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East Coast Main Line Company

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Gerry Leighton
Head of Station & Depots and Network Code
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

2nd June 2011

Dear Gerry,

Consultation on a revised contractual regime at stations – Proposed changes to the Station Access Conditions and Independent Station Access Conditions – Issued March 2011

In reference to the above mentioned consultation dated March 2011 East Coast Main Line Company Limited (ECML) would like to highlight the following concerns with the proposals set out;

- From the consultation it is evident that there is a divergence between the representation of Network Rail's opinion on the best way to take these issues forward and the ATOC recommendations for improvements. This should give rise to a concern within the train operators, especially when it is stated within the consultation document that Clause B6 of the National Station Access Conditions may be used to impose changes. It is suggested that this clause may be used without taking the views of ATOC into consideration.

- **Differentiating between proposed changes to national template SACs and specific Station Change Proposals**
  - Removal of Station Meeting Requirement
    - As stated in Part B, NSACs, while it can be agreed that specifically stating that a station meeting should always be convened is not a requirement in each and every case it should be acknowledged that there should be a process laid out that all parties are able to reference within a specific section of the conditions that would allow for such a meeting to occur if required.
  - Section C
    - While the changes proposed under Section C of the NSACs (Part 3 of the ISACs) do appear in principle to streamline the process of User Instigated Station Change it is felt that the timescales suggested do not allow for sufficient review of any proposal but the simplest. It is also suggested that all timescales should be brought into line and a single suggested timescale for a reply to any proposal or notice would be a standard 28 days as opposed to the current split timescales.
  - Categorisation of Station Change Proposals
    - While ECML recognises the benefit of having further defined levels of change it is suggested that the change proposer will make the decision as to which level of change is being used in the individual case. While the benefit of the additional levels can be seen, it is felt that this may cause additional concern and conflict between the SFO and Beneficiaries if there is a disagreement on the materiality of the proposal involved. There is a suggestion that a 'notice of intention' should be used when such instances occur but it is felt that this is currently the process by a different name and is simply a consultation process. Further clarity of terms is required for the different changes to ensure that two different parties cannot come to a different conclusion of the type of change for the same proposal.
  - ECML feel that committed obligations for station improvements under a franchise agreement are not addressed. When building a franchise bid the prospective franchisee should use all endeavours to ensure proposed projects are in the best interest of the industry, station and users of the station. It is felt that if all these conditions could be shown, and as the franchise agreement is a legally binding contract, then any

applicable increase in charges for said station as a result of the project/change should be included within QX and not be subject to a compensation agreement.

- Suggested materiality of £5,000
  - This value is taken to highlight the difference between a Notifiable Change and a Material Change. It is felt that this level could cause issue for a number of reasons:
    1. A standard level across all stations is not realistic and could be viewed as a penalising factor for larger station operators or indeed Network Rail for Independent Stations. An improved measure could be a percentage of the annual QX-able charges;
    2. A level such as this could be perceived as a test for projects where one of the reviewing factors could be, 'can the on-going costs of this project be kept to £5,000 or less?' It may give rise to situation where Station Projects are not carried out if this value is exceeded; and
    3. If change proposals are predicted to cost over this amount as on-going costs, especially in light of the purported move to full repairing and insuring leases, this may give rise to situations where the proposal or project is dismissed out of hand by the franchisee as there is no provision within the SFO franchise business plan to incorporate the on-going costs. This could lead to reduced investment in stations as a whole and is further evidenced by the proposal that for such changes a compensation agreement is offered to all beneficiaries leading to all on-going costs becoming the liability of the franchisee proposing the change.

- **Direct Involvement of third party developers**
  - ECML is of the opinion that any investment by a party external to the Rail Industry should be actively encouraged but we question allowing outside organisations having the ability to directly propose change proposals that will affect the Station Facility Owning franchisee's on-going costs. It is felt that any changes that may be suggested by an external party should be proposed in conjunction with the SFO of the station(s) and not independently. An independent proposal could affect the long term plans of the SFO which in turn could be detrimental for the future aspirations of the stations. This is a concern now that current opinion suggests that longer rail franchises will be procured in the future, raising the financial risk to SFOs for future changes at the investment levels proposed through the agreement of 99 year full repair and insurance leases for stations.
  - ECML does not recognise any benefit from the distinction between the types of developer who can qualify as an external contributor and would propose that as an industry we do not make a specific distinction. We should welcome investment from any party where a benefit for the Users of the rail network can be shown.

- **Ground for objecting to a Material Change Proposal (C4.7 of the proposed SACs and 10.7 of the proposed ISACs)**
  - ECML agrees with the approach that financial objections should not delay improvements being made to stations but is mindful of the issues that outstanding financial objections could raise. For the changes proposed to the objection process, in the case of a financial objection, the proposals do not provide for any financial compensation at the time the additional costs are incurred. The process laid out suggests that all disputes will be resolved through the Access Disputes Resolution Rules but this can be a lengthy process which can take many months or even sometimes years to reach a conclusion.

- **Registration and implementation of a proposed Station Change**
  - ECML broadly agrees with the changes proposed to the registration and implementation of change although it is felt that this suggested amendment will create extra paper work for each party that will need to be recorded, logged and updated as and when changes occur. The suggestion that the change process could be an on-line process would be particularly welcomed although how this will be administered will be a subject for discussion. For example, if it is proposed that all changes will be registered with the ORR then that this should be through the ORR website.

- **Compensation Agreements**
  - While ECML acknowledges the benefit of such an agreement in protecting franchisees from unforeseen increases in costs, it is felt that under the current regime Station Change is not taken lightly and station initiatives and projects are undertaken with the view of all Users in mind. We ask that it is acknowledged that any change that is undertaken at a station should be viewed on its individual merits where the impact on all TOCs' Users is assessed by each party. Where a suitable benefit is identified then this should justify an increase in QX-able costs. The emphasis will lie with the proposer to justify how and why the increases in costs are QX-able and that all measures have been taken to mitigate against any such increases. Using the proposed method offers very little protection to the Station Facility Owner and very

little incentive to improve the facilities further than the present obligation and from the condition at the beginning of the franchise agreement.

- The conditions as shown in Annex 13, clause 11 and Annex 14, clause 13 highlight the points for when the financial undertaking of the Proposer to make compensation payments will cease to be if the Compensation Route is to be followed. The clauses suggest the only time that the financial obligation arising from a compromise agreement will cease will be at the Material Change Consultee's (MCC) franchise end date (subject to extensions) or at a change in Control Period, depending on which option is chosen for the final documents. This will lead to increased workloads for annual fixed offer preparation and as such is transferring a time and work burden from one area of the QX regime to another (from change proposals to fixed offer preparation).
- It is unclear whether or not the proposed Compensation Agreements, as attached in Annexes 13 and 14, are the actual documents that are to be used or if these are only templates that could be amended accordingly.
- Within the Compensation Agreement for third party developers (Annex 14) there is a reference to the Access Dispute Resolution Rules as a route to use to resolve any disputes. ECML does not accept that this will be suitable in dealing with parties external to the industry as their organisation will not be covered by the dispute resolution process through these means.
- It is unclear how the suggested compensation should be calculated to the benefit of all parties and how this compensation would take into account unquantifiable benefits such as Users security or improved environments. The only clause within the Compensation Agreement that makes reference to a calculation is clause 3.2 of the proposed agreements. This clause is only concerned with the proposed increases in QX costs to manage the station and does not cover any benefits the Users would receive as a result of the proposed change.
- ECML does not consider the addition of interest to be suitable in the case of refunded fixed compensation payments as the MCC will more than likely not be at fault for the reason why the Material Change did not go ahead. It would seem unfair to make interest payment part of the contracted conditions.
- ECML does not accept that if a Material Change was not fully completed then there would be any obligation on the MCC to reinstate the original position as it is felt this would be the Material Change Proposer's (MCP) responsibility.

- **Provision of Alternative Accommodation in the Co-operation Agreement**
  - ECML recognises the ATOC point that all operational facilities removed as part of a change should be subject replacement with alternative facilities. I suggest that operational facilities that do not form part of the core facilities at a station will normally be covered by a lease agreement and as such will be compensated through other means than a Station Change Compensation Agreement. ECML would request further clarity on clause 12.2 of Annex 13 and clause 14.2 of Annex 14 to cover the available facilities that are present at the station in question; if no such facilities exist then discussion will be required between the MCP and the MCC to clarify the issue. For example;
    If the MCC has some office accommodation that is used for staff who deal with the movement of trains then the replacement, while not being a like for like, should be able to accommodate all staff members and equipment as before as is available at the station which may not be the same sized rooms. If there are no such facilities available then further discussion will be required to look at alternative locations outside the station lease area and arrangements for leasing or procurement. Alternatively if the office accommodation is used by employees who are not primarily concerned with the movement of trains then this will normally be covered by a lease agreement and will not be core. Such facilities may well have lease charges terminated which in itself is a form of compensation, the alternative to this would be for the SFO to try to find alternative accommodation for all tenants.

- **Changes contained within Annex H**
  ECML has no concerns with the changes proposed within Annex H.

ECML is happy for this response to be published on the Office of Rail Regulation website.

Yours Sincerely

Niall Melvin
Commercial Access Manager
East Coast Main Line Company Limited