



OFFICE OF RAIL REGULATION

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Dear Oliver and Derek

## **Approval of a track access contract between Network Rail Infrastructure Limited and London & South Eastern Railway**

### **Introduction**

1. On 5 December 2007, the Office of Rail Regulation (ORR) issued directions under section 18 of the Railways Act ("the Act") requiring Network Rail Infrastructure Limited (Network Rail) to enter into a track access contract with London & South Eastern Railway Limited (LSER). This letter sets out the reasons for our decision.

### **Background**

2. On 31 August 2007, we received an application from Network Rail and LSER under section 18 of the Act for approval of a track access contract. This was to replace their non-model clause contract which was entered into in 1995 ("the 1995 contract") with a new contract based on ORR's model clauses.

### **The approved contract**

3. The approved contract provides LSER with the access rights it requires to operate its services in the timetable commencing on the Principal Change Date (PCD) 2007. The contract is due to run until PCD 2014.

### **Consultation**

4. In line with our criteria and procedures<sup>1</sup>, we consulted the Department for Transport and those industry parties who we considered might have an interest in the application. We received one consultation response, from English Welsh & Scottish Railway (EWS). Its concerns are set out under the subheadings below.

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<sup>1</sup> *Criteria and procedures for the approval of passenger track access contracts*, fourth edition, ORR, May 2006, available at <http://www.rail-reg.gov.uk/server/show/nav.202>.

## *Schedule 5 – International Freight Train Slots*

5. EWS queried the inclusion of bespoke wording within Schedule 5 of the draft contract which made LSER's rights subject to the delivery of certain international freight paths (between Dollands Moor and Wembley European Freight Operating Centre). It was concerned that the inclusion of this wording meant there could be a conflict between the rights in the proposed contract and EWS's track access contract.

6. Network Rail responded that it had a long-term obligation arising from the Channel Tunnel Usage Contract of 1987 to provide 35 International Freight Train Slots (until 2086). Some of these paths have been included in a freight track access contract, but not all of the 35 paths were in use at present. As the unused paths might be called upon in due course, there was a possibility of a timetable conflict between the rights in the LSER contract and Network Rail's obligation to provide the 35 paths. If the unused paths were called upon, it could lead to a conflict between Network Rail's obligation to provide these rights and the rights in LSER's contract.

7. The bespoke wording included in the contract precludes LSER from exercising any Firm Right to the extent that exercise of that right would lead to a conflict with an International Freight Train Slot bid up to T-12<sup>2</sup>. Whilst this does not affect LSER's Firm Rights to quantum, it could lead to its train paths being moved to different times. A similar provision was in the 1995 contract. Thus, it was not the case that there would be a conflict between EWS's contract and the proposed LSER contract.

## *Freight Route Utilisation Strategy (Freight RUS)*

8. EWS said that it appeared Network Rail had not taken account of the Freight RUS when making the application.

9. Network Rail responded to EWS, apologising for its omission in the application form. It said that, on the basis that the bespoke provision relating to International Freight Train Slots would be in the new contract, it was content that the contract would be consistent with the Freight RUS.

## *Schedule 11 – rights to the testing of Class 395 'Javelin' rolling stock*

10. In September 2007, we approved the 62nd supplemental agreement to the 1995 contract. This gave LSER Contingent Rights to test Class 395 'Javelin' rolling stock in preparation for high-speed domestic services on "High Speed 1". This permitted LSER to operate test trains between 30 September 2007 and 27 February 2008 during the hours of 2345 and 0435. Train testing could occur on, at any one time, either of the route between Pluckley and Marden and the route between Margate and Whitstable.

11. In its consultation response for that application, EWS expressed concern that if the route through Maidstone East was closed, the train testing could restrict EWS's use of the diversionary route between Pluckley and Marden. Network Rail assured EWS that in the event that the Maidstone East route was closed, train testing would not occur.

12. The draft new contract included the same rights that we approved in the 62nd supplemental agreement so that LSER could continue to test its trains up to

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<sup>2</sup> T-12 denotes the point twelve weeks before the timetable is implemented.

27 February 2008. In the consultation on this contract, EWS expressed the same concerns that it had raised earlier although this time seeking a longer-term assurance that train testing would not occur if the Maidstone East route was closed.

13. To allay EWS's concerns, Network Rail and LSER agreed to include some text in Schedule 11 disapplying LSER's rights to operate over the Pluckley and Marden section at any time that the Maidstone East route was closed. This is set out in paragraph 2.2 of Schedule 11.

14. EWS was content with Network Rail's responses to all the points it raised and had no further comments.

### **ORR's review**

15. When reviewing this contract we were aware that it contained a number of non-model clause provisions copied across from the 1995 contract. Consequently, we were keen to ensure that the use of such non-standard provisions was appropriate.

#### *Schedule 2 – The Routes*

16. The version of Schedule 2 included in the draft agreement was copied across from the 1995 contract. We made some suggestions on how to improve and update the contents of this schedule. Following further discussion, the applicants produced a revised Schedule 2, which reflected the routes that LSER would be serving.

#### *Schedule 4*

17. We noted that the draft agreement did not contain a specific provision for possessions relating to the Thameslink Project. The parties advised us that it was their intention to use the standard provisions in Part 3 of Schedule 4 for compensation relating to this project. We were content with this approach.

#### *Schedule 5 – general issues*

18. We suggested a number of minor changes to the tables and provisions in Schedule 5 to ensure that the new contract would work as intended and deliver the rights that LSER required.

19. A number of provisions in Schedule 5 of the draft contract were copied across from the 1995 contract. We found that many of these were unnecessarily complicated and lacked clarity. Accordingly, we advised the parties to reconsider these provisions, and suggested alternatives for their consideration that were more consistent with model clauses. After further discussion, the parties incorporated revised provisions into the draft contract.

#### *Schedule 5 - Rights for special events*

20. The draft contract included Firm Rights to certain seasonal events, such as the fireworks display at Battle and the Lord Mayor's Show. We advised the parties that, in principle, we did not consider that rights to such events should be Firm Rights. This is because such occasional rights could subsequently preclude the operation of a regular scheduled service. Thus, rights for special or seasonal events should generally be Contingent Rights.

21. In any case, Firm Rights are only afforded first priority in the timetabling process if the Train Operator bids for the service by the Priority Date for the relevant timetable. Bids for occasional events are rarely bid so far in advance. Any bids made after the Priority Date are treated as Spot Bids even if they purport to be Firm Rights. The Network Code contains provisions (in Conditions D4.5.3-D4.5.5) to deal with situations where a Spot Bid is made for a sporting or other public event that would conflict with any train slot already scheduled in the Working Timetable.

22. We suggested that the parties replace the provisions for Firm Rights for specific seasonal events with the provision in paragraph 7 of the recently issued general approval<sup>3</sup>. This would give LSER permanent Contingent Rights for additional services for special or seasonal events to accommodate anticipated customer demand (up to what Network Rail could accommodate in accordance with the Decision Criteria in Part D of the Network Code).

23. The parties made this suggested change. They also included text to disapply the Schedule 8 performance regime in respect of any additional services operated pursuant to this provision to the extent that they are operated between midnight and 0500 hours on New Years Day. Such disapplication is appropriate to facilitate the management of public safety by the relevant authorities following New Year's Eve celebrations. This amendment removes the need for the parties to make annual amendments to the contract to effect this disapplication (as was done previously under the 1995 contract).

*Schedule 5 – rights to services over the Christmas period and treatment of public holidays*

24. The original draft contract included bespoke arrangements that would permit LSER to operate on Boxing Days subject to some very convoluted and confusing conditions relating to additional charges. These were carried forward from the 1995 contract. Following the development of model contracts and other regulatory policy since the 1995 contract was approved, we wished to be satisfied that the inclusion of these charges was appropriate. Accordingly, we asked Network Rail to:

- (a) confirm whether the provisions were consistent with arrangements for Boxing Day in its contracts with other operators; and
- (b) confirm and demonstrate that the additional charges set out in the provision reflected the incremental direct costs of LSER operating the services on Boxing Day and that these charges would not be recovered through the existing charging framework.

We also said that any additional charges should be explicit in the contract.

25. Following these questions, Network Rail removed the charging provisions from the contract. The applicants, after discussion with ORR, replaced the original drafting providing access rights on Boxing Day with more explicit and concise provisions. These are set out in paragraph 2.9 and Table 2.3 of Schedule 5.

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<sup>3</sup> Passenger Access (Short Term Timetable and Miscellaneous Changes) General Approval 2007, available at <http://www.rail-reg.gov.uk/upload/pdf/s22-genapp2007.pdf>.

*Schedule 5 – International Freight Train Slots and Eurostar Train Slots.*

26. Paragraph 2.12 of the approved contract contains a bespoke provision relating to International Freight Trains Slots and Eurostar Train Slots (both defined in paragraph 1.1 of Schedule 5).

27. Before Eurostar moved its UK base from Waterloo International to St Pancras International on 14 November 2007, it operated over network between Waterloo International and Fawkham Junction. Despite the closure of Waterloo International, Eurostar retains access rights to run between Fawkham Junction and Waterloo International, though it is unlikely that these will be exercised.

28. LSER has a franchise obligation to provide a four trains per hour stopping service each way between London Victoria and Orpington. The access rights for this service are predicated on using capacity freed up by the transfer of the Eurostar services to St Pancras International. To prevent a timetable conflict in the event that Eurostar exercises its extant rights, the contract contains a bespoke provision preventing LSER exercising any Firm Right to a particular time period where that Firm Right would conflict with a Eurostar train slot that has been bid by the relevant Priority Date. LSER's train slot in the timetable could therefore be moved so that there was not a conflict.

29. This bespoke provision also prevents LSER exercising a Firm Right to the extent that that right would conflict with an International Freight Train Slot bid up to T-12. This is discussed in more detail in paragraphs 5-7.

30. We were content for this provision to be included to prevent LSER's rights conflicting with International Freight Train Slots and Eurostar Train Slots.

*Schedule 5 – Firm Rights to Stabling*

31. The original draft contract included Firm Rights to stabling at a number of locations. Our criteria and procedures<sup>4</sup> state that we do not expect to approve such rights as a matter of course and that operators should demonstrate that such rights are a very important commercial requirement. However, no justification was made in the original application as to why the applicants considered it a commercial necessity for LSER to have these rights.

32. The applicants subsequently said that, as most of the locations were used by other operators, they considered it sensible to establish clearly which party may use the stabling facilities and at what times.

33. We noted that the proposed stabling rights relating to Blackfriars and Smithfield Sidings would, in any case, expire at PCD 2008 (because the Thameslink programme will mean they will not be available thereafter). As the timetable commencing at PCD 2007 had already been agreed, any Firm Rights to stabling could have no bearing in the timetable from PCD 2007 to PCD 2008. Therefore, we suggested that there was little point in including them in the contract and therefore they should be removed.

34. The two other locations listed were Orpington and Bellingham. As LSER was the only passenger train company operating around these locations we did not consider that

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<sup>4</sup> See paragraph 4.67.

holding Firm Rights to stabling was a commercial necessity. The applicants did not object to this argument and they removed all proposed Firm Rights to stabling from the draft contract.

35. It should be noted that even without Firm Rights to stabling, the model track access contract gives operators the rights to stabling necessary or reasonably required for giving full effect to the services.

#### *Schedule 7*

36. During the course of this application, we issued a general approval to permit parties to update Schedule 7 of their contracts with the new Traction Electricity Charge provisions agreed following discussion between Network Rail, ATOC and ORR<sup>5</sup> earlier in 2007. The applicants took the opportunity to incorporate these provisions into the draft contract before we issued directions.

#### *Schedule 11*

37. We were content with the inclusion of rights to test Class 395s within the new contract. This is discussed in more detail in paragraphs 10-14 above.

### **Duration**

38. The contract is for a period of seven years (PCD 2007-PCD 2014). On the basis that this contract is to support the delivery of franchise commitments, we are satisfied that this duration is consistent with our policy on long-term track access contracts<sup>6</sup>.

### **Revised draft contract**

39. Following our comments and further dialogue with Network Rail and LSER, the applicants submitted a revised version of the contract on 4 December 2007. We were satisfied that this version was suitable for approval.

### **Our conclusions**

40. We are satisfied that our approval of this track access contract is consistent with our statutory duties.

### **Public register**

41. In accordance with section 72 of the Act, a copy of the approved access agreement has been placed on our public register. Before doing so, we redacted the Performance Points, Payment Rates and Monitoring Point Weightings in Appendix 1 of Schedule 8, and Sustained Poor Performance Thresholds in Appendix 3 of Schedule 8 on the grounds that disclosure might seriously and prejudicially affect LSER's interests. A copy of the redacted agreement has also been placed on our website.

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<sup>5</sup> *Revised Passenger Access (Traction Electricity Charges) General Approval 2007*, available at [http://www.rail-reg.gov.uk/upload/pdf/pass-ec4t\\_gen\\_appvl\\_2007-rev.pdf](http://www.rail-reg.gov.uk/upload/pdf/pass-ec4t_gen_appvl_2007-rev.pdf).

<sup>6</sup> *Long-term track access contracts: final conclusions*, ORR, June 2005, available at <http://www.rail-reg.gov.uk/server/show/nav.201>.

**Distribution**

42. A copy of the directions was sent to both Network Rail and LSER on 5 December 2007. This letter, with a copy of the directions, will be sent to Keith Merritt at DfT. Copies of the directions will be placed on our public register and this letter will be posted on the ORR website. I am copying this letter without enclosures to Steven Saunders at Network Rail and to Nigel Oatway at EWS.

Yours sincerely

**Richard Gusanie**