

Application to the Office of Rail Regulation for a passenger track access contract under section 17 of the Railways Act 1993

1. Introduction

This form should be used to apply to the Office of Rail Regulation (ORR) for directions under section 17 of the Railways Act 1993 for a new track access contract. Section 17 is the means by which those seeking the right to use a railway facility (including Network Rail's network) apply for compulsory third party access if they have failed (for whatever reason) to reach agreement with the facility owner.

Where an applicant wishes to submit an application direct to ORR and have ORR conduct the industry consultation on its application, this form should be completed fully before submission to ORR. Alternatively, where an applicant wishes either to request Network Rail (for applications where it is the facility owner) to conduct a pre-application consultation or to conduct a pre-application consultation itself, this form should be completed up to section 7.4 before carrying out a pre-application consultation. The remainder should be completed after the consultation, before applying to ORR for directions under section 17.

The form sets out our standard information requirements for considering such applications. It cross-refers throughout to our criteria and procedures (C&Ps)¹ and, where appropriate, to the Industry code of practice for track access application consultations (the Code of Practice)¹. The C&Ps explain the process and timing for our consideration of access applications and discuss the issues we will need to consider. Applicants should use the published model passenger track access contract as their starting point when drafting the contract they would like². Applicants are strongly encouraged to read the C&Ps and the Code of Practice before making an application.

It is very important that the application is made in good time and prospective applicants are strongly advised to read (and if necessary take advice on) the procedures which are laid out in the Railways Act 1993 and the C&Ps in this respect. We will be happy to discuss prospective applications.

A copy of this form, and of ORR's model track access contract, can be accessed electronically and downloaded via the ORR website (www.rail-reg.gov.uk).

2. The application

2.1 Title of proposed contract:

Track Access Contract (Passenger Services) between Network Rail Infrastructure Limited and NXEC Trains Limited.

2.2 Contact details (*Company and named individual for queries*):

¹ *Criteria and procedures for the approval of passenger track access contracts: fourth edition*, Office of Rail Regulation, May 2006, and *Industry code of practice for track access application consultations*, both available at <http://www.rail-reg.gov.uk/server/show/nav.202>.

² This is available at <http://www.rail-reg.gov.uk/server/show/nav.202>.

Company: NXEC Trains Limited
Contact individual: Adrian Caltieri
Job title: Head of Operations Development
Address: National Express, Main Headquarters Building, Station Road York YO1 6HT

Telephone number: 0845 059 3057
Fax number:
E-mail address: adrian.caltieri@nationalexpress.com

C&P
para(s)
3.9-3.14

2.3 Licence and Railway Safety Case/Certificate: please state whether the applicant intends to operate the services itself or have them operated on its behalf

Please state whether the proposed operator of the services (a) holds a valid train operating licence under section 8 of the Railways Act 1993 or an exemption under section 7, and (b) has an accepted Railway Safety case under the Railways (Safety Case) Regulations 2000 **or** a Safety Certificate under the Railways and Other Guided Transport Systems (Safety) Regulations 2006. If the answer to (a) or (b) is no, please state the point which the proposed operator has reached in obtaining a licence or exemption and Railway Safety Case/Certificate (as the case may be)

NXEC Trains Limited holds a valid train operating licence and a Safety Certificate

3. The proposed contract

3.1 Executive summary: please provide an executive summary of the proposed contract. This should cover the services, the commercial terms, and the applicant's reasons for seeking the contract in the terms proposed. The summary in this section should also explain (here or by cross-reference to the answers in the sections below):

- where there is an existing agreement in respect of the services in question, any differences between the existing agreement and the proposed contract (e.g. calling patterns, frequency, routes, rolling-stock, commercial terms etc);
- any aspects in which the proposed contract contains bespoke provisions departing from the published model track access contract and the charging, performance and restrictions of use regimes established through ORR's periodic review (or subsequent interim reviews) of access charges; and
- any material safety risks that have been identified arising from the proposed contract and the arrangements for their control and mitigation (by reference to the provisions of the operator's Railway Safety Case/Certificate and, so far as is possible, the Railway Safety Case/Certificate of the facility owner)

This proposed contract is to enable the continued delivery of the SLC 2 timetable as required by the Franchise Agreement. The proposal continues the rights currently being sought in the associated S22a (the 23rd) submission from the expiry of the current NXEC Track Access Contract until the Principal Change Date 2015. The Schedule 5 rights being sought in this submission are identical to those in the current S22a submission.

The SLC 2 timetable provides for an off peak frequency of 5 trains per hour to and from London. The service pattern is based on a standard hour timetable which repeats each hour. The main differences compared to the existing NXEC timetable are:

Full use of Model Clauses

A standard pattern which repeats each hour including Saturdays and Sundays with a reduced frequency at the beginning and end of each day

One of the existing Leeds trains extended to/from Bradford each hour

An additional train per hour between London Kings Cross and Lincoln or Harrogate

Commercial terms regarding Schedules 4 and 8 are yet to be agreed

No material safety risks have been identified.

3.2 Terms not agreed with the facility owner: please set out here those specific areas of the proposed contract which the applicant has **not** been able to agree with the facility owner, the reasons for the failure to agree and the reasons for seeking these provisions **2.24 3.72-3.74**

Whilst National Express has had a dialogue with Network Rail on the outline destinations to be served and the timescales for implementation of the service, Network Rail indicated that it did not wish to enter into negotiations on National Express' December 2009 aspirations until such time as the ECML RUS has been established. Although the ORR has stated that the RUS was established on 29 April, National Express has not yet been able to have meaningful dialogue on this proposal.

3.3 Departure from ORR's model passenger track access contract: please set out here, with reasons, any areas where the drafting of the proposed contract omits, amends or adds to ORR's published template passenger track access contract (as appropriate, cross-referencing to the answers below). Wherever the proposed contract contains a new process (e.g. a self-modification provision) ORR will wish to see a flowchart illustrating that the process is robust, internally consistent and leaves no loose ends **2.50-2.56 6.2-6.3**

Schedule 1: The contract includes the bespoke invoicing provisions of NXEC's current TAC.

Schedule 4: Reference to the CTRL and Thameslink Possessions regimes are deleted and the access charge supplement provisions assume indexation from 2008 rather than 2003.

Schedule 7: The contract includes the bespoke payment, invoicing and additional permitted charge provisions of NXEC's current TAC.

Schedule 8: Paragraph 14 dealing with the Passenger's Charter has been deleted in its entirety. This is consistent with the operation of NXEC's current TAC. Appendix 1 has been left blank at this stage.

Schedule 9: The liability cap will need to be agreed in due course.

Schedule 11: Standard Schedule 8 reopener wording has been included to deal with the expected introduction of new services with effect from PCD 2009.

In general terms it is acknowledged that relevant values/amounts in schedules 4, 7, 8 and 9 will need to be included to reflect the relevant CP4 values.

3.4 Duration of contract: please state the commencement date sought for the proposed contract, and provide justification for the proposed duration (in particular, giving reference to ORR's policy on long-term access contracts³ where contracts would be for longer than five years) **4.74-4.79**

The commencement date will be the date ORR issues directions to Network Rail. The duration is proposed to be until the Principal Change Date in December 2015. This covers the life of the existing franchise and until the first principal change date of the next franchise.

4. The expression of access rights and the consumption of capacity

4.1 Benefits: please set out what specific benefits will result from the proposed contract. In particular, please describe any new rights sought or significant changes in the pattern of services, their benefits to passengers and their impact on existing operators **4.30-4.36**

This proposal represents the most radical timetable change on ECML since electrification. It offers significant passenger and industry benefits through the introduction of a standard hour timetable with an increased number of trains thereby improving the service offer to existing and new destinations. A standard hourly pattern is a RUS recommendation and has been an industry aspiration for some time. It will enable the optimisation of connectional opportunities with other operators, effectively using available capacity, staff and train resources, whilst delivering improved performance. The increase in services also facilitates the delivery of the HLOS growth metric.

The operation of an additional train per hour has been utilised to spread stopping patterns between the services thereby giving improvements in journey times to the majority of customers. The additional service gives Lincoln, Garforth, Horsforth, Pannal and Harrogate frequent, high quality, reliable services to London. Cleethorpes and Grimsby will be reconnected to London with a direct service. The extension of some Leeds services to/from Bradford connects Bradford to Wakefield, Peterborough and London hourly without consuming any additional capacity on the core ECML.

A standard hour pattern also facilitates the effective timetabling of other passenger and freight services.

4.2 Congested infrastructure: please state whether the part(s) of the network to which this application relates have been declared congested by the facility owner, under regulations 23-25 of the Railways Infrastructure (Access and Management) Regulations 2005⁴ **4.84-4.85**

None of the infrastructure has been declared congested.

³ *Long-term access contracts: final conclusions*, Office of Rail Regulation, June 2005 available at <http://www.rail-reg.gov.uk/upload/pdf/240.pdf>

⁴ These regulations are available at <http://www.opsi.gov.uk/si/si2005/20053049.htm>

4.3 Adequacy: please set out to what extent and by what process (if any) the applicant has satisfied itself that there is sufficient network capacity for the services in the proposed contract, and the implications for overall network performance and the facility owner's maintenance and renewal activities **4.17-4.38**

The quantum of services applied for is identical to that required by the recent ITT for the ICEC franchise for which 4 separate bidders submitted a compliant timetable. Network Rail has been aware of the need for 5 franchised services per hour since 1999 and this requirement was encompassed in the 2004 ITT. National Express received a letter of support from Network Rail as part of its successful franchise bid in June 2007. The RWA consultancy has been retained by National Express to undertake detailed capacity analysis.

The operation of a standard hour timetable maximises the use of capacity and will drive a performance improvement.

The analysis National Express East Coast undertook as part of its bid was that capacity existed for the level of service proposed in this contract, together with existing open access and 2 freight trains per hour (between Peterborough and Doncaster). Although this is contrary to one of the conclusions of the ECML RUS we wish to point out that the ORR has assured National Express East Coast that it will not rely on this conclusion pending the optimisation of Network Rail's capacity analysis.

2.44-2.49
4.51

4.4 Flexing rights: please provide a general description of the extent of the facility owner's flexing rights in the proposed contract, the rationale for the extent of flex provided, including changes from that in any existing agreement in respect of the services in question, and the extent to which the provisions have been agreed with the facility owner

National Express has been unable to discuss this with Network Rail. As this is an entirely new timetable proposition it is the National Express East Coast view that flexing rights other than at point of departure should be set to zero as flex consumes capacity. National Express is willing to negotiate justifiable flexing needs with Network Rail provided this improves the timetable quality of all operators.

4.5 Protected rights and obligations: please describe the extent to which the proposed contract contains any protected rights and/or protected obligations (i.e. protection from subsequent amendment of the Network Code under Condition C8), and explain the justification for the form and extent of protection sought by reference to ORR's criteria **4.69-4.70**

None

4.6 Journey time protection: please describe the extent to which the proposed contract affords journey time protection to any services (by establishing maximum journey times, fastest key journey times or maximum key journey times), and explain the justification for the form and extent of protection sought by reference to ORR's criteria **4.52-4.66**

This is a new timetable proposition for ECML which provides opportunities for National Express East Coast, Network Rail and other passenger and freight operators. For the purposes of this

application National Express East Coast has set journey time protection at current journey times including existing RoP recovery times. National Express East Coast is willing to negotiate reduced journey time protection where this facilitates a quality timetable proposition for all rail customers.

4.7 Other limitations on flexibility: please describe the extent to which the proposed contract contains any other restrictive obligations on the facility owner (e.g. regular service intervals, clockface departures etc), and explain the justification for any such provisions by reference to ORR's criteria **4.39-4.48**

The rights sought in Table 3.2 of Schedule 5 are intended to offer the customer a regular service pattern by scheduling trains at even intervals although they have different origins or destinations. For Yorkshire services the intention is to provide a half hourly service between London and Leeds in both directions operated by services to Leeds or Bradford. Northbound the half hourly interval applies at London Kings Cross, southbound at Leeds. For Newcastle and Scotland services the intention is to provide a half hourly service between London and Newcastle in both directions and a minimum of an hourly service between London and Scotland, operated by services to/from Newcastle, Edinburgh, Glasgow, Aberdeen or Inverness. Northbound the half hourly interval applies at London Kings Cross, southbound at Newcastle. For Lincoln and Harrogate services the intention is to provide an hourly service between London Kings Cross and Newark Northgate in both directions operated by services to Harrogate, Lincoln or Cleethorpes. Northbound the hourly interval applies at London Kings Cross, southbound at Newark Northgate. The quantum of trains to each location is expressed in Table 2.1 in Schedule 5.

4.8 Specified equipment: where the proposed contract contains changes to specified equipment (rolling stock), please give full details, including timescales, and the extent to which the vehicle and route acceptance procedure in the Network Code (Part F) has been completed **4.49-4.50**

This proposed contract seeks rights for class 180 DMU's and IC 110 sets formed of a Class 90 locomotive, up to 9 mk 3 coaches and a DVT. Vehicle and route acceptance already exists for the IC 110 sets. National Express East Coast has not commenced Network Code (F) as it is considered the process of approving this submission and the associated S22a will cover this

4.9 Moderation of competition: where applicable, please describe the extent to which the proposed contract seeks contractual protection from the introduction of competing services on specific flows, and explain the justification for such protection by reference to ORR's policy on moderation of competition **4.71-4.73**

None

4.10 Franchise obligations: please explain the extent to which the services in the proposed contract are necessary to fulfil obligations under a franchise or concession agreement **4.3-4.4**

National Express East Coast has a franchise commitment to deliver an SLC 2 timetable. The Franchise Agreement provides "The detailed commitments to be delivered by the Franchisee from December 2010 will be developed in due course, and will pay due regard to the recommendations of the East Coast Main Line (ECML) Route Utilisation Strategy (RUS)".

Following the publication of the RUS in February 2008 National Express East Coast has discussed the detail of the SLC 2 timetable with the DfT.

All the services covered by this application are necessary to fulfil National Express East Coast's obligation under the Franchise Agreement except the proposed extensions of current Leeds services to/from Bradford and the proposed new services to/from Harrogate are only a Franchise obligation between London and York. These services in addition to the franchise obligations are new initiatives developed by Nxec since taking over the franchise and have the full support of the DfT. The operation of SLC2 is necessary for National Express East Coast to fulfil the premia payment.

4.11 Public funding: please state whether (and if so to what extent) the services in the proposed contract are subject to financial support from central or local government (other than the Department for Transport or Transport Scotland), including Passenger Transport Executives, and provide a point of contact at that body **3.32 4.23 4.35-4.38**

None

4.12 Passenger Focus: please state whether (and if so to what extent) the services in the proposed contract have been discussed with Passenger Focus, and provide copies of any relevant correspondence **3.32 4.48**

Only an initial briefing has taken place due to the short space of time between the ORR's statement that the RUS has been established of the RUS and this submission. A full stakeholder briefing process is in place.

4.13 Route utilisation strategies (RUSs): if applicable, please also state which RUSs (including the Freight RUS) are considered relevant to this application and whether the proposed rights are consistent with that RUS. If the proposed rights are not consistent, please state the reasons for this. **2.29 4.5-4.8**

This proposal is fully aligned to the ECML RUS in terms of quantum of trains, destinations, serving locations off the core ECML, offering faster journey times to key locations, the use of a standard hourly repeating pattern and minimising the use of sub 125 mph rolling stock.

See also paragraph 4.3 above. This application and its content are without prejudice to any arguments that Nxec Trains Limited may wish to make regarding or relating to the ECML RUS.

5. Incentives

5.1 Charges and performance: please set out, and explain the reasons for, any instances where the proposed contract departs from the charging and/or performance regimes established by ORR's periodic review (or subsequent interim reviews) as reflected in ORR's model passenger track access contract, including the financial implications (e.g. establishment of an access charge supplement or rebate) **5.1-5.43**

None

5.2 Train operator performance: please describe any planned initiatives associated with the operation of the services in the proposed contract aimed at improving the applicant train operator's own performance **4.30 5.1**

The implementation of a standard hourly pattern.

5.3 Facility owner performance: please describe any planned initiatives associated with the operation of the services in the proposed amendment aimed at improving the facility owner's own performance. **4.30 5.1**

The implementation of a standard hourly pattern together with the opportunity to completely rewrite the ECML timetable to drive performance.

5.4 Restrictions of use: please describe and explain the reasons for any instances where the proposed contract departs from the restrictions of use (possessions) compensation regime established by ORR's periodic review of access charges and his subsequent interim review of the possessions incentives regime **5.44-5.51**

None

6. Enhancement

6.1 Enhancement details: where the proposed contract provides for the delivery of any network enhancements, or the services in the proposed contract are predicated on any planned network enhancements, please give full details of the relevant enhancement schemes, including a summary of outputs from the scheme, timescales and the extent to which the network change procedure in the Network Code (Part G) has been completed (where appropriate, by reference to submissions made under ORR's enhancement reporting framework) **4.82-4.83**

None

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6.2 Enhancement charges: please confirm that the arrangements for the funding of any network enhancements are consistent with ORR's Policy Framework for Investments⁵, and summarise the level and duration of payments, and the assumed rate of return (see chapter 3 of the Conclusions document) **5.7 5.12-5.14**

None

7. Other

7.1 Associated applications to ORR: please state whether this application is being made in parallel with, or relates to, any other current or proposed applications to ORR (e.g. in respect of track, station or light maintenance depot access contracts or agreements) **3.17**

<p>1) A S22(a) (the 22nd) the purpose of which is to convert the existing Monday – Friday trains operating on Contingent Rights to Firm Rights. These Firm Rights are carried forward in this S17 application.</p> <p>2) A S22(a) (the 23rd) the purpose of which is to amend the existing Track Access Contract to contain the same rights proposed in this S17 application from the Principal Change Date 2009 until the expiry of the current Contract.</p>
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7.2 Supporting information: please state here any further justification or relevant information in support of the application, including a list and explanation of any other material being submitted (and supply copies with the application) **3.30**

None

7.3 Side letters and collateral agreements: please confirm here that the whole of the proposed contract between the parties has been submitted with this application and that there are no side letters or other documents which purport to qualify or otherwise affect the proposed access contract **6.12-6.16 6.21**

Confirmed

7.4 Confidentiality exclusions: where applicable. please explain clearly what elements of the application **3.23-3.27**

⁵ *Policy Framework for Investments: Conclusions*, Office of Rail Regulation, October 2005, available at <http://www.rail-reg.gov.uk/upload/pdf/255.pdf>

have been excluded, on the grounds of confidentiality, from the version of the proposed amendment sent to consultees for the pre-application consultation process (if undertaken). Alternatively, where an application has not been subject to pre-application consultation, the applicant should state what elements of the application and proposed amendment they would wish ORR to exclude from publication.

In excluding, or seeking the exclusion of, any information, the applicant should have regard to the grounds of confidentiality specified in section 71(2) of the Railways Act 1993, and provide a full justification for each instance by reference to those statutory grounds. Further guidance is provided in the Code of Practice. Subject to its decision on such exclusions, it is ORR's intention to publish this application and the proposed contract on the ORR website. (NB under the process established by Schedule 4 of the Railways Act 1993, ORR is obliged to send a copy of the application **in full** to the facility owner)

Code of Practice:
20-23

This application has not been subject to pre-application consultation. The applicant wishes the ORR to exclude the amount of the additional permitted charges in paragraphs (d) and (e) of paragraph 2 of Part 5 of Schedule 7.

Note: Where a pre-application consultation is to be undertaken in line with the Code of Practice, the remainder of this application should not be completed until after that consultation has been completed

8. Pre-application consultation

8.1: Has a pre-application consultation been carried out in line with the Code of Practice? If yes, please:

Code of Practice:
17-18,
34-39

- state whether Network Rail or you (the applicant) conducted the consultation;
- list all train operators, franchising authorities and other parties that were consulted, stating which parties, if any, made representations (other than nil returns) and attach their responses and any associated documentation to this form; and
- state the period allowed for the consultation and, if this was less than 28 days, please explain the reasons for this.

If a pre-application consultation has not been carried out, please explain what informal discussions have been held with those third parties who might be affected by this application and the nature of any concerns raised.

No

8.2 Resolved issues: please detail any issues raised in response to the consultation that have been resolved to the satisfaction of the consultee. You may wish to refer to responses attached to this form.

Code of Practice:
43-44

Not applicable

8.3 Unresolved issues: please detail any issues raised in response to the consultation that have not been resolved to the satisfaction of the consultee, including any correspondence with that consultee. You may wish to refer to responses attached to this form. Please explain why you do not think these issues should preclude ORR's approval of the application.

Code of Practice:
45

Not applicable

8.4: Please explain any aspects of the application that have changed as a result of the consultation and why they have changed.

Not applicable

8.5: Please list here any further information being provided to ORR to support the application that was not made available to consultees in any pre-application consultation held as part of this application and listed in section 7.2. If the applicants wish ORR to consider excluding this information from subsequent publication they should justify why the information is of a confidential nature, following the guidance provided in section 7.4 above.

Not applicable

9. Certification

Warning: Under section 146 of the Railways Act 1993, any person who, in giving any information or making any application under or for the purposes of any provision of the Railways Act 1993 (including section 17), makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, is guilty of an offence and so liable to criminal prosecution **3.31**

I certify that the information provided in this form is true and complete to the best of my knowledge

Signed Date 09 June 2008.....

Name (in caps) ...DAVID FRANKS..... Job title ...Managing Director.....

For (company)NXEC Trains Limited.....

10. Submission

10.1 What to send:

Please supply, in hard copy, the signed top copy of this application form, one copy of the proposed draft contract, with copies of any documents incorporated by reference (other than established standard industry codes or other instruments) and any other attachments, supporting documents or information. **3.30**

Please also supply the application, the proposed contract and, insofar as it is possible, any other supporting information, in electronic form, by e-mail or on disc, **in plain Microsoft Word format** (i.e. excluding any macros, auto-para or page numbering, or other auto-formatting). **3.28-3.29**

10.2 Where to send it:

Manager, Track Access Team
Directorate of Access, Planning and Performance
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

ORR Form Passenger S17 January 2008