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30 March 2012

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Dear David and Andy

Freightliner Heavy Haul Limited: Proposed 18th Supplemental Agreement

Introduction

1. On 2nd March 2012, the Office of Rail Regulation ("ORR") approved the 18th Supplemental Agreement ("SA") to the track access contract ("TAC") between Network Rail Infrastructure Limited ("Network Rail") and Freightliner Heavy Haul Limited ("FHH") under section 22 of the Railways Act 1993 ("the Act"). The agreement was submitted formally to us on 2nd March 2012. This letter sets out the reasons for our decision.

Purpose of the agreement

2. The 18th SA proposed changes to the Schedule 5 Rights Table to Service Group 6229 to amend and surrender existing Level 1 Rights, and to include new Level 1 and Level 2 Rights in respect of services which have working timetable paths in the December 2011 timetable. The 18th SA took effect from 2nd March 2012 until the expiry of FHH's track access contract on the Principal Change Date 2016.

Consultation



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3. In line with the arrangements for industry consultations on TACs¹, a pre-application consultation was carried out by Network Rail and FHH. Only DB Schenker Rail (UK) Limited (“DBS”) and Transport for London (“TfL”) responded.

4. DBS raised the following points:

- Certain inward bound trains arrived much earlier than the proposed Minimum Turn Around time - *all such proposals were subsequently withdrawn.*
- 0M42 09:05 MWFO Southampton MCT to Wool MoD Siding proposed to retime to 10:05 SX appears as a 09:05 departure in TOPS –*at the time of consulting it was intended that 0M42 depart Southampton MCT at 10:05. This is no longer the case, and the Rights Table and Commentary have been amended.*
- 6W49 01:15 MX from Dorchester South to Wool MoD Siding is proposed as MX but appear in TOPS as WFO. There also appears to be another service with the same Train Reporting Number as 6W49 but departing at 18:50 EWD – *6W49 01:15 MX amended to run WFO and both services operate with the same reporting number.*
- In addition to 6O02 23:38 SUN/6O02 00:41 THFO/6O02 00:23 SO Bardon Hill Quarry to Crawley Foster Yeoman there are schedules in TOPS for WTHFO for 23:17 and 23:20 – *the schedules are used when 6O02 runs via Temple Mills rather than Kew resulting in an earlier departure of either 23:17 (WTHO) or 23:20 (FO).*
- 6M16 11:48 SO Crawley Foster Yeoman to Bardon Hill Quarry shows arrival time at Destination as 18:45 in the Rights Table but 17:44 in the schedule – *amended to arrive at 17:44.*
- Certain identified schedules appear in TOPS but not in the proposed Rights Table – *are not part of the proposed Rights Table but are in TOPS.*

5. TfL raised the point that if ORR approved the FHH 12th SA to extend the Track Access Contract (“TAC”) to 2020 then the additional rights should also expire in 2020. If this was the case, the additional rights would conflict with the Crossrail Track Access Option, and would have to be modified at an appropriate time as per the Crossrail modification provision in Schedule 13 of the FHH TAC. Network Rail submitted the 18th SA with the Principal Change Date as 2016.

6. Given the proposed changes to the access rights as detailed above, DBS and TfL confirmed that they had no further concerns. The appropriate changes formed part of the informal submission to ORR on 18 July 2011.

ORR Review

¹ Industry code of practice for track access application consultations, Annex A of the *Criteria and procedures of the approval of track access contracts*: (<http://www.rail-reg.gov.uk/upload/pdf/408.pdf>)

7. Our review of the 18th SA raised some operational issues following publication of our interim policy as set out in our letter of 23rd September 2011². We explained in our letter that, in the short term, we would not approve extensions to existing TACs beyond December 2013 until we had consulted on our future policy and reached a conclusion. We also said that for operators seeking new or amended rights during this period that;

“...we will consider each application on its merits taking account of the nature and extent of the rights sought before deciding whether to approve them beyond December 2013. We will write separately to those operators who have submitted applications in due course.”

8. Given our interim policy, we carried out an extensive review of the changes proposed to the Rights Table in respect of proposed changes to Level 1 rights and new Level 1 rights, i.e., those rights with specific timings and routings, and which, if approved as submitted to us, would apply until the Expiry Date of the TAC (PCD 2016), unless surrendered earlier by FHH. This would far exceed the December (PCD) 2013 date to which we have said we are prepared to approve them. In considering the 18th SA, we have taken into account:

- (a) the number of Level 1 Rights (being Firm Rights) sought;
- (b) the timing, operation and routing of the proposed services;
- (c) the effect they could have on future timetable changes;
- (d) implications of major projects that are, or will be, underway in this timescale; and
- (e) the extent to which the changes to the Rights Table use additional capacity, or simply make different use of existing capacity.

9. In applying our interim policy, we proposed several amendments to the 18th SA which were set out in our letter to the parties dated 28th November 2011. We sought to time limit a number of new access rights by agreeing to approve them until PCD 2013 as Level 1 rights and as Level 2 rights thereafter. FHH responded on 6 January 2012 asking us to reconsider our position in the light of additional details it provided to us about the access rights concerned. In response, we wrote to the parties on 20 January 2012 saying that we had revisited our reasons for applying limitations to approving Level 1 rights under our interim policy given the additional information we had been provided with. We explained that we were willing to approve some of the Level 1 rights as originally proposed but others would still need to be time limited. To discuss matters further, we met with FHH on 24 January 2012 and again on 29 February 2012 during which we said that we were content to approve the following *changes* to access rights (identified by Train Reporting Number) informally submitted to us:

² <http://www.rail-reg.gov.uk/server/show/nav.201>, under “Related documents”.

- 6M16 10:59 MTHO; 6M16 11:48 SO; both 6V87s 10:59 MTHFO-Y; 6O56 05:02 THO; 6V44 18:48 THO; 6A59 17:45 SX; 6L60 09:30 SX; 6M50 10:03 MSX; and 6M50 10:22 SO: as Level 1 rights to PCD 2013 and Level 2 rights thereafter (see paragraph 10 below).
- 6M47 09:53 SX Neasden to Croft Quarry subject to it being amended to SX-Y.

10. The access rights identified in the first bullet point in paragraph 9 above are all subject to review under a new provision included in FHH's TAC as part of the amendments approved under this 18th SA. The review provision, new Schedule 15 of the TAC, provides a mechanism for the parties to review the Level 2 access rights approved from PCD 2013 to the Expiry Date of the TAC to give effect to ORR future policy on the approval of track access rights (see paragraph 7 above). The provision was developed by ORR in response to Freightliner Group's concerns that Network Rail might decide not to agree to undertake such a review, especially as we considered that s22A of the Act could not be used to that end. The review provision is available to all freight operators for inclusion in their track access contracts where implementation of our interim policy has required us to limit the approval of access rights as described above. A passenger version has been developed for passenger train operators³ who have been or will be similarly affected. ORR intends to conclude its policy review by the end of April 2012.

ORR's conclusions

11. 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 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

³ Further information on this can be obtained from Ian Williams, Manager, Track Access at ORR:
Tel: 020 7282 2992.



12. Under clause 18.2.4 of the TAC, Network Rail is required to produce a confirmed copy, within 28 days of any amendment being made, and send copies to the ORR and the train operator. Thank you for providing me with the conformed copy.

Public register

13. In accordance with section 72 of the Act, we will place a copy of the 18th SA on our public register. The parties have asked us to redact the customer name from the Schedule 5 Rights Table prior to placing on the public register and we have agreed to this request.

14. A copy of this letter will be sent via email to Martin Hunt and Andrew Munden at Network Rail, and Lindsay Durham at Freightliner Heavy Haul Limited.

Yours sincerely

Sona Trivedi

Track Access Executive