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Dear David and Andy

Freightliner Limited: Proposed 11th Supplemental Agreement

Introduction

1. On 2nd March 2012, the Office of Rail Regulation ("ORR") approved the 11th Supplemental Agreement ("SA") to the track access contract ("TAC") between Network Rail Infrastructure Limited ("Network Rail") and Freightliner Limited ("FLIM") 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 11th SA proposed changes to the Schedule 5 Rights Table to Service Groups 6060 and 5101 to amend and surrender existing Level 1 Rights, and to include new Level 1 rights in respect of services which have working timetable paths in the May 2011 timetable. The 11th SA took effect from 2nd March 2012 until the expiry of FLIM's track access contract on the Principal Change Date 2016.



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Consultation

3. In line with the arrangements for industry consultations on TACs¹, a pre-application consultation was carried out by Network Rail and FLIM. GB Railfreight Ltd (“GBRf”), London Overground Ltd (“LOROL”) and London Underground Ltd (“LUL”) responded with queries:

4. GBRf raised the following issues:

- Given that the Westfield to Felixstowe branch is now heavily congested, and the invitation to tender for a new 29th slot from the Port of Felixstowe has been issued, GBRf cannot support a proposal for Level 1 rights for the 0B62 09:37 (MSX) Felixstowe Creek R.S. – Ipswich Yard, and 0B92 00:40 (MSX) Felixstowe Creek R.S. – Felixstowe North, reversing at Trimley (takes up capacity which is scarce on the Felixstowe South branch), and would rather wait the awarding of the 29th slot out of the Port of Felixstowe - *Network Rail confirmed that 0B62 is required to get the loco from 4L83 positioned to work 4M89. This is currently suspended as 4L83 is running to Felixstowe North FLT under STP conditions to balance the diversion of 4E50. However, should this become permanent, the requirement for 0B62 will fall away. Furthermore, the capacity used is that which is of no use and its removal would not permit any additional workings to be introduced between Ipswich and Felixstowe. As for 0B92, this has ceased running and has been removed from the Rights Table and Commentary.*

5. LOROL commented that a number of the proposed additional rights traversed ‘their’ routes which host an enhanced LOROL train service since completion of the NLRIP works – *Network Rail confirmed that there were no clashes with the LOROL services that it or FLIM were aware of.*

6. LUL queried whether any LUL infrastructure was impacted by the proposed changes - *Network Rail confirmed that it was not aware of any such clashes.*

7. Given the proposed changes to the access rights as detailed above, GBRf, LOROL and LUL confirmed they had no further concerns. The appropriate changes formed part of the informal submission to ORR on 16th August 2011.

ORR Review

8. Our review of the 11th 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

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>)

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

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.”

9. 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 FLIM. This would far exceed the December (PCD) 2013 date to which we have said we are prepared to approve them. In considering the 11th 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.

10. In applying our interim policy, we proposed several amendments to the 11th SA which were set out in our letter to the parties dated 2nd December 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. FLIM responded on 15th December 2011 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 10th 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 FLIM on 24th January 2012 and again on 29th February 2012 during which we said that we were content to approve the following access rights (identified by Train Reporting Number) informally submitted to us:

- 4O50 20:15 SX Daventry IRFT to Southampton MCT we said we would approve as Level 1 rights to PCD 2013 and Level 2 rights from PCD 2013 to 2016 as the new Level 1 rights cover the distance between Hams Hall and Daventry only.

- 4M59 21:12 FSX Felixstowe North FLT to Ditton O'Connor we said we would approve as above given the new Level 1 rights cover the distance between Crewe and Ditton only.

11. The access rights identified in the first bullet point in paragraph 10 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 8 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

12. 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.

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

Conformed copy of the track access contract

13. 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. I look forward to receiving the conformed copy.

Public register

14. In accordance with section 72 of the Act, we will place a copy of the 11th 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.

15. A copy of this letter will be sent via email to Gordon Cox at Network Rail, and Lindsay Durham at Freightliner Limited.

Yours sincerely

Sona Trivedi

Track Access Executive