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**30 June 2021**

Dear Simon and Chris

**Direction of the 10<sup>th</sup> Supplemental Agreement (10<sup>th</sup> SA) to the Track Access Contract dated 11 December 2016 (the TAC) between Network Rail Infrastructure Limited (Network Rail) and Freightliner Heavy Haul Limited (FLHH) (together the Parties)**

**Introduction**

1. Today the Office of Rail and Road (ORR) has directed the parties to enter into the 10<sup>th</sup> Supplemental Agreement (10<sup>th</sup> SA) of the TAC under section 22A of the Railways Act 1993 (the Act). This letter explains our reasons for our decision.
2. This followed an application made by Freightliner Heavy Haul Limited (FLHH) on 8 December 2020 for directions under section 22A of the Act. This case has required considerable analysis of capacity and performance; and the parties needed time to prepare their representations. It has also highlighted wider strategic network capability challenges which ORR has had to consider.

**Summary**

3. The original dispute concerned 54 new and amended rights, but as the application progressed with ORR, some rights were agreed by the parties and dealt with in the 9<sup>th</sup> SA; one duplicate right and some contested rights were removed; while others were agreed later on in the process but still form part of 10<sup>th</sup> SA.
4. The total number of rights directed in the 10<sup>th</sup> SA is 43. ORR directed that the parties enter the 10<sup>th</sup> SA as applied for by FLHH<sup>1</sup>, except that we have determined that the expiry date for contested new rights shall be the Subsidiary

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<sup>1</sup> And subsequently amended or updated.  
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Change Date 2023<sup>2</sup> (SCD 2023), rather than at the end of the TAC, in 2026 (as applied for), for the reasons set out below. This will allow the parties to further review the issues, namely improving performance and assessing network capability, before considering any future extensions.

5. While ORR considered this case, Network Rail and FLHH continued to review the services concerned. Where there had been performance improvement, the parties agreed to move the relevant rights to the 9<sup>th</sup> SA. The parties agreed other rights later on in the process, and these are included in the 10<sup>th</sup> SA but for the duration of the TAC, as indicated in the directed Rights Table [and not SCD 2023 - the date for the rights that were not agreed].
6. Other changes reflect amendments to existing rights that are already in the TAC [reflecting the current Working Timetable (WTT) or other required changes] and with a duration of the TAC (until 2026). We have directed the amendments be made as applied for, without time limiting them to SCD 2023<sup>3</sup>.

## Background

7. FLHH's and Network Rail's failure to reach agreement on the 54 rights<sup>4</sup> in the original application for the 10<sup>th</sup> SA fell into three main categories:
  - Performance.
  - Route Availability (Heavy Axle Weight).
  - Anglia Event Steering Group (ESG).

These categories were not mutually exclusive and some rights fell into more than one group. This case relates solely to FLHH servicing its Mendip Rail contract. This involves the movement of aggregates from quarries in Somerset to London and the South East. We are aware that this case raises significant issues relevant to wider discussions between Network Rail and freight train operating companies (FOCs).

8. Both parties made detailed representations, which were shared between them. This letter does not attempt to cover every element in detail. Rather, it summarises the representations and highlights the issues we considered<sup>5</sup>. It explains the reasoning behind our directions. The conclusions section sets out some additional observations.

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<sup>2</sup> Some rights where Network Rail and FLHH reached agreement on performance during this process will have an expiry date matching the TAC [2026].

<sup>3</sup> With certain exceptions, see paragraph 53 etc.

<sup>4</sup> Subsequently reduced when rights were moved to 9<sup>th</sup> SA.

<sup>5</sup> Please refer to the parties' representations for details.

9. This case only concerns rights on which Network Rail and FLHH were unable to agree. The rights that they could agree on were included in the 9<sup>th</sup> SA, and approved on 21 April 2021 under section 22 of the Act. The 9<sup>th</sup> SA also included the surrender of a number of access rights that were no longer needed.

#### *ORR's role*

10. ORR is the independent safety and economic regulator for Britain's railways. We are responsible for ensuring that railway operators comply with health and safety law. We regulate Network Rail's activities and funding requirements, among other matters.
11. For track access, we make sure that passenger train companies and FOCs have fair access to the rail network and that best use is made of capacity. If a train operator wants to access the railway network, it must apply to Network Rail for access rights, which then requires approval by us. If a train operator cannot agree terms, including access rights, then it can apply to ORR under section 22A of the Act. Our wider regulatory responsibilities, not just our access approval role, were relevant when assessing this access application.
12. Under section 22A(1), ORR may give directions in respect of:
  - '(a) amendments permitting more extensive use of the railway facility or network installation by the applicant; and*
  - (b) any amendments which ORR considers necessary or desirable in consequence of those amendments.'*

We consider that the new rights and changes to existing rights which FLHH applied for, in particular those relating to origins, destinations, days, with associated re-timings, are increased use of the network in the circumstances of this case, and are therefore more extensive use (MEU) for the purposes of this section 22A.

13. Some rights are a change of Route Availability from RA8 to RA10. On its own we are not convinced that this in and of itself, is necessarily MEU. But we have received no arguments on this point, and is not contested in this present application; as such, we have not ruled on this aspect. In the present application, however, the changes from RA8 to RA10 are at least a consequence of the other amendments being sought, which do constitute MEU, so we are including them within the directions.

#### *Aggregates traffic*

14. FLHH was awarded the Mendip Rail Haulage contract and took over services on 3 November 2019. This traffic has been running since the 1970s. On taking over

the contract, and completing rights transfers from the previous incumbent<sup>6</sup>, it was evident that the contractual rights did not reflect the services as they are now in the WTT. Many services were running on a Train Operator Variation Request (TOVR)/‘spot bid’ basis. FLHH wanted to update its Rights Table to reflect the services’ actual timings and train characteristics; reflecting the paths offered in the December 2020 WTT. This was a big exercise. It took some months due to the number of rights involved and the impact of COVID-19.

15. The Mendips traffic supports the construction sector (house and road building) and projects such as HS2 and power station building. It is the UK’s largest commercial freight contract. FLHH wanted a stable train plan, with rights applied for, amended or surrendered as required<sup>7</sup> in line with the practice set out in the Network Code and the TAC.

### **FLHH’s application**

16. In its Form F, FLHH said that it had inherited, from the previous operator, an out of date Rights Table and wanted to update it. FLHH explained that it could not reach agreement with Network Rail for some services given concerns over the performance and the impact of these heavy trains on certain structures, as well as ESG work on the Anglia Route. Altogether there were 29 additional firm rights requested and 25 to be amended. This was reduced later following work by the parties and some were transferred to the 9<sup>th</sup> SA.

### *Performance*

17. The original application concerned 44 train slots<sup>8</sup> objected to by Network Rail on performance grounds. It was stated that the Network Rail account team would not advance the rights to the Network Rail Sale of Access Rights (SOAR) Panel because the services could not demonstrate a Freight Delivery Metric (FDM) score of at least 92.5% between January and March 2020.
18. FLHH claimed that it inherited some performance challenges. Since taking over the contract it has worked to improve performance across the service group. This included a Joint Performance Plan with Network Rail. FLHH pointed to “significant performance improvements” in subsequent months.
19. FLHH noted that Network Rail’s threshold for advancement to the SOAR Panel was based on FDM, which is a regulatory measure of Network Rail’s

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<sup>6</sup> Using the process set out in the Network Code (Part J.7 etc.).

<sup>7</sup> Note: customer demands change and this is reflected in changes to train services.

<sup>8</sup> Form F. New and amended rights.

performance rather than FLHH's. It also noted that by the time the application was made this was historic data. FLHH said this was inappropriate because:

- It did not reflect current performance levels and performance plans.
- Periods 11-13 of 2019/20 were at the start of the contract while the services were "bedding in".
- The data used did not reflect the services as they were in the December 2020 timetable and the rights now sought.
- Performance improved when there were fewer other services on the network - indicating that factors beyond FLHH's control could account for some performance issues.

20. It also disagreed with other performance criteria set by Network Rail and stated that "FOC on self" delay minutes fell by 6.7% in 2020 and reduced delay minutes on other operators by 60%, whilst also increasing tonnage moved.
21. FLHH says it was not made aware [early enough] that other metrics such as Right Time Departure (RTD) and Arrival to Fifteen (A2F) minutes were to be used to determine outcomes. Network Rail said that these metrics were included in the Tripartite Improvement Plan with milestones, but we note that is relatively recent.
22. FLHH added that data from later in 2020 provides a better representation of its performance and the absence of any analysis on third-party delay minutes was surprising. FLHH said that although performance improved in 2020, it was getting mixed messages from Network Rail, which was unhelpful. The refusal to progress the requests to SOAR Panel was inconsistent with the messages from the Western Region.

#### *Route availability*

23. Nine slots were included for rights running with Heavy Axle Weight (HAW) characteristics at RA10 (up to 25.4 tons per axle). Network Rail was only prepared to sell these rights for limited periods of time in certain areas<sup>9</sup>. FLHH was concerned about how little contractual certainty that would provide. FLHH noted that the ability to maximise load is key to the economics of rail freight and getting best use of the network. It noted the apparent inconsistency between Network Rail regions and the consequence that more trains would have to run to reflect reduced axle weight (or put more reliance on road traffic).

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<sup>9</sup> Some routes (eg Glynde near Newhaven) only have a 6 month dispensation due to the state of the viaduct.

24. FLHH noted that the ability to run trains technically above the Route Availability published in Network Rail's Sectional Appendix has been established practice for "decades", with any special requirements identified through dispensations. This has encouraged considerable investment over the years in rolling stock and rail facilities. Meanwhile, there is an expectation that the duration of rights aligns with the TAC. FLHH says that until recently Network Rail had been prepared to sell access rights at RA10 through to 2026. Several services are already contracted to run over structures but where Network Rail's new processes are being applied.
25. FLHH looked at the specific structures where the limited dispensations were proposed. FLHH queried the state of the assets cited by Network Rail as of concern and the amount of funding available for network maintenance. It was unclear to FLHH how the situation would be resolved.

#### *Great Eastern Mainline*

26. Five train slots concerned paths over the Great Eastern Mainline to reach terminals in East Anglia. FLHH was told that Network Rail did not intend to sell access rights due to the ongoing Event Steering Group (ESG). FLHH however contested this given that the ESG was "paused" and the services concerned were already in the Working Timetable.

### **Network Rail representations**

#### *Performance*

27. Where Network Rail rejected slots on performance grounds, key issues included:
- Failure to meet FDM targets.
  - Inadequate amount of data due to low number of services.
  - Services had not run at all despite being in the WTT.

Network Rail said it went to significant lengths to analyse FLHH's initial application and it had balanced the operator's needs with the integrity of the wider network.

28. Network Rail agreed that performance had improved since April/May 2020. But it also noted that this was part of a wider pattern of step changes in freight services generally, reflecting the reduced levels of passenger traffic due to COVID-19. Network Rail still had specific concerns about performance and Right Time Departures from the Whatley and Merehead Quarries.



29. Network Rail engaged with FLHH and the freight customer in performance improvement activity<sup>10</sup>. Network Rail acknowledged on 12 February 2021 that six services had improved and could be supported. These were included in the 9<sup>th</sup> SA. On 21 June 2021 Network Rail accepted that a further six services could be accepted until PCD 2026 as performance had improved<sup>11</sup>.

#### *Route Availability*

30. Network Rail's representations cited the declining condition of metallic bridges in the Southern Region and certain structures on the Anglia Route. Network Rail said that it could agree to 14 services only with time limits rather than TAC expiry (PCD 2026). It would however be able to support them at RA8. Network Rail provided a detailed table setting out the constraints for each relevant service and structure.
31. In answer to FLHH's points about funding, Network Rail replied that current funding levels are insufficient to maintain even a steady state condition of the assets. Over time, without intervention, the Southern Region will see a loss of capability. Network Rail said that the Variable Usage Charges (VUC) were designed to cover wear and tear costs on the network but were not sufficient to address the fixed costs of enhancing network capability.

#### *Great Eastern Mainline*

32. By the time FLHH made its section 22A application, the position of the GEML ESG had moved on. In February 2021, Network Rail agreed to support two services on the GEML but two remained rejected, on performance grounds (6V53 and 6V12). The GEML ESG ceased to be a matter of dispute for the purposes of the 10<sup>th</sup> SA.

#### *Other rights*

33. Network Rail noted that FLHH included 7C59 (FO) in the application. It said that this right was included within the 9<sup>th</sup> SA<sup>12</sup> and did not need further consideration. FLHH agreed when we followed this up.

### **Industry Consultation**

34. An industry consultation was conducted by Network Rail between 4 November and 4 December 2020. Responses were received from Great Western Railway

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<sup>10</sup> Tripartite Improvement Plan.

<sup>11</sup> 6L26 7A48 7O40 7C27 6V76 6O47. \*One new right GV76 was caveated by Network Rail at RA10 until PCD2022 only – but see below.

<sup>12</sup> 7C/59 (SX).

and Cross Country Trains. No concerns were raised and there were no outstanding unresolved issues.

## **ORR Review**

35. In considering FLHH's application we followed the procedures set out in Schedule 4 of the Act and we had regard to the duties set out in section 4 of the Act. It is for each party to make its case in relation to the proposed SA. FLHH and Network Rail were given the opportunity to make representations and respond to the other party's respective arguments. We also asked for additional information that we needed to make an informed decision<sup>13</sup>.

### *Performance*

36. We reviewed the arguments presented by FLHH and Network Rail. It is clear that Network Rail has given considerable attention to analysing the performance of this traffic. ORR's concern is the impact on other operators, as well as the integrity of the network generally. FDM can be a proxy for integrity. However, the evidence for the direct impact of poor performance on other operators was limited, which may be a reflection of reduced passenger services during the COVID-19 months. There were also no outstanding objections from consultees, as pointed out by FLHH. Passenger services will however increase again in future, including additional Crossrail services.
37. We note that performance tended to improve across 2020. However, we are cognisant of Network Rail's point that the network was less busy than usual and COVID-19 provided an unusual environment. Network Rail said it was generally the case that freight performance improved across the board. It would be difficult to attribute [potentially temporary] improvements to any specific FLHH long term efficiencies.
38. The parties' representations drew different pictures of the performance issues. We therefore asked Network Rail for performance data for the last five years and we looked at the trends. These showed that the performance metrics had been consistently relatively poor for FDM, RTD, and A2F; albeit with some fluctuations. However they are not significantly worse now than five years ago, when these services were running as a matter of routine. This is demonstrated in the chart `freight performance 2017-21`<sup>14</sup>:

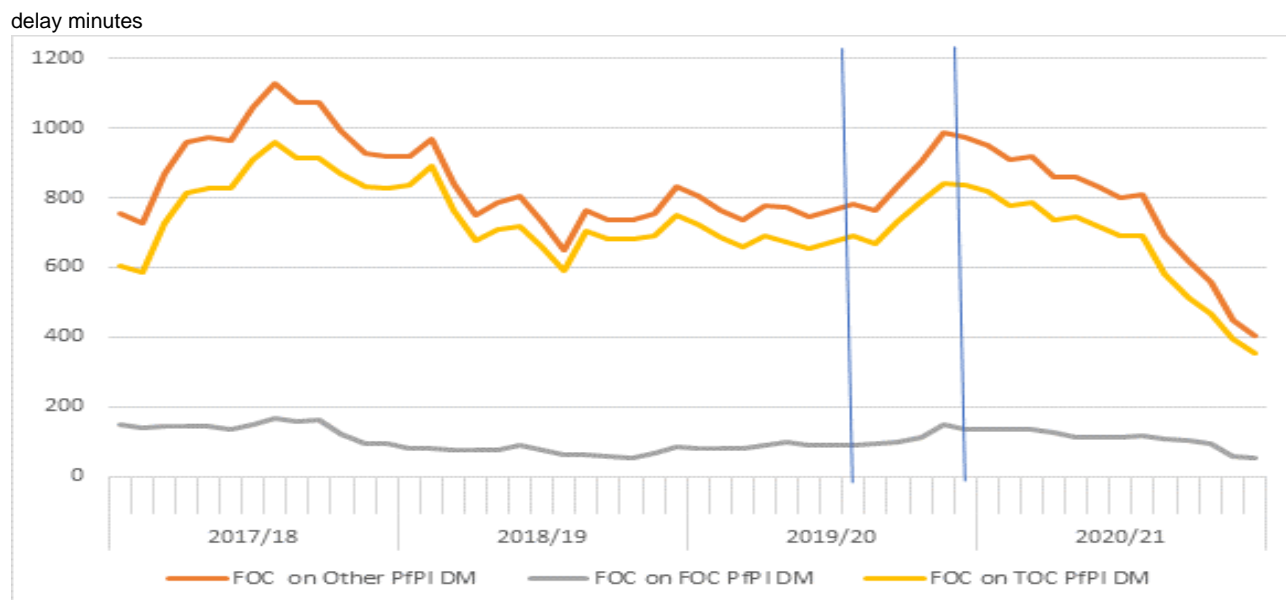
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<sup>13</sup> <https://www.orr.gov.uk/sites/default/files/om/expression-of-access-rights-and-use-of-capacity-december-2011.pdf>

<sup>14</sup> As supplied by Network Rail.



### freight performance 2017-21



39. There are particular concerns about FLHH trains arriving at or departing late from terminals, particularly the two quarries. The parties have worked on an improvement plan with milestones to see if services can be made more efficient or retimed. We note that performance improved between January and May 2021 for some services. However, for others, performance remained relatively poor, with RTDs below 50%.
40. Network Rail stated that a dozen or so of the services had never actually run and so no performance data was available. Consequently Network Rail could not support them. In its representations of 26 February 2021 FLHH argued that five services do run regularly but some others were withdrawn to be put in a later application. It is not a requirement for new rights for trains to be in the WTT, performance can be modelled in any case; but we noted these developments.

### Route availability

41. HAW trains typically need route clearance at RA10 rather than the more typical RA8. In September 2020 Network Rail introduced processes to improve the assurance of HAW access rights. This process led to some of its regions and routes limiting the term of sale for some HAW access rights. In the case of Southern Region some RA9 and RA10 access rights were limited to two years duration, which aligns with its usual HAW dispensation period.
42. Network Rail permits trains requiring a higher Route Availability to run on sections of the network with a lower Route Availability subject to conditions (such as running at lower speeds) using its dispensation process. Nine slots in FLHH's

application concern rights that Network Rail had declined to sell to the end of the TAC for the Southern Region and Anglia Route.

43. FLHH argued that the higher VUC it pays goes towards the wear and tear on Network Rail assets. Network Rail said that RA8 bridges can be managed to support HAW traffic. However, guaranteeing more traffic over the long term would require upgrading the capability of several structures. This would require significant investment it is not funded for. It wants to limit the sale of new rights for some traffic at present.
44. The VUC is a charge designed to recover Network Rail's operating, maintenance and renewal costs that vary with marginal changes in traffic. But these charges do not cover capability changes, such as improving the network from RA8 to RA10. HAW trains pay a higher VUC rate to take into account the fact that they are heavier and cause more damage to the network than a normal train. More damage implies more frequent maintenance or renewals. Network Rail said that there has been under-investment in this area.
45. FLHH pointed out that this HAW traffic has been running across the network for years and was no surprise to Network Rail. It looked at specific assets and questioned Network Rail's conclusions. Meanwhile, the imposition of new limits creates uncertainty for the rail freight sector. Network Rail recognises this but is concerned that HAW traffic will degrade certain assets over time and it cannot guarantee that dispensations will roll over.
46. We asked Network Rail if alternative routes are available. We were told that in Southern Region this is not practicable, as the structures issue runs across the area and could create operational issues for FLHH and other operators. For Anglia, some services might be re-routed if needed but this might have knock-on effects for FLHH and other operators. We note that if structures do have to be closed to HAW traffic, other routings may be available. But there is not enough certainty here for us to direct long term rights at this time. It may be a matter for FLHH and Network Rail to consider over the next few months.

## **ORR's conclusions**

### *Performance*

47. The performance of the FLHH services is not noticeably worse than that of the previous train operator. By seeking to update its Rights Table<sup>15</sup>, FLHH is seeking to regularise the situation which will actually allow for better monitoring of service

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<sup>15</sup> The Rights Table is part of Schedule 5 of the TAC and contractualises the FOCs' access rights.

performance; and regularising the position, providing more certainty all round. This initiative should be encouraged. Also, considerable efforts are being made to improve performance. The historic performance track record lends weight to the FLHH position that it has an expectation of being able to run these long standing services as part of a regular, stable plan.

48. Network Rail has already agreed to contractualise most of the relevant service group through the 9<sup>th</sup> SA. Since the application was made the position has been reviewed in respect of further services, which Network Rail is now prepared to accept. It has concerns about the balance and the effect on network integrity.
49. ORR respects the efforts of the parties to reach agreement on many of these services. Regarding the balance, we consider that both FLHH and Network Rail have legitimate viewpoints. On balance, we do not think it appropriate to direct Network Rail to sell new long term access rights for poor performing services on an increasingly busy mainline. However, the alternative of the traffic not running or continuing to rely on TOVRs is not proportionate or indeed viable in the short term. We consider that directions for new rights lasting two years provide the opportunity for efficiency to be improved further, particularly with the quarries and at the terminals around London; and with fleet management.
50. It is unusual for ORR to limit the duration of individual access rights and not to align them with the TAC<sup>16</sup>. Our decision here in respect of new rights is an exception. Taking into account our section 4 duties we concluded that our directions are proportionate in light of the issues presented, without disrupting the current WTT and legitimate commercial interests. **Extension of the rights after SCD2023 cannot be assumed** and should be dependent on the performance of services and network integrity at the time they are reassessed.
51. ORR also notes that these trains are getting longer and heavier; and the amount of this traffic is increasing. There is no automatic right for new or changed services to be accommodated. Indeed it may be the case that too many new services could exacerbate congestion at freight terminals. The impact on performance off the mainline network should be looked at by FLHH when considering new services.

#### *Amendments*

52. Included in this application there are a significant number of access rights that needed updating but are already in the Rights Table. We do not consider it

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<sup>16</sup> It has previously also been done by agreement between Network Rail and beneficiaries.

appropriate to time limit the duration of rights that are already in the TAC. These services are not to be time limited until SCD2023 and the amendments to be made are those applied for. The changes substantially reflect the current WTT, with often relatively small adjustments. Objections have been, generally, to the services themselves and less on the specific changes FLHH wanted. Both parties' representations might have focused more on the point that these are existing contractualised rights.

53. We make two exceptions to the stance taken in paragraph 52. 6O54 is a substantial change to the existing right and so we limit it to SCD 2023, as if it were a new right. 6L21 is a substantially extended route and so we also limit it to SCD 2023 as if it were a new right (as discussed above). Both will need to be reviewed in due course.

#### *Access reviews*

54. We note that FLHH may have been frustrated by the state of the access rights associated with this traffic. This is particularly so given that, under the terms of the TAC, TOVRs should not be relied on for more than twelve months. This should normally provide enough time for them to be assessed and turned into firm rights. We recommend that Network Rail continues to work with FLHH to keep the relevant rights in the Rights Table up to date. Indeed this needs to be the case more widely. We know that this has been an issue for other Rights Tables and that Network Rail has been working to improve matters. There should also be **regular access rights reviews meetings** so that rights can be updated and unused ones surrendered. This would help avoid the scale of the problem and the uncertainty faced by FLHH in 2019.

#### *Network Capability*

55. Network Rail said it has no obligations to provide Route Availability above what is published in the Sectional Appendix and that it is not funded to do so. The operation of HAW traffic could contribute to the declining condition of certain assets. Our assessment is that we should not direct Network Rail to sell new long term rights for RA10 traffic over RA8 assets at this time. Our directions state that the RA10 terms expire in SCD 2023 for new access rights<sup>17</sup>. We expect to have more detailed discussions with Network Rail as part of PR23 and in particular what is needed to maintain the network at current capability.
56. Safety is a prime consideration for ORR and the parties. If there is an issue with a structure, the dispensation would be withdrawn by Network Rail, and the trains

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<sup>17</sup> Including GV76.

would not run over it. The issue highlighted in this application is that some assets might have to be closed to HAW traffic at some future point, which impacts the degree of certainty that can be given to FOCs by Network Rail.

57. Communication with rail users is key. Network Rail should have been aware of potential issues on network capability some years ago. Network Rail's announcement in 2020 of new processes to improve the assurance of HAW access rights may have come as a surprise to some FOCs. Network Rail is progressing the issue with FOCs through a series of workshops. We await the outcomes of those meetings. Meanwhile, we note that it is most likely that HAW traffic will continue to run as before, but with greater scrutiny.
58. We also note that there appears to be, in effect, a blanket policy limiting the sale of RA10 access rights across the Southern region, reflecting the nature of the structures there. We recommend that Network Rail looks at the structures in this region and reviews the availability of each specific asset to safely accommodate HAW traffic. ORR's view is that Network Rail should be in a better position to assess the viability of HAW traffic in the next few months. However, funding and network capability cannot be resolved quickly, so the parties will need to work with the infrastructure available.
59. We expect Network Rail to have enough funding to maintain the current network capability at least to the standard published in the Sectional Appendix. Network Rail should have considered HAW and network capability when submitting its case for funding for previous Periodic Reviews. We expect HAW traffic to be part of the PR23 Network Rail Access Charges Review.

#### *Amendments*

60. Four existing rights have amendments that among other matters increase Route Availability to RA10. We direct that the changes be made, but in line with our findings above for new rights, we direct that those specific changes expire in SCD2023<sup>18</sup>. They can of course be reviewed by the parties before then.

#### *Directions*

61. In total ORR has directed 43 rights in the 10<sup>th</sup> SA. 16 are for the duration of the TAC reflecting where agreement has now been reached or where the changes are amendments to services already in the Rights Table.

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<sup>18</sup> The rights will remain in place after SCD2023 but not at RA10.  
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62. The balance of 27 services are until SCD2023 only. We expect the parties to continue to examine the underlying issues and extend rights further where appropriate, or return to ORR if they cannot agree.

### **ORR's duties**

63. In making this decision, we are satisfied that this decision takes into account our duties under section 4 of the Act, in particular:

- to protect the interests of users of railway assets;
- to promote the use of railway network in Great Britain for the carriage of passengers and goods and the development of that railway network, to the greatest extent ...economically practicable;
- to promote efficiency and economy on the part of the persons providing railway services; and
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

64. Once the agreement is signed, in accordance with section 72(5) of the Act, you must send a copy to ORR within 14 days and in accordance with section 72(2)(b)(iv), a copy will be placed on our public register and website.

65. In entering any provision on the register, ORR is required to have regard to the need to exclude, as far as is practicable, the matters specified in section 71(2)(a) and (b) of the Act. These sections refer to:

- any matter which relates to the affairs of an individual, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that individual; and
- any matter which relates to the affairs of a particular body of persons, whether corporate or incorporate, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that body.

66. When submitting the copy of the signed agreement would you therefore identify any matters which you would like ORR to consider redacting before publication. You will need to give reasons for each request explaining why you consider that publication would seriously and prejudicially affect your interests.

PP *MRE Haswell*

**Steve Jones**