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Dear Colin,

Consultation on Access Options

I refer to your recent consultation regarding the principles you intend to adopt with regard to access options.

As you are no doubt fully aware, TfL's East London Line project has submitted an application for an access option which is currently under consideration. Whilst TfL supports the overall principles set out in your paper we do believe that it is essential that a decision on the East London Line application is made sooner rather than later and that this decision does not await the final conclusions of the consultation. To this end we have strong concerns regarding the statement in paragraph 1.16 which suggests that any such decision may have to await the ensuing policy statement. The delivery of the East London Line project is dependent upon securing appropriate access rights in good time and the decision on access options will have an effect on the critical path of the project. It is for this reason that TfL strongly believes that the decision must not be delayed.

In paragraph 1.14 the overarching principles that ORR intend to adopt are set out in summary. TfL agrees in general with these principles with the following commentary:

- *Track Access Options (TAOs) only to be approved where capacity is likely to be available.*
Agreed.
- *TAOs only to be approved to support financial investment which is dependent upon track access.*

Agreed - but the period for the access option must reflect the level of investment and not be constrained by an artificially imposed maximum period.

- *Where there is uncertainty about delivery of capacity there may be a need to adjust other rights when the firm access contract is approved.*
Agreed.
- *ORR to consider the benefits and costs of approval of a TAO.*
Agreed - but due consideration must also be given to the social benefits delivered by new access options/rights as opposed to a purely financial/economic assessment.
- *TAOs to be expressed as an envelope of rights which should be converted into firm contractual rights and held by the train operator responsible for exercising them.*
Agreed but TfL would expect that the envelope of rights may need to specify certain essential parameters (e.g. certainty of 'all stations' stopping patterns for Metro services).
- *Where an established RUS exists this must be taken into account when ORR makes any decision on a TAO.*
Whilst a RUS must be taken into account it must be recognised that an 'established' RUS can only represent a snapshot in time. The process must be mature enough to recognise where route requirements have moved on and to reflect such changes, if necessary, in any consideration of a TAO.

TfL's detailed responses to the specific questions and other matters raised in the body of the consultation follow.

Responses to specific questions

Paragraph 2.5 - "Do consultees agree with our view on the application of TAOs, or are there any alternative approaches to approving such deferred access rights that we may not have considered?"

Yes. TfL supports the concept of a track access option (TAO) rather than forward access contracts and supports the reasoning set out in the ORR's document. However TfL would expect that the principle of specifying an envelope of rights would be sufficiently flexible to allow definition of essential parameters (e.g. stopping patterns).

Paragraph 2.12 – "TAOs should incorporate the Network Code."

In principle this is agreed but in our detailed response (below) TfL notes (and agrees in the main with ORR's recommendations) that certain changes need to be made to the Network Code to:

- a) ensure appropriate representation of both holders of TAOs and stakeholders; and
- b) the application of Part J only relates to a track access contract and not a TAO.

Paragraph 2.19 - "Access rights should be time-limited."

In general TfL agrees with this approach subject to the following provisos:

- The length of time of the access option should be sufficient to encompass the total investment life and must not be constrained by any artificially defined maximum period.
- Whilst TfL agrees that any 'reserved' capacity available before the access option is exercised as a firm right could be made available to other operators before such rights need to be taken up there must be sufficient flexibility in the process to allow for such rights to be exercised earlier than planned (i.e. as per the ORR 'green/amber' period set out in paragraphs 3.19 and 3.20).

Paragraph 2.20 (e) – "ORR to have particular regard to ... the extent to which the increase in capacity is as a result of associated funding of network enhancement."

TfL would also add that regard should also be given to 'off-network' works which also affect or improve utilisation of capacity (e.g. new depot works).

Paragraph 2.22 – "[ORR to] have regard to benefits and costs of proposals for the TAO. Paragraph 2.23 – "...it may be appropriate to give additional weighting as described in [ORR's] Criteria and Procedures."

TfL would wish to emphasise the need to take account of wider social benefits when considering any proposal. Whilst TfL recognises and welcomes ORR's stated intention to give additional weighting to certain factors (paragraph 2.23), in inner-city areas it is essential for the social benefit element to be given an appropriate weighting which recognises the greater contribution that inner-suburban services provide to improved mobility and communications in such areas and which often make a significant and positive impact to areas of high social deprivation.

Paragraph 2.27 - "Do consultees agree with our proposed approach to considering the interaction between RUSs and TAOs?"

No. There cannot be a rigid adherence to strategies published in a RUS which, for whatever reason, may have become outdated. The process must recognise that a new investment plan and corresponding application for a TAO may well have changed the foundation of strategies published in an earlier RUS and which need to be updated. The process must be equipped to recognise and cater for such changed circumstances when and if they arise. Similarly RUSs under development must take account of any TAOs under negotiation or preparation.

Paragraph 2.36 - "Do consultees agree with the criteria against which we propose to consider TAO applications, and that our TAO policy should focus on cases where there is significant financial investment in a railway facility? If so, are the means by which we intend to consider an application

appropriate, or are there any other issues which we should take into account?”

TfL is content with this approach.

Paragraph 2.37 – “conclusions to be normally reached in 18 weeks,... six months for complex cases.”

TfL would expect that the increased adoption of template agreements and model clauses should enable speedier conclusion of decisions but would add that the six months duration for more complex agreements should be seen as a maximum period.

Paragraph 3.7 – “Do consultees agree with our proposed approach to approving long term TAOs? If not, what other factors should be taken into account?”

Whilst TfL agrees with the broad principle it must be recognised that the cost of infrastructure investment in Great Britain is, at present, higher than in other European countries. For that reason it is likely that the payback period may well be longer for projects in this country and this must be borne in mind when assessing the period that the TAO will be applicable against any guidance from Europe on maximum periods for such options to apply. Furthermore the earlier statements in paragraph 3. 6 (options of long duration ossifying the network etc.) cannot go without comment. TfL would not expect potential (but unconfirmed) worries about ossification of the network or long ‘pay-back’ periods to undermine investment decisions which have strong public interest benefits (i.e. by rejecting the length of period requested for a TAO). That said, TfL would agree that development of the network should not be constrained by inflexible long-term access contracts.

Paragraph 3.14 - “Do consultees agree that the term of a TAO should generally encompass both the construction period relating to any network enhancement/development, and the period for which network capacity is reserved to support the investment? Is it then appropriate for the TAO to be exercised through the reflection of TAO rights in a track access contract (perhaps over a shorter term than that of the TAO) between the train operator of choice and the infrastructure manager?”

In general TfL has no objection to the principles outlined provided that the arrangements allow the optimal access rights to be enjoyed to the end of the defined payback period. TfL agrees with the principle that there may need to be some flexibility to change services within the period of the TAO and also the operator of those services although the fact that there could be a number of subsequent track access contracts ‘nested’ within the TAO should not allow the broad envelope of rights to be eroded as a result of any new or revised contracts being applied for.

Paragraph 3.17 – “Do consultees consider that the approach proposed in paragraph 3.16 would be an appropriate way in which to address the prospective impact on network performance of the proposed rights?”

In TfL's opinion, Network Rail's processes undertaken by their Strategic Access Planning Unit should be robust enough to model the performance impact of additional services with a sufficient degree of accuracy to support applications for TAOs without the need for performance to be monitored during a proving period following the introduction of new services. TfL has no firm objection to the concept of a proving period to ensure correct calibration of the Schedule 8 performance regime under track access contracts, but is concerned that a proving period could apply a more onerous performance mechanism to incentivise performance and could put at risk capacity already reserved under a TAO.

Paragraph 3.24 - “Do the proposed timings set out in paragraphs 3.18 to 3.23 appropriately reflect the specific stages that will be associated with a TAO application?”

The proposal seems logical and workable providing the periods of the track access contract(s) are co-terminus with the payback period of the investment.

Paragraph 3.35 – “Consultees’ views are sought on whether they consider that fixed track access charges and reservation charges if implemented should apply to TAOs.”

TfL believes that the reservation charge should only apply when the option is converted to a firm right through an access contract. TfL also notes that if, as proposed, there is sufficient flexibility in the TAO process to allow access by other train operators prior to those rights being exercised (e.g. the ‘green period’) there should be no reason for the reservation charge to apply to a TAO.

As regards the application of the fixed charge element to a TAO, the process may be unduly complex. Firstly, if certain rights were taken advantage of by other users in the so-called ‘green period’ then the fixed charge should not apply to the holder of the TAO for that time.

Secondly, if an element of the fixed charge was to apply to the holder of the TAO this may give rise to disputes regarding the exact proportion to be paid. As noted in our response regarding the reservation charge, the assessment of available capacity is complex and dependent not only on the infrastructure but the type of train operated. By definition, changes to service patterns and train type could alter the proportion of avoidable cost to be allocated. It is also likely that only a relatively small proportion of the network would be affected by any prior transfer or relinquishment of rights (i.e. unused but available capacity) given that any investment would, at that time, be in the course of building new capacity at an adjacent point. Thus the application of the fixed charge to a small proportion of rights not

exercised and over a limited part of the network would seem to be confusing with little benefit. It should also be borne in mind that a proportion of this charge will also be based on the common costs associated with maintaining the network to accept normal day to day traffic and should not be allocated to unused rights.

Thus the whole process is likely to be onerous and give little benefit. In TfL's view it is hard to justify why a further, additional, charge should apply to an investor in the network who is actually developing additional and improved capacity and funding its implementation.

Paragraph 4.4 – “Consultees are asked to comment on the need for TAO model clauses and application form, and the specific issues that these should address.”

Whilst noting that in some instances bespoke provisions may be necessary, TfL agrees that the adoption of model clauses can deliver benefits in the clarity and quicker processing of applications.

Paragraph 4.27 – “Do consultees agree with the scope of changes foreseen as being required to the Network Code to reflect the needs of access option holders, or can they identify any other specific areas that will need to be addressed ?”

TfL agrees that:

- a) access option holders need representation on the Class Representative Committee (CRC). Whilst the establishment of a separate Class may be necessary as a minimum, TfL also believes that the CRC should also be encouraged to take more account of the requirements and views of other stakeholders. Therefore it may be desirable for CRC to be required to take account of such views in addition to the establishment of a separate Class for option holders;
- b) part D should be amended to allow option holders the certainty that bids are dealt with appropriately under the Decision Criteria;
- c) the changes proposed under Parts F and G should be taken forward to give option holders comparable rights to train operators under network and vehicle change proposals;
- d) that the use it or loose it provisions should not apply to a TAO until exercised under a track access contract (although we accept that bespoke provisions may be necessary in some circumstances);
- e) the changes to the definitions set out in Condition A1.6 (i.e. that relating to franchised services) relating to the processes under Part J are essential to remove any ambiguity regarding train services operated under a concession agreement and to remove the risk of their being prematurely removed from any following access contract;
- f) option holders will need to be able to obtain relevant information under Part K; and
- g) it is essential that the industry dispute resolution process is accessible by option holders. TfL would have no objection to a nominal charge

being levied in respect of supporting the activities of the Access Disputes Committee.

Annex B, Paragraph 2 – “the duration of a TAO “would not principally be determined by the payback period.”

TfL is unclear as to how ORR proposes to consider the weighting between various criteria. TfL’s reading of the document is that the payback period would be a key consideration but other criteria will be taken into account (paragraph 2.29). However, TfL has also advocated that social benefits be accorded an appropriate priority. TfL would appreciate clarification of the ORR’s line on consideration of the various criteria.

Conclusions

TfL is supportive of the main conclusions and principles set out in the paper. It does, however, have reservations about potential time limitation of access options, the relationship of RUSs with future applications and the potential applicability of additional charges in respect of the granting of options. These concerns have been fully described beforehand.

This completes TfL’s comments on the consultation.

Yours sincerely

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