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Alec McTavish (ATOC)
Ekta Sareen (Network Rail)
Cc: Traction Electricity Steering Group (TESG)

Dear Alec and Ekta,

Amendments to ESTA boundaries and network change

This letter sets out our response to your separate requests for our view on whether changing ESTA boundaries would be a network change under Part G of the Network Code. This is in the context of a suggestion that this would constitute network change, and so should not be dealt with under the Traction Electricity Rules change procedure, as we have proposed. The letter goes on to discuss the process for amending the ESTA boundaries.

ESTA boundaries

As you know, the boundaries for ESTAs are, at present, set out in Schedule 7 of track access contracts. These divide up the network for the purposes of billing for traction electricity.

From our reading of the definition of network change¹, whilst we can see that the infrastructure changes arising from the electrification of a route would constitute a network change, we do not consider that adjusting the boundaries following this would be a network change in itself.

The location of an ESTA boundary does not affect the operation of the network or of train services. We recognise that changing the boundaries could affect the volume wash-up and distribution system loss factor (DSLFF) (e.g. depending on how many services would operate within an ESTA), but this is a charging matter rather than anything that falls within the scope of network change.

It is also the case that there is no mechanism in Part G that could require an amendment of the track access contract to give effect to a boundary change. Under existing CP4 contractual arrangements, the ESTA boundaries can only (formally) be changed through an amendment to each track access contract.

¹ For ease of reference we have included the definition in an appendix to this letter.

We also note that ESTA boundaries have been amended over the last decade². However, we are not aware of a network change having taken place in connection with this.

In summary, we do not think that amending ESTA boundaries would be a network change. However, we are conscious that it has been suggested that it would be a network change and that we have not seen the rationale for this. Should any party feel that it can make a convincing case for this (taking into account the points set out above), we would be happy to discuss this.

The Traction Electricity Rules and the mechanism for amending ESTA boundaries

Background

As you know, we intend to move the ESTA boundary definitions from Schedule 7 of track access contracts to the new Traction Electricity Rules (“the Rules”)³. This will enable changes to be made to the definitions using the change process set out in the Rules, providing a more efficient process compared to the current arrangements which require an amendment to every individual track access contract.

In July 2013, we consulted on a draft version of the Rules which incorporated the ESTA boundary definitions. These included an amended version of the process for making a change to the Rules, which provided for the following:

- for Network Rail, train operators and ORR to be able to each make a proposal to amend any part of the Rules (as now, except we proposed to prevent parties other than ORR putting forward changes to the DSLFs. This was intended to reflect our policy decision in our draft determination (paragraph 16.178) to give more certainty to metered operators);
- for train operators, Network Rail and ORR to be consulted on any proposed rules change (this is unchanged from the EC4T Metering Rules);
- for Network Rail and all electric train operators to be able to vote on a proposal. Any proposals achieving a simple majority in favour could then be submitted to ORR for

² We note that during control period 3, there were only ten ESTAs (see Appendix 7B of Schedule 7 to the CP3 version of the model passenger contract – available at <http://www.rail-reg.gov.uk/upload/pdf/194.pdf>), whereas for CP4 there are 20.

³ These will supersede the EC4T Metering Rules on 1 April 2014.

consent (this reflected a change from the EC4T Metering Rules where only Network Rail and metered train operators can vote);

- in deciding whether to give consent, ORR can take into account the representations of consultees and its statutory duties;
- ORR has a 'unilateral' right to propose and implement amendments subject to consultation (i.e. with no vote of Network Rail and train operators), similar to its right to amend the Network Code (condition C8). However, any amendments made through this process are delayed for 90 days⁴.

Issues

Whilst we had thought that the above rules change process should apply to proposed amendments to ESTA boundary definitions, further consideration following the recent discussions at TESH has led us to conclude that this may not be an effective arrangement.

In particular, we note that whereas changes to the main provisions of the Rules would apply to most if not all train operators, an ESTA boundary change may affect only a small number of train operators. The simple majority vote procedure could therefore involve just a few interested train operators and Network Rail, with a large number of abstentions. It could prove difficult for Network Rail to progress a boundary change if train operators felt that the change would lead to them paying a higher wash-up – even if the proposed boundary change was the right thing to do. If this happened, Network Rail would then be likely to request ORR to take forward the amendment to ESTA boundaries using its unilateral change power. ORR would then consult and decide whether the change should be made. If it decided that the change should be implemented, there would then be a 90 day delay before this could take effect.

There could be a significant number of boundary changes during CP5, as electrification is gradually rolled out and a new ESTA is expanded over time. The framework in the draft Rules, whilst ultimately providing a way to resolve any stalemate arising from the voting process, could potentially be time consuming and inefficient (involving two consultations on the same topic and a 90 day delay) given the number of changes that may be required to ESTAs.

⁴ This 90 day delay was included to ensure that, if certain major changes are introduced by ORR, industry parties have time to prepare before the change is implemented. For example, changes to billing systems. This is similar to the 180 day delay under C8 of the Network Code.

On reflection, we consider there is a good case for changes to ESTA boundaries to be subject to a slightly different arrangement which does not involve a vote.

Proposed revised process

We suggest the process is revised to reflect the following:

- Network Rail would consult on a proposed change to ESTA boundary definitions (as now);
- Where train operators raise concerns, Network Rail should seek to resolve these;
- Where there remain outstanding concerns/objections from train operators, if Network Rail considers that the boundary change is appropriate, it may submit the proposal to ORR to determine, without there being any vote amongst operators;
- ORR would then review the outstanding concerns of train operators, and seek further information where necessary, before making a decision on whether to consent to the proposed change.

This would be more efficient and would achieve the same result as the process in the draft Rules, albeit without a long drawn out process. It would also be very similar to how consultation concerns relating to track access applications are dealt with.

Restriction on proposed changes to DSLFs

In our draft determination, we said that neither train operators nor Network Rail should be able to propose changes to DSLFs in the Rules, in order to give metered operators certainty. We reflected this in the July 2013 draft Rules.

However, new ESTAs will need to be created during CP5. If Network Rail is unable to make a change proposal to introduce a new DSLF, it would have to ask ORR to make such a proposal on its behalf. There could then be two change proposals – one from Network Rail (to establish a new ESTA), and one from ORR (to establish a corresponding DSLF). We now think prohibiting Network Rail from being able to make rules changes relating to DSLFs would be a disproportionate response to giving certainty to metered train operators.

We therefore think that we should remove this prohibition on Network Rail to enable it to introduce DSLFs as electrification is rolled out. For avoidance of doubt, this does not change our policy position that the DSLFs established for CP5 should not be amended. Our final determination will make this clear. If Network Rail did make a proposal to change



ESTAs established through the final determination, it would be unlikely that we would consent to this.

We are happy to discuss any aspect of this letter.

Yours sincerely

A handwritten signature in black ink, appearing to be 'RG' with a long horizontal stroke extending to the right.

Richard Gusanie

Appendix: Definition of Network Change – Part G of the Network Code

“Network Change” means, in relation to an Access Beneficiary:

- (a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:
 - (i) the Network; or
 - (ii) trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; or
- (b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:
 - (i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and
 - (ii) has lasted or is likely to last for more than six months,including
 - (x) a temporary speed restriction;
 - (y) a material change to the location of any of the specified points referred to in Condition B1.1(a); or
 - (z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or
- (c) any material variation to an established Network Change, other than an authorised variation,

but does not include a closure (as defined in the Railways Act 2005) or a change made under the Systems Code.