



Louise Beilby
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Dear Sophie and Josh

29th Supplemental Agreement to the Track Access Contract between Network Rail Infrastructure Limited and XC Trains Limited 8 August 2017

1. On 25 September 2023 XC Trains applied under section 22A of the Railways Act 1993 (the Act) to amend its Track Access Contract (TAC) by means of the 29th supplemental agreement.

Summary

2. This XC Trains application was not supported by Network Rail. ORR has considered the application and the representations received from parties. We have decided to reject the application because it contradicts ORR's policy on use of access and the evidence supporting future use of the access rights is insufficiently strong. This letter sets out the reasons for our decision in more detail.

Application purpose

3. The application proposed the extension of a number of unused access rights currently in XC Trains' TAC in service groups EH01 between Birmingham New Street and Reading/Manchester Piccadilly/Newcastle/York/Bristol Temple Meads and EH02



between Birmingham New Street and Stansted Airport, from the Principal timetable Change Date (PCD) in December 2023. XC Trains states that it plans to use the rights again from the Subsidiary timetable Change Date (SCD) in May 2025 but concedes that they will remain inactive for the next three timetable periods.

4. Network Rail has not supported this application, citing its policy on unused access rights and pointing out that XC Trains' current TAC expires on PCD 2024, a full timetable period before it believes these rights will be required again.

Industry consultation

5. GB Railfreight stated that it was not able to support the application due to its contravention of Network Rail's unused access rights policy.
6. London North Eastern Railway (LNER) also expressed that it could not support the application due to some discrepancies in the rights tables. XC Trains reissued the consultation with corrections to the tables as a consequence, and no further response was received from LNER.
7. Greater Western Railway expressed its support with the caveat that it would need to see proof that the retention of the rights was endorsed or specified by the DfT. XC Trains has pointed to its recently-signed National Rail Contract (NRC) as evidence of this.
8. Northern made some queries relating to route capacity and rolling stock availability, which XC Trains appeared to answer to its satisfaction, as it had no outstanding objection at the time of submission.
9. Comments in support were received from West Yorkshire Combined Authority, Amey Infrastructure Wales, West Midlands Trains and Transport Focus.

Statutory Consultation

10. As required under the Act, on 25 September, we sought Network Rail's representations on the application and it replied on 13 October. We forwarded these representations to XC Trains on 13 October, and asked for its comments. XC Trains provided comments on 27 October.
11. In its representations, Network Rail reiterated its position regarding unused access rights, stating that it had been clear on its policy for some time now and it was not



able to “reserve capacity” for rights that were not going to be used for the foreseeable future (in this case, beyond the current TAC expiry date).

12. Network Rail acknowledged that it had not progressed a Failure to Use notice under Part J4 of the Network Code, as it should have done when XC Trains failed to surrender the rights in question.
13. XC Trains restated its intention to start using the rights again from SCD 2025 and stated that it did not feel it was appropriate to relinquish them on even a temporary basis in light of its recently-issued National Rail Contract (NRC) and the commercial requirement for those rights arising from this.
14. XC Trains also stated that Network Rail was aware of its aspirations from SCD 2025 as it had been party to the NRC negotiations. It pointed out that no Part J4 process was instigated by Network Rail even though it appeared to be aware of the unused access rights (and XC Trains’ aspirations to retain them) through the business planning process.

ORR review

15. ORR’s previous statements on the use of network capacity ([Future Service Levels and Unused Access Rights, 2021](#)) and Network Code compliance ([Timetabling and Network Code Change Requirements, 2022](#)) remain valid. Our position is also clearly set out in our [Use of Capacity](#) guidance, specifically the section entitled “Rights Must be Used”. These statements and guidance have informed the decision we have made in this case.
16. XC Trains’ response to Network Rail’s representations does not, in ORR’s opinion, adequately justify its position or its desire to retain the rights beyond the current TAC expiry date. It acknowledges Network Rail’s policy but does not make a case for why it should not be subject to it, other than restating that it does intend to use the rights again in the future and that it has been instructed to keep them by its funder. In our view, this does not constitute a strong enough reason to ignore the stipulations of the Code.
17. We acknowledge that Network Rail has failed to act decisively on this operator’s unused access rights, seemingly using the supplemental agreement process instead of that set out in the Code to address the issue. However, this does not negate the principle of the policy nor the fact that XC Trains’ application is in direct opposition to it.



Our duties under section 4 of the Act and our decision

18. We have considered this supplemental agreement and we have concluded that its rejection is consistent with the discharge of our statutory duties under section 4 of the Act; in particular, those relating to promoting improvements in railway service performance (section 4(1)(b)), promoting efficiency and economy on the part of persons providing railway services (section 4(1)(c)), and enabling persons providing railway services to plan their businesses with a reasonable degree of assurance (section 4(1)(g)).

19. We have looked very closely at all the evidence submitted from the parties and consultees. We have concluded that, we should reject the application.

Public register and administration

20. An electronic copy of this letter will be sent to the Department for Transport and Network Rail, and will also be placed on the ORR website.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Louise Beilby', with a stylized flourish at the end.

Louise Beilby