



Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

Network Rail
1 Eversholt Street
London
NW1 2DN

8th April 2015

Dear David,

RE: Proposed Track Access Contract Between Network Rail Infrastructure Limited and East Coast Trains Limited under Section 17 of the Railways Act 1993

Executive Summary

The East Coast Main Line is an exceptionally valuable asset in the national transport system. It provides the fastest surface transport between London, North East England and Edinburgh, and is faster than or competitive with air over these distances. It is a multi user route, combining freight, commuter services and long distance passenger service, both franchise and Open Access. Substantial infrastructure enhancements have been completed in CP4 and more are due to be completed in CP5 in order to grow both freight and passenger traffic.

Network Rail welcomes the opportunity to potentially add to the list of operators, and enhance competition through further discussions with East Coast Trains Limited (ECTL) regarding the proposals in this Section 17 Application. Further discussions are required, due to the fact that there are elements of this Application that Network Rail may be able to support in the future, but can't at this time due to a combined demand for access amongst all applicants, over and above the available capacity.

Network Rail is continuing to work constructively with ECTL regarding this Application, and will keep ORR up to date as those discussions progress.

This is an interesting Application which potentially sits alongside the applications of other operators as a complimentary service offering, providing greater choice for end customers, which Network Rail is interested in discussing further.

This Application is one of four Section 17 Applications received for services on the ECML to commence from December 18 onwards. As a result, NR has undertaken a capacity analysis exercise and presented those findings to ORR. Discussions around the results of that analysis are ongoing with ORR.

The proposed contract

Definitions

“Expiry Date” a 10 year term is sought

This application requests a contract length of 10 years.

Legislation currently states (regulation 18.8 of Access and Management Regulations) that 'A framework agreement for a period of between five and ten years must be justified by the existence of commercial

contracts, specialised investments or risks’.

Network Rail recognises the importance of scrutinising applications as to whether investments being made by an applicant are such that they can qualify as being ‘specialised’ in order to justify extended rights to capacity, as required by both The Railways Infrastructure (Access and Management) Regulations and by Art.42 of EU Directive 2012/34. In doing so, the ORR could consider the nature of any identified potential investments on their individual merits, such as that of disposable assets such as rolling stock.

Contingency provisions in case of delay to implementation of future control periods

NR requests that the contract should include a bespoke provision to require ECTL to enter into a contingency provision in case of delay to the implementation of a future CP (given franchised operators’ charges effectively ‘time out’ at the end of each CP).

NR recommends using the text below (most recently used in the new Scotrail contract) for the control period end clause, which would form a new Clause 20:

20 TREATMENT OF FUTURE PERIODIC REVIEWS

20.1 Interim Treatment prior to implementation

If a Proposed Review Notice proposing amendments to the Contract is outstanding and the terms have not been implemented in accordance with paragraph 7 of Schedule 4A to the Act on or before the last day of a Control Period (the “**CP End 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 for the period (the “**Interim Period**”) commencing on and from the day immediately following the CP End Date or on and from any later date (or dates) specified in the Proposed Review Notice in respect of any individual amendment, in each case until such time as:

- (a) a Review Implementation Notice is served; or
- (b) following a reference to the Competition and Markets Authority in accordance with paragraph 9 of Schedule 4A to the Act, any amendments to the Contract, made in accordance with paragraphs 12(8), 12(9) or 14 of Schedule 4A to the Act, come into operation.

20.2 Reconciliation Payment

- (i) Within [30] days after the end of the Interim Period, Network Rail shall calculate whether a reconciliation payment is due to or from the Train Operator by reference to the total amount paid by each party during the Interim Period and the total amount which should have been paid in light of the implementation of the amendments to the Contract (the “**Reconciliation Payment**”), and shall provide to the Train Operator:

- (ii) a statement of the amount due to or by the Train Operator; and
 - (iii) such background workings as may reasonably be required for a proper understanding of the calculation.
- (b) Within [30] days after the date upon which Network Rail shall have provided to the Train Operator the information referred to in clause 20.2(a), any amount due shall be invoiced for payment, and payable, as provided under this Contract.

20.3 Definitions

In this Clause 20:

“Control Period”

means the regulatory control period determined by the ORR, the first such Control Period being the Initial Control Period;

“Initial Control Period”

means the control period operating as at the date of the Contract (which commenced on 1 April due to end on 31 March 2019);

“Proposed Review Notice”

means as at the last day of the Control Period ending immediately prior to the relevant New Control Period the most recently proposed Review Notice given by ORR in accordance with Schedule 4A of the Act;

“Review Implementation Notice”

has the meaning given to “review implementation notice” in paragraph 7 of Schedule 4A to the Act; and

“Review Notice”

has the meaning given to “review notice” in paragraph 4 of Schedule 4A of the Act.

Schedule 4- Engineering Access Statement, Timetable Planning Rules and Restrictions of Use

Network Rail notes that as an Open Access Operator, ECTL is requesting Type 3 Compensation only. Network Rail is content to support that approach.

Schedule 5-The Services and the Specified Equipment

Whilst Network Rail is interested in further discussions with ECTL regarding its proposals in Schedule

5, it cannot yet confirm that the capacity exists to offer the sale of the track access rights described within it, due to the number of competing Applications it has received.

We have undertaken a Capacity Study in order to ascertain the level of rights across the competing applications that could be supported, and Network Rail has fed back its detailed findings to the ORR by separate cover.

In summary the analysis finds that whilst not all of the LDHS paths requested in all the applications can be accommodated, this Application from ECTL presents more flexible options for capacity. Network Rail would be keen to support any combination of applications that provided best use of capacity to the end users.

Network Rail supports that fact that ECTL are seeking 'quantum' rights only, with no Journey Time or Interval protection being sought.

Specified Equipment

Clause 5.1 of Schedule 5 states that the Specified Equipment to be used is 'to be confirmed', although the application form states that:

'The services will be resourced by modern new build electric 125mph rolling stock with performance capabilities comparable to the new Class 800/801 trains that the East Coast franchisee will operate from 2018.'

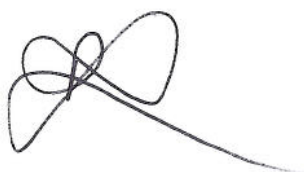
Network Rail would need to satisfy itself that once ECTL is able to confirm its Specified Equipment, that it is fully route and gauge cleared.

Proving period

Network Rail believes that a proving period provision should be included within this contract. Such a provision needs to be negotiated between Network Rail and ECTL, and would essentially provide a mechanism for addressing any deterioration of network performance caused by the introduction of the services contained within this Application. This would ensure that any train service performance disbenefits from the introduction of the new services do not outweigh the benefits of the additional services to passengers.

Any such mechanism should include an obligation on ECTL to remedy any significant deterioration as soon as reasonably practicable rather than at the end of the proving period. In the case of minor deterioration, the provision should oblige both ECTL and Network Rail to meet promptly to take remedial action.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Rebecca Stonehouse". The signature is written in a cursive style with a long horizontal line extending to the right.

Rebecca Stonehouse
pp. Rachel Gilliland