

Application to ORR for provisional approval of a proposed amendment to a freight track access contract under section 22 Of the Railways Act 1993

1. Introduction

This form should be used when making an application to the Office of Rail Regulation (ORR) for provisional approval of a proposed amendment (agreed by both parties) to an existing track access contract. Having taken account of our comments, the parties may then wish formally to submit an amendment for our approval under section 22 of the Railways Act 1993 (the Act).

This form sets out our standard information requirements for considering such applications. It cross-refers throughout (in the right-hand column) to our criteria and procedures for the approval of freight track access contracts¹, which explains the process and timing for our consideration of access applications and discusses the issues we will need to consider. We have 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 our criteria and procedures before making an application.

It is very important that the application is made in good time and prospective applicants are strongly advised to read (and if necessary take advice on) the procedures which are laid out in the Act and our published guidance in this respect.

The track access team at ORR 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 our model freight track access contract, can be accessed electronically and downloaded via the ORR website at www.rail-reg.gov.uk.

Criteria document para(s)

2. The application

2.1 Title of proposed amendment:

Direct Rail Services: Sixth Supplemental Agreement

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

<u>Facility Owner</u>	<u>Beneficiary</u>
Company: Network Rail Infrastructure Limited	Company: Direct Rail Services Limited
Contact individual: Gordon Cox	Contact Individual: Chris Connelly
Job title: Customer Relationship Executive	Job title: Commercial Director
Address: 40 Melton Street, London NW1 2EE	Address: Kingmoor Depot, Etterby road, Carlisle CA3 9NZ
Telephone number: 020 7557 8352	Telephone number: 01228 406606
Fax number: : 020 7557 9107	Fax number: 01228 406659
E-mail address: gordon.cox@networkrail.co.uk	E-mail address: chris.connelly@drsl.co.uk

¹ *Criteria and procedures for the approval of freight track access contracts: third edition*, Office of Rail Regulation, May 2006, available at <http://www.rail-reg.gov.uk/server/show/nav.204>.

² *Model Freight Track Access Contract*, Office of Rail Regulation, December 2005, available at <http://www.rail-reg.gov.uk/upload/doc/freightmodcontract-dec05.DOC>.

2.3 Licence and Railway Safety Case/Safety Certificate

Please state whether the applicant intends to operate the services itself or have them operated on its behalf.

3.9-3.15

Please state whether the proposed operator of the services:

- (a) holds a valid train operating licence under section 8 of the Act or an exemption under section 7; and
- (b) has an accepted Railway Safety Case under the Railways (Safety Case) Regulations 2000 or a Safety Certificate under the Railways and Other Guided Transport Systems (Safety) Regulations 2006.

If the answer to (a) or (b) is no, please state the point which that person has reached in their obtaining of the licence or exemption and Railway Safety Case or Safety Certificate (as the case may be).

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

3. The proposed amendment

3.1 Executive summary

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

3.23

- where there is an existing agreement in respect of the services in question, any differences between the existing agreement and the proposed amendment (e.g. service characteristics, routes, intermediate points, rolling stock, commercial terms etc); **3.54**
- any respects in which the proposed amendment contains bespoke provisions departing from the model freight track access contract and the charging, performance and restrictions of use regimes in the model freight track access contract; and **2.50-2.51**
6.2-6.3
- any material safety risks that have been identified arising from the proposed amendment and the arrangements for their control and mitigation (by reference to the provisions of the facility owner's and operator's Railway Safety Cases or Safety Certificates). **4.9-4.11**

The purpose of this Sixth Supplemental Agreement is to amend Schedule 5 of the Track Access Contract between Network Rail and DRS dated 31 January 2003.

This application is made in conjunction with the submission of the replacement Track Access Contract (TAC) between West Coast Trains Limited (WCTL) and Network Rail. As requested by ORR, Network Rail is submitting around the same time all agreed supplemental agreements and modification provisions for consideration in support of the new WCTL TAC; this application refers specifically to the changes required to DRS's existing TAC. In summary, the specific changes proposed in this application have been highlighted or marked up in the attached rights table.

We understand that ORR will undertake the consultation on these proposed changes, as part of its overall consultation and consideration of the new WCTL TAC.

3.2 Departure from ORR's model freight track access contract

Please set out here, with reasons, any areas where the drafting of the proposed contract omits, amends or adds to ORR's model freight 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), we will wish to see a flowchart illustrating that the process is robust, internally consistent and leaves no loose ends.

2.50-2.51
6.2-6.3

This Sixth Supplemental Agreement is consistent with the model track access contract (freight services). The only changes being made are to Schedule 5, the format of which is consistent with the Freight Model Contract.

3.3 Duration of amendment

Please indicate the commencement date sought for the proposed amendment, and provide justification for the proposed duration (in particular, referring to ORR's long-term access contracts policy³ where contracts would be for longer than five years).

4.69-4.75

Approval for this proposed 6th Supplemental Agreement is sought in time for the timetable offer date 11 July 2008.

The commencement date of this proposed Sixth Supplemental Agreement is from the later of timetable offer date 11 July 2008 or upon the ORR's approval but should be commensurate with the commencement date of the replacement Track Access Contract (TAC) between West Coast Trains Limited (WCTL) and Network Rail. This is targeted to commence on the Principal Change Date in December 2008.

The DRS track access contract has an expiry date of 31 December 2009. The amendments set out in this Sixth Supplemental Agreement will expire on expiry of the track access contract.

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

4.1 Benefits

Please set out what specific benefits will result from the proposed amendment. 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.

4.31-4.36

The proposed changes have been imposed upon DRS by Network Rail in order to provide compliance with the December 2008 Timetable. These changes are in respect of access rights that traverse the West Coast Mainline and are required to prevent any conflicts with the proposed rights in the replacement Track Access Contract (TAC) between West Coast Trains Limited (WCTL) and Network Rail. Opportunity has also been taken to voluntarily surrender access rights that are no longer required.

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

4.2 Congested infrastructure

Please state whether the part(s) of the network to which this application relates have been declared congested by Network Rail, under regulations 23-25 of the Railways Infrastructure (Access and Management) Regulations 2005.

4.79-4.80

The rights in the proposed new schedule 5 right table, do not relate to the parts of the network which have been declared congested, as detailed below:

- Barassie Junction / Kilmarnock / Newton Junction / Machline Junction to Gretna Junction
- Gospel Oak to Barking
- Reading to Gatwick

4.3 Adequacy

Please set out to what extent and by what process (if any) the applicants have satisfied themselves that there is sufficient network capacity for the levels of rights for services in the proposed amendment, and the implications for overall network performance and the facility owner's maintenance and renewal activities.

4.12-4.36

The changes proposed in this supplemental agreement are required to provide compliance with the December 2008 Timetable in respect of access rights which traverse the West Coast Mainline and to prevent any conflicts with the proposed rights in the replacement Track Access Contract (TAC) between West Coast Trains Limited (WCTL) and Network Rail. No new rights are proposed, only changes to existing rights and the deletion of some rights which are no longer required and/or where DRS has advised in its Priority Date Notification Statement (PDNS) it does not intend exercising those rights.

All the rights are subject to the Freight Operating Constraints, as described in the DRS track access contract. The Freight Operating Constraints include Rules of the Route, which are provided to support and facilitate the facility owner's maintenance and renewal activities.

4.4 Level 1 rights

Please state to what extent the level 1 rights in the proposed track access contract are required to service freight haulage contracts currently held by the operator and how the length of these contracts compare with the length of the proposed track access contract. Where rights are not proposed to be used fully, please provide a justification for why we should approve them as requested.

4.37-4.40

The Level One access right amendments proposed are required to support the contracts held by the operator. Whilst the length of these contracts vary and are different to the length of the proposed amendment the operator reasonably expects to continue to operate these services until the expiry of the Track Access Contract 31 December 2009. If any access rights are subsequently no longer required these will be proposed for deletion via the Section 22 process. Part J of the Network Code also applies.

4.5 Level 2 rights

Please state to what extent the level 2 rights in the proposed track access contract are required to service freight haulage contracts currently held by the operator and how the length of these contracts compare with the length of the proposed track access contract. Where rights are not proposed to be used fully, please provide a justification for why we should approve them as requested. **4.37-4.40**

No Level 2 rights are proposed.

4.6 Level 3 rights

Please comment on the extent to which the operator expects to use the level 3 rights in the proposed contract. In particular, the operator should state whether the rights requested are seasonal i.e. for 3 months each year, or whether they will be used occasionally e.g. Monday, Wednesday and Friday. **4.37-4.40**

It is proposed that the following rights are amended from level 1 to level 3 (see Appendix):
The new Level 3 rights highlighted in the rights table, are for traffic currently moved by EWS. Should DRS wish to switch suppliers back to Sandbach they will need to move the traffic themselves, therefore DRS require the ability to Spot Bid for these slots

4.7 Cordon caps

Please explain any changes to existing cordon caps and/or whether any new cordon caps are proposed. **4.63-4.66**

No changes are proposed.

4.8 Flexing rights

Please provide a rationale for any departure from the default +/-30 minutes flex provision. **2.43-2.46**
4.48-4.49

The standard flexing provision of +/- 30 minutes is proposed for all new or altered rights, except 4S49 which has a flex of +/-120 in order to overcome potential Sunday diversions.

4.9 Protected rights and obligations

Please describe the extent to which the proposed amendment 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 ORR's criteria. **4.67-4.68**

There are no protected rights or protected obligations in this Sixth Supplemental Agreement.

4.10 Other limitations on flexibility

Please describe the extent to which the proposed amendment contains any other restrictive obligations on the facility owner (e.g. a right that can only be exercised over a particular route), and explain the justification for any such provisions by reference to ORR's criteria. **4.37-4.54**

There are no such restrictive obligations on the facility owner in this Sixth Supplemental Agreement.

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4.11 Route utilisation strategies

If applicable, please also state which route utilisation strategies (RUSs) are considered relevant to this application and whether the proposed rights are consistent with that RUS, and the freight route utilisation strategy. If the proposed rights are not consistent, please state the reasons for this.

2.28
4.5-4.8

<p>The proposed rights are consistent with all RUSs established to date (South West Main Line, Cross London, Scotland, Freight, North West and Greater Anglia), the recently published East Coast Main Line RUS and those currently in development (Network, South London, Lancashire & Cumbria, Wales, Merseyside, Yorkshire & Humber, Sussex, Kent, East Midlands, West Midlands & Chilterns, and Great Western).</p>	
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5. Incentives

5.1 Charges and performance

Please indicate, and explain the reasons for, any instances where the proposed amendment 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).

5.1-5.18
5.25-5.32

<p>There are no changes to either the DRS charging or performance regimes in this Sixth Supplemental Agreement.</p>	
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5.2 Train operator performance

Please describe any planned initiatives associated with the operation of the services in the proposed amendment aimed at improving the train operator's own performance.

4.31
5.25-5.31

<p>There are no planned initiatives associated with the particular flows in this Sixth Supplemental Agreement. The parties will review performance and develop relevant initiatives where these are considered appropriate or necessary.</p>	
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5.3 Facility owner performance

Please describe any planned initiatives associated with the operation of the services in the proposed amendment aimed at improving the facility owner's own performance.

4.31
5.25-5.31

<p>There are no planned initiatives associated with the particular flows in this Sixth Supplemental Agreement. The parties will review performance and develop relevant initiatives where these are considered appropriate or necessary.</p>	
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5.4 Performance regime changes

Where applicable, please provide justification for any changes to Schedule 8 of the track access contract in the proposed amendment. If necessary, please provide any relevant information in support of the changes proposed.

5.25-5.26

<p>There are no changes to either the DRS charging or performance regimes in this Sixth Supplemental Agreement.</p>	
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5.5 Restrictions of use

Please indicate and explain the reasons for any instances where the proposed amendment departs from the restrictions of use regime in the model freight track access contract.

5.33-5.36

There is currently no specific restriction of use (possession) compensation regime for freight services.

6. Enhancement

6.1 Enhancement details

Where the proposed amendment provides for the delivery of any network enhancements, or the services in the proposed amendment 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 ORR's enhancement reporting framework).

4.77-4.80

The changes proposed in this Sixth Supplemental Agreement are predicated directly on the delivery of the West Coast Route Modernisation enhancement.

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 ORR's policy framework for investments⁴, and summarise the level and duration of payments, and the assumed rate of return.

5.19-5.21

All arrangements for funding are consistent with the ORR's policy framework for investments. Please refer to the application for the replacement Track Access Contract (TAC) between West Coast Trains Limited (WCTL) and Network Rail for more information.

7. Other

7.1 Associated applications to ORR

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

3.18-3.19

This Sixth Supplemental Agreement is made as a direct consequence of the submission of the replacement Track Access Contract (TAC) between West Coast Trains Limited (WCTL) and Network Rail.

⁴ *Policy framework for investments: conclusions*, Office of Rail Regulation, October 2005, available at <http://www.rail-reg.gov.uk/upload/pdf/255.pdf>.

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 ORR's approval is not required⁵. **2.62-2.65**
3.19

Not applicable to this Sixth Supplemental Agreement.

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). **3.32**

The rights table attached is highlighted to reflect the proposed amendments and deletions.

Those service characteristics struck through are to be deleted.

Those highlighted in green are proposed amendments.

7.4 Objections or unresolved concerns

Please detail any objections or unresolved concerns arising from any pre-application consultation of train operators or other interested parties undertaken by the facility owner in respect of the proposed services **4.30**

None.

7.5 Side letters and collateral agreements

Please confirm here that the whole of the proposed amendment 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 amendment. **6.12-6.16**
6.21

There are no side letters or collateral agreements between the parties that relate to this application.

7.6 Confidentiality exclusions

Please indicate clearly any elements in the application and the proposed contract that the parties wish to exclude from wider consultation on the grounds of confidentiality specified in section 71(2) of the Act, and provide a full justification for each instance by reference to those statutory grounds. Subject to our decision on such exclusions, it is our intention to publish this application and the proposed amendment on the ORR website. **3.25-3.29**

The parties request that names of third party customers shown on the proposed Schedule 5 Rights Table are kept confidential. This is for consistency with the public register copy of the existing DRS track access contract, where such information has been excluded.

⁵ As provided for in The Railways (Class and Miscellaneous Exemptions) Order 1994, SI 1994 No.606

8. Certification

Warning: Under section 146 of the Act, any person who, in giving any information or making any application under or for the purposes of any provision of the Act (including section 18), makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, is guilty of an offence and so liable to criminal prosecution.

**3.33
6.22**

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 amendment as submitted.

<u>Facility Owner</u>	<u>Beneficiary</u>
Signed:	Signed:
Date:	Date:
Name (in caps): BARBARA BARNES	Name (in caps): CHRIS CONNELLY
Job title: Head of Customer Service	Job title: Commercial Director
For (company): Network Rail Infrastructure Limited	For (company): Direct Rail Services Limited

9. Submission

9.1 What to send

Please supply hard copies of: the signed application form; the proposed amendment; any documents incorporated by reference (other than established standard industry codes or other instruments); and any other attachments, supporting documents or information.

3.32

Please also supply the application, the proposed amendment 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).

3.30-3.31

9.2 Where to send it

Manager, Track Access Team
Directorate of Rail Markets, Passengers and Freight
One Kemble Street
London
WC2B 4AN

ORR Form 22 May 2006