

APPLICATION TO THE REGULATOR FOR APPROVAL OF A FREIGHT TRACK ACCESS CONTRACT UNDER SECTION 17 OF THE RAILWAYS ACT 1993

1. Introduction

This form should be used to apply to the Rail Regulator 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.

The form sets out the Regulator's standard information requirements for considering such applications. It cross-refers throughout to the Regulator's published document on his criteria and procedures for the approval of access contracts¹. That document explains the process and timing for the Regulator's consideration of access applications and discusses the issues the Regulator will need to consider. The Regulator has also published a model freight track access contract which applicants should use as their starting point when drafting the contract they want². Applicants are strongly encouraged to read the Regulator's criteria document before making an application. Cross-references to this document have been included on this form.

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 Regulator's published guidance in this respect.

The track access team at the Office of the Rail Regulator will be happy to discuss prospective applications. Applicants are strongly encouraged to contact the Office at an early stage, preferably before making an application, to discuss their likely requirements. Contact details are shown at the foot of this form.

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

2. The application

2.1 Title of proposed contract:

Track Access Contract (Freight Services) between Network Rail Infrastructure Limited and Freightliner Heavy Haul Limited

Criteria
document
para(s)

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

Company: Freightliner Heavy Haul Limited
Contact individual: Michael Leadbetter
Job title: Rail Access Manager
Address: Basford House, Basford Hall, Off Gresty Road, Crewe, CW2 5AA

Telephone number: 01270 452406
Fax number: 01270 452455
E-mail address: leadbetterm@freightliner.co.uk

¹ *Criteria and procedures for the approval of freight track access contracts: second edition*, Office of the Rail Regulator, London, March 2004.

² *Model Freight Track Access Contract*, Office of the Rail Regulator, London, March 2004.

2.3 Licence and railway safety case Please state whether the applicant intends to operate the services himself or have them operated on his behalf **3.10-3.14**

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. If the answer to (a) or (b) is no, please state the point which that person has reached in his obtaining of the licence, exemption or railway safety case (as the case may be)

Freightliner Heavy Haul Limited (FHH) intends to operate the services itself and holds a valid operating licence under section 8 of the Railways Act 1993. FHH also has an accepted railway safety case under the Railways (Safety Case) Regulations 2000.

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): **3.19**

- 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. service characteristics, routes, intermediate points, rolling stock, commercial terms etc); **3.67**
- any respects in which the proposed contract contains bespoke provisions departing from the published model track access contract and the charging, performance and possessions regimes in the Regulator's model freight track access contract; and **2.42-2.46**
6.2-6.3
- 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 facility owner's and operator's railway safety cases) **4.5-4.6**

This application is for a new track access contract to commence on 14th June 2008, upon expiry of the existing track access contract which expires on 13th June 2008.

Duration – it is proposed that the expiry date of this agreement will be 30th September 2016 as this is expected to be 10 years from the approximate approval time of the agreement. In line with the ORR policy on long-term access contracts and the Railways Infrastructure (Access and Management) Regulations 2005 FHH believes it has justification for a 10 year access agreement. FHH has invested in many new locomotives and wagons since 2001. This equipment is expected to have a 30 year lifespan. FHH has various commercial contracts with customers, these vary in length between 1 and 10 years and also requires a 10 year access agreement in order to give potential new customers confidence to invest in new equipment to allow them to move freight by rail.

FHH also notes that a 10 year access agreement has recently been approved between EWS and Network Rail (NR). FHH does not believe that its circumstances are materially different to those of EWS and that it would give EWS an advantage in the freight on rail market if a similar length contract was not approved between FHH and NR.

Services – The services which this track access agreement would apply to are the movement of rail freight services and the associated empty wagon, light-engine movements and ancillary movements.

Commercial Terms – The terms of the contract are based on the ORR's freight model contract. The charges for the contract are in accordance with the ORR's freight model contract and are calculated by reference to the charges published on the web site of the ORR.

The proposed contract includes some variances to the freight model contract and these are listed under paragraph 3.3 of this application form.

The Schedule 5 access rights are based on the Approved 12th Supplemental Agreement. Some amendments to existing services and new services are included. This application includes a commentary listing the differences between this application and the 12th Supplemental Agreement.

Criteria
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2.24
3.65-3.68

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

All clauses of the main body of the contract have been agreed with Network Rail.

In addition the wording of the following Schedules have been agreed:

Schedule 1 - All
Schedule 2 - All
Schedule 3 - All
Schedule 4 - All
Schedule 5 – with the exception of Paragraph 4.6.16 and the appended Rights Table and the Cordon Cap Table
Schedule 6 - All
Schedule 7 - with the exception of Paragraph 2.7.4
Schedule 8 – wording agreed with the exception of paragraph 8.2 (cancellation sums) and paragraph 13.1 (volume related cap adjustment) and Appendix 1 has not been agreed
Schedule 9 - All agreed except Paragraph 3 (a) and 4 (a)
Schedule 10 – All
Schedule 11 – NR unable to agree as needs to be agreed by CTRL
Schedule 12 - All
Schedule 13 – All (Re-opener of Schedule 4)

3.3 Departure from Regulator's model track access contract Please set out here, with reasons, any areas where the drafting of the proposed contract omits, amends or adds to the Regulator's published template track access contract (as appropriate, cross-referencing to the answers below). Where the change is one that we have invited through the model contract and is relatively self-explanatory (e.g. where the name of the operator has been added in the appropriate place) you may wish to confirm that this change has been made to give effect to the contract. Wherever the proposed contract contains a new process (e.g. a self-modification provision) the Regulator will wish to see a flowchart illustrating that the process is robust, internally consistent and leaves no loose ends

The proposed contract is based on the Regulator's model track access contract as published on the ORR website. We list below the proposed variances:

Clause 1.1

Removal of definitions "Longstop Date" – not required

Additional definition for "Enhanced Cancellation Sum" (see Schedule 8)

Clause 3.2 ,3.3, 3.4 and 3.5(a)

Deleted – not required

Clause 18.8 Adjustment (additional)

Schedule 11 shall have effect

Clause 18.9 Adjustment (additional)

Schedule 12 shall have effect

Clause 18.10 Adjustment (additional)

Schedule 13 shall have effect

Schedule 4 – Paragraph 3.4 amended to include reference to Enhanced Cancellation Sum. (see Schedule 8)

Schedule 5 – WCML included as existing contract except with clause 4.6.16 for termination

Schedule 7 – Definition of indexed figures updated to include Enhanced Cancellation Sum.

IIEC to be calculated in respect of Year ending 31st December vice Financial Year.

Schedule 8 – Introduction of a new paragraph 8.2.2 (Enhanced Cancellation Sum), consequently paragraph 8.2.2 becomes 8.2.3, amendments to Paragraphs 9.2.1 and 9.2.2. and Appendices 1 and 2 are required in addition. Inclusion of paragraph 13, Adjustment of the Network Rail and Train Operator Caps, which is the same as paragraph 13 in existing contract.

Schedule 9 Paragraphs 3 and 4 – this paragraph is inconsistent with Clause 11.6.6 and has been amended so it is consistent with Clause 11.6.6. The principle that the Annual Liability Cap should be based on when incidents begin to occur not when they are settled.

Schedule 11 CTRL - the schedule included is as per the existing FHH access agreement. This is the wording that has previously been agreed with NR/CTRL

Schedule 12 West Coast Main Line – included as per existing contract except with clause 4.6.16 for termination

Schedule 13 Schedule 4 re-opener - this schedule allows for Schedule 4 to be amended following the completion of the ORR's Possessions Review. The current model clause Schedule 4 is unsatisfactory as it does not include any wording which covers the situation where Network Rail requires a possession that if implemented would prevent the freight operator's Firm Contractual Rights being used or could only be used with considerable variation e.g. a major diversion or by using different traction. A decision can only currently be made based on the Decision Criteria in the Network Code. The Decision Criteria includes many conflicting statements and usually does not lead to a conclusive position. This situation has led to many disputes between Network Rail and FHH.

3.4 Duration of contract Please indicate the commencement date sought for the proposed contract, **4.59-4.64** and provide justification for the proposed duration (in particular any factors that would support a contract longer than the standard five-year period contemplated by Directive 2001/14/EC)

It is proposed that this contract will commence on 14th June 2008 and expire on 30th September 2016.

This length of contract is in line with the ORR's policy on long term access agreement and Criteria and procedures for the approval of freight track access contracts: third edition.

FHH has various commercial contracts in place with customers that vary between 1 and 10 years in duration.

FHH has invested considerably in new locomotives and wagons over the last 5 years, this is specialised equipment that has no use outside of the immediate freight on rail market. This equipment has a lifespan of approximately 30 years. FHH and its customers require to invest in new specialised equipment in its terminals and this equipment has a lifespan of 30-40 years,

FHH requires certainty of access rights in order to make these investments.

The duration of the proposed contract is in line with the recently approved EWS contract and the circumstances are not materially different.

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

4.24-4.29

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 freight customers and their impact on existing operators

The access rights are based on the existing FHH 12th Supplemental Agreement. Some rights have been amended and there are some additional access rights included. A summary of these changes is attached to this application form as Appendix 1.

These amendments reflect the changing requirements of customers and the distribution patterns that they require. As freight operators we must have the ability to be flexible to changing requirements as road operators can be.

Some access rights have been voluntarily relinquished as they are no longer required

All additional rights that are proposed as Level One rights are within the current WTT and therefore should have no material impact on existing operators.

A number of additional rights have been proposed as Level Two rights and some of these are not included at the time of application within the current WTT. FHH are currently preparing bids for these Level Two rights into "white space" within the WTT and the paths required are for new business that we are planning to operate within the next 18 to 24 months. Level two rights are quantum rights only and as these will only be added to the WTT into "white space" we do not believe that they will materially impact on existing operators.

Additional rights allow for growth in volumes moved by FHH.

4.2 Adequacy Please set out to what extent and by what process (if any) the applicant has satisfied themselves that there is sufficient network capacity for the levels of rights for services in the proposed contract, and the implications for overall network performance and the facility owner's maintenance and renewal activities **4.7-4.29**

FHH is satisfied that there is sufficient network capacity for all services within the current WTT.

FHH has requested Level Two rights (quantum) for a number of additional services. FHH has examined the current WTT for these routes and believes that there is current capacity within a 24 hour period for these quantum rights to be satisfied.

4.3 Level 1 rights Please state to what extent the level 1 rights in the proposed contract are required to service freight haulage contracts currently held by the operator and how the length of these contracts compares with the length of the proposed contract **4.30-4.33**

FHH operates services for a number of customers in differing areas of interest. However the majority of these customers operate out of terminals that are constrained on space and therefore the individual timing of services is extremely important. Furthermore a high percentage of services are timed to meet onward transportation and therefore arrival within a certain timespan is required. A number of loading and discharge locations are also limited by environmental constraints.

Virtually all services have some contracted committed level of service. Contracts with customers vary from 1-10 years in duration.

4.4 Level 2 rights Please comment on the extent to which the operator expects to use the level 2 rights in the proposed contract. Where rights are not proposed to be used fully, please provide a justification for why the Regulator should approve them as requested **4.30-4.33**

All Level 2 rights requested are for new services which are expected to be operated within the next 18 months (though many will commence much sooner).

Once these services have been established within the WTT FHH will meet with NR with a view to applying to convert these services to Level 1 rights by means of a Section 22.

4.5 Cordon caps Please explain any changes to existing cordon caps and/or whether any new cordon caps are proposed **4.54-4.56**

Cordon Caps are proposed to reflect the new Level 2 rights requested.

4.6 Flexing rights Please provide a rationale for any departure from the default +/-30 minutes flex provision **2.38-2.41**
4.41-4.42

The majority of rights included in this application have been proposed with a flex of +/- 30 minutes. A number of rights are proposed with a flex of +/- 15 minutes, this flex reflects constraints in terminal working which require services to be within a specific time window. All of these services have flex of +/- 15 minutes in the current FHH track access agreement. A number of services are also included with a flex's of +/- 60 minutes and +/-120 minutes, these are to allow Network Rail flexibility in pathing these services over congested areas of the Network and also at weekends around possession opportunities, again specific detail on changes proposed from the current agreement are included in the attached commentary (Appendix A).

4.7 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 the Regulator's criteria **4.57-4.58**

Not applicable

4.8 Other limitations on flexibility Please describe the extent to which the proposed contract contains any other restrictive obligations on the facility owner (e.g. a right that can be exercised over only a particular route), and explain the justification for any such provisions by reference to the Regulator's criteria

4.30-4.46

Certain services that operate at an increased trailing length or weight can only be operated over one route for at least part of their journey, due to the constrained nature of any alternative routes. A number of waste services are also constrained by gauge, this and other restrictions are listed on the rights table in Schedule 5.

4.9 SRA strategies Please state here which of the SRA's strategies are considered relevant to this application and why

2.15-2.19
4.3-4.4

Statement by Transport Secretary on the Government's objectives for rail freight delivered to Parliament on 19th July 2005

The Future of Rail White paper published July 2004

5. Incentives

5.1 Charges and performance Please indicate, and explain the reasons for, any instances where the proposed contract departs from the charging and/or performance regimes in the model freight track access contract including the financial implications (e.g. establishment of an access charge supplement or rebate)

5.1-5.17

5.22-5.29

The current Cancellation Sum (~~£~~ at 2006/7 price levels) does not make reasonable provision for compensation nor does it represent the actual losses made by FHH in the event of a cancellation of a service. ~~£~~ This does not include the loss of goodwill which is a major factor in retaining business to rail

However FHH accepts that Network Rail are only funded for the current level Cancellation Sum payment at an efficient level of performance.

In this application FHH proposes that if Network Rail's performance should worsen and the number of cancellations per year should increase the Cancellation Sum just for the cancellations in excess of the agreed target amount should increase to ~~£~~ per train.

FHH believes that this would act as an incentive to Network Rail to not worsen their performance to FHH. This proposal would not alter Network Rail's cash flow unless they become less efficient. Paragraph 8.2.2 is introduced to support this payment of an 'Enhanced Cancellation Sum' in the event of an increased number of cancellations.

In the current track access agreement the cancellation sum of ~~£~~ is not set at broadly the same level as the compensation payable under Schedule 8 for the minutes delay accrued by the time the service is deemed a full cancellation as per the ORR Criteria and procedures for the approval of freight track access contracts :third edition. In the current contract the service is deemed to be a cancellation if it does not arrive or depart within 12 hours of its planned time.

The NR payment rate is currently ~~£~~ (06/07 price levels) x 12 hours (720 minutes) equals ~~£~~ per service. FHH is of the view that the current imbalance between the cancellation sum and the value of the minutes accrued on a late running service acts as a disincentive on Network Rail and encourages perverse behaviour.

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 train operator's own performance

4.24
5.22-5.28

FHH has worked with NR to improve performance on certain trains which were poor performers, these include Thorney Mill to Bardon Hill, Bristol to Calvert waste and the cement from Owxwellmains to View Park. For each of these trains Network Rail helped us identify what the issues by extracting data from thir PALADIN system. Where reasons for trends of delays were established action plans were put in place to improve performance. Where new problem services arise we will continue to work with Network Rail to undertake similar reviews.

5.3 Restrictions of use Please indicate and explain the reasons for any instances where the proposed contract departs from the restrictions of use regime in the model freight track access contract **5.30-5.33**

The Schedule 4 proposed is as per the model clauses contract however a Schedule 13 has been introduced as a re-opener of Schedule 4, to take place once the current ORR Possessions Review is complete.

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 the Regulator's enhancement reporting framework) **4.67-4.69**

Not applicable

6.2 Enhancement charges Please confirm that the arrangements for the funding of any network enhancements (outside the scope of the incremental costs provisions) are consistent with the Regulator's enhancement framework, and summarise the level and duration of payments, and the assumed rate of return **5.18-5.20**

Not applicable

7. Other

7.1 Associated applications to the Regulator Please indicate whether this application is being made in parallel with, or relates to, any other current or proposed applications to the Regulator (e.g. in respect of track, station or other freight facilities access contracts or agreements) **3.15**

It is expected that a supplemental agreement (13th) to amend the existing access agreement access rights, which expire on 13th June 2008, will be submitted shortly.

7.2 Unregulated access Please comment on the extent to which any contracts are being negotiated for access to a facility adjoining Network Rail's network (e.g. to a freight light maintenance depot) where the Regulator's approval is not required³

2.54
3.15

Current arrangements to terminals served by the existing access agreement will continue.

7.3 Supporting information Please indicate 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)

3.28

Appendix A – commentary on access rights changes

7.4 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 qualify or otherwise affect the proposed access contract

6.12-6.16
6.21

None apart from those listed in Schedule 3

7.5 Confidentiality exclusions Please indicate clearly any elements in the application and the proposed contract that the parties would wish to exclude from wider consultation on 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. Subject to his decision on such exclusions, it is the Regulator's intention to publish this application and the proposed contract on the ORR website

3.21-
3.25

All words in italics – references to commercial revenues which are commercially confidential.

³ As provided for in The Railways (Class and Miscellaneous Exemptions) Order 1994, SI 1994 No.606

8. 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

I certify that the information provided in this form is true and complete to the best of my knowledge and that [facility owner] and [beneficiary] are willing to enter into the attached contract as submitted

Signed:
Date:
Name (in caps):
Job title:
For (company):

9. Submission

9.1 What to send

Please supply, in hard copy, the signed top copy of this application form, three copies of the proposed draft contract, copies of any documents incorporated by reference (other than established standard industry codes or other instruments) and any other attachments, supporting documents or information. **3.28**

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). **3.26-3.27**

9.2 Where to send it

Manager, Track Access Division
Directorate of Rail Markets and Access
Office of the Rail Regulator
1 Waterhouse Square
138-142 Holborn
LONDON
EC1N 2TQ

ORR Form S18 March 2004