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Dear Rebecca and Lindsay

## **Application by Freightliner Heavy Haul Limited under section 22A of the Railways Act 1993: 25<sup>th</sup> Supplemental Agreement (coal)**

1. The Office of Rail Regulation (ORR) has directed the 25<sup>th</sup> Supplemental Agreement (25<sup>th</sup> SA) to the track access agreement between Network Rail Infrastructure Limited (Network Rail) and Freightliner Heavy Haul (Ltd) (FHH). This letter is to explain the extent and purpose of our direction and to set out the reasons for our decision.

### **Purpose of the agreement we have directed**

2. The 25<sup>th</sup> SA gives FHH new and amended access rights for its coal services up to the Principal Change Date in 2016 (PCD 2016). ORR's directions, however, only relate to those rights changes that involve 'more extensive use' of Network Rail's network.

3. We have directed that FHH and Network Rail enter into a Supplemental Agreement to their track access agreement that inserts into the FHH Rights Table all the additional rights requested and amends five rights (with headcodes 4S15, 4K02, 6E75, 4S28 and 4S33). FHH had applied for most of these rights at Level One (L1), Network Rail was only prepared to agree to rights at Level Two (L2). ORR's directions are for them to be at L1.

4. The principal reasons for ORR's decision are:

- The desirability of consistency of treatment between rail freight operating companies.

- The L1 rights are to last only until the Principal Change Date 2016 when the track access contract expires. The approach to the specificity of these rights can be revised in the light of the industry's access rights work currently away.
- FHH's releasing capacity and bringing its rights table up to date.
- The decision is consistent with ORR policy, as set out in our West Coast Main Line policy.

5. As explained later in this letter, ORR may only direct on rights that make 'more extensive use' of the network. Network Rail and FHH are submitting a separate Supplemental Agreement under section 22 of the Act covering those amendments to those rights that are not more extensive use and where agreement has been reached (the 28<sup>th</sup> SA). FHH has also made a separate application to update its Rights Table for non-coal services (27<sup>th</sup> SA). Both the 27<sup>th</sup> and 28<sup>th</sup> SAs are subject to separate ORR notices.

## Background

6. Each freight train operator has a Rights Table, as part of their track access contract with Network Rail, which sets out their rights to access Network Rail's network. There are two types of 'firm rights', identified as L1 rights and L2 rights. A L1 right is a firm right to a train slot with specific arrival and departure times on specified days of the week, with a specified permitted variation, or flex, value (usually +/- 30 minutes). A L2 right is a firm right to a specific number of train slots but only per day. There are also level three (L3) rights, called contingent rights<sup>1</sup>. This case concerns at which level new or amended rights should be granted in respect of FHH's coal traffic.

7. ORR approval is needed under the Railways Act 1993 (the Act) for new track access contracts or amendments to existing rights. Where parties have an existing track access contract but are unable to reach agreement on the terms of a proposed amendment to permit more extensive use, the beneficiary can apply to ORR to issue directions under section 22A of the Act. ORR may issue directions to both parties on the terms of an amendment to the contract. More detail is available in our track access guidance<sup>2</sup>.

### *More extensive use*

8. Section 22A of the Act states that ORR may give directions requiring the parties to an access agreement to make amendments permitting more extensive use of the network, and to make consequential amendments. More extensive use means an increased use of capacity. So this only refers to new rights, or amended rights that make increased use of the network (such as more route miles). It does not apply to amendments that make less use of the network or the deletion of rights.

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<sup>1</sup> and <sup>2</sup> see our guidance [http://orr.gov.uk/data/assets/pdf\\_file/0003/4818/ta\\_criteria\\_and\\_procedures.pdf](http://orr.gov.uk/data/assets/pdf_file/0003/4818/ta_criteria_and_procedures.pdf)

9. ORR's directions under section 22A of the Act may not be used in respect of rights that make less extensive use of the network, including deleting them. In the case of amendments that are not more extensive use and are agreed by the parties, these may be made by specific application to ORR under section 22 of the Act or by using ORR's general approval<sup>3</sup>.

10. DB Schenker (DBS) told us that it was a debatable issue whether converting L2 rights to L1 rights could be considered as more extensive use, the test for making an application under section 22A. In general terms, ORR does not regard the direct substitution of L2 for L1 access rights as more extensive use as meant by section 22A of the Act. This is because one right does not take up more capacity than the other, all other things equal. However in this case ORR's directions only apply to new rights or amendments that result in more extensive use.

11. Accordingly, the only rights in FHH's application that ORR may direct under section 22A are: all the additional rights requested and certain amended rights (4S15, 4K02, 6E75, 4S28 and 4S33). All of these involve more extensive use of Network Rail's network.

## **FHH's application**

### *Process*

12. On 17 December 2014 FHH submitted an application to ORR (the 25<sup>th</sup> SA) under section 22A of the Act for its Rights Table to be updated. An application had not been submitted under section 22 of the Act as agreement had not been reached on a number of points by the parties. This application formally replaced an earlier application dated 28 November 2014. The revised Rights Table would apply until the end of the contract at the Principal Change Date in 2016 (PCD 2016). The application included:

- Application form (Form F)
- Draft Supplemental Agreement
- Supporting documentation (annexes A-E)
- Proposed schedule 5 Rights Table<sup>4</sup>.

13. FHH said that Network Rail had agreed to the proposed changes to the Schedule 5 rights table only on the basis that new and amended access rights are granted at L2. Network Rail however was not prepared to agree L1 rights for coal services. ORR accepted the application on that basis and undertook to consider the issues involved.

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<sup>3</sup> [http://orr.gov.uk/data/assets/pdf\\_file/0011/5420/freight\\_access\\_ga\\_2012.pdf](http://orr.gov.uk/data/assets/pdf_file/0011/5420/freight_access_ga_2012.pdf)

<sup>4</sup> The contract miles were subsequently clarified by FHH – 4K02 being 71 contract miles and 6E75 being amended to 264 contract miles.

### *Application for L1 rights*

14. FHH said that the application was to enable FHH to fulfil its haulage contracts and reflect changes since the 8<sup>th</sup> SA. In particular there had been a reduction in the number of origin and destination combinations due to mine closures and changes due to freight operator competition. FHH noted that its proposed altered and additional services were in the working timetable and were currently operating.

15. FHH contended that there is a commercial requirement for coal rights to have L1 access rights rather than L2. Coal traffic is needed to fuel power stations across Great Britain. FHH explained:

*“It is vital that the freight operators have timed access rights to ensure that they can fulfill the requirement of just in time delivery and a continual and steady arrival of services that is required by the power station.”*

16. FHH argued that that the coal market has changed since rail privatisation. Most coal is now sourced at just eleven ports, compared to various mines and ports a few years ago. There are however many operational issues to consider including arrival and departure times at terminals; and performance issues at terminals and on the national network.

17. FHH also noted in its application that Network Rail has agreed an extension to DBS’s access rights, until PCD 2016, which included the roll-forward of its L1 rights for haulage of coal traffic. FHH contended that this shows an inconsistent application of policy by Network Rail.

18. FHH contended that Network Rail was not applying the principles set out in ORR’s West Coast decision letter of 2 April 2013. FHH’s view is that the principles should apply across all the routes and there should be a balancing net-nil effect where new L1s balance with L1 rights relinquished.

19. Also FHH pointed out that the parties and others (including ORR) were in discussions about changes to the Schedule 5 templates from PCD 2016. In FHH’s view any revised policy should not be applied until then or there would be a risk of further inconsistency.

20. The services applied for already appear in the working timetable and have been through the relevant scheduling processes. So there are no performance issues (that is adverse impact on other services) associated with granting FHH the rights it applied for.

21. FHH applied for two new rights (4K51 and 4K54) at L2. This is because they are wagon maintenance moves and there are no customer expectations of L1 rights. This was not disputed between the parties.

## Industry consultation

### *Process*

22. On 19 December 2014 we started a wider industry consultation on this application. There were no 'interested persons', who would be directly affected by the proposed rights if granted, identified by Network Rail within the meaning of Schedule 4 of the Act.

### *Responses*

23. On 16 January 2015 DBS made representations on the proposed 25<sup>th</sup> SA. DBS that started by saying it supported FHH's view that the coal market had changed and this necessitated a move towards the granting of L1 rights. DBS said that was particularly the case at power stations, where deliveries of biomass could not be stored but went straight to be burned in the furnaces.

24. However, DBS argued that Network Rail was not being inconsistent as between applications made by DBS (its 116<sup>th</sup> SA) and FHH. Although both applications involved L1 rights, the DBS application was essentially a 'roll over' of its current rights for electricity coal services (so L1 rights remain at L1 and L2 rights remain at L2). This does not change the status quo. If the FHH application for L1 rights was not accepted, it would still have L1 and L2 rights in the 2015/16 timetables, like DBS. DBS also referenced more extensive use, as discussed above.

25. DBS in its representations stated that FHH was unable to surrender certain L2 rights to/from Uskmouth power station. DBS says that these had already been transferred to it from FHH under Condition J7 of the Network Code in September 2013. FHH conceded that the inclusion of Uskmouth power station rights was an oversight. These do not form part of the application, which under section 22A only concerns more extensive use rights.

26. On 15 January 2015 we received representations from GB Railfreight (GBRf) that four proposed rights should be removed from the application as access rights relating to those services was being transferred from FHH to GBRf. Network Rail agreed. FHH said that the transfer of rights was premature, and asked for the paths to be included in the SA and for any subsequent transfers to be made through the Part J process. GBRf agreed with that position.

27. GBRf, as a general point, agreed with FHH's views on the flexibilities afforded to Network Rail by L1 rights.

### *Intermediate points and routings*

28. FHH's application included a number of intermediate points. An intermediate point in the rights table is a point where the train needs to call or stop. The reason needs to be stated in the special terms column. However, it is not supposed to be used to determine routings. The routing column can be used to specify routes but again care must be taken

not to over-specify or unnecessarily constrain Network Rail's timetabling process. FHH has agreed to the deletion of several routings and intermediate points from its requested additional services. The headcodes of these rights are 6D52, 6F46, 6F72, 6A49, 6H01, 6H57, 6R71, 6R72, 4R04, 4R38, 6M97, 6M12, 6M64, 4V22, 6M27, 6M02, 4N74, 6M86, 4K51 and 4K54. We have reflected this in our directions.

### *Ravenstruther*

29. We also received a query about the status of Ravenstruther, which is one of the terminals included in FHH's current Rights Table. FHH advised that Ravenstruther is currently mothballed and is in the hands of the Scottish Coal administrators. We assume therefore that services are not currently running. FHH however wants to reserve rights for movements to/from Ravenstruther so they are not cited in the FHH rights to be deleted. As these rights are not subject to change, they are not part of the more extensive use application. FHH will be aware that under Condition J4 of the Network Code access rights are subject to certain surrender provisions if they are not used.

### **Network Rail's representations**

#### *Process*

30. We wrote to Network Rail on 19 December 2014 sending it a copy of FHH's application in full. Network Rail replied on 12 January 2015. There were further letters on 16 and 21 January 2015. It agreed that the parties were agreed on the extent of the rights. It noted that the only area of disagreement was about the level of specificity (L2 versus L1).

#### *Network Rail's position*

31. Network Rail's correspondence shows that FHH's application had been considered by its Sale of Access Rights (SoAR) Panel. It noted the changes in the coal market and the tight resourcing of operations that has evolved. Network Rail contended that FHH was seeking to transfer business risk in customer contracts it has signed, to Network Rail, in the form of tighter access rights, even though Network Rail was not a party to those commercial contracts. It also contended that more highly specified rights would place constraints on Network Rail and restrict its ability to construct future timetables. The SoAR panel's position is that new coal rights should not be sold at L1.

32. Network Rail said that FHH's supporting annex A showed that coal paths were now more homogenous. This supported, rather than detracted from, a case for L2 rights. Also it noted that Network Rail and Freight Operating Companies (FOCs) running Electricity Supply Industry (ESI) coal services enjoyed a collaborative process of agreeing to swap or amend coal slot plans as required. That process could be undermined if L1 rights had to change every time that operational plans changed.

33. Network Rail also said it believed the L2 policy was in accordance with ORR's West Coast Main Line policy. In particular that policy highlights the danger of ossification from the sale of overly-prescriptive rights.

34. In terms of comparison with DBS, Network Rail said that it considers applications on a case by case basis. Network Rail contended that the DBS application extended existing rights and so did not place additional restrictions on Network Rail, whereas FHH sought more highly-specified rights which would restrict Network Rail's ability to apply its flex. Network Rail also stated that 100% of the rights in FHH's 25<sup>th</sup> SA are at L1 compared to approximately 46% of FHH's coal rights overall; and 30% for GBRf and 45% for DBS for their coal traffic.

#### *Less extensive use*

35. Network Rail, however, noted that the original 25<sup>th</sup> SA application contained some L1 rights that were being amended to reduce capacity take. Network Rail said that it now agreed to sell those rights because they did not represent an increase in capacity take. These were therefore to be carried over to the new rights table. The rights Network Rail is prepared to amend and retain at L1 have the headcodes 4N31, 6E84, 4S11 and 6M61.

36. However, these changes cannot be made through the section 22A process and will now be made by a separate application under section 22 of the Act. This is the 28<sup>th</sup> SA. It will also include changes to headcodes 4S08 and 6M62, amendments that are not covered in the 25<sup>th</sup> SA decision.

#### **Freightliner's representations**

37. FHH wrote to us again on 20 January 2015 in response to the consultation responses. FHH noted that the services concerned were already timetabled and running. FHH disagreed with a Network Rail assertion that the Decision Criteria [in Part D of the Network Code] gives sufficient protection against a deterioration of the efficiency of a path. Timetabling decisions made using the Decision Criteria could only be subjective and did not give FHH the confidence it needed.

38. FHH believed that the +/-30 minutes flex and the inbuilt pathing and looping time in freight paths gave a reasonable balance of risk and flexibility to both freight operators and Network Rail.

39. FHH also contended that L1 rights were more compatible with the 'slot process' of allocating freight paths between operators. The +/-30 minute flexing allowed a freight path to be moved anytime within a standard hour. This also limited the ability of L1 rights to ossify the timetable.

## Analysis

### *L1 or L2*

40. The essence of this application is whether FHH should be granted L1 rights for coal traffic that makes more extensive use of the national network. The sole point of contention between Network Rail and FHH is the specification at which they should be sold. Network Rail contends that L2 rights are appropriate.

41. Network Rail and DBS contended that the roll forward programme for DBS's access rights was different to the application made by FHH. We note however that the DBS programme means that, in fact, *new* access rights would appear in the relevant timetable period. Meanwhile FHH's are of a different pattern but actually reflect the services that are running, in contrast to DBS. FHH should not be penalised for attempting to keep its rights table up to date.

42. FHH has made a commercial case for its particular coal services to be granted L1 access rights. This is supported by other FOCs. Network Rail disagrees. We have not seen any minutes of the SoAR panel meetings or detailed written feedback to FHH, but Network Rail and its SoAR panel take the view that the coal paths are homogeneous and L2 rights should suffice.

43. We recognise the benefits of Network Rail having greater flexibility for its timetabling operations. Operators should be able to rely on the protections built into the timetabling process. The Decision Criteria in Part D of the Network Code require Network Rail to take account of several important commercial factors when developing the timetable, for example, to make journey times "as short as reasonably possible" and "enabling operators of trains to utilise their assets efficiently". There is a mechanism to settle disputes where an operator believes Network Rail has done the wrong thing, and under which ORR can ultimately determine appeals.

44. Network Rail's recent decision to sell the routes that are less extensive use, without deviating from the current routes, at L1. This is a sensible, pragmatic approach.

45. Meanwhile, FHH is in the position of having to meet customers' demands. ORR's view is that there is a balance to be struck between FHH's legitimate concerns for certainty given the commercial circumstances it has described and Network Rail's desire for flexibility. However it is clear that FHH's position, as a customer of the infrastructure provider, should be properly considered and taken into account. FHH's customers will also prefer more certainty over delivery times.

46. L1 rights are flexible in that they have a +/-30 minute flex provision. These are greater than often allowed in firm rights for passenger traffic. This should provide Network Rail with flexibility for its normal timetabling operations, in respect of the routes concerned.

In approving L1 rights we are not creating conflicts with any other operators' firm access rights.

### *WCML*

47. Both parties have made reference to ORR's West Coast Main Line policy<sup>5</sup>. ORR's correspondence sets out our policy in respect of the specification of access rights especially in respect of busy parts of the network, focusing on the West Coast Mainline. We will be withdrawing that policy with effect from PCD 2016. The policy does not preclude the sale of L1 rights by Network Rail.

### *Post PCD 2016*

48. It is intended that a more flexible approach to rights tables will be adopted by all operators from PCD 2016. It is not inconsistent for a freight operator to be granted additional L1 rights up to that time. From then all new access rights will need to be reviewed in the light of the revised processes, including those in the 25<sup>th</sup> SA. Granting FHH L1 rights until PCD 2016 will not undermine this process. The updated rights table will however inform any FHH post-PCD 2016 Rights Table, and an application by FHH under section 17 of the Act has already been lodged with ORR.

### **Conclusion**

49. A balance must be made between Network Rail's need for flexibility and FHH's demand for commercial certainty. Network Rail is right to be concerned about undue specificity and potential ossification of its network. However, on the basis of the application presented, we do not believe that the case has been made that L2 rights across the board would provide the certainty that FHH, and its customers, desire and be consistent with the treatment of other train operators.

50. Given also that these rights only run to 2016, the industry workstreams on access rights and that some unnecessary specificity is to be removed, we consider that L1 rights are appropriate in this instance and should not adversely impact on performance or Network Rail's timetabling process. Two new rights should be at L2 not L1, as requested by FHH (4K51 and 4K54).

### **ORR's statutory duties**

51. In considering the application and in reaching our decision, we are required to weigh and strike the appropriate balance in discharging our statutory duties under section 4 of the

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<sup>5</sup> See [http://orr.gov.uk/\\_data/assets/pdf\\_file/0013/3514/nr-wcml-orr-rsponse.pdf](http://orr.gov.uk/_data/assets/pdf_file/0013/3514/nr-wcml-orr-rsponse.pdf) and the follow up letter of [http://orr.gov.uk/\\_data/assets/pdf\\_file/0013/15214/specification-of-access-rights-in-track-access-contracts.pdf](http://orr.gov.uk/_data/assets/pdf_file/0013/15214/specification-of-access-rights-in-track-access-contracts.pdf)

Act. We believe that approval of this supplemental agreement is consistent with these duties, in particular our duties to:

- (a) protect the interests of users of rail services;
- (b) promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of the railway network, to the greatest extent that ORR considers economically practicable;
- (c) contribute to the development of an integrated system of transport of passengers and goods;
- (d) promote competition in the provision of railway services; and
- (e) enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

### **Conformed copy of the track access contract**

52. Under clause 18.2.4 of the Track Access Contract, Network Rail is required to produce a confirmed copy, within 28 days of any amendment being made, and send copies to ORR and the train operator. I look forward to receiving the conformed copy.

### **Public register**

53. In accordance with section 72 of the Act, we will place a copy of the 25th SA on our public register. The customer name will not be included in the revised the Schedule 5 Rights Table placed on the public register.

54. We will also place a copy of this letter, ORR's directions and the industry representations on our website<sup>6</sup>.

55. A copy of this letter will be sent via email to Madeline Matthews at Network Rail.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Gordon Herbert', is written over a horizontal line. Below the signature, the name 'Gordon Herbert' is printed in a bold, black, sans-serif font.

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<sup>6</sup> <http://orr.gov.uk/consultations/access-consultations/track-access-decisions/disputed-amendment-to-contracts-section-22a>