

Rail Delivery Group

Response to ORR consultations on:

- **Implementing infrastructure cost charges for open access operators**
- **ORR's draft guidance on the economic equilibrium test**

Date: 14 January 2019

Rail Delivery Group response to ORR consultations on:

- **Implementing infrastructure cost charges for open access operators; and**
- **ORR's draft guidance on the economic equilibrium test**

Organisation: Rail Delivery Group

Address: 200 Aldersgate Street, London EC1A 4HD

Business representative organisation

Introduction: The Rail Delivery Group (RDG) brings together passenger train operators, freight train operators, as well as Network Rail; and together with the rail supply industry, the rail industry – a partnership of the public and private sectors - is working with a plan *In Partnership for Britain's Prosperity*¹ to change, improve and secure prosperity in Britain now and in the future. The RDG provides services to enable its members to succeed in transforming and delivering a successful railway to the benefit of customers, the taxpayer and the UK's economy. In addition, the RDG provides support and gives a voice to passenger and freight operators, as well as delivering important national ticketing, information and reservation services for passengers and staff. taxpayers and the economy. We aim to meet the needs of:

- Our Members, by enabling them to deliver better outcomes for customers and the country;
- Government and regulators, by developing strategy, informing policy and confronting difficult decisions on choices, and
- Rail and non-rail users, by improving customer experience and building public trust

For enquiries regarding this consultation response, please contact:

Ian Marlee

ian.marlee@raildeliverygroup.com

07799 864496

Rail Delivery Group

2nd Floor, 200 Aldersgate Street

London EC1A 4HD

¹ *In Partnership for Britain's Prosperity*, RDG (October 2017):
<http://www.britainrunsonrail.co.uk/files/docs/one-plan.pdf>

Overview

1. This document outlines the key points from our members in response to ORR's consultations on implementing infrastructure cost charges for open access operators and ORR's draft guidance on the economic equilibrium test. The Rail Delivery Group (RDG) welcomes the opportunity to contribute to these consultations. We are content for this response to be published on the ORR website.
2. Open access operators (OAOs) have an important role to play in delivering new and/or alternative services to customers and increasing competition in today's railway. At the same time, there are significant costs associated with planning and delivering open access services. These services can also have a significant impact on existing operators and on competent authorities procuring services under public service contracts (PSCs).
3. It is therefore vital that there is sufficient clarity on how applications for access rights by OAOs will be judged, when and where infrastructure cost charges (ICCs) will apply and the level(s) of those charges so that all parties can plan their businesses with a sufficient degree of certainty.
4. It is also vital that any ICCs reflect the OAO's share of the fixed costs of the relevant infrastructure and that they are only paid to the extent that the profitability of each relevant service means that the OAO can bear the additional cost relating to that service.
5. The key points of the RDG's response are as follows:
 - we welcome the additional guidance provided in both consultations in a move towards increasing clarity, but have concerns in specific areas;
 - there is a concern with the proposed definition of the interurban market segment and that too much uncertainty remains around assessment of the impact of an open access service on the profitability of PSC services and the net cost for respective competent authorities. Both of these may impact on business planning for existing services and potential new open access services;
 - the definition of a substantial modification appears to capture relatively minor changes to existing services, which is likely to deter such changes to the detriment of passengers; and
 - we consider that these concerns could be addressed by clearer and, in some cases, more appropriate definitions and, subject to the comments below, by more work now on how any regulatory discretion would be exercised.
6. Our detailed points are set out below.

Implementing infrastructure cost charges for open access operators

Revised 'not primarily abstractive' test

7. Any comments RDG members may have on this will be included in their individual responses to this consultation.

Definition of a 'substantial modification' of access rights

8. We agree that relief from ICCs should be provided to existing OAOs for the entirety of CP6 unless there is a substantial modification of access rights. However, there is a risk that this introduces a perverse incentive to avoid making modifications to access rights in response to changes in consumer demand. This risk is minimised if the definition of 'substantial modification' is set at a point where the benefits of any modifications outweigh the additional cost of ICCs. If it is set lower than this, relatively minor modifications which would benefit customers are less likely to be made.
9. We are concerned that the proposed definition is too restrictive and would unduly disincentivise certain changes which would benefit customers being made. We consider that ORR should reconsider this definition.

Proposed definition of the interurban open access market segment

Proposed definition

10. We recognise that ORR is using the interurban open access market segment as a proxy for the ability of an OAO to bear ICCs for particular services. However, we consider that more work needs to be done in this area. We are concerned about the extent to which the current proposals reflect this ability to pay, for example by disregarding time of day and by using station demand and distance between stations. It would be useful to understand how well the proposed definition and various options would align with the ability to pay analysis. Any inconsistency between the proposed approach and ability to bear ICCs is likely to distort an OAO's decision as to which new services to develop (or which existing services to modify) or even mean that they are unwilling to invest in developing new proposals.

ORR discretion

11. We agree with ORR that a clear and specific definition of the interurban open access market segment is better than one with a discretionary aspect. Network Rail has indicated that it would be far better to amend the proposed definition so as to avoid the need for a discretionary element. Other RDG members see some benefit in ORR taking other factors into account in making a final decision on the ability of a particular service to bear an ICC where there are marginal cases. The major disadvantage with such an approach is that it has the potential to introduce significant uncertainty in the process, which will affect operators' ability to plan their businesses and put together proposals. It also risks adding significant delays to the process. We therefore consider that, if regulatory discretion is to be available, more work needs to be done now on what other factors could be considered, how they would be taken into account and how any remaining regulatory discretion would be exercised.

Process

12. We consider that ORR should clarify the process around ICCs. For example, it is not clear from the consultation document who ORR would expect to undertake the assessment of substantial modification and the interurban market segment.

ORR's draft guidance on the economic equilibrium test

Definition of a 'substantial modification' of access rights

13. We consider that it would be helpful for ORR to explore whether whatever definition is ultimately established in relation to ICCs (see our comments above) could be used for the EET or whether there are any impediments, legal or otherwise, to this.

Approach to assessing the impact on economic equilibrium

14. The draft guidance sets out many of the factors that ORR will consider when assessing the impact on profitability of services operated under a PSC and the impact on net cost for the relevant competent authority awarding the PSC. However, there is no indication as to how these factors will be considered and the level at which these impacts will be considered to be indicative or decisive of an issue with an OAO application. This leaves a significant level of uncertainty making it very difficult for both OAO applicants and existing operators to plan their businesses sufficiently and may be a significant deterrent to (potential) OAOs to develop proposals for new open access services. We consider that more detail needs to be provided on these issues and on how wider net benefits will be taken into account.