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Dear Rob and Richard

Approval of a track access contract between Network Rail Infrastructure Limited and First Greater Western Limited

Introduction

1. The Office of Rail Regulation (ORR) has today approved the terms of the track access contract originally submitted by Network Rail Infrastructure Limited (Network Rail), with the agreement of First Greater Western Limited (FGW) (jointly the parties), under section 18 of the Railways Act 1993 (the Act) on 27 October 2006. Further to our initial comments, the parties subsequently submitted revised drafts on 23 November 2006 and again on 27 November 2006. We have directed Network Rail to enter into the contract under section 18(7) of the Act subject to certain modifications to the final draft of 27 November 2006. In considering the application and in reaching our decision, we have had regard to our statutory duties under section 4 of the Act. The purpose of this letter is to explain the reasons for our decision.

The contract

2. The contract gives FGW permission to use Network Rail's network in order to operate franchised passenger services. It will come into effect from the later of the date of signature and 10 December 2006 and will expire on the Principal Change Date (PCD) 2014. It replaces three existing contracts, those of the former Great Western Trains Company Limited, First Great Western Link Limited, and Wales and West Passenger Trains Limited, all of which were transferred to FGW when the three franchises were merged into one.

3. FGW's franchise expires on 31 March 2016, subject to some limited options for early termination at 31 March 2013. FGW had sought rights until PCD 2016, however, Network Rail was only prepared to offer rights until PCD 2014. A term of eight years has therefore been requested in order to provide FGW and the Department for Transport (DfT) with a reasonable measure of certainty for the bulk of the duration of the franchise.

4. A contract of between five and ten years would be in accordance with our policy on long term track access contracts, taking into account the very material obligations FGW has under the franchise agreement, including an investment in excess of £200million in the first three years. A term of eight years is acceptable in that it provides FGW, or any subsequent franchisee, with the certainty of rights through to the end of the timetable period following the potential break point in the franchise agreement.

5. The contract contains the rights necessary to provide the services described in FGW's franchise agreement, as contained in the December 2006 timetable offer. Whilst this timetable shows some changes from the current one, the services retain broadly the same structure and use the same rolling stock as before.

Departures from the model contract

6. We believe that part of the value of a model contract is the knowledge that other operators' contracts contain the same, or very largely the same, terms and conditions. We are therefore concerned to ensure that we only approve those departures that we believe are strictly necessary.

7. The commercial terms of this contract follow very much the model contract format and are based on the existing commercial arrangements and consolidation of the services of three separate operators into one. The proposed contract submitted by Network Rail contained a number of departures from the model contract. Many of these are changes that we will be making to the model contract, for example, to reflect the transfer of responsibilities from the Strategic Rail Authority to the Secretary of State pursuant to the

Railways Act 2005, and the implementation of the Performance Regime Review under our Review notice of December 2005.

8. There are two other significant departures from the model contract namely:
- electricity supply provision is treated differently, in view of the arrangements to operate Heathrow Connect services between Paddington and Hayes & Harlington, whereby Heathrow Airport Limited takes responsibility for the payment of electricity traction current charges; and
 - additional access charges are included in respect of some inherited infrastructure projects at Bristol and Reading and also operations outside the time window envisaged under the last regulatory review that require FGW to pay the costs of signal boxes remaining open beyond their previous hours.

These provisions mirror provisions in the existing track access contracts and we consider it is appropriate that the new contract should retain them.

9. The contract submitted by Network Rail also contained a number of other minor departures from the model contract, mainly to Schedule 5. Where we consider the parties have justified these changes, we have agreed them. Where they were unable to do so, the directed contract reverts to the model contract.

Consultation

10. In considering track access applications, we make considerable effort to ensure that our decision is consistent with our statutory duties. This is a significant contract using capacity across a wide area of the network. Therefore, in addition to consulting those we are required to consult under the Act, we also consulted widely across the rail industry. We received few comments, due in part to the earlier consultation by the DfT on its franchise proposals, and the consultation then undertaken by the parties. Furthermore, there were no unresolved disputes when the December 2006 timetable was finalised.

11. In the following paragraphs, we outline the principal comments received. As our own review of the contract raised similar concerns, our views on the comments received appear under the heading "ORR review".

Arriva Trains Wales/Trenau Arriva Cymru Limited

12. Arriva Trains Wales/Trenau Arriva Cymru Limited (ATW) expressed concern that FGW wished to secure 30 Firm Rights to extra slots in association with special events, together with a further 30 Contingent Rights, a total of 60 rights. This compared with

ATW's total of 20 Contingent Rights. ATW said that both operators provided complementary services for events at Cardiff's Millennium Stadium and should have broadly similar rights, otherwise Network Rail would award first priority to bids from FGW, potentially allowing it to monopolise capacity.

Heathrow Express

13. Heathrow Express raised three issues:

- it pointed out that some of the times quoted in Table 3.3 of Schedule 5 – Earliest and latest Passenger Train Slots – were incorrect;
- it suggested an addition to the platform rights sought by FGW in respect of the Heathrow Connect services; and
- it questioned the need for FGW to have stabling rights for diesel multiple units at Paddington, now that those units could be stabled at Old Oak Common.

New Southern Railway Limited

14. New Southern Railway Limited (Southern) raised two issues:

- as FGW does not operate Class 170s (as far as Southern was aware) it questioned why this class was listed in the Specified Equipment for Service Group EF09; and
- it felt that the level of journey time protection listed in Schedule 5 for the Reading - Gatwick services (Maximum Journey Time, Fastest Key Journey Time and Maximum Key Journey Time) seemed excessive and asked whether Network Rail was certain that these restrictions would not unduly compromise its ability to make efficient use of network capacity.

ORR review

15. Before formal submission of the proposed contract on 27 October 2006, we met with the parties on three occasions to discuss various aspects of the proposed contract. They had also submitted a draft of the proposed contract, except for Schedules 5 and 8, and we had had the opportunity to agree with them certain changes before formal submission. The review in the following paragraphs relates specifically to the formal submission of 27 October 2006.

Capacity and performance

16. In approving the proposed contract, we are approving a significant allocation of capacity on the national network. We are acutely aware of this, particularly in the context of the ongoing debate surrounding capacity utilisation and performance. We believe that it is critical that new applications such as this one receive a high degree of scrutiny in order to ensure that the resulting allocation of capacity is consistent with the discharge of our statutory duties. In addition to the wide consultation of all potentially interested parties, we have therefore carried out our own detailed assessment of the proposed use of capacity. This assessment has addressed a number of issues, described below.

Route Utilisation Strategies

17. The parties advised that the Service Level Commitment (SLC), on which the proposed contract was based, was consistent with the Route Utilisation Strategy (RUS) for the Great Western Main Line (GWML). They also advised that they believed that the rights were consistent with the relevant RUSs for the South Western Main Line and the Brighton Main Line (BML). However, we found that there was no reference to the proposed second train each hour between Reading and Gatwick Airport in the BML RUS, which was in the SLC but could not be timetabled at this stage. No rights were sought for these trains between Redhill and Gatwick Airport.

Consistency with other operators' access rights

18. We would not intentionally approve access rights which conflict with access rights held by other operators. In view of the fact that the services to be operated by FGW from December 2006 are at similar levels to those it is currently operating, no consultees had any comments on consistency with other operators' rights, other than in respect of rights to slots in association with special events as mentioned in paragraph 12.

Unused access rights

19. In paragraph 4.28 of our criteria and procedures document¹ we state that we would normally expect to approve Firm Rights (or any other entitlement) only where we are satisfied that the train operator has a firm intention to exercise those rights. FGW has confirmed that it intends to use all of the access rights in the proposed contract.

¹ *Criteria and procedures for the approval of passenger track access contracts: fourth edition*, ORR, London, May 2006. Available on the ORR website at: http://www.rail-reg.gov.uk/upload/pdf/288-pass_candp4ed.pdf

Consistency with available resources

20. We are always concerned to ensure that train operators have adequate resources available for the services they propose to operate. This is important not only for the success of the proposed services, but also because of the adverse effect on network performance of inadequate resources. We have therefore confirmed that FGW's resources are appropriate to the level of services implied by the proposed contract.

Allocation of scarce capacity

21. The access rights in the proposed contract use network capacity that is, in some cases, already quite congested. The approval of those rights, therefore, might preclude the subsequent approval of new access rights for other operators. It could also affect overall network performance, because the more services running on a particular route, the more difficult it is for that part of the network to recover from disruptions. We have considered these issues carefully before approving the proposed contract.

22. We have taken into account that the proposed contract is one that Network Rail is willing to enter into and that it adds only a relatively small number of new rights to those in the three existing track access contracts. However, some of these increases are at key locations on the network. The parties believe that the development of the December 2006 timetable has proved these increases are acceptable, and that a move to a more standard hour timetable occurring at the same time will improve timetable efficiency and performance. Network Rail, as the operator of the network, should be well placed to judge whether the rights proposed represent an efficient use of capacity or whether some reduction in the operator's existing rights would improve overall network performance, to the benefit of passengers and freight customers.

Operational performance

23. Network Rail and FGW advised that:

- they are confident that the outcome of the process to develop the December 2006 timetable was supported by adequate network capacity and had been reviewed for effects on network performance and maintenance and renewal activities;
- the rights sought in the contract were to operate services reflecting what the timetable development process had proven;
- as part of its franchise agreement FGW was committed to a full suite of significant fleet reliability enhancements, including fitting new engines to its fleet of HSTs;

- reducing much of the HST fleet to 2 + 7 formation, as against the current 2 + 8, and maintaining current journey times would improve punctuality; and
- the planned increase in the line speed on the relief lines between Paddington and Reading was also aimed at improving performance rather than reducing journey times.

24. We have considered whether the proposed access rights might have a potentially adverse effect on operational performance. We do not believe this to be the case in view of the fact that FGW will be operating services retaining broadly the same structure and using the same rolling stock as currently. Whilst there are some increased service levels, as noted above this is combined with a move to a more standard hour timetable.

25. However, current operational performance on the GWML is of great concern to ORR and we are currently reviewing performance on the route with both Network Rail and FGW. This review is an ongoing work-stream for this office. As FGW's services are a key part of this review, we do not wish to raise any specific issues in relation to operational performance in this decision letter.

Other issues

26. We had a number of major concerns with the expression of the rights sought in Schedule 5 of the contract; the validity of the contents of some of the tables in Schedule 5; the charging provisions in Schedule 7; and whether Relevant Schedule 8 Modifications were required.

27. We provided the parties with a detailed list of our concerns. We suggested that they should amend and submit a revised draft contract, including amended provisions and tables where necessary. The parties submitted a response to our concerns, in which they accepted some, but did not agree with others, and then submitted a revised draft contract on 23 November 2006, with a further draft on 27 November 2006.

28. In the following paragraphs, we detail our concerns with the original expression of rights and validity of the contents of Schedule 5, before moving on to discuss the issues relating to Schedule 7 and Schedule 8.

Table 2.1: Passenger Train Slots

29. When we reviewed the quantum of rights we found a number of apparent anomalies which we pointed out to the parties. They re-checked the quantum, acknowledged that there were a number of errors, and made corrections where necessary in their revised draft of 23 November 2006.

Rights for special events

30. We shared ATW's concern with the rights sought by FGW to run additional services in connection with special events. We advised the parties that we would not normally approve Firm Rights for Relief Passenger Train Slots, as Network Rail would have to reserve too much capacity to be able to accommodate the wide range of possible bids. In any case, to be awarded first priority, Firm Rights must be exercised at the Priority Date for the relevant timetable and it seems unlikely that FGW would be able to bid for relief slots so far in advance. We also said that the proposal for 30 Firm Rights a day plus 30 Contingent Rights a day seemed excessive.

31. The parties reviewed their proposals and said that there were implications in the drafting that they had not appreciated, it not being FGW's intention to have Firm Rights to 30 slots. Rather, FGW was seeking to secure paths for services to/from London and/or Bristol. FGW said that space existed for these services and, in the past, the London trains at least had been incorporated in certain years in the First Working Timetable.

32. FGW said that it believed that if the contract included the right and FGW gave reference to it at the Priority Date notification, its use could be picked off the shelf when required under short term planning processes. It said that notification would help Network Rail to provide allowance for it in developing the timetable. FGW therefore proposed to retain Contingent Rights summed over all service groups to 30 Relief Train Slots on any day in connection with the Henley Regatta, 20 in connection with the Glastonbury festival and ten on any other day. As part of this maximum allowance, FGW sought Firm Rights summed over all service groups for eight slots serving either Bristol Temple Meads or Paddington in connection with either Glastonbury or Cardiff events.

33. FGW said that the Cardiff slots would in the main assist in moving passengers who would otherwise overcrowd services operated by all operators between Newport and Cardiff and Swansea (or West Wales) and Cardiff. FGW added that it had sought to accommodate ATW's concerns by capping the rights sought at the levels indicated above.

34. We do not agree with FGW regarding the Priority Date notification and subsequent short term planning processes mentioned in paragraph 32. At the Priority Date, a train operator must notify Network Rail of the Firm Rights it intends to exercise, the Firm Rights it does not intend to exercise and any other rights it intends to exercise. Those rights are then incorporated into the Working Timetable in accordance with the Decision Criteria and the priorities set out in Part D paragraph 3.2.3. Under FGW's revised proposal, Network Rail would still have to reserve capacity permanently in the timetable to accommodate an additional eight services on any day for any of the services listed Table 2.1 serving Paddington and/or Bristol Temple Meads. As FGW would also be entitled to change the

origin, Calling Pattern, Journey Time and destination of any of these services, it is difficult to see how Network Rail could guarantee to meet all of those wide-ranging possibilities.

35. Part D of the Network Code states clearly that Spot Bids using Contingent Rights are considered at the time they are made. If they are made in connection with a sporting or other public event, then Network Rail may exercise its flexing right to resolve any conflicts with trains already scheduled in the timetable. If the spot bid trains will carry passenger numbers which are materially greater than are usually carried on trains on the relevant part of the network at that time, then the train operator whose service needs to be flexed to accommodate the spot bid must not unreasonably withhold or delay its consent to the exercise of Network Rail's flexing right. In compiling the timetable, Network Rail should, of course, consider how it would accommodate bids for relief trains when they are made. We believe rights to Relief Passenger Train Slots should be contingent unless they are for specific origin, destination and dates, such as summer holiday relief trains. Therefore, the directed contract does not include the revised Firm Rights sought by FGW in paragraph 32, but does include the Contingent Rights as listed.

Public Holidays

36. In the proposed contract, the parties had omitted to say what service would operate on public holidays. We explained that the effect of not including any specific provisions was that FGW would retain the usual rights it had on the day of the week on which the public holiday fell; for example, FGW's rights on Good Friday would be the same as any other Friday.

37. FGW advised that its franchise required it to operate a Saturday service on bank holidays and between Christmas and New Year. However, some other operators ran a modified weekday service, which made it difficult for Network Rail to ensure that it could deliver firm rights for a Saturday service.

38. As the parties were unable to resolve this issue in the time available, we agreed that paragraph 2.9 in Schedule 5 should be left as "Not used", but the parties should agree appropriate drafting and submit it for approval in a subsequent supplemental agreement.

Table 3.1: Service Intervals and associated paragraphs

39. As originally submitted, the time-bands during which the service interval was to apply were largely missing from the tables. There were some other apparent anomalies, and the parties had departed from model contract wording in the associated paragraphs.

40. In their revised draft of 23 November 2006, the parties reverted to model contract wording, addressed our concerns about the absence of time-bands and resolved the apparent anomalies.

Table 3.3: Earliest and latest Passenger Train Slots

41. As originally submitted, these tables contained a very large number of entries, some of which appeared not to reflect the actual times of the first and last trains. We pointed out to the parties that the number of entries was excessive, as the purpose of these tables is to set down in the contract the times at which the route should be open for the earliest service in the morning and the latest service in the evening. Once a route is protected by one service, other services using the same route do not need to be listed in the tables, as it adds nothing.

42. The parties acknowledged that they had misinterpreted these tables and in their revised draft of 23 November 2006 reduced the number of entries. Where there was an anomaly between the times shown and the current times of FGW's first and last trains, FGW advised that it wished to retain the original times, as this provided FGW with additional protection. As Network Rail was happy to agree to this, we saw no reason to insist on the times being amended.

Table 4.1: Calling Patterns

43. We identified a number of anomalies in the calling patterns which the parties addressed in the revised draft of 23 November 2006.

Table 5.1: Specified Equipment

44. The example quoted by Southern in paragraph 14 above was one of a number of instances where the proposed contract included rolling stock which either FGW does not currently operate, is not planning to operate, or is not appropriate for the particular route. The parties accepted our suggested changes and included them in the revised draft of 23 November 2006.

Table 6.1: Maximum Journey Times, Table 6.2: Fastest Key Journey Times and Table 6.3: Maximum Key Journey Times

45. Our greatest concern was with the proposals for journey time protection. We said to the parties that Table 6.1: Maximum Journey Times seemed to have been used only for Sunday services, when it should have been used for non-critical services throughout the week. This should be the main journey time protection used. Fastest Key Journey Times and Maximum Key Journey Times should be used in far fewer cases, as explained below.

46. Paragraph 4.59 of our criteria & procedures document explains that Fastest Key Journey Times are intended to protect the operator against degradation of the network affecting journey times by establishing the fastest time that a train can travel between set points on the network. It should be used where there is a limited number of services making a specific, non-standard stopping pattern and for which a headline journey time is required. Under these provisions, the train operator must bid for three services with the same non-standard stopping pattern and specified equipment and Network Rail must accept one of the three with the specified journey time. These provisions are inappropriate where all trains have the same calling pattern.

47. We advised the parties that, in the same way, but to a lesser extent, Table 6.3: Maximum Key Journey Times should be used to protect key flows, not all flows. We also identified considerable discrepancies between the stopping patterns shown in the tables and the stopping patterns of trains in the timetable, so the journey time protection would be of little use in these instances.

48. In responding to our concerns, FGW said that it would like to retain the rights as proposed in the application given the limited time available until the rights had to be in place for the December 2006 timetable. FGW said that Network Rail had agreed the proposed values following a review of the December 2006 timetable offer, and of the risks likely to apply to journey time provision over the term of the proposed contract. FGW explained that they had used all three tables fully in order to protect journey times throughout the week. It had used Maximum Key Journey Times as this prevented a Rules of the Plan change being proposed (except in certain circumstances). For this reason FGW felt that a key journey time right was necessary for each route.

49. We agreed that there was insufficient time to resolve this issue given the limited time available, but did not agree that the contract should include rights with which we had such serious reservations. Therefore, we have removed all journey time protection from the directed contract. Nevertheless, we believe that FGW should have an appropriate level of journey time protection. Once the parties have entered into this contract, we will issue a Journey Time Review Notice under the provisions in paragraph 7.5 of Schedule 5 requiring them to negotiate new journey time provisions and propose tables that accord with our published criteria and guidance². Hopefully it will be possible to complete this work before the Priority Date for the December 2007 timetable, 18 January 2007.

² *Guide to the model passenger track access contract*, ORR, London, June 2004. Available on the ORR website at: <http://www.rail-reg.gov.uk/upload/pdf/202.pdf>

Table 8.1: Platform Rights

50. FGW had sought extensive Firm Rights to specific platforms at Paddington and Reading. Paragraph 4.67 of our criteria and procedures document explains that we do not expect to approve rights to use particular platforms as a matter of course. We say that the train operator will need to demonstrate that such rights are a very important commercial requirement and Network Rail should establish that the rights do not create an undue constraint on its ability to exercise flexing rights or to satisfy the aspirations of other users or potential users of the network. In support of these rights FGW said that:

- the sleeper service required the platforms in order to aid joining and alighting at the two terminal locations;
- the rights sought at Paddington reflected a commercial benefit to FGW in having its high speed inter-city passenger trains alongside the main concourse area which contains the main passenger facilities;
- there were further priorities for use of the revenue-gated areas to ensure maximum revenue was secured for the industry; and
- the Reading rights were to show FGW's preference for the more passenger friendly and accessible main platforms (Platform 9, for instance, has no escalator).

FGW added that all rights sought were subject to Rules of the Route and Rules of the Plan. Network Rail had significant flexing rights if the timetable structure required it, and this provision showed FGW's preferences in order.

51. Our view is that Network Rail should address bids for specific platforms in line with the Decision Criteria so that the best use can be made of capacity. As FGW is by far the main user of Paddington and Reading stations, we would expect Network Rail to accommodate FGW's bids for specific platforms unless there was a good reason for not doing so. We have therefore deleted all rights to platforming except for the sleeper service, where we accept there is a reasonable requirement for Firm Rights.

Table 8.2: Connections

52. The parties had requested Firm Rights to a number of connections in the proposed contract. However, the associated wording in terms of both quantum and minimum connecting times was such as to make the exercise of these rights impractical. The parties agreed to delete most of the rights originally requested, only retaining rights to connect into and out of ATW's services connecting with the ferry service at Fishguard.

Table 8.4: Stabling facilities

53. In response to the comments of Heathrow Express, the parties agreed to delete the originally proposed rights to stable units at Paddington.

Charging provisions in Schedule 7

54. The parties had submitted a Schedule 7 in model contract format, with the Fixed Track Charge and Capacity Charge calculated by reference to the entries for the Train Operator in the Schedule of Fixed Charges and the List of Capacity Charge Rates published by ORR on 23 December 2003. As neither of these documents contains entries for FGW we suggested that Schedule 7 should be amended to include the specific charges FGW would pay. The directed contract has been suitably amended.

Relevant Schedule 8 Modifications

55. We asked the parties why they had not included a Relevant Schedule 8 Modifications provision given that there were two specific proposals aimed at improving punctuality rather than reducing journey times, namely:

- reducing much of the HST fleet to 2 + 7 formation, as against the current 2 + 8; and
- the planned increase in the line speed on the relief lines between Paddington and Reading.

56. In respect of the re-configuration of the HST fleet, the parties advised that they believed such provisions were not necessary because both parties had made sufficient commitment at a high level to re-calibrate when the fleet changes to 2 + 7 formation. In respect of the line speed project, contracts for this had not yet been drawn up, nor had the funding strategy been formally proposed to ORR for approval. Therefore, the parties believed that to insert provisions into the contract at this stage would be premature. Rather, they felt, a requirement to re-calibrate should be included in an implementation agreement covering the necessary works.

57. Having given due consideration to the parties' response, we have agreed that Relevant Schedule 8 Modifications are not required.

ORR's public register

58. We are required under section 72 of the Act to maintain a public register which must include, inter alia, every direction to enter into an access contract. Would you therefore

please send me two copies of the signed contract no later than 14 days after the date upon which the contract is entered into, as required by section 72(5) of the Act.

59. In placing any contract on the public register, we are required to have regard to the need for excluding, so far as that is practicable, the matters referred to in section 71(2)(a) and (b) of the Act. These cover:

- (a) 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
- (b) any matter which relates specifically to the affairs of a particular body of persons, whether corporate or unincorporate, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that body.

60. When you submit the copies of the signed contract would you therefore please list any aspects of the contract which you wish us to consider excluding from our register and explain why you consider how they meet the requirements of sections 71(2)(a) or (b).

61. I am copying this letter without enclosures to Steven Saunders at Network Rail, to Keith Merritt and Edmund Cullen at the DfT, to Chris Dellard at ATW, to Richard Brown at Heathrow Express and to Dave Walker at Southern.

Brian Hopkinson