



OFFICE OF RAIL REGULATION

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Dear David and Oliver

### **Approval of a Track Access Agreement between Network Rail Infrastructure Limited and London Overground Rail Operations Limited**

1. The Office of Rail Regulation (ORR) has today approved the terms of the above track access contract (TAC) submitted to it by Network Rail Infrastructure Limited (Network Rail) and London Overground Rail Operations Limited (LOROL), under section 18 of the Railways Act 1993 (the Act) on 5 November 2007, and has directed Network Rail to enter into it. In considering the application and in reaching our decision we have had regard to our statutory duties and our criteria and procedures document<sup>1</sup>. The purpose of this letter is to explain the reasons for our decision.

#### **Background**

2. This is one of four new TACs resulting from the Midlands franchise re-mapping undertaken by DfT, the three other TACs being those of East Midlands Trains Limited, London & Birmingham Railway Limited and XC Trains Limited. These four new TACs will replace four existing TACs – those of Central Trains Limited, CrossCountry Trains Limited, Midland Main Line Limited and Silverlink Train Services Limited (Silverlink).

3. Whilst the franchise re-mapping involved some major changes to which franchisee/concessionaire operates which services, the services themselves are

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<sup>1</sup> *Criteria and procedures for the approval of passenger track access contracts: fourth edition*, Office of Rail Regulation, May 2006, available at [http://www.rail-reg.gov.uk/upload/pdf/288-pass\\_candp4ed.pdf](http://www.rail-reg.gov.uk/upload/pdf/288-pass_candp4ed.pdf).

essentially unchanged. That means the total quantum of rights in the four new contracts is broadly the same as the total quantum in the four existing contracts.

4. Network Rail and Transport for London (TfL) made the initial application for our approval of this TAC in June, as at that time TfL had not announced the successful bidder for the Concession to operate the services in the TAC. It was always the intention that the successful company would enter into the TAC. Since TfL announced LOROL would be the operator, LOROL has been involved in our discussions with Network Rail and TfL about the terms of the TAC and has confirmed that it is content for us to issue directions to Network Rail to enter into this TAC with LOROL.

### **The contract**

5. The TAC gives LOROL permission to use Network Rail's network in order to operate passenger train services currently operated by Silverlink between:

- (a) Richmond and Stratford;
- (b) Gospel Oak and Barking;
- (c) Willesden Junction and Clapham Junction; and
- (d) London Euston and Watford Junction.

6. The TAC comes into effect on 11 November 2007 and expires on 11 November 2014. The terms of the TAC are based on those of the model passenger track access contract<sup>2</sup>, although we have also approved some bespoke provisions that are described below.

### **Departures from the model contract**

7. The proposed contract contained several departures from the model contract that we have approved, the most significant of which are detailed below.

#### *West Coast Route Modernisation provisions: Schedule 5, paragraph 9*

8. Since 2003, we have included WCRM provisions in all new or extended contracts containing firm access rights on the West Coast main line. The WCRM provisions provide for Network Rail to modify, with our consent, the rights in a contract to the extent that it is

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<sup>2</sup> Available at [http://www.rail-reg.gov.uk/upload/doc/ta-pasmodcotrct\\_190707.doc](http://www.rail-reg.gov.uk/upload/doc/ta-pasmodcotrct_190707.doc).

necessary to avoid it being in breach of any contract between Network Rail and WCT. These provisions expire on or before the PCD 2009.

9. This contract contains rights, in Service Group EK02, that could potentially conflict with WCT's access rights. As we are prevented by Section 17 of the Act from directing Network Rail to enter into a contract which would put it in breach of an existing contract, and Network Rail has not yet submitted a new WCT contract and confirmed what modifications, if any, are required to LOROL's rights, we have approved WCRM provisions in this TAC.

10. We have asked Network Rail to tell us, at the time it submits the draft WCT contract, what modifications, if any, it will require to all those contracts with WCRM provisions. We will consult widely on the draft contract and the proposed modifications to any other operators' access rights before deciding whether to consent to such modifications.

#### *Harringay Rights additional permitted charge: Schedule 7, Part 5*

11. The TAC contains provisions that allow Network Rail to make an additional charge on LOROL associated with the operation of services between Gospel Oak and Barking outside the normal opening hours of the route "the Harringay Rights". The charge covers Network Rail's additional operational costs arising from it extending the opening hours of the signal box at Harringay Park Junction to enable LOROL to operate these services. We approved this additional charge in the Silverlink TAC (in the Silverlink 18th Supplemental Agreement) and, on the basis that its continuation has been agreed between the parties, we are content for this charge to continue.

#### *Schedule 11 Relevant Schedule 8 Modifications*

12. The TAC contains, in Schedule 11, "Relevant Schedule 8 Modifications" provisions which enable the parties to collect accurate performance data before populating Appendix 3 of Schedule 8 (sustained poor performance threshold) and to apply those changes retrospectively. We are content with the parties using these provisions for this purpose and we will consider their application for our approval of the modifications in accordance with our criteria and procedures.

### **Consultation process**

13. In considering track access applications, we make considerable efforts to ensure that our decision is consistent with our statutory duties. We therefore invited comments from the Department for Transport (DfT), the Mayor of London, London TravelWatch and Passenger Focus. In line with our policy to consult as widely as possible, and in view of

the overall scale of the changes associated with the midlands franchise remapping, we also consulted all train operators on the application. Consultation on the agreement began on 20 June 2007 and ended on 16 July 2007. The consultees raised the following issues:

*Virgin West Coast Trains Limited (VWC)*

14. VWC questioned why the expiry date of the proposed agreement was 11 November 2014 rather than the Principal Change Date 2014. Network Rail explained that this was the date specified by TfL during discussions regarding the proposed contract, as it aligned the expiry date of the track access contract to the end date of the Concession Agreement between Rail for London Limited and LOROL. VWC did not make any further comments.

15. Our policy on duration<sup>3</sup> is that we would be prepared to approve a term of up to two years after the end of the relevant franchise if this is necessary to allow the orderly transfer of the franchise to a new franchisee and/or ensure the continuation of priority bidding rights for the operator in question. However, as we had consulted on a draft contract of seven years duration, we did not direct a contract of a longer duration but would consider any application from the parties to extend the duration of the TAC on its merits and in accordance with our criteria and procedures.

*English Welsh & Scottish Railway Limited (EWS)*

16. EWS asked for assurance that the proposed contract would be compatible with future developments that may result in changes to freight services, including train slot changes at Camden Road due to the December 2008 West Coast Timetable Change, the Olympics, the Greater Anglia RUS and Crossrail. Network Rail said that it would be mindful of the needs of all of its customers when changes to the quantum of rights and any development works required to facilitate that were proposed. Network Rail also said that it was aware that any queries EWS raised regarding future LOROL supplemental agreements would need to be addressed before we would approve them.

17. We will consider any future applications from the parties for changes to the quantum of rights in accordance with our criteria and procedures. We would therefore expect to consult any potentially affected operators and consider their views in making our decision on any such application. We are currently considering an application from the parties under section 22 of the Act for additional contingent rights to reflect additional services which are commencing on the Principal Change Date 2007.

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<sup>3</sup> See paragraph 3.17 of *Long-term access contracts: final conclusions*, Office of Rail Regulation, June 2005, available at <http://www.rail-reg.gov.uk/upload/pdf/240.pdf>.

18. EWS said that whilst the parties stated in their application form that the proposed contract was consistent with the Cross London route utilisation strategy (RUS), it did not appear to take into account the Freight RUS. Network Rail said that the proposed contract was consistent with the Freight RUS and that it would take both the Freight and Cross London RUSs into account when considering future developments on the routes.

19. Our policy<sup>4</sup> is that where a track access application relates to an area with an established RUS, we will expect to take into account the strategies described within that RUS when making our decision, and whether proposed new rights are consistent with the RUS. However, we do not consider that a RUS can assume that existing contractual rights will be overridden: it should reflect existing rights. As the contract reflects largely the existing rights in the Silverlink TAC, we are content that our approval of it does not conflict with either the Freight or Cross London RUS. In line with our policy, we will however consider whether any future applications from the parties for increases in the quantum of rights are consistent with these RUSs.

20. EWS confirmed that it had no further comments on either of the issues it had raised.

#### *Freightliner Group Limited*

21. Freightliner asked the parties for confirmation that there were no proposed changes to the level and operation of passenger service provision. Network Rail confirmed that there were no changes to the quantum of rights in the proposed contract compared to that in the Silverlink TAA. Freightliner did not make any further comments.

#### **Our review**

22. Our review of the proposed agreement did not raise any operational performance concerns as the quantum of rights in Schedule 5 had not increased over that contained in the Silverlink TAC and the rights to the use of particular stabling facilities currently held by Silverlink were not included. However, during the process of our consideration, we identified several issues which required discussion with the parties and TfL. The parties agreed the following changes to the original submission, which have been included in the version of the contract that we have approved:

- (a) drafting changes for consistency with the model contract, including the new Significant Restriction of Use provisions in Part 3 of Schedule 4;

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<sup>4</sup> See paragraphs 4.5-4.8 of *Criteria and procedures for the approval of track access contracts: fourth edition*, Office of Rail Regulation, May 2006, available at [http://www.rail-reg.gov.uk/upload/pdf/288-pass\\_candp4ed.pdf](http://www.rail-reg.gov.uk/upload/pdf/288-pass_candp4ed.pdf).

- (b) Clause 15 (Novation): bespoke wording has been used to reflect that LOROL is operating under a Concession Agreement awarded by Rail for London Limited;
- (c) charging provisions:
  - (i) Access Charge Supplement for Restrictions of Use in Schedule 4: this has been recalculated in accordance with the franchise remapping;
  - (ii) definition of “List of Capacity Charge Rates” in Part 1 of Schedule 7: a bespoke list of charges has been included as LOROL was not included in the list of capacity charge rates published by ORR on 23 December 2003 to which the model contract definition refers;
  - (iii) definition of “Schedule of Fixed Charges” in Part 1 of Schedule 7: a bespoke list of charges has been included as the fixed track charge for each of the four new midlands operators has been recalculated following the remapping of services and so the list published by ORR on 23 December 2003 to which the model contract definition refers was not applicable to LOROL;
  - (iv) Traction Electricity Charge provisions in Part 2 of Schedule 7: these are now consistent with the provisions in the Annex to the General Approval issued by ORR on 30 August 2007;
  - (v) future access charges reviews provisions in Part 7 of Schedule 7: a new paragraph has been inserted to account for the review initiation notice served by ORR on 28 February 2007 not having been served on LOROL;
  - (vi) Liability Cap in Schedule 9: this has been recalculated in accordance with the remapping of services between the four new midlands operators;
- (d) the following modifications to the tables used in Schedule 5 of the Silverlink TAC:
  - (i) the use of Table 3.1 (service intervals) in place of Table 3.2 (clockface departures) as this is more suited to the service patterns LOROL will operate; and
  - (ii) the removal of Table 8.3 (departure time ranges) as LOROL has adequate rights provided by the use of Table 3.3 (earliest and latest slots).

## **Conclusions**

23. In considering the application and in reaching our decision, we have had to weigh and strike the appropriate balance in discharging our statutory duties under section 4 of

the Act. We have concluded that approval of this agreement is consistent with our section 4 duties under, in particular those relating to:

- (a) promoting the use of the railway network for the carriage of passengers (section 4(1)(b)); and
- (b) enabling LOROL to plan the future of its business with a reasonable degree of assurance (section 4(1)(g)).

### **ORR's public register**

24. 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 and every 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.

25. In placing any agreement 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 the individual, where publication of that matter would or might, in our opinion, seriously and prejudicially affect the interests of that individual; and
- (b) any matter, which relates specifically to the affairs of that particular body or persons, whether corporate or incorporate, where publication of that matter would or might, in our opinion, seriously and prejudicially affects the interests of that body.

26. When you submit the copies of the signed agreement would you therefore please list any aspects of the agreement which you wish ORR to consider excluding from its register and explain why you consider they meet the requirements of sections 71(2)(a) or (b).

### **Distribution**

27. Please find enclosed a copy of the directions. I am copying this letter and the directions to Christine Bricard at TfL and 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, Robert Hodgkinson at VWC, Nigel Oatway at EWS and Michael Leadbetter at Freightliner.

Yours sincerely

**Sam Gibbins**