be required to have due regard to an SFO's representations. This is some way from them being required to impose specific requirements on a grantee, as they are currently required to do pursuant to G6.

It is our position that where a consultee TOC's costs will exceed the Financial Impact threshold, or where there is another material adverse effect on a TOC, the proposal to grant a new easement or wayleave must always amount to a Material Change. Easements and wayleaves are not necessarily harmless with regard to their effect on a station or consultee TOCs, and Network Rail is under no obligation to grant them.

Costs issues in the Co-operation Agreement

6.18 The proposed modified SACs (C4.13, and 10.13 in ISACs) retains provisions for consultees on Material Change Proposals to recover their costs reasonably incurred in evaluating and responding to those Proposals up to the date that the Co-operation Agreement is entered into (after which, such costs will be dealt

with under that mechanism).

Noted. Our comments on this are set out below in response to question 6.22.

6.19 *Alternative ways of compensating the Material Change Consultees for costs they incur as a result of the proposed change are set out under clauses 4 to 7 of the Co-operation Agreement (where the proposer is an industry party, and clauses 6 to 9 of the agreement where the proposer is a third party developer).*

Noted. Our comments on this are set out below in response to question 6.22. On the issue of disputes however we would reiterate our view expressed earlier that we are not convinced that third parties external to the industry are able to initiate and/or participate in proceedings governed by the rail industry ADRR as is proposed in the Cooperation Agreement. We therefore question whether it is appropriate to rely on these as a means of resolving disputes with third parties.

6.20 *These include that a consultee may receive compensation either by way of a fixed amount agreed in advance of the works (which may be paid in instalments, it does not necessarily mean a lump sum will be paid in advance), or once its costs have been incurred (with provision for some payment to be made as costs are incurred, rather than waiting until the project is complete before final costs are calculated and paid).*

Noted. Our comments on this are set out below in response to question 6.22.

6.21 *The proposed Co-operation Agreement also provides for what should happen if a proposer fails to complete implementation of the Material Change. The proposed drafting provides that where a Material Change is not completed, consultees who have not received compensation by way of a fixed sum will still receive compensation for costs incurred, and that those who have already received a fixed sum based on the assumption that the works would be completed may have to repay some of that sum, together with some interest element.*

Noted. Our comments on this are set out below in response to question 6.22.

6.22 *Respondents are requested to submit their comments on the Co-operation Agreement. In particular, we would welcome comments on the following points:*

- *Are the alternative ways of compensating Material Change Consultees sufficient?*

  The definition of 'MCC Costs' is poorly drafted and confusing. We have a number of issues on the current draft of this definition:

  - **The definition narrowly defines the class of costs/losses which can be claimed. It provides that the only costs and losses which may be claimed by an affected consultee are those**

which result from a material adverse impact upon their business, to the extent those costs/losses are directly attributable to the implementation of the Material Change Proposal (subject to netting off of benefits and costs recouped). This means that no costs incurred by a TOC during the consideration/consultation process, or after completion of the works could be claimed under the Agreement. Indeed, the only costs which could be claimed would be those which resulted from a material adverse impact on the TOC's business – a mere adverse impact would not qualify.

We do not agree with this narrowing of the types of costs and losses incurred that may be claimed. All costs and losses incurred by a consultee as a result of the proposal, both in considering and responding to it and during the period of implementation should be capable of being claimed. These costs form part of the true cost of the scheme and would be counted as such if the station and the trains running into it were all operated by the scheme's proposer; all consultees' reasonable costs and losses should form part of the proposer's business case for the scheme. Consultees should not be required to subsidise the costs attributable to a scheme, which, in practice, may result in little or no direct benefit for them and/or may disrupt their operations.

- **For clarity 'loss of profit' should be changed to 'loss of revenue or profit', as a significant category of losses potentially incurred by a TOC will be revenue losses.**

- **There should be a specific exclusion for a deemed recovery of a consultee's costs via ticket prices (which appears to be implied as a means of recovering costs in paragraph (b) of the definition of 'MCC Costs' in the Co-operation Agreement and of 'Consultee's Costs' in the draft SACs). A TOC's decision to increase its ticket prices is not influenced by a desire to recover costs associated with a scheme undertaken at a specific station along one of its routes.**

It may be appropriate to introduce the concept of a financial impact test into the compensation regime. This could require a consultee to incur, say, £5,000 costs/losses (this figure perhaps being in line with the Financial Impact threshold applicable to the station in question) before it could make a claim, but once this threshold had been reached, all costs/losses (subject to a netting off of benefits received and costs paid by third parties) could be claimed.

Clause 7.3: We do not consider it appropriate for a consultee to be required to demonstrate that it requires on-account payments due to cashflow implications on its business. If a proposer has elected to undertake a scheme, then it must accept that some consultees will require reimbursement of their out-of–pocket expenses as and when these are incurred, to be invoiced at the end of each four-week

accounting period and paid within 14 days. This is not unreasonable and the consultee should not be expected to have to establish a case for this pursuant to the disputes resolution process in the event of dispute. There should be an automatic right for a consultee to require on-account payments.

Clause 10: We do not agree that a consultee should be obliged to accept and implement Savings Suggestions put forward by the proposer. The proposer may have little or no appreciation of how a consultee's business operates and what may be appropriate for one operator's business may not be appropriate for another. The consultee will not necessarily have proposed these works be undertaken and so should not be required to implement suggestions which may be wholly unsuitable for its business in order to save the proposer money. We believe that this clause should provide that the proposer is entitled to make Savings Suggestions and that the consultee shall be required to have due regard to these suggestions, but shall not be required to implement them where they are considered inappropriate.

Clause 10.5: We consider this is inappropriate and should be deleted, as it may require the consultee to reveal confidential business information to the proposer (who may be a competitor), which is not acceptable.

Our concerns over the 'Savings Suggestions' provisions become exacerbated in the context of third party developers (clause 12). These parties may well be commercial developers or local authorities with little or no previous experience of working within the rail industry. It is inappropriate for such parties to be able to instruct a TOC to operate its business in a particular manner and to attempt to force it to do so via the disputes resolution process.

- *In instances where part of a fixed sum is to be returned by a consultee because a Material Change has not been completed, is the addition of interest appropriate?*

  No, the addition of interest is not reasonable. The proposer is not obliged to offer fixed sum compensation and if it does so, this is part of the risk profile of that approach.

- *If a Material Change once-commenced is left incomplete (for any reason), should there be provisions for reinstating the original position (which might lead to consultees incurring further costs)?*

  Yes there should be. The proposer must bear the consultees costs associated with the reinstatement work. The cost of this risk should form part of the business case for undertaking the scheme in the first place.

  However we consider that it would be helpful to have some provision for capturing improvement from a part-finished scheme where this

has been made and where an agreed alternative condition may be preferable to reinstating the original position.

Similarly there should be some provision for a situation in which a developer goes out of business part-way through a scheme, leaving the work unfinished. This should set out how the costs of remediation would be met in such circumstances.

Provision of Alternative Accommodation in the Co-operation Agreement

6.23 The Co-operation Agreement for Material Changes requires the proposer to provide alternative accommodation if required (clause 12 in the agreement for industry parties, and clause 14 in the agreement for third party developers). That alternative accommodation is stated to cover works to Core Facilities only (defined under SACs).

We believe that this obligation should extend to all accommodation occupied by an industry party for operational purposes.

6.24 Network Rail considers the proposed clause is a more onerous obligation on a Station Change proposer than is currently provided for within SACs.

We do not agree. Under the current system, a consultee who was unhappy with the proposals for alternative accommodation would simply object to the entire Change Proposal. The proposer would need to refer the objection to unfair prejudice proceedings, for the objector to be overruled (which may well not happen) before the proposal could be implemented at all. We consider that the current system provides a stronger shield for the TOC than the proposed new clause.

6.25 In its initial comments, ATOC considers all operational facilities removed as part of a Station Change proposal should be subject to an offer of alternative accommodation; that if the alternative accommodation which is provided results in increased operation or moving costs to an operator, then these should be included within the compensated costs; and that if no alternative accommodation can be offered due to physical constraints, then the proposer must offer a full indemnity for costs and losses associated with having to relocate to a site outside the station boundary.

We continue to support this stance. These are operational facilities required to deliver the station's primary function. TOCs may be required to suffer the inconvenience of moving into temporary accommodation to enable works to proceed and should not also be expected to subsidise costs associated with the proposer's scheme.

6.26 Respondents are requested to submit their comments on the appropriate terms for the provision of alternative accommodation.

As stated above, and in response to question 6.15, but to summarise:

- **Details of the proposed alternative accommodation should form**

part of the Change Proposal;

- **The proposer should be required to offer to replace all operational accommodation affected by the proposal, unless the occupant agrees otherwise;**

- **Non provision of suitable alternative accommodation should be a ground for objection to the Proposal; and**

- **That if the alternative accommodation provided results in increased operation or moving costs to a TOC, then these should be included within the compensated costs; and if no alternative accommodation can be offered due to physical constraints, then the proposer must offer a full indemnity for costs and losses associated with having to relocate to a site outside the station boundary.**

Additional modifications

6.27 At Annex H we have set out a number of proposed additional modifications to the SACs. The purpose of these modifications is to update the SACs to make them reflective of current industry structures and to take account of the new dispute resolution process that came into effect on 1 August 2010.

Noted.

6.28 Respondents are invited to provide any comments or observations they may have on these proposed additional modifications.

There drafting makes reference to Scottish Ministers e.g. in definition of 'Material Change Consultee'. Since these documents are intended to apply only to England and Wales we query the reference in the drafting. In addition we note that, on transport matters, the Welsh Government has similar powers to DfT and so ought to be referenced alongside it as a Material Change Consultee in the definitions, rather than appearing as equivalent to PTEs or TfL.

ATOC
June 2011