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To

1. Amey Keolis Infrastructure/Seilwaith Amey Keolis Limited
2. Network Rail Infrastructure Limited
3. DB Cargo (UK) Limited
4. Freightliner Heavy Haul Limited
5. Freightliner Limited
6. GB Railfreight Limited

By email

Dear AKIL, Network Rail and FOCs,

Core Valley Lines: Freight operators' track access contracts

Part 1 - Background

Introduction

1. On 29 November 2019 the Office of Rail and Road (ORR) issued directions for Amey Keolis Infrastructure/Seilwaith Amey Keolis Limited (AKIL) to enter into new track access contracts (TACs) with: Freightliner Ltd, Freightliner Heavy Haul Ltd, DB Cargo (UK) Ltd and GB Railfreight Ltd (together the FOCs) to operate freight services on the Core Valley Lines Network (CVL). We also issued approval notices in respect of consequential amendments to the current Network Rail TACs with the FOCs. We have considered all these applications together, recognising that they are intrinsically linked. This letter explains the reasons for our decision to approve these new and amended TACs.

Legislation and ORR's role

2. Under the Railways Act 1993 (the Act), a train operator may only enter into a contract with a facility owner for the use of that facility (including track) following ORR's approval and direction.
3. Proposed contracts on which the parties have reached agreement require ORR's approval and direction under section 18 of the Act. Any subsequent agreed amendments to a regulated contract require our approval under section 22 of the Act.
4. To cover the new arrangements for the CVL, AKIL and the FOCs applied for ORR's approval and directions for their new TACs and Network Rail and the FOCs applied for approval of corresponding amendments to their existing agreements. We have considered these applications in line with our statutory duties and published guidance.

Summary of arrangements

5. Network Rail is transferring its ownership of the CVL to Transport for Wales (TfW) and in turn, is relinquishing its role as infrastructure manager of the CVL. The transfer is due to take place in early 2020, subject to all the relevant requirements being met. The contractual terms for the management of the CVL infrastructure are set out in the ODP Grant Agreement¹ between Keolis Amey Wales Cymru Limited (KAWC) and Welsh ministers. An explanation of the ODP Grant Agreement can be found on the TfW website². AKIL was in turn appointed by KAWC to be the CVL infrastructure manager. The effective start date of the contracts is the Transfer Date, when AKIL becomes the infrastructure manager of the CVL. The purpose of the new TACs is to ensure that the FOCs can continue to operate their freight services seamlessly over both networks.
6. The FOCs currently have TACs with Network Rail granting access to the whole of its network, including what will be the CVL. They are seeking new TACs with AKIL in order to retain access over the CVL. DB Cargo and Freightliner Heavy Haul currently have Firm Access Rights over the CVL in their Schedule 5 Rights Tables. Those rights are replicated in the CVL TACs. No new rights are being applied for. It is a recurrent feature throughout the proposed new agreements that the FOCs desired to be no worse off than under the current arrangements.

Part 2 – the CVL

CVL-FOC TACs

Contract terms

7. The applicants' Form Fs (with annexes) set out and explained the main differences between the CVL and Network Rail TACs. These generally reflect the different infrastructure manager, updates to definitions and some minor drafting points and matters such as TfW step-in rights. Some other issues raised more substantive matters that needed to be worked through by the parties, particularly the provisions covering restrictions of use, delays and charges. These were particularly of interest to the parties as, of course, this is the separation of CVL from an existing network, rather than the addition of an entirely new one.

Schedule 5

8. The Rights Tables for DB Cargo and Freightliner Heavy Haul have been populated to reflect the rights they already hold on that part of Network Rail's network that is being transferred. The corresponding changes to the Rights Tables in the Network Rail contract are reflected in the section 22 Supplemental Agreements referred to below.
9. Arrangements are agreed in respect of the making access proposals under Network Rail's timetabling processes and the respective Network Codes, to ensure smooth and seamless operation of freight services crossing the CVL boundary.

Schedules 4 and 8

10. AKIL, Network Rail and the FOCs have agreed that Network Rail will administer the Restrictions of Use (or possessions) and Performance regimes under Schedules 4 and

¹ https://tfw.wales/sites/default/files/documents/REDACTED%20ODP%20Grant%20Agreement%20clean%20final%2020181221_1.pdf

² <https://tfw.wales/sites/default/files/documents/TfW%20Intro%20to%20the%20Grant%20Agreement.pdf>

8 of the CVL TACs on behalf of AKIL. The operation of the Performance regime has been termed 'the single star model'.

11. A separate agreement is being entered into between AKIL and Network Rail (*the Infrastructure Manager Agreement*) which will attribute various matters, including payments arising due to variations to services/restrictions of use, as appropriate, between AKIL and Network Rail.
12. The new CVL TACs include Schedules 4 and 8. However, these include paragraph 1A which disapplies the remainder of the Schedule should a FOC have a current TAC with Network Rail. In these cases (all the FOCs' TACs), Schedules 4 and 8 in the Network Rail TACs applies. If the current arrangements cease to be used the CVL Schedules 4 and 8 will be invoked. In Schedule 8 of the CVL TACs, there are certain matters to be completed including train operator and infrastructure manager caps. AKIL has told us that the parties do not wish to complete these tables now, as the necessary CVL specific information is not available or may change by the time that the CVL Schedule 8 is used (if ever). Future changes to the TACs will need ORR's approval.

Schedule 7

13. The charges paid by the FOCs to use the CVL will follow Network Rail's Track Usage Price List for CP6, until 31 March 2024. Track charges will be reviewed and adjusted by AKIL on 1 April 2024 using the information that will have, by then, become available and thereafter the track access charges will be reviewed on a five-yearly basis. ORR will not be the economic regulator for the CVL and will not conduct price reviews in the same way that we do for Network Rail. However, we note that in approving these arrangements, there is a specific governance arrangement between TfW and CVL. Also, any charging structure will have to meet the relevant legislative requirements and will be appealable to ORR under the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016.
14. Until 1 April 2024, the CVL-FOC TACs refer to the CP6 Track Usage Price Lists issued by Network Rail. If any of the FOCs propose using new rolling stock on the CVL which is not included in the Track Usage Price List, a supplement will be required under the bilateral provisions in each CVL-FOC TAC. We would expect any charges to replicate the supplements made under the bilateral provisions in the Network Rail-FOC TACs.
15. The CVL-FOC TACs have removed all references to electrified rolling stock and charging arrangements. These will need to be reviewed and re-introduced as relevant to any electrification programme.

Schedule 9 and indemnity caps

16. Schedule 9 limits the respective liabilities of the parties under elements of the TAC. The figures used were negotiated between AKIL and each FOC. They are lower than the default sum in the current Network Rail model contract, reflecting the circumstances of the CVL.

CVL Network Code and other codes

17. AKIL has prepared and consulted on a CVL Network Code³. This was based on Network Rail's Network Code and adapted as appropriate for the CVL. A detailed explanation was provided in the Form F. If significant changes are made to the Network

³ <https://tfwrail.wales/sites/tfwrail.wales/files/2019-10/CVL%20Network%20Code%20-%202025%20October%202019.pdf>

Rail Network Code then there are provisions for changing the CVL Network Code to maintain alignment.

18. AKIL provided us with a summary of the other codes and arrangements:

Table 1 – Summary of other codes and arrangements

Arrangement	Status
Network Statement and Framework Capacity Statement	CVL's Network Statement has been published ⁴ , of which the capacity statement is a part.
Railway Operational Code (ROC)	AKIL is using Network Rail's ROC for now because the CVL will be signalled/controlled from Cardiff until such time as the CVL has its own signalling/control centre at which point, a ROC will be agreed and published by AKIL, for the CVL.
Emergency Access Code	AKIL has agreed with the operators that an Emergency Access Code is not required at this time but this will change in due course.
Connection contracts	The two connection agreements between AKIL and Network Rail have been agreed and directed by ORR but not yet signed. Another is agreed with Merthyr (South Wales) Ltd for Cwmbargoed and currently subject to industry consultation.
Engineering Access Code	AKIL will control engineering access to the CVL, the details of which will be input into Network Rail's engineering access and train planning systems. This means that there will not be a standalone CVL Engineering Access Statement (EAS) but the EAS for the CVL will be incorporated in Network Rail's EAS.
Access Disputes Committee (ADC)	AKIL has agreed a contract with the ADC which will be entered into before the Transfer. It will be renewed annually thereafter.
Delay Attribution Board (DAB)	AKIL has agreed a contract with the DAB although this has not been formally agreed yet, it does not need to take effect until 31 January 2020. It will be renewed annually every March.
Claims Allocation and Handling Agreement (CAHA)	AKIL is signed up to CAHA.

Duration

19. The expiry date of the CVL TACs is the Principal Change Date 2026. This reflects the TACs the FOCs already have in place with Network Rail. The provisions have been expanded to allow for novation to another infrastructure manager, should AKIL cease to be the infrastructure manager of the CVL and TfW wishes to appoint another. This provision allows for the continuation of services.

⁴ <https://tfwrail.wales/about-us/core-valley-lines-infrastructure-manager>

Consultation

20. AKIL conducted a pre-application industry consultation between 25 October and 24 November 2019. Transport Focus supported the proposed application. No objections or issues were declared in the application submitted to ORR.

ORR Review

21. We note that relatively few freight train services operate on the CVL. There are also specific arrangements for the governance of the TfW and AKIL relationship. We have therefore adopted a proportionate approach to the regulation of the CVL contracts. We have also taken into account:

- the use of the Network Rail model contract as a starting point;
- the effort that has been made in drafting agreements specific to the CVL network and ensuring smooth running over services between adjoining networks;
- the agreement of all the parties involved; and
- that no substantive issues were raised in consultation.

22. Our own final review did not identify any unresolved issues. The parties kept us involved as their proposals emerged and took account of our feedback throughout. The parties' communication with us from an early stage helped us understand the arrangements presented to us at the formal application stage.

23. Our decision is to issue directions and approvals, as applied for. I should, however, emphasise that we have considered this case on its specific merits and this does not necessarily represent a precedent for the regulation of other 'new' networks.

24. In certain instances the figures and terms used in the Network Rail TAC were set and/or controlled through Period Reviews and by changes to ORR's model contracts. ORR will not be the economic regulator of the CVL and so some terms are not subject to that control and therefore open to more negotiation between the parties (such as Schedule 9 liability caps). ORR expects transparency and consistency in the approach to these and any future negotiations.

Duration

25. The duration of the CVL TACs is longer than the default period of five years as required by legislation and explained in our guidance⁵, at nearly seven years. This reflects the TACs the FOCs already have with Network Rail and their established expectations. The FOCs argued that they have already justified why they need long-term contracts, reflecting their types of business and investment commitments⁶. It also makes sense in this instance to align the CVL and Network Rail TACs. All parties are in agreement on this matter. The FOCs concerned have operated services with Firm Rights on the CVL or have some expectation of doing so. ORR therefore approves the contract duration in the specific circumstances of this case.

⁵ https://orr.gov.uk/_data/assets/pdf_file/0018/22815/duration-of-framework-agreements-guidance.pdf

⁶ <https://orr.gov.uk/rail/access-to-the-network/track-access/track-access-decisions/decisions-library> [see our decision letters for the FOCs' contracts with Network Rail, 2016.]

Redactions

26. 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 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.
27. Our policy for redacting information from Network Rail-FOC TACs is well established and is currently limited to the facility owner and operator caps in Appendix 1 of Schedule 8 and, on request, non-contractual information and comments in Rights Tables. We will adopt the same policy in relation to CVL-FOC TACs. As matters stand, however, the caps are yet to be agreed and so do not need redaction, for now. If the parties wish ORR to consider redacting any other information before publication they will need to give reasons for each request explaining why publication would seriously and prejudicially affect their interests.
28. When sending us new TACs and supplemental agreements we ask AKIL to provide us with clearly marked redacted and unredacted versions in line with agreed policy.

Other authorisations

29. AKIL will need other relevant authorisations in place before train services will be able to operate including a network operator licence and appropriate safety authorisations.

Part 3 - Network Rail's amendments

Network Rail's track access contracts with FOCs

Purpose

30. Although Network Rail will cease to be the infrastructure manager for the CVL following its divestment to TfW, it will continue to provide certain services to the new network. As a result, changes are necessary to existing Network Rail TACs with FOCs that want to continue to use the CVL. Certain changes were driven by the arrangements discussed above, especially for Schedules 4 and 8.
31. Network Rail and each of the FOCs submitted proposed supplemental agreements to ORR on 27 November. The supplemental agreements concerned are:
- Freightliner Heavy Haul Limited 13th Supplemental Agreement.
 - Freightliner Limited 10th Supplemental Agreement.
 - GB Railfreight Limited 13th Supplemental Agreement.
 - DB Cargo (UK) Limited 31st Supplemental Agreement.

Amendments

Schedule 5

32. The Freightliner Heavy Haul and DB Cargo Schedule 5 Rights Tables have been amended to reflect the boundaries between the two networks including changes to the origins and destinations, as necessary. Network Rail will continue to validate the train paths as part of the national rail timetable.
33. Also, the references to the rolling stock library have been updated to match ORR's model contract and the CVL contract, so it will refer to RSSB's R2 system.

Schedules 4 and 8

34. Network Rail will become the Performance Regime Operator applying the single star model across both networks. The changes to Schedule 4 and 8 were made to allow the implementation of this regime. A full explanation was provided in the Form Fs provided with the application.

Consultation

35. Network Rail conducted a pre-application industry consultation on its website between 25 October and 25 November 2019.

ORR Review

36. The changes to the Network Rail TACs have all been agreed by the parties. No issues were raised by the industry consultation. The changes are necessary to give effect to the arrangements for the CVL discussed above. We ask Network Rail to provide us with signed copies of the supplemental agreements (with versions redacted as appropriate).

ORR model contracts

37. Other freight train operating companies will wish to use freight trains on the CVL. ORR will therefore produce updated model Network Rail TACs. Other operators will be able to enter into these agreements or update their existing contracts using ORR's General Approval⁷ as appropriate. We will also update our guidance in due course. We will not be making available model contracts for the CVL. However, prospective operators will be able to use the newly directed TACs as the basis for their own TACs with AKIL.

Part 4 – ORR approval

Conclusions

38. ORR was content to issue directions to AKIL and the FOCs in respect of the applications submitted to us on 26 November 2019 without further modification.
39. ORR was satisfied to approve the consequential amendments to the current TACs between Network Rail and the FOCs as submitted to us on 27 November 2019. ORR issued approval notices, in advance of them being signed. This was an exception to

⁷ https://orr.gov.uk/_data/assets/pdf_file/0016/23371/freight-track-access-contracts.pdf

our usual processes to reflect that no issues were identified, the close association with the directions for the CVL contracts and the tight timescales involved.

40. These decisions take into account ORR's 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.

CVL Directions

41. Once the FOCs' new TACs with AKIL are signed, in accordance with section 72(5) of the Act and the contract terms, please could AKIL send copies within 28 days; and then in accordance with section 72(2)(b)(iii) redacted versions will be placed on our public register and website.

CVL Codes

42. Please could AKIL ensure that we are sent copies of the CVL Emergency Access Code and the other associated operational codes when they have been finalised with users, and also ensure these are available on the relevant CVL website.

Network Rail approval notices

43. ORR has approved the modifications to the Network Rail-FOC contracts. In accordance with section 72(5) of the Act, and in accordance with section 72(2)(b)(iii), copies of the signed versions will be placed on our public register when sent to us. Copies of our approval notices will be placed on our Public Register and website.

Yours faithfully



Gordon Herbert