

Brian Kogan
Deputy Director, Railway Markets & Economics
Telephone 0207 282 2097
Fax 0207 282 2043
E-mail brian.kogan@orr.gsi.gov.uk



11 December 2012

Eve Boyle
Head of Fleet Contracts
Southern Railway Limited
Go-Ahead House
26-28 Addiscombe Road
Croydon
CR9 5GA

Anne-Marie Lewis
Engineering Commercial Manager
First Capital Connect Limited
Hertford House
1 Cranwood Street
London
EC1V 9QS

SECTION 17 RAILWAYS ACT 1993: DEPOT ACCESS AGREEMENT BETWEEN SOUTHERN RAILWAY LIMITED AND FIRST CAPITAL CONNECT LIMITED IN RESPECT OF SELHURST LIGHT MAINTENANCE DEPOT

Application

1. On 11 May 2012, First Capital Connect Limited ("FCC") applied to the Office of Rail Regulation ("ORR") under section 17 of the Railways Act 1993 as amended ("the Act"). In its application, it asked us to give directions to Southern Railway Limited ("Southern") to enter into a Depot Access Agreement ("DAA") in respect of Selhurst light maintenance depot ("the depot"), where Southern is the Depot Facility Owner ("DFO").

Grounds for disagreement

2. FCC has made an application under section 17 of the Act because the two parties could not agree the terms of depot access.
3. The Thameslink Programme of planned engineering works that had closed the Thameslink route between Blackfriars and Kentish Town ("the core route") on



4. weeknights and weekends ceased in May 2012 and the route was opened for normal running. However blockades on 13 occasions between July 2012 and November 2013 have been planned.
5. FCC currently has a DAA for Selhurst depot. It was designed to provide access for FCC to use depot services during the regular blockades (up to 88 units stabled and serviced per accounting period). This level of access is no longer required since the core route has re-opened.
6. FCC has sought to reduce the level of access it requires in the DAA it has with Southern. However, the parties have been unable to agree on the reduced level of access that FCC needs and consequently have been unable to agree an amendment to the existing DAA.

Process

7. In considering this application, we have followed the consultation procedure specified in Schedule 4 of the Act. We have been conscious of the need to give all affected parties the opportunity to make representations to us and to provide us with relevant information. The process we have followed is summarised here:
 - On 11 May 2012 we received an application from FCC asking us to direct Southern to enter into an agreement for access to Selhurst light maintenance depot.
 - On 14 May 2012 we invited Southern to make written representations on the application from FCC and directed it to furnish us with the names and addresses of every interested person as required by paragraphs 3(1) and 4(1) of Schedule 4 of the Act.
 - On 28 May 2012, Southern named Network Rail Infrastructure Limited ("Network Rail"), Lombard/Royal Bank of Scotland and Bombardier Transportation UK Limited ("Bombardier") as Interested Parties in this application. We also gave Department for Transport ("DfT") as interested parties (i.e. not as "interested persons" as defined in Schedule 4 to the Act) the opportunity to comment on the application.
 - On 8 June 2012:
 - Representations were received from Southern dated 7 June 2012;
 - FCC's representations on Southern's submission were requested; and

- A response was received from 'interested person' Lombard/RBS – no specific comments were made.
- On 13 June 2012 a response was received from 'interested person' Bombardier Transportation UK Limited – no specific comments were made. The responses received from Bombardier and Lombard/RBS were sent to FCC and Southern. No specific response was received from FCC and Southern in relation to interested person representations.
- No response was received from Network Rail or DfT in relation to this case.

Hearing

8. On 3 October 2012, a hearing was held before a panel of ORR staff under my chairmanship. FCC and Southern were invited to make representations. A stenographer was present to record the details of the meeting. The transcript was subsequently shared with the parties and their comments sought on its accuracy.
9. The aim of the hearing was to:
 - a) provide clarity regarding FCC's requirements for access to Selhurst depot; and
 - b) explore the impact on Southern if directed to enter into an access contract.
10. FCC outlined the terms on which it sought access to Selhurst depot, and Southern outlined the terms on which it could provide access. The hearing established that the terms on which FCC sought access to Selhurst had changed since its initial section 17 application.
11. At the hearing the parties agreed in principle to pursue a contract containing the following terms:
 - a) a mechanism to link the timetabling process, where engineering work possessions of the Blackfriars to Kentish Town 'Core Route' by Network Rail are notified to operators in accordance with its Network Statement; and
 - b) a charge for depot access that reflects the costs Southern incurs in the out stabling of its vehicles to make space for FCC's vehicles.

Decision

12. Following the hearing, and after careful consideration of the facts of this case, I have decided to issue directions to Southern under section 17 of the Act to enter into a DAA with FCC for Selhurst depot.

13. The DAA contains the following specific provisions:

Termination of existing DAA

- a. a Condition Precedent requiring the Beneficiary (FCC) to terminate the existing DAA in accordance with Clause 6.7 of that agreement before the directed agreement can come into full force;

Access to be provided

- b. Southern shall grant to FCC access to Selhurst depot for the stabling and servicing of six four car units on the dates when the "Core Route" (London Blackfriars to Kentish Town inclusive) is possessed for engineering works by Network Rail.

Process for applying for access

16. Before commencement of the new DAA (i.e. during the 180-day period of termination of the existing agreement) the Beneficiary shall request in writing access to the Depot on the date of any planned possession of the Core Route set out in the Rules in effect at the date on which the Previous Agreement terminated. The Depot Facility Owner shall grant the access requested for periods not exceeding 104 hours and not less than 24 hours.

17. Following commencement of the new DAA, if new Rules come into effect:

- a) as soon as possible after the new Rules come into effect and in any case no later than D-26, the Beneficiary shall notify the Depot Facility Owner in writing of any date during which the Beneficiary requires access to the Depot, as a result of a possession of the Core Route; and
- b) the Depot Facility Owner shall grant the access requested in accordance with the paragraph above for periods not exceeding 104 hours and not less than 24 hours.

Inclusion of additional Defined Terms

18. The following additional defined terms will be included in the directed DAA at Clause 1.1:

"Core Route" means the route from London Blackfriars to Kentish Town inclusive

“D-26” shall have the same meaning as in Part D of the Network Code, as that part is modified from time to time;

“Previous Agreement” means the depot access agreement dated 3 March 2006 between the Depot Facility Owner and the Beneficiary;

“Rules” shall have the same meaning as in Part D of the Network Code, as that part is modified from time to time;

Access Charge

14. Southern shall charge FCC an access charge of £73.67 per vehicle per day. The access charge has been assessed by our economists as an efficient fee for depot access and for the out stabling Southern must undertake to accommodate FCC's vehicles. FCC has confirmed it will accept this fee if Southern is directed into an access contract.

The Railways Act 1993

15. Under the Act, anyone seeking access to a light maintenance depot for the purposes of obtaining light maintenance services must enter into a contract approved or directed by us. An access contract that we do not approve or direct will be void. Where an applicant for access cannot agree the terms of access with the facility owner the applicant is entitled to apply to us under section 17 to direct the facility owner to enter into the access contract on specified terms.
16. When we exercise our functions under Part 1 of the Act, we are governed by our statutory duties, most of which are set out in section 4 of the Act. There is no statutory order of priority amongst these duties, and it is for us to balance them and give each appropriate weight in the circumstances of an individual case. In considering the application and in reaching our decision as to appropriate directions in this case, we have had regard to our duties under section 4 of the Act as amended, complied with the statutory procedures, and adhered to the process and timescales set out in Schedule 4 to the Act.
17. In relation to this case we have given particular weight to the following duties:
 - Section 4(1) (a) otherwise to protect the interests of users of railway services;
 - Section 4(1) (g) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance; and

- Section 4(2) to exercise the functions assigned or transferred to it [ORR] under or by virtue of this Part [Part 1 of the Railways Act 1993] or the Railways Act 2005 that are not safety functions in the manner which it considers is best calculated to protect –
 - (b) the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of –
 - (i) the prices charged for such use.

Next steps

18. Please note that until the access agreement is entered into none of the provisions contained within it are applicable. The directions state that the DAA should be entered into **not later than 11 January 2013**.
19. The ORR unique reference number given in our directions should be inserted in the top right hand corner of the cover sheet of each document before signature to ensure all parties have a uniform referencing system.
20. The facility owner must send us a copy of the signed access agreement **no later than 14 days** after the date upon which it is entered into. It is an offence under section 72(6) of the Act to fail to comply with this duty.
21. When we receive a copy of the signed access agreement we will retain it on our public register. No exclusions will be made prior to it being placed on the public register, unless a request for redaction is made to us. If you wish to request an exclusion of all or part of the agreement, or have any other questions, please contact my colleague, Stuart Freer, as soon as possible. Stuart can be contacted on 020 7282 3674 or by email at stuart.freer@orr.gsi.gov.uk.

Yours sincerely

BRIAN KOGAN