

01 November 2021

Future Service Levels and Unused Access Rights

Introduction

1. Since March 2020, in response to public health measures and significantly decreased passenger demand, passenger train service levels have been below the quantum of access rights held by passenger train operating companies (TOCs).
2. As the country continues to emerge from the pandemic, the industry has an opportunity to work together to ensure the best use of the rail network for passengers and freight, as well as support economic recovery. However, disagreements over capacity could occur where operators are not using all their allocated access rights and other operators apply or submit an appeal for this capacity. Our duties mean we recognise the need to consider these aspirations alongside the importance of retaining capacity to facilitate the recovery of passenger services.
3. Under the existing framework, the ORR could be asked to determine the outcome for disputed access applications or appeals related to unused rights. We also have a wider role in holding the industry to account for the efficient use of network capacity. During the last year, ORR has discussed with Network Rail and the Department for Transport (DfT) their plans under the regulatory and contractual framework for optimal use of the network as train service levels changed because of the removal of COVID-19 restrictions.
4. We are publishing this regulatory statement to explain how we will apply the established legal and contractual framework to access rights in the specific circumstance of the COVID-19 recovery. This statement is in line with our published guidance and policies. In summary, this statement explains that:
 - a. **Industry obligations:** We expect Network Rail and operators to comply with the relevant obligations of the Network Code and access wider framework, including ensuring capacity allocation policies are up to date and by carrying out regular access rights reviews; and

- b. **Access applications:** We may require additional information and analyses to support our consideration of applications for additional capacity in some circumstances.

Industry obligations and Network Rail policy

5. DfT has been working with its operators to develop train services which prioritise performance while optimising financial and operational efficiency. These service specifications determine whether those operators' will use all of their access rights. We expect train operators to be mindful of their obligations under condition J2 of the Network Code to surrender unused access rights where they have no current or foreseeable ongoing commercial need to hold them.

6. Network Rail is responsible for working with industry to manage unused access rights within the existing Network Code framework and to update its capacity allocation policy to reflect current circumstances. In February 2021, Network Rail discussed its policy position on unused access rights during and after COVID-19 at its Sale of Access Rights (SoAR) Panel. In May 2021, Network Rail also wrote to current and aspiring operators explaining its approach to applying the relevant parts of the Network Code.

7. There are specific provisions within the Network Code where non-use should be disregarded, i.e where it is attributable to non-economic reasons beyond the beneficiary's control and is temporary in nature. We understand that Network Rail has considered these provisions in the context of COVID-19 restrictions being lifted and longer-term changes in the level of demand or funding.

8. We expect Network Rail to conduct regular access rights review meetings as set out in condition J9 of the Network Code, including proactively identifying any reductions in use of rights. Uncertainty over future demand for services and rights is likely to increase the frequency of such reviews, to inform whether Network Rail should consider issuing a Failure to Use notice under condition J4. Network Rail should also work with industry to establish, communicate, and keep up to date its policy and approach to the retention, or surrender of unused access rights during COVID-19 recovery.

Appeals

9. Network Rail should ensure its published capacity allocation policy is kept up to date to reflect the current circumstances. That policy should be consistent with the existing access framework and recognise the Network Code provides the framework for Network Rail to work with industry to manage unused rights.

10. It remains open for train operators to use the existing regime's process, which may result in an access dispute referral to ORR. We will consider any referral on a case-by-case basis, within the existing access framework and in line with our statutory duties.

Access applications (new or competing)

11. During this period of recovery from the pandemic, ORR will continue to determine track access applications from all operators on a case-by-case basis, within the existing legal framework for access and in line with our statutory duties.

12. The Railways Act 1993¹ prohibits ORR from directing an access contract which would cause Network Rail to breach another access agreement. This means we could not direct an access contract which directly conflicted with rights already held by another operator, even if those rights were currently unused. By proactively communicating its policy on use of rights and meeting its contractual obligation to undertake regular Rights Review Meetings, Network Rail should be prepared to assess whether access applications conflict with existing rights. This is in addition to its Sale of Access Rights process, where it should continue to use its capacity analysis to demonstrate applications do not pose a conflict with existing rights (either in use or unused). Through industry engagement in Rights Review Meetings and its capacity analysis, Network Rail will be best placed to consider the service permutations needed to accommodate an application alongside existing rights.

13. Parties should be aware that during this period of service recovery the mismatch between access rights and actual service levels, as well as uncertainty over future service levels, may complicate our assessment of the potential impact of applications for additional services. For disputed applications, requiring capacity, performance, or economic analysis (to assess the impact on the funds available to the Secretary of State), we will need to consider different modelled timetable scenarios where appropriate. Among other things, we may need to examine the impacts of the proposed services on the timetable that is likely to operate, as well the impacts in the scenario where all services with rights are timetabled. This will capture likely short-term and potential long-term economic, and performance impacts dependent on levels of service recovery. This is necessary for us to take decisions based on the most accurate and realistic forecasts. As this will entail an extra layer of complexity and resource for Network Rail and applicants, we encourage parties to discuss modelling requirements with us at the earliest opportunity.

14. For publicly contracted TOCs seeking additional access rights, we will expect to see evidence of funder support for the specific rights and of operators' intent and ability to operate the new services before we approve them. Where TOCs plan to phase-in services, we will seek additional assurances and justification from TOCs of their plans and in the event of approval may include contractual mechanisms, such as longstop dates, to ensure the prompt use of additional rights.

15. Some freight traffic lends itself more readily to short term traffic flows and changes than open access passenger train operators. Freight Operating Companies

¹ Section 17(1)(b)

(FOCs) are already able to use Train Operator Variation Requests (TOVRs) to get timetable slots for up to 12 months for each service. The reduction in passenger services has allowed some additional freight services to be added to the timetable (using TOVRs), as well as supporting improved freight performance or allowing longer trains.

16. Normally, if FOCs need longer term rights, they will look to convert TOVRs into firm rights, under their Network Rail track access contracts. It is not always a straightforward matter to identify how much capacity is released by services not running. Furthermore, COVID-19 recovery provides added complexity for Network Rail on whether it can sell new access rights or allow modifications because of the need to identify the dependencies of a higher number of reduced services.

17. We encourage Network Rail to continue to work with FOCs and to explain where the conversion of short-term TOVRs to firm rights is likely to be constrained by existing, if temporarily unused, access rights. This emphasises the importance of Rights Review Meetings. We encourage Network Rail and FOCs to continue to work together and identify where the best use of capacity can be made, even if it is just for time limited and short-term services.

Application of this statement

18. COVID-19 has created an unusual set of circumstances where there is the potential for an unusual quantity of unused access rights. This statement sets out our position in the interests of transparency and regulatory certainty of what we expect from industry. This statement is available on our website and should be considered alongside our guidance on regulating the track access regime². This statement will remain relevant during the period where operating train services are below the issued access rights for the network. However, we will review this guidance following implementation of the May 2022 timetable.

Daniel Brown

A handwritten signature in black ink that reads 'Daniel Brown'.

² <https://www.orr.gov.uk/guidance-compliance/rail/operator-access-network/track-access/guidance>