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22 August 2022

To

1. Tyne and Wear Passenger Transport Executive
2. Colas Rail Limited
3. DB Cargo Limited
4. Freightliner Limited
5. Freightliner Heavy Haul Limited
6. GB Railfreight Limited

## **Tyne and Wear Passenger Transport Executive: Freight operators' Access Agreements**

### **Introduction**

1. Today the Office of Rail and Road (ORR) issued directions for Nexus to enter into new Access Agreements with: Colas Rail, DB Cargo, Freightliner, Freightliner Heavy Haul and GB Railfreight (together "the FOCs") in respect of the Metro Shared Network, under section 18 of the Railways Act 1993 (the Act). We have considered these applications together, recognising that they are intrinsically linked. This letter explains the reasons for our decision to approve these new Access Agreements, with some modifications.

### **Context – transfer of Jarrow Branch Line**

2. In order to double-track a short stretch of its Metro light rail network, Nexus will take over a freight line from Network Rail. This will remove bottlenecks at the three sections of single-track line. The parallel line will undergo slewing and merging to form a six kilometre stretch of dual-tracked network, called the Metro Shared Network (MSN).
3. The freight line, formerly known as the Jarrow Branch Line, currently owned by Network Rail, is used to serve the Jarrow Oil Terminal. The works are scheduled to take place from 12 September 2022 over a 12-week period. During this period Metro services will be suspended, but freight services will continue to be accommodated.
4. As a result of the change, each FOC will need to enter into an Access Agreement with Nexus as an Access Beneficiary.

## Legislation

5. The Act sets out the regulatory framework for Access Agreements. Sections 17- 22A of the Act set out an approval role for ORR in relation to access to railway facilities.
6. Most of the wider Nexus network is exempt from the Act's access regime by virtue of The Railways (Class and Miscellaneous Exemptions) Order 1994 (the CMEO). ORR's directions relate to the non-exempted section of the network and where relevant the permissions to access the Nexus facility imply permission to use the shared network to exit as well as enter.
7. Under the CMEO, some types of facilities and specified facilities are exempt from the Act's access provisions. This means ORR approval is not needed for Access Agreements at those facilities. Nexus already has an exemption (from the requirement for a licence in respect of a network, station or light maintenance depot) by virtue of the CMEO for the railway assets that it owned at the time of privatisation in 1994. The existing CMEO exemption will not extend to the infrastructure that Nexus is obtaining from Network Rail (the track comprised in the former Jarrow Branch Line).
8. The Access Agreements are a hybrid set of arrangements; part of the track will be covered by the Act and part of it will be exempt by virtue of the CMEO. However, it is ORR's view that the 2016 Regulations apply to the whole MSN. Nexus considers that it should be regarded as a "service provider" under the 2016 Regulations. This position is supported by the FOCs. This means that Nexus will need to comply with all provisions relating to the obligations as a service provider, including the Implementing Regulation on Access to Service Facilities and Rail Related Services. ORR's position is set out in detail in our [Regulatory Statement](#).
9. The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 ("the 2016 Regulations") describe entitlements and obligations in respect of governance for railway undertakings. Nexus will act as a service provider (for the purposes of the 2016 Regulations). It will maintain access to the Jarrow Oil Terminal for rail freight services and will provide the following services as part of the wider Access Agreements to the adjoining network to Jarrow Oil Terminal:
  - A train formation/shunting facility.
  - The capability for freight trains to be stabled temporarily across part of the MSN.
  - An ancillary service of access to the telecommunications network on the MSN.
10. In any event, where the access provisions of the Act do not apply, the 2016 Regulations provide an appeal process where access has been denied or the applicant seeking access considers that it has been unfairly treated. The 2016 Regulations also govern Access Agreements, regardless of the CMEO exemption.

## **ORR's role**

11. Access Agreements are generally between the facility owner (of a rail freight terminal or similar) and an Access Beneficiary (typically a FOC). The Act sets out the regulatory framework for Access Agreements including an approval role for ORR. If Access Agreements covered by the Act are not approved by ORR, they are void.
12. ORR issued a broad [General Approval in 2018](#) for regulated agreements that is widely used by the industry instead of seeking specific approval from ORR. Parties have discretion to draft agreements that match their needs, subject to the terms required by law. Given the nature of the application and its novelty, the parties asked for ORR specific approval.
13. Our Regulatory Statement (issued April 2022) set out ORR's role for the MSN. This included our regulatory approach based on the assumption that the relevant matters would be covered by way of bilateral Access Agreements. Our statement clarified that ORR will have an appeal role under the 2016 Regulations, should any FOC feel that it is treated unfairly, is being discriminated against or is in any other way aggrieved (see Regulation 32).

## **Access Agreements**

14. Nexus engaged with ORR from an early stage to introduce the project and to discuss ORR's regulatory role, including its access and licensing functions. The parties based their contracts on arrangements made for the Core Valley Lines (CVL). Although there are some similarities between the two, for example they both operate mixed traffic, there are some key differences. CVL is recognised as an infrastructure manager and all its network is covered by the Act. It also pays a fee, under its licence, to ORR.
15. The Nexus view is that it will be providing a service (like ports and freight terminals) and is not an infrastructure manager for the purposes of the 2016 Regulations. The FOCs want to maintain existing protections and close off any risk that Nexus might limit future access to the MSN. Nexus has accepted the need for certainty and security and has agreed to enter into bilateral Access Agreements with each Access Beneficiary.
16. The applications were received on the following dates:
  - DB Cargo: 23 June 2022.
  - Freightliner: 27 June 2022.
  - Freightliner Heavy Haul: 27 June 2022.
  - GB Railfreight: 11 July 2022.
  - Colas Rail Limited: 25 July 2022.

## ***Contract terms***

17. The applications set out and explain the main differences between the MSN Access Agreements and Network Rail's Track Access Contracts. These generally included some minor drafting points, simplifications, and updates to definitions to reflect the

differences between these networks. Some other issues raised more substantive matters that needed to be worked through by ORR with the parties. This particularly included the Metro Network Code and Metro Access Disputes Resolutions Rules. Some of the differences are highlighted below.

18. The parties agreed that although part of the MSN is covered by the Act and part is covered by the CMEO, it would be impractical to have separate contracts for each section. Rather the parties' preferred approach is to have a single contract, for each FOC, governing access. ORR agrees with this approach. We expect consistent and equal treatment between the regulated and non-regulated sections of the MSN.
19. Nexus consulted on its proposed Access Agreements. One for the incumbent Colas Rail, and others for DB Cargo, Freightliner, Freightliner Heavy Haul and GB Railfreight. FOC consent was needed for the Network Change to proceed (planned for September 2022). The FOCs then asked for Access Agreements to be in place for convenience and protection as Access Beneficiaries, should they ever need to use the MSN. As Beneficiaries they will get to influence the Metro Network Code and Metro Access Disputes Resolution Rules (Metro ADRR) even if they run no active rail services on the line.

#### *Schedule 7*

20. Charges paid by the FOCs to access the MSN are based upon a flat price for each round trip to the Jarrow Oil Terminal, calculated using an 'assumed train consist' and Network Rail's track usage price list. ORR will not conduct periodic price reviews for the MSN in the way that we do for Network Rail. ORR's role is explained in the Regulatory Statement.

#### *Schedule 8*

21. Nexus and the FOCs have agreed that Nexus will administer a Performance Regime under Schedule 8 of the Access Agreements. However, the Performance Regime is simplified to only address the consequential liability of a delay that Nexus may cause a train operator to incur under its track Access Agreement with Network Rail.

#### *Schedule 9*

22. Schedule 9 limits the respective liabilities of the parties under elements of the Access Agreements. Nexus has agreed an asymmetric liability cap with the Access Beneficiaries. Accordingly, in each Contract Year, the liability of Nexus is capped at £5 million and the Beneficiary's liability is capped at £100,000 (both figures are subject to indexation). This is because the FOCs wanted to ensure their potential exposure would not unduly or significantly increase as a result of these changes to the network.

### *Freedom of Information clause*

23. Clause 14.7 inserts a new clause concerning the Freedom of Information Act. This is a clause not found in a Network Rail contract. Nexus state that this is a standard clause found in public sector contracts such as Nexus and it provides additional structure to the obligations to which Nexus is subject to. The inclusion of this clause has been negotiated and agreed with the freight operators.

### *Rights table*

24. The Rights Tables in Annex 1 of Schedule 5 of each Access Agreement is only populated with firm rights in Colas Rail's Access Agreement as the incumbent freight operator. There will not be an increase in the firm rights operating over the existing infrastructure. The difference is that those firm rights will be split over infrastructure owned by two separate parties.

25. DB Cargo's application included a separate Annex to reflect the balance of rights it had as the previous operator however this has been excluded from its submitted Access Agreement with Nexus, as it is no longer needed.

### *Metro Network Code*

26. The Access Agreement and Metro Network Code will contain certain priorities for freight services accessing the facilities of the MSN to provide assurance of access in light of Nexus also operating Metro passenger services. Nexus will preserve the existing firm rights that exist over the Jarrow branch line as "Priority Rights".

### *Metro ADRR*

27. Nexus has prepared Metro Access Dispute Resolution Rules (Metro ADRR). These rules apply to disputes concerning the Access Agreement and the Metro Shared Network. The rules are closely modelled on the national existing Access Dispute Resolution Rules and have been agreed with all Beneficiaries and the Access Disputes Committee.

### *Contract duration*

28. The expiry date of each Access Agreement will align with the expiry dates in the Network Rail track access contracts. For all FOCs this date is PCD 2026. Separate to this application, the FOCs have informally submitted applications to ORR to extend their track access contracts to PCD 2030. If approved, the FOCs would then seek to extend the Nexus Access Agreements in the same way.

### **Consultation**

29. Nexus conducted a 28-day consultation from 16 June 2022. The deadline was extended due to additional information becoming available. Nexus then conducted a 14-day consultation for its Access Agreement with Colas Rail. This reflected the

situation that Colas Rail had just been appointed in mid-June, as the successor to DB Cargo in serving the oil terminal. No issues were raised by either industry consultation.

### **Associated connection contracts**

30. ORR has issued [directions](#) for new contracts in respect of new connection points either side of the transferred track. These have been agreed and directed by ORR.

### **Nexus licence**

31. ORR has developed a network licence so that FOCs will have the assurance of continued network licence protection. The licence itself is unusual in that section 10 of the Act 1993 will apply. Section 10 allows licence conditions to apply to 'mixed activity' comprising exempt and non-exempt parts to bring licensing uniformity. The [proposed licence](#) will be similar to the one issued for the Core Valley Lines.

### **ORR Review**

32. We have reviewed the terms of the Access Agreements submitted and, after receiving further information from the parties, we are content to approve them. In particular we have considered the context where the network is unlike most freight service facilities and has some similarities with the CVL, where ORR has already approved similar arrangements. We have, however, included some minor modifications as part of our Directions.

33. ORR's view is that the contractual arrangements should be efficient and robust but also proportional to the size and complexity of the network concerned. It can take time and effort for Facility Owners, Access Beneficiaries and ORR to administer such agreements, especially if they diverge from the current Network Rail arrangements over time. The inclusion of the lengthy Metro Network Code and Metro ADRR increases the chances that this set of arrangements could be disproportionate. Overly-prescriptive Access Agreements can introduce inflexibility and complexity.

34. ORR appreciates the specific nature of the MSN, the fact that all the parties are in agreement, and that all parties have taken part in the development of the contractual arrangements for the MSN. We recognise the FOCs' goal is that they should be no worse off on the MSN than with the rights they currently have. We also note that all the FOCs have been treated equitably and the agreements are similar and consistent.

### *Review clause*

35. With all this in mind, ORR has developed a new review clause (18.2A), where the parties are expected to initiate a review of the contract terms, which could result in simpler arrangements, in the light of experience and developments. This clause could be progressed in parallel to Condition 7 of Part C of the Metro Network Code. We have inserted this new provision as part of our Directions. This review would need to start

within two years of operations starting (before 12 September 2024) and any changes resulting directly from it would need the agreement of all the FOCs, Nexus and ORR.

### *Other modifications*

36. We have also included in our Directions with some minor modifications:

- a. Clean versions of the contracts with various notes removed (which were not intended to be part of the formal contract) – such as the removal of the words ‘Draft’ and the correction of typing errors. The full list is included as part of the Directions.
- b. We have also directed that the reference to Schedule 4A of the Act in clause 18.2.1 is removed. ORR will not be conducting Periodic Reviews under Schedule 4A of the Act.

### **Conclusion**

37. ORR is content to issue directions to Nexus and the FOCs in respect to the Access Agreement applications submitted to us. Our own final review did not identify any unresolved issues and the parties kept us involved as their proposals emerged.

38. Once the FOCs’ Access Agreements with Nexus are signed, in accordance with section 72(5) of the Act and the contract terms, please could Nexus send copies within 28 days; and then in accordance with section 72(2)(b)(iii) redacted version will be placed on our public register and website

39. ORR expects Nexus to publish a Service Facility Description making its services and charging policy clear and transparent.

40. ORR expect the parties to undertake a combined review of the terms of the contract and associated documents before 12 September 2024.

41. ORR’s directions are subject to modifications provided by Nexus on 10 August 2022 (see *Schedule annex – Modifications to the access agreement submitted*). Nexus will need to submit a final version of the Access Agreements including those modifications to ORR for directions.

### **Our duties under Section 4 and our decision**

42. We have concluded that approval of this agreement strikes the appropriate balance in discharging our statutory duties under section 4 of the Act, including those relating to:

- a. promoting improvements in railway service performance (section 4(1)(b));
- b. protecting the interests of users of railway services (section 4(1)(a));

- c. enabling persons providing railway services to plan their businesses with a reasonable degree of assurance (section 4(1)(g)).

### **Redactions**

43. 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:

- i. 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
- ii. Any matter which related 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.

### **Public register and administration**

44. A copy of the Directions and the signed contract will be placed on our public register. Copies of this letter and the contract will also be placed on the ORR website.

45. Once the agreement is signed, in accordance with section 72(5) of the Act, you must send a copy to ORR within 14 days.

Yours sincerely

A handwritten signature in black ink, appearing to be 'R. Holt', written over a horizontal line.

**Ryan Holt**