

Railways Act 1993

Supplemental Agreement (Interim Treatment of Access Charges Review) General Approval 2008

2008 No. 5

Made 23 October 2008

Coming into force 24 October 2008

The Office of Rail Regulation, in exercise of the powers conferred upon it by section 22(3) of the Railways Act 1993, gives the following general approval.

Citation, commencement and revocation

1. (1) This general approval may be cited as the Supplemental Agreement (Interim Treatment of Access Charges Review) General Approval 2008.
- (2) This general approval comes into force on 24 October 2008.

Interpretation

2. (1) In this general approval:

“access agreement” means an agreement entered into after 1 April 1994 under which Network Rail Infrastructure Limited grants a beneficiary permission to use its track for or in connection with the provision of services;

“beneficiary” includes an operator of trains; and

“services” means services for the carriage of passengers or goods by railway.

- (2) In this general approval:

- (a) unless the context otherwise requires, terms and expressions defined in the Railways Act 1993 shall have the same meanings in this general approval;
- (b) the Interpretation Act 1978 applies to this general approval in the same way as it applies to an enactment; and
- (c) unless the context otherwise requires, any reference to a numbered paragraph is a reference to the paragraph in this general approval which bears that number.

Approval of amendments

3. The parties to an access agreement may enter into a supplemental agreement in the form attached at Schedule 1 to this approval.

4. Where the supplemental agreement attached at Schedule 1 contains square brackets, the parties to an access agreement may make such deletions or insertions as are appropriate in accordance with the instructions contained between the relevant square brackets.

5. The parties to an access agreement, which is governed by Scottish law, may delete or modify the terms of the supplemental agreement attached at Schedule 1 only to the extent necessary in order to comply with the laws of Scotland.

Brian Kogan

Brian Kogan

Duly authorised by the Office of Rail Regulation

23 October 2008



Schedule 1

SUPPLEMENTAL AGREEMENT

between

NETWORK RAIL INFRASTRUCTURE LIMITED

and

[insert name of train operator]

**relating to amendments to a Track Access
Contract (*[Non-Franchised Passenger/Passenger/Freight –delete as appropriate]*
Services) dated *[insert date]* –
Interim treatment of access charges review**

THIS SUPPLEMENTAL AGREEMENT is dated [insert date] 2008 and made between:

- (1) **NETWORK RAIL INFRASTRUCTURE LIMITED**, a private company registered in England under company number 02904587, having its registered office at Kings Place, 90 York Way, London N1 9AG ("**Network Rail**"); and
- (2) [insert name of train operator], a private company limited by shares registered in England and Wales under company number [insert number], having its registered office at [insert address] (the "**Train Operator**").

Background:

- (A) The parties entered into a Track Access Contract ([*Non-Franchised Passenger/Passenger/Freight – delete as appropriate*] Services) dated [insert date] as amended by various supplemental agreements (which track access contract as subsequently amended is hereafter referred to as the "**Contract**").
- (B) The parties wish to amend the Contract to incorporate a mechanism which will provide for the treatment of revised track access charges and certain other matters forming the subject of the Office of Rail Regulation's periodic review pending the conclusion of the periodic review process. This Supplemental Agreement provides for the insertion of a new Clause [insert relevant clause number] in order to incorporate such a mechanism into the Contract.

IT IS HEREBY AGREED as follows:

1. INTERPRETATION

In this Supplemental Agreement words and expressions defined in and rules of interpretation set out in the Contract shall have the same meaning and effect when used in this Supplemental Agreement except where the context requires otherwise.

2. EFFECTIVE DATE AND TERM

The amendments to the Contract made pursuant to this Supplemental Agreement shall have effect from [the date hereof] and shall cease to have effect at [insert time] hours on the Expiry Date or earlier termination of the Contract.

3. AMENDMENTS TO THE CONTRACT

A new Clause [insert number] shall be inserted into the Contract as follows:

"[insert number] INTERIM TREATMENT OF ACCESS CHARGES REVIEW

[insert number].1 Treatment prior to Implementation

If the terms of a Proposed Review Notice proposing amendments to the Contract are not implemented in accordance with paragraph 7 of Schedule 4A of the Act by the Current Control Period Expiry Date for any reason, then, irrespective of such terms not having been so implemented, each proposed amendment to the Contract set out in the

Proposed Review Notice shall have effect from the day after the Current Control Period Expiry Date or from any later date (or dates) specified in the Proposed Review Notice in respect of any individual amendments.

[insert number].2 Definitions

In this Clause [insert number]:

"Current Control Period" means the period of five years commencing at 0000 hours on 1 April 2004 and ending at 2359 hours on 31 March 2009;

"Current Control Period Expiry Date" means the last day of the Current Control Period;

"Proposed Review Notice" means as at the last day of the Current Control Period the most recent Review Notice (including any Revised Review Notice) given by the Office of Rail Regulation during the Current Control Period the terms of which are proposed to take effect after the Current Control Period Expiry Date;

"Review Notice" has the meaning given to "review notice" in paragraph 4 of Schedule 4A of the Act; and

"Revised Review Notice" means any new Review Notice given by the Office of Rail Regulation pursuant to paragraph 8(2) of Schedule 4A of the Act.

4. EFFECT OF THIS SUPPLEMENTAL AGREEMENT ON THE CONTRACT

The parties agree that the Contract, as amended by this Supplemental Agreement, shall remain in full force and effect in accordance with its terms, and with effect from and including the date hereof and during the period in which the amendments made by this Supplemental Agreement are to have effect, all references in the Contract to the "Contract", "herein", "hereof", "hereunder" and other similar expressions shall, unless the context requires otherwise, be read and construed as a reference to the Contract as amended by this Supplemental Agreement.

5. LAW

This Supplemental Agreement shall be governed by, construed and given effect to in all respects in accordance with the law of [England and Wales/Scotland – *delete as appropriate*].

6. THIRD PARTY RIGHTS

No person who is not a party to this Supplemental Agreement shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Supplemental Agreement.

7. COUNTERPARTS

This Supplemental Agreement may be executed in any number of counterparts, each of which when executed and delivered shall constitute an original, but all the counterparts shall together constitute one and the same instrument.

IN WITNESS of which Network Rail and the Train Operator have, by their duly authorised representatives, respectively entered into this Supplemental Agreement on the date first above written.

SIGNED BY)
for and on behalf of)
NETWORK RAIL)
INFRASTRUCTURE LIMITED)

SIGNED BY)
for and on behalf of)
[*Relevant Train Operator*])
)

EXPLANATORY NOTE *(this does not form part of the general approval)*

Section 22(3) of the Railways Act 1993 ("the Act") enables the Office of Rail Regulation ("ORR") to give its approval in advance to the making of certain amendments to access agreements. As long as an amendment falls wholly within the terms and conditions of a general approval, the parties to the access agreement in question may amend it without seeking ORR's specific approval of the amendment. If it does not come within the scope of the general approval, a specific approval under section 22 or directions under section 22A, section 22C or Schedule 4A to the Act must be obtained. Amendments that have not been approved by ORR - either under a general approval or a specific approval, or made pursuant to directions - are void.

As ORR explained in its consultation letter of 23 April 2008¹ and in its consultation on train operator compensation from possessions², the amendment contained in this supplemental agreement is intended to facilitate the implementation of the periodic review 2008 ("PR08"). The supplemental agreement introduces a new clause into train operators' track access contracts which provides that the contents of any review notice served by ORR when implementing PR08 will have effect in train operators' track access contracts from the date specified in the review notice i.e. 1 April 2009, (the start of the new control period), regardless of whether the implementation process is delayed, for example as a result of Network Rail exercising its statutory right to object to the notice.

If PR08 cannot be implemented by 1 April 2009, the arrangements under the current control period (CP3) time out and many of them, including certain track access charges payable by train operators to Network Rail in the existing track access contracts, do not have stated amounts beyond 31 March 2009. Through this amendment, Network Rail will receive the various income payments (which would otherwise be timed out) under those access contracts at the start of the new control period, pending final implementation of PR08 under the statutory process.

It is acknowledged that operators' track access contracts may need to be further amended to incorporate changes that are required to be made pursuant to the statutory process under Schedule 4A of the Act (e.g. following a reference to the Competition Commission). Any such changes will come into effect through the statutory process and therefore have not been included within the scope of this supplemental agreement.

Under section 72(5) of the Act a copy of all amendments of access agreements, including amendments approved under this general approval, must be sent to ORR within 14 days of being made. Subject to the requirement in section 72(3) of the Act to have regard to the need for

¹ "Periodic Review 2008 implementation", 23 April 2008.

² "Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for freight operators, franchise passenger operators access charge supplements and part G of the network code, 11 July 2008.

excluding certain information, such copies will be entered into the public register.