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Dear Ian and Nick,

**Application by GB Railfreight Limited under section 22A of the Railways Act 1993:
4th Supplemental Agreement**

1. On 5 December 2017 the Office of Rail and Road (**ORR**) issued directions under section 22A of the Railways Act 1993 (**the Act**) to Network Rail Infrastructure Limited (**Network Rail**) to amend its existing track access contract (**TAC**) with GB Railfreight Limited (**GBRf**), dated 11 December 2016, as formally requested by GBRf on 9 August 2017 to form its 4th Supplemental Agreement (**the 4th SA**).
2. Our directions contain some modifications to the original submission by GBRf. This letter explains our directions and the reasons for them.

Summary

3. ORR's decision is:
 - To approve new firm access rights, excluding access rights from the Port of Tyne to Lynemouth, until Principal Change Date (**PCD**) 2026. Taken together with the rights GBRf proposes to give up, these changes amount to an alteration of GBRf's service patterns with a broadly similar quantum of services. It has been demonstrated that it is a more efficient use of capacity.
 - To approve new access rights from the Port of Tyne to Lynemouth but only until Subsidiary Change Date (**SCD**) 2019, as these are essentially new rights. We have considered this in the context of Network Rail's policy for East Coast Mainline (**ECML**). This does not preclude GBRf from continuing to discuss its proposals with Network Rail. We expect Network Rail to work quickly to clarify its position beyond SCD 2019.

4. During our consideration of the application, GBRf and Network Rail came to agreement on the access rights using the Trans-Pennine line that did not interact with the ECML. We are content to approve these access rights as submitted to us.
5. The reasons for this decision are explained below.

Submission to ORR

6. GBRf was unable to agree terms for a number of access rights with Network Rail, on ECML and the Trans-Pennine line. It submitted a section 22A application to ORR, applying for:
 - 114 new rights (per week);
 - 45 modifications to existing rights; and
 - 72 existing rights to be removed¹.
7. The application submitted to ORR on 9 August 2017 consisted of:
 - Form F – Application form.
 - Appendix A – The proposed amended Rights Table
 - Appendix B – supporting email documentation
8. We received an updated Rights Table from the parties on 27 September 2017, and a copy of the proposed 4th SA from GBRf on 5 October 2017.

ORR's approach

9. We followed ORR's track access guidance² and the procedures set out in Schedule 4 of the Act for considering the applications. We have also had regard to the duties under section 4 of the Act (**the section 4 duties**)³.
10. It is for each party to make its case concerning the proposed agreement. GBRf explained the areas where it could not reach agreement with Network Rail. There were further iterations between the parties and us to clarify their concerns.
11. On 23 November 2017, we shared the draft decision and supplemental agreements with GBRf and Network Rail to check their factual accuracy. We received some comments from Network Rail, which we took into account in our final directions.

Representations

12. In agreement with GBRf the application in full (without any redactions) was sent to Network Rail for its comments in accordance with the procedure set out in Schedule 4 of the Act. Network Rail responded on 20 September 2017. GBRf responded in turn to

¹ 71 rights will be removed, as flow 732 was counted as both a removal and amendment in the original Rights Table. It is now counted as an amendment only.

² <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>.

³ <http://www.legislation.gov.uk/ukpga/1993/43/section/4>.

those representations on 20 September 2017, with Network Rail providing some clarifying comments in response to GBRf on 21 September 2017. We met with the parties on 30 October 2017 to discuss further the specific issues for the access rights that would use the ECML.

Consultation

13. Network Rail hosted and issued the industry consultation on GBRf's behalf. The consultation ran from 11 August to 11 September 2017. Responses were received from Transport Focus, West Yorkshire Combined Authority, Arriva Rail North, Transport for Greater Manchester, Merseytravel and the Welsh Government.
14. Transport Focus, West Yorkshire Combined Authority and Merseytravel were all broadly supportive of the application. The Welsh Government had no comment. Arriva Rail North and Transport for Greater Manchester were generally supportive, with some concerns that are discussed below.
15. Arriva Rail North and Transport for Greater Manchester asked for confirmation from Network Rail that the proposed access rights would not conflict with passenger services due to start in the December 2017, May 2018 and December 2019 timetables. Network Rail confirmed that they would not conflict with the December 2017 timetable but it was too early to answer for May 2018 and December 2019. It therefore could only say that it would follow the due process as is required by the Network Code.
16. Transport for Greater Manchester raised some concerns over the routings that were changed in the Rights Table. Network Rail confirmed these were suggested routings, and did not dictate which route a service must use in future.
17. We asked Network Rail to provide the details of any Interested Persons as defined under Schedule 4. Network Rail did not identify any such person.

Background

18. GBRf told us of a recent cross-industry Electricity Supply Industry (**ESI**) Review of all coal and biomass services. This review looked at how paths for ESI services were being used by the Freight Operating Companies (**FOCs**). From this review, unused paths were removed and other paths adjusted to make the most effective use of capacity. This led to a number of access rights being adjusted across the FOCs. For GBRf, these changes are to:
 - Coal services from Immingham to Cottam, West Burton, Ratcliffe and Eggborough power stations and from Port of Blyth to Cottam, West Burton and Drax.
 - Biomass services from Port of Tyne and Liverpool to Drax.
19. There are also some access rights for a new to rail contract for biomass from Port of Tyne to Lynemouth power station.

20. GBRf initially submitted the 4th SA to Network Rail on 3 March 2017, with proposed sixty minute windows for both arrivals and departures. Network Rail responded on 22 May 2017, offering access rights with 24 hour windows from PCD 2019 where they use the Mirfield or Calder Valley route and 24 hour windows from PCD 2020 where they use the ECML.
21. Discussions continued until late June 2017. GBRf said that Network Rail's view on access rights on the ECML and across the Trans-Pennine route was unclear and not robust, the application to Network Rail had not progressed and the impasse could not continue. Therefore GBRf sent its section 22A application to ORR in August 2017.

Issues in the application

More extensive use

22. Section 22A of the Act allows ORR to direct the parties to an access agreement to make amendments to that agreement permitting more extensive use (**MEU**) of a railway facility or network installation, and to make any necessary consequential changes.
23. MEU means "*increased use for the purpose for which the applicant is permitted by the access agreement to use the railway facility or network installation*"⁴. We will therefore consider giving directions pursuant to section 22A in respect of, for example, requests for new or additional rights or amendments to existing rights which will make increased use of a railway facility or network (such as an increase of route miles) in line with the meaning of MEU.

ORR's view

24. GBRf is seeking a package of new rights, amendments to some existing rights and the removal of others that would then no longer be needed.
25. For both the new access rights and the proposed amendments which would increase usage of the network by existing rights, we consider that these will result in more extensive use of the network within the meaning of section 22A. Neither party has disputed that these changes would result in MEU.
26. Pursuant to section 22A we are therefore directing both parties to make the necessary amendments to the access agreement to reflect these proposed access rights, including the access rights on the Trans-Pennine route that are now agreed.
27. The access rights which GBRf are seeking to remove from the Rights Table will reduce the usage of the network by GBRf.

⁴ See <http://www.legislation.gov.uk/ukpga/1993/43/section/22A> for the full definition of MEU.

28. GBRf and Network Rail agreed that they will concurrently enter into a supplemental agreement (**the 5th SA**) under section 22 of the Act in respect of these relinquished access rights under the General Approval.

ECML capacity

29. GBRf highlighted in its application that the changes to its access rights, including on the ECML, were part of the cross-industry ESI Review of all coal and biomass services. This review was carried out by Network Rail and the FOCs. This review looked at the paths used by ESI services and considered how they could be improved for all parties, including the end-customers. One part of the final stage of the review was to amend, add and remove as necessary access rights from the FOCs' TACs to reflect the improved new paths. Network Rail confirmed to us that it supported the work that had been done in this review to improve paths.
30. Network Rail said in its initial response to GBRf in May 2017 that on the ECML there are planned timetable re-casts from PCD 2020. It anticipated that there will be a significant reduction in available capacity during works and there will be a need to divert and/or retime services due to a series of full line blockades on the ECML.
31. In its representations to us of 20 September 2017, Network Rail argued for firm access rights until SCD 2019 with the access rights then expiring instead of continuing with a 24 hour window. Network Rail referred us to its letter of 20 September 2017, which set out Network Rail's policy on new access rights on the ECML. The letter outlined that several schemes were proposed affecting ECML capacity, and that until all the schemes reach the "commit to deliver" stage and were funded it could not commit to the allocation of services against the available capacity. Network Rail hoped to give more clarity on this by the end of the second quarter of 2018.
32. GBRf disputed Network Rail's position, stating that the SCD 2019 end date could not be justified, as there was no replanning expected on the ECML until 2021 and that none of the connectivity schemes will be completed by May 2019. Network Rail clarified after the meeting that the SCD 2019 end date was chosen as this is the date that Network Rail has been directed into contracts with Virgin Trains East Coast Limited with access rights for a Long Distance High Speed service specification, which Network Rail is uncertain it can meet due to the requirement to deliver various capacity enhancement schemes.
33. Network Rail confirmed in the meeting of 30 October 2017 that its objections to GBRf having new access rights on the ECML until PCD 2026 were due to its wider policy on the ECML and concerns over some of the Special Terms included in the application. It did not have concerns over the individual impact of these rights. The services are currently running as Train Operator Variation Requests.

ORR's view

34. We are aware of Network Rail's concerns regarding capacity on the ECML as set out in its letter of 20 September 2017, and that it is taking a cautious approach to approving new access rights. Although we understand Network Rail's caution in light of project risks, uncertain costs and fixed budgets, we have concerns that its policy does not allow any flexibility for approving new rights which might allow for better use of capacity. We are also concerned as to when Network Rail will be clearer about the position beyond SCD 2019 and the specific things that must happen to give it that clarity. We have asked Network Rail to address these points.
35. In this case, there are more access rights being removed that use the ECML than new access rights, not including the Port of Tyne to Lynemouth access rights. Therefore approving these new access rights and removing unused rights in fact improves the use of capacity compared to the current situation. We also note that Network Rail did not have issues with the individual impact of these access rights, which are currently running as Train Operator Variation Requests.
36. We encourage Network Rail and FOCs to rationalise their rights to effectively use capacity. Therefore we have decided to approve these new access rights, apart from those from Port of Tyne to Lynemouth which are dealt with below, and allow them to continue until the end of GBRf's contract on PCD 2026. This allows for certainty for both GBRf and its end-customers. Network Rail retains the ability to remove these rights from GBRf's contract if they are not used for ninety days under Part J of the Network Code, and has the opportunity in 2019 to reopen the window sizes of access rights with the reopener provision in Schedule 5⁵.
37. This decision should not, however, be taken as meaning that all new firm access rights for freight on the ECML should be approved beyond SCD 2019 by default. In this case the overall use of capacity is lowered by having new firm rights while giving up existing rights, as opposed to retaining the existing firm rights. This is why we have approved it even with Network Rail's pause on extending access rights beyond SCD 2019.

Port of Tyne to Lynemouth Rights

38. GBRf applied for 20 new access rights per week between Port of Tyne and Lynemouth in its application alongside the access rights discussed above. These access rights are for traffic that is new to rail and are not based on existing access rights to Lynemouth when it was a coal-fired power plant. Coal services have not run since 2015.
39. As the proposed access rights use the ECML, Network Rail requested that these access rights are time-limited to expire on SCD 2019, as discussed above. Network

⁵ See our conclusions letter on Schedule 5: http://orr.gov.uk/_data/assets/pdf_file/0019/20638/schedule-5-of-the-model-freight-track-access-contract-conclusions-2016-01-20.pdf.

Rail did not have any specific objections to these access rights beyond this and the linking of departures and arrivals in the special terms.

ORR's view

40. These are new access rights that are not replacing existing access rights. As far as we are aware, they were not included in any capacity analysis done to date of the ECML. We have decided in this case to time-limit these access rights to SCD 2019. We will consider any future application to extend these rights beyond SCD 2019 on its merits once there is more clarity on future ECML capacity. This should be confirmed early in 2018 at which point we would also expect Network Rail to say more about the long term sustainability of these access rights.

Special Terms

41. In its representations, Network Rail raised concerns over the level of prescription contained in the Special Terms for the access rights GBRf applied for. A number of access rights had comments in the special terms column for minimum turn-around times which noted that the right should depart or arrive before another named service. Network Rail argued that this unnecessarily constrained its ability to flex rights, obligating it to terminal start and leave times, and that such comments should be included in the non-contractual comments line instead.

42. GBRf said that it needed the information in its Right Table for Network Rail's train planners to have the right information for planning. GBRf and its customers also invest resources in strict planning around arrival and departure times, and therefore the terms protected the business and make sure that if Network Rail moved one slot by ten minutes, Network Rail would move the corresponding slot too. Otherwise the whole train plan is at risk of falling apart. GBRf also said that there is a precedent for GBRf to use these special terms as the new TACs that started on PCD 2016 and several SAs have been approved with special terms included in the Rights Tables.

ORR's view

43. We have commented on the prescription of access rights in previous decisions, such as in our decision letter for GBRf's section 17 application⁶. In that decision we noted that additional prescription in the Rights Table – such as routing – had to be justified. GBRf argued that Network Rail's train planners need these special terms to know in which order services should depart or arrive. Such information is useful to train planners, however this information can be included in the non-contractual comments line and still be available to planners. It is not a justification for prescription in access rights by itself.

⁶ http://orr.gov.uk/data/assets/pdf_file/0014/21524/s17-gb-railfreight-decision-letter.pdf.

44. Network Rail has a responsibility, when constructing the timetable, to consider the commercial interests of GBRf under D4.6.2 of the Network Code, with or without inclusion of additional prescription in the special terms. Therefore we do not see this as a justification for the level of prescription GBRf are arguing for.
45. GBRf argued that ORR has previously approved the use of special terms. During the section 17 applications we asked applicants to justify the prescription they added to their Rights Tables. They were removed where they could not be justified. We also considered Network Rail's objections and the use of special terms on their merits in the context of this case.
46. We are not convinced that the special terms are needed in this instance. Therefore we are directing that these comments be moved to the non-contractual comments rows. Although they will not form a contractual commitment, we do expect Network Rail's planners to take account of these comments in the construction of efficient timetables.

Windows Size

47. GBRf disagreed with Network Rail's initial view that only 24 hour windows should be granted after PCD 2019 on the Trans-Pennine line or PCD 2020 on ECML, because of ORR's directions on the default position for the window size of future firm freight access rights in February 2016. It also stated that the reasons for not supporting sixty minute windows were unclear, inconsistent, not properly thought through and not backed up by any reference to ORR's *Criteria and Procedures for the Approval of Track Access Contracts* document.

ORR's view

48. In our decision on GBRf's section 17 application for a new TAC in February 2016, we said that sixty minute windows should be a starting point for new freight firm rights. This does not mean that Network Rail can *only* grant freight firm access rights with sixty minute windows. We expect justifications to be provided for sixty minute windows, especially where there are potential capacity constraints. In this case, GBRf has provided justification in its application to us for sixty minute windows, in relation to the stability of the supply chain for ESI.

Trans-Pennine capacity

49. Network Rail said in its initial response to GBRf in May 2017 that on the Trans-Pennine line, the Trans-Pennine Route Upgrade Project (currently at GRIP 3) needed to be considered against the application. This was in respect to diversionary route requirements during construction and a timetable re-cast in 2019.
50. In its representations to us of 20 September 2017, Network Rail confirmed that it had now agreed to grant GBRf the rights it had requested, where these rights did not use the ECML, with 60 minute windows until PCD 2026. We therefore have not considered the parties' arguments further.

ORR decision

51. In making this decision, we have taken into account our section 4 duties, in particular:

- to protect the interests of users of railway assets;
- to promote the use of railway network in Great Britain for the carriage of passengers and goods and the development of that railway network, to the greatest extent ...economically practicable;
- to promote efficiency and economy on the part of the persons providing railway services; and
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

ORR Modifications

52. We updated the Rights Table in the 4th SA we are directing Network Rail and GBRf to enter to reflect the changes explained in this letter, including the move of access rights to be relinquished from the section 22A application to the 5th SA.

Other matters

53. Once the agreement is signed, in accordance with section 72(5) of the Act, you must send a copy to us within 28 days and in accordance with section 72(2)(b)(iii), a copy will be placed on our public register and website.

54. In entering any provision on the register, we are required to have regard to the need to exclude, as far as is practicable, the matters specified in section 71(2)(a) and (b) of the Act. These sections refer to:

- any matter which relates to the affairs of an individual, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that individual; and
- any matter which relates to the affairs of a particular body of persons, whether corporate or incorporate, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that body.

55. When submitting the copy of the signed agreement would you therefore identify any matters which you would like us to consider redacting before publication. You will need to give reasons for each request explaining why you consider that publication would seriously and prejudicially affect your interests.

56. I am grateful to GBRf and Network Rail for their contributions during our consideration of the issues raised by this case.

Yours sincerely