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Dear Steve,

Representations to the ORR: Proposed 10th Supplemental Agreement to the Track Access Contract between Network Rail Infrastructure Limited and Freightliner Limited

I refer to your email dated 09 March 2021 where you invited Network Rail Infrastructure Limited to make further written representations in respect of the 10th Supplemental Agreement application made by Freightliner Limited under Section 22A of the Railways Act 1993 (the Act). Network Rail's response is below.

This response will provide further representations under the three principal headings that have been used throughout our correspondence; Performance, Route Availability and Great Eastern Mainline. This response will answer sequentially the specific subheadings within these three areas raised in Freightliner's response to our representations and will further provide a response on the qualifying questions that the ORR sought within the email inviting further written representations.

Performance

Stable Train Plan

Freightliner have highlighted that they require a stable train plan in order to have a firm basis from which to improve performance. Network Rail welcome the mindset of continual improvement in the performance of Mendip's flows through tackling specific issues on a headcode by headcode basis. Network Rail does not agree that this therefore means that firm rights should be awarded to services that are not performing at a level that is supportive of an efficient Network. This was articulated in our previous representations in which we highlighted that Network Rail is not supportive of an approach that sees us "*contractualise poor performing services that have an overtly negative impact on the Network*".

Freightliner go on to state that the lack of a stable train plan for these rights is directly linked to "*substandard timetable offers*" that "*divert resources to away from performance improvement activity*". Network Rail wishes to disentangle two separate issues.

Firstly, the timetable bids and offer process has a clearly defined escalation and dispute mechanism that should an operator disagree with the offer provided by Network Rail is available for impartial

arbitration on a matter. Further investigation specifically on the claimed “over 30 train schedules associated with Mendip Rail traffic were either missing or offered unsatisfactorily” reveals that of the 42 rights that were not supported under the headline of performance, 8 paths have been referred by Freightliner to the access disputes committee. As such, the assertion that timetabling challenges are as a result of not having firm rights seems to be only partially correct, with the remaining 34 of rights seemingly not referred for a timetabling dispute. Appendix A provides detail to support this view.

Secondly as per appendices provided in our previous representations (which has been appended to this response as Appendix B) we have established a tripartite performance improvement forum and developed a stakeholder endorsed milestone plan for specifically the rights disputed within this supplemental. Single points of contact and resource has been identified from Freightliner, Mendip Rail Ltd and Network Rail. At no point have Freightliner indicated that there is a resource challenge inhibiting their input to that forum which provides a clear outcome delivery statement of working at a granular headcode level to support the fundamental performance improvements required to unlock the support of the rights being contested.

Existing Traffic

Freightliner contest that Network Rail are preventing progression of contractualisation of an existing train plan. Network Rail disputes this and points to the FLHH 9th supplemental in which Network Rail has supported the contractualisation of 130 rights, with the current number of rights being disputed under the heading of performance standing at 31. These headline figures provide support to the assertion that Network Rail has worked very closely with Freightliner to establish a firm contractual position for the Mendip’s flows in a fashion that provides contractual certainty for Freightliner but does not contractualise the performance risk that the disputed rights expose to the Network. Our support has not ceased at this point though, and Appendix B provides a clear pathway via a performance improvement milestone plan for these rights for which concern remains. We are pleased the Freightliner are engaged in this workstream and are actively supporting its progression and encourage a continuation of this approach.

Alternative Proposal

Freightliner wish to seek clarity on what the alternative proposal is for the contested rights in question. This is confusing for Network Rail given we have been clear both in our previous response and in the above sections that a clearly defined milestone plan exists to actively resolve the performance characteristics of concern for these rights (Appendix B). The milestone plan provided has a tranche specifically dedicated to collating findings and measuring success (tranche 3). Should the delivery of tranche 1 and tranche 2 not derive the desired outcome, it will be incumbent on all three parties involved in this workstream to review and agree what next steps are as part of the commitments made in tranche 3.

[REDACTED]. Conversely, it may be appropriate to look to retime services or to look at if capacity exists for alternative pathing options. The detail will very much depend on the specific performance challenge for the headcode in question and therefore Network Rail seeks Freightliner’s continued buy in and support to this workstream to provide the best possible chance of resolving performance concerns for the flows in question.

FNPO Qualifying Criteria

Freightliner have described the decision criteria used to support or not support Mendip’s services applied for their initial submission and provided appendix 1 which gives a summary of the criteria used. Correspondence at the time provided in Appendix C made two very pertinent things clear. Firstly, that A2F and RTD were used to provide a rounded view of a service’s performance in cases where FDM was below the regulatory floor target of 92.5%. Appendix C further supports this assertion where there is evidence of both articulation around RTD and evidence within the analysis spreadsheet of the capture and use of RTF and A2F for the headcodes in question. This is important as it evidences the use of FDM,

RTD and A2F to arrive at a reasonable decision as to support or not support a service, contrary to the statement that *“FLHH is not aware that any other performance measure was used to determine support for the progression of the application”*. The second pertinent thing to highlight is that Appendix 1 provided by Freightliner clearly states that *“COVID performance data (is) to be excluded for baseline performance analysis as drawing on this data does not reflect ‘normal’ service”*. Network Rail described at length in initial representations the rationale provided for the revised analysis undertaken in acknowledgement of both the period of time that had elapsed since the application and the *“pre COVID”* data analysis and the justification for criteria applied in light of the *“significant and temporary change in Network conditions”*.

It is incumbent on Network Rail to undertake relevant and proportionate analysis of performance impact that is appropriate for rights applications being considered under their own merit. Having acknowledged the significant period of time that had elapsed from initial analysis to representations on the 10th supplemental, Network Rail in a decision welcomed by Freightliner took a more recent view of performance to help validate or challenge assertions made by Freightliner in their Form F submission. It would be remiss of Network Rail to ignore the significant changes to the Network that had occurred in the interim and thus the criteria articulated used analysis that Freightliner were familiar with (not forgetting the 27 instances where the FDM regulatory floor was not met, but supporting RTD and A2F data led to support and contractualisation of rights in the FLHH 9th supplemental) and provided a relevant and proportionate view of the flows in question. Further this approach was endorsed in the tripartite forum between Network Rail, Freightliner and Mendip Rail Ltd of which Appendix B – the performance improvement plan on a page for unsupported Mendip’s flows on the grounds of performance is a key output. Network Rail is concerned that we have mutually agreed to an approach in this forum but Freightliner are challenging this approach in their response to our representations.

Updated Performance Statistics

Network Rail point to Appendix B and the agreed performance milestone plan to counter Freightliner’s assertion that *“these representations are the first time that FLHH have been made aware that these stretch targets for performance improvement”*. Appendix B clearly articulates in the *“planned outcome”* section of the milestone plan what the required output of this workstream is with the *“problem statement”* section of this plan making reference to the rights contested on the grounds of performance within the 10th supplemental. This milestone plan was agreed and endorsed by all stakeholders prior to the initial submission of representations by Network Rail and so it is concerning to read that Freightliner are seemingly unsighted on this element of our collective target. Network Rail has provided both within this response and our initial representations a clear rationale about how we are seeking to acknowledge the significant but temporary impact COVID has had on the Network whilst balancing the future aspirations of operators, and in this instance Freightliner who are seeking rights through to Principal Change Date 2026. Further and as above, Appendix C evidences clear engagement with Freightliner on FDM, A2F and RTD during FLHH 9th supplemental agreement engagement.

Application of Different Qualifying Criteria

Freightliner in their Form F submission stated in reference to FDM state that *“this of course is a measure of how well Network Rail is performing rather than Freightliner’s performance”*. This is particularly interesting given they state in the response to Network Rail representations in reference to an uplift in FDM that it *“shows the good work and focus that FLHH have had in this area”*. These conflicting statements prove difficult for Network Rail to understand what Freightliner’s view is on FDM. What is clear is that Network Rail has been managing a complex rights application over a significantly turbulent period of change within our industry brought about by the impact COVID has had on our industry and thus to navigate this and to apply performance analysis in a reasonable fashion, we have sought to review rights in a fair and transparent fashion. As previously mentioned in this response, Freightliner have been sighted on this and are actively involved in the delivery of the performance plan on a page seen in Appendix B where the agreed criteria can be seen clearly in the *“planned outcome”* section of the plan.

Third-Party Delay Minutes

Freightliner assert that third party delay minutes are a good indicator of performance improvement. It is worth highlighting again that our tripartite performance plan on a page in Appendix B was endorsed by all stakeholders and represents a forum where Freightliner have an opportunity to share and voice how we manage and improve performance. Freightliner have for reasons unknown chosen to not use that forum to articulate their aspiration for Third Party Delay minutes to be considered when reviewing these services, but have chosen to challenge why they were not being used within their response to our representations. We welcome further engagement with Freightliner as to how we can set criteria that incentivise all relevant parties but must point to the agreement of such criteria in this instance to support our approach.

Services Identified as Not Running by Network Rail

Network Rail welcome Freightliner's provision of further information on services not running and thank Freightliner for confirming the withdrawal of headcodes that they will not be pursuing firm rights for at this time. Below provides a response to the specific challenges Freightliner make in their response to our representations around four specific headcodes that Freightliner still wish to seek firm rights for. All run check information referred to within this section covers P13 19/20 through to P12 20/21 inclusive.

6V90 MSX Dagenham – Acton

Appendix D is a collation of run check information for 6V90 MSX Dagenham – Acton which shows that from P13 19/20 through to P12 20/21 we have two recorded two journeys for this service. Once on Thursday 5 March 2020 and once of Tuesday 3 September 2020. We will continue to keep this under review as part of our previously articulated performance plan on a page seen in Appendix B that captured identified non-runners within scope. Outputs from this are expected in May 2021 and we are grateful for Freightliner's continued engagement in this forum to support collating performance data in a fashion that enables meaningful analysis of this service with an adequate sample size and assurances around how awarding firm rights demonstrates a responsible use of Network capacity.

6V90 MO Dagenham – Acton

Appendix E is a collation of run check information for 6V90 MO Dagenham to Acton. This shows that through our initial analysis period this service had run just four times which is below the minimum threshold of 5 trips that was laid out as an initial parameter of support (see Appendix C) and that the service did not run in the revised analysis period of P6 – P8 20/21 inclusive. This provides supporting evidence for the conclusion reached to date. It is encouraging that there is evidence of further regular running since this challenge has been highlighted and captured both in our initial representations and as part of the scope of the tripartite performance plan on a page (Appendix B). This has led to this service running five times from P9 through to P12 inclusive and we encourage Freightliner to continue to work with us within our tripartite performance improvement forum in bringing together a meaningful sample size that allows a robust and fair review of the performance of this service to take place. As previously articulated the tripartite performance improvement forum expects as laid out in Appendix B to come to fruition in May 2021.

7C39 SX Acton- Merehead

Appendix F is a collation of run check information for 7C39 SX Acton – Merehead. Of note for this run check information is that it captures both Whatley Quarry and Merehead Quarry destinations for this service contrary to the Freightliner response to representations which suggests that these changes had not been captured and taken into account.

Having run just twice prior to P12 20/21 it is encouraging to see this service has run twice in P12 20/21 which again represents a positive indication of the level of engagement that has been captured in our tripartite performance improvement plan on a page seen in Appendix B. This forum was devised to work

collaboratively with Mendip Rai Ltd and Freightliner to get non-runners and contested rights into a position where there is clear performance case to support contractualisation of these rights.

6C70 WFO Avonmouth- Whatley

There are no records of this service running within our run check information and will continue to work with Freightliner in our tripartite forum to understand how we can unlock this issue.

6054 MO Humberstone Road - Allington

Appendix G is a collation of run check information for 6054 MO Humberstone Road – Allington. This once again demonstrates the agreed minimum sample size for meaningful performance analysis had not been hit in previous sample periods. We will continue to work with Freightliner and Mendip Rail Limited to get this path into a position where meaningful analysis can be undertaken and seek assurances that this represents an efficient use of capacity on the Network.

Joint Performance Plans

Network Rail is pleased to see that Freightliner remain committed to performance improvement not only of the flows captured within this 10th supplemental section 22a but the wider Mendip's service group and their other flows. Network Rail is confused that Freightliner considers performance improvement activity for the flows within the 10th supplemental and the 10th supplemental itself to be two different matters given the majority of services that both parties do not agree on relate to the performance of these services. This forum aims to improve performance to enable support of contractualisation. Without a minimum level of performance achieved Network Rail must ensure that the Network is not exposed to the detrimental impact of contractualised poor performers where firm rights are not in place.

ORR Performance Data request

Network Rail acknowledges that in email correspondence, ORR are seeking FDM, A2F and RTD broken down on a period by period basis between March 2016 and March 2021 for the items not supported by Network Rail on the grounds of performance. This is a significant analysis request which, as communicated in follow up discussions with the ORR cannot be provided at the time of submission of this response. This request is actively being worked through at present and we anticipate that we can follow up with provision of this information to the ORR by Friday 23rd April 2021.

Summary

In summary, Network Rail are required to ensure that the award of firm rights enables the most efficient and high performing use of the Network and its capacity. Network Rail views the reduction in the number of services on the Network as a significant contributor to performance improvements that has been seen across the industry, irrespective of operator or geographical location. Notwithstanding this Network Rail continues to work with Freightliner and Mendip Rail Limited on the services contained within the 10th supplemental to establish providing the required data to undertake sound performance analysis and we welcome Freightliner's continued engagement and support on this matter. The milestone plan provided in Appendix B and in our initial representations has been endorsed by all stakeholders as the approach for how we address non – runners and poor performers. The timelines for conclusion of that workstream is clearly articulated and we look forward to working further with Freightliner on this workstream through to conclusion.

Heavy Axle Weight (HAW)

Importance of Heavy Axle Weight

Network Rail recognises that RA10 capability is important to the productivity, efficiency and competitiveness of the rail freight sector. Furthermore, we recognise that the possible alternative of running longer trains can, as Freightliner points out, bring issues of its own. While these points are recognised, neither provides Network Rail with suitable reason to knowingly commit to HAW access rights which we cannot guarantee to fulfil.

Similarly, Network Rail recognises that Freightliner having contractual certainty of RA10 capability is important for planning and investment purposes but, again, that circumstance does not provide Network Rail with suitable reason to knowingly commit to HAW access rights which we cannot guarantee to fulfil.

Overall, Network Rail does not consider that it is in the best interests of our freight industry partners to commit to HAW access rights which we cannot guarantee to fulfil.

‘Level 2’ nice-to-have

It is a statement of fact that Network Rail is not obligated to provide RA in exceedance of that which is published in the Sectional Appendix. As such, any comments in our previous representations about HAW capability being a ‘Level 2 nice-to-have’ do accurately reflect the status of HAW capability versus our Network Rail licence obligations.

Network Rail is obviously aware that we have previously agreed and contracted HAW access rights across our network, including in areas where we now feel we are unable to do so. As explained by our previous representations, irrespective of previous access rights sold, we consider that it would be irresponsible and unproductive for Network Rail to agree the RA10 access rights in question as these may not be deliverable for the entire term sought by Freightliner.

It is important to stress that whilst we feel unable to support some HAW access rights on our network and have provided clear reason for this, numerous other HAW access rights have been agreed for sale up to PCD December 2026 in Freightliner’s 9th Supplemental Agreement. These agreed access rights have been on Lines of Route where no HAW constraints have been cited and where we are comfortable that capability above published RA levels continues to allow us to do so.

Maintaining incentives

In consideration of Freightliner’s comments, it is appropriate to emphasise that Network Rail *does* wish to maintain HAW capability long term where it exists today, however that aspiration does not mean we are obligated to do so, that we are funded to do so, or that we will be able to.

Network Rail agrees somewhat with Freightliner that it is important that the industry and its funders review HAW incentives/framework and whether HAW capability should be more clearly mandated and funded in future Control Periods. Periodic Review 2023 offers an opportunity to discuss this matter further and for Network Rail’s Regions/Routes to submit any necessary proposals that might better provide certainty of HAW capability. Network Rail recognises that HAW capability is a key area to address as part of the Periodic Review 2023 for Control Period 7.

Network Rail can confirm that the operation of a HAW train does require an appropriate RT3973/HAW dispensation form, regardless of whether the train has an access right or not. Network Rail can also confirm that there is no quota on the number of trains that can run under the dispensation granted by the RT3973/HAW dispensation form. While these points are true, it would be short-sighted to suggest or assume that the existence and longevity of a HAW dispensation on a particular section of line is as robust for 100 HAW trains as it is for a single HAW train. Logic would suggest that, all other things being equal, any ‘nice-to-have’ capability above published RA levels will more quickly deteriorate the more that that ‘nice-to-have’ capability is utilised. Network Rail has recently turned its attention to reviewing HAW provision because we perceive that use of HAW dispensations is increasing.

Network Rail is able to confirm that an RT3973/HAW dispensation would be withdrawn in the event that infrastructure relevant to the dispensation became unable to accommodate HAW traffic, and that the RT3973/HAW dispensation would be withdrawn regardless of whether trains have access rights in place or not.

Funding position

Understandably, Freightliner has queried why it is the case that Network Rail South East Route welcomed its Control Period 6 funding settlement as a means of addressing the decline in metallic structures, yet now states that funding levels are insufficient to maintain the steady state of the asset stock. The simple reality of the situation is that whilst South East Route was pleased that asset sustainability had been recognised as an issue, the level of additional investment was far short of that needed to maintain the capability status quo.

Freightliner contends that the sale of access rights should be kept separate from matters of funding and that the two matters should not be conflated. By way of response, Network Rail considers that its Network License obligations and funding envelope are highly relevant to the matter of whether we can successfully sustain HAW capability on parts of our network, which in turn enables (or not) Network Rail to support HAW access rights.

Charges

It is important to recognise that Freight Variable Usage Charges are designed to recover the operating, maintenance and renewal costs that vary with marginal changes in traffic, however they do not reflect the costs of providing or changing the capability or capacity of the network. The Periodic Review 2018 process recognised this. In this Freightliner case, the sale (or not) of HAW access rights on Southern Region and Anglia Route is a matter of providing or changing capability of the network. As our previous representations explained, the charges do not provide Network Rail with the funds to enhance, or defer reductions in, the 'nice-to-have' headroom of asset capability above published RA levels.

In its representations, Freightliner points to a lack of information regarding the delta between the costs of maintaining RA8 capability versus those of maintaining RA10 capability. This is not a specific piece of work that Network Rail has undertaken however an ongoing assessment by Kent and Sussex Routes (two parts of Southern Region) is nearing the view that £260m would be the Control Period 7 cost of refurbishing and replacing one hundredth of its metallic underbridge stock every year. Investment of this degree would enable Kent and Sussex to move to a position whereby it could support HAW access rights once again.

It has been queried by Freightliner whether all Southern Region's structures are in the same position/condition such that HAW access rights cannot be sold across any of the structures. Network Rail concedes that not all structures on Southern Region are in the same condition but that it is difficult to predict which metallic underbridges will fail first. As such, a portfolio-wide approach to the sale (or not) of HAW access rights has been adopted.

In its submission, Freightliner sought to understand what is driving a different approach to HAW capability and contractual protection on Southern Region and Anglia Route, compared to other Network Rail geographic areas. Network Rail believes its previous representations were very clear on those reasons why Southern Region and Anglia Route are opposing the sale of some HAW access rights. It is, however, worth noting that the age profile of Southern Region's metallic structures is a significant differentiator between its structures and that of other regions (the age of Southern Region metallic underbridges being greater than other areas). The rate of bridge renewals between different Routes is also different.

Proposed revision to RA10 term

Network Rail notes Freightliner's comments but has none to add of its own.

Additional non-supported HAW access rights from 9th SA

Network Rail does understand that other HAW access rights exist on the same routes on other days of the week. Our rationale for not selling further HAW access rights on additional days is that we must draw a line

under the number of HAW access right commitments we have on infrastructure whose condition we are concerned about.

New process

Network Rail stated in its previous representations that following a joint working group of Route Asset Managers for Track, Structures and Earthworks, it was requested that their explicit approval be gained for any sales of access rights which would permit freight services to operate in exceedance of the RA published in the Sectional Appendix. The implication here was that this had not always been happening to the required level with Supplemental Agreements preceding that time (i.e. those Supplemental Agreements before September 2020). As such, it is fair to assume that some HAW constraints were not being sufficiently reported and considered in the Sale of Access Rights process prior to September 2020.

Network Rail would like to reassure Freightliner that its new process regarding the assurance of HAW access rights *is* being evenly and consistently applied across different Regions/Routes. The only reason certain Regions/Routes are coming forward with HAW issues is entirely down to the condition of certain assets or subsets of assets on those areas, which have been well documented in our previous representations.

ORR Alternative Routing Request

Network Rail acknowledges that in email correspondence, ORR are seeking to understand if alternative RA10 compliant routing options have been considered. Specifically, Network Rail has been asked to outline if alternative routes exist and if there is available capacity to facilitate routing of the affected services. As with the performance data request, Network Rail has actively assigned resource to consider this query and we expect to provide this information to ORR on or before Friday 23 April 2021. This aligns with the provision of performance information requested by ORR that we address earlier in this response.

Great Eastern Mainline

In line with the initial representations provided by Network Rail on this matter, the Great Eastern Mainline is subject to an Event Steering Group which will review timetabling options for December 2022 onwards. This Event Steering Group will involve appropriate stakeholders who have expressed support for the approach laid out. Network Rail provided a more detailed update to that effect at the March 2021 trilateral between ORR, DfT and Network Rail. Network Rail further confirmed there is no formal access policy in place for Anglia on the Great Eastern Mainline.; a position reflected in our representations to this supplemental.

Summary

In summary Network Rail considers this response to have addressed the sub headings put forward by Freightliner in line with the request from the ORR and hope that this in addition to our initial representations provides ORR with the comprehensive insight required to make an informed decision on these matters. We will continue to work through disputed rights with Freightliner, specifically as outlined within our response under the heading of performance. We have further outlined when supporting analysis requests will be supplied for ORR consideration and will follow up with provision of that information in line with the commitments contained within this response.

Yours sincerely



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CC:

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Charlene Wallace, Network Rail
Nick Coles, Network Rail