

# APPLICATION TO THE OFFICE OF RAIL AND ROAD FOR A DEPOT ACCESS CONTRACT, OR AMENDMENT TO A DEPOT ACCESS CONTRACT, UNDER SECTION 17 OR 22A OF THE RAILWAYS ACT 1993

## 1. Introduction

This form should be used to apply to the Office of Rail and Road (ORR) for:

- directions under section 17 of the Railways Act 1993 (the Act) for a new depot access contract. Section 17 is the means by which those seeking the right to use a railway facility apply for compulsory third party access if they have failed (for whatever reason) to reach agreement with the facility owner; or
- directions under section 22A of the Railways Act 1993 for an amendment to an existing depot access contract. Section 22A allows anyone seeking an amendment to an existing depot access contract, which allows more extensive use, to apply for a compulsory amendment if they are not able (for whatever reason) to reach agreement with the facility owner.

The form sets out the ORR's standard information requirements for considering such applications.

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, (Section 17/22A and Schedule 4).

The Stations and Depots 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 ORR's template depot access contracts and amending document/agreements, can be accessed electronically and downloaded via the ORR website [here](#).

## 2. The application

### 2.1 Title of proposed contract or amendment:

Proposed Depot Access Agreement (non-TOC Beneficiary) between Hitachi Rail Limited (Beneficiary) and Abellio East Midlands Limited (Depot Facility Owner) for access to and light maintenance services at Leeds Neville Hill Depot (the "Proposed DAA") to commence on 1 April 2020.

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

Company: Hitachi Rail Limited

Contact: Andrew Rogers

Individual:

Job title: Head of Projects & Contracts East

Address: Hitachi Rail Limited, 7<sup>th</sup> Floor, One New Ludgate, 60 Ludgate Hill, London EC4M 7AW

Telephone number: [Redacted]

Fax Number: N/A

**2.3 Licence and railway safety case:** Please state whether the applicant intends to use the depot himself or whether someone else will use the depot on his behalf

Please state whether the proposed user of the depot (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)

Hitachi Rail is seeking to enter into a depot access agreement at Neville Hill Depot pursuant to the requirements of the East Coast Intercity Express Programme procured by the Secretary of State for Transport in 2012, whereby pursuant to the terms of contracts between the Secretary of State for Transport, Agility Trains East Limited and Hitachi Rail Limited, Hitachi Rail is required to procure access to Neville Hill Depot for the purposes of securing certain light maintenance services in its capacity as maintainer (including as Entity in Charge of Maintenance) of the class 800/801 Azuma fleet on behalf of the train operator (London and North Eastern Railway Limited (LNER)). LNER will operate the class 800/801 Azuma fleet under LNER's safety case and train operating licence.

Accordingly, as a manufacturer and train maintainer, Hitachi Rail does not hold a train operating licence (or any exemption) and does not hold a railway safety case. Hitachi Rail holds a light maintenance depot licence in connection with the provision of certain maintenance services from Depots where Hitachi Rail is the Depot Facility Owner.

### 3. The proposed contract or amendment

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

- where there is an existing agreement in respect of the services in question, any differences between the existing agreement and the proposed contract; and
- any aspects in which the proposed contract/amendment contains bespoke provisions departing from the published template depot access contract.

The Proposed DAA (at Enclosure 1) is a new depot access agreement on the ORR's generally approved template terms for the purposes of securing access and light maintenance services in connection with the overnight servicing of newly introduced Class 800/801 Units, built by Hitachi Rail and operated by LNER. The expected start date for the Beneficiary Depot Services is **1 April 2020**.

The commercial terms in respect of the Beneficiary Depot Services set out in the Proposed DAA are **not agreed** by the parties (as outlined in more detail further in section 3.2 and 5 of this application).

Accordingly, Hitachi Rail requests that the ORR, having considered this application and representations of the Depot Facility Owner, **direct pursuant to section 17 of the Railways Act 1993 that the Depot Facility Owner enters into the Proposed DAA on commercial terms that are non-discriminatory and which satisfy the requirements of the Railways (Access, Management and Licensing of Railway Undertaking) 2016 in connection with the pricing of services.** The ORR will note that Hitachi Rail and the Depot Facility Owner have entered into a fixed term DAA on 16 August 2019 (approved by the ORR pursuant to section 18) with a view to allowing time to conclude commercial discussions over access charging. The Proposed DAA will replace the fixed term DAA dated 16 August 2019.

Whilst discussions are continuing, Hitachi Rail understands that the scope of services is agreed between the parties (subject to further consideration of the maximum levels during the Transition Period) and provide for the overnight servicing comprising a 1 Day Exam (Schedule 5), Fueling and Fuel Point Exam (Schedule 6), External Machine Wash (Schedule 7), Stabling (Schedule 8), Internal Daily Clean (Schedule 10), Depot Access – Train Moves (Schedule 12), CET Servicing (Schedule 19) and a limited amount of Work Arising, as set out in the enclosed Proposed DAA (the "Beneficiary Depot Services" as defined in the Proposed DAA and enclosed at Enclosure 1).

The parties also have acknowledged that due to the replacement of the existing LNER legacy fleet by the class 800/801 Azuma fleet, there will continue to be a period of transition at Neville Hill Depot and that due to certain capacity constraints at Neville Hill Depot the minimum and maximum levels of services required for the full class 800/801 Azuma fleet cannot be provided by the DFO in full until the withdrawal of the LNER legacy fleet (the "Transition Period"). The parties have sought to agree an approach through a side letter (Enclosure 2) to review and where possible increase the Minimum and Maximum Levels of Service during end of the Transition Period to reflect the requirements of the class 800/801 Azuma fleet, subject to the approval of the ORR in respect of any variation. At the conclusion of the Transition Period it would be the intention of the parties to agree Minimum and Maximum Levels of Beneficiary Depot Services as set out in Enclosure 4. This is described in more detail at sections 4.3 and 7.3 of this application and Enclosure 2.

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**3.2 Terms not agreed with the facility owner:** Please set out here those specific areas of the proposed contract/amendment 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

Hitachi Rail is unable to agree to the price proposed by the Depot Facility Owner for the Beneficiary Depot Services for the Minimum Level of the Beneficiary Depot Services set out in the Proposed DAA.

The Depot Facility Owner's price/charge for the Minimum Level of Beneficiary Services (as such Minimum Level will be uplifted in accordance with the Transition Period Side Letter) for the period 1 April 2020 to 31 March 2021 is set out in Enclosure 3.

Hitachi Rail has been unable to agree the proposed charges (as set out in Enclosure 3) for the following reasons

1. The proposed charges in respect of the Minimum Level of Beneficiary Depot Services (as such may be amended by the Transition Period Side Letter) in Hitachi Rail's view (based on a review of comparable (but limited) publically available depot access agreements at Neville Hill and other similar facilities) exceed the access charges for equivalent services provided at Neville Hill and similar services at similar facilities within the same region of the United Kingdom (with the exception of train moves – see Enclosure 3).
2. Accordingly, Hitachi Rail consider that the proposed charges may exceed the cost to the Depot Facility Owner of providing access to its service facilities and/or the supply of services within those facilities (plus a reasonable profit). Hitachi Rail has not been able to satisfy itself based on information provided that the charges are offered on a non-discriminatory basis.

Publically available information on the ORR register does not permit a full analysis of access charging at Neville Hill Depot to determine whether the proposed Access Charges are discriminatory. However, on the basis of the limited public information available in respect of access charging at Neville Hill Hitachi Rail believes that 1 Day Exam equivalent services are charged at a rate of approximately between [Redacted] per hour at Neville Hill. Hitachi Rail believes that the proposed charges in respect of the 1 Day Exam Beneficiary Depot Services significantly exceed this hourly rate.

We have also included at Enclosure 3 a comparison of access charges agreed with other depot facility owners located in the North of England and Scotland in respect of the same scope of beneficiary depot services per vehicle (being class 80X Azuma vehicles) per night that Hitachi Rail is now seeking to procure at Neville Hill (with the exception of train moves – see detail in Enclosure 3). This highlights a significant difference in the proposed charges in respect of the Beneficiary Depot Services proposed by the Depot Facility Owner compared to charges for the same services per vehicle per night at other light maintenance facility in the same geographical region. Hitachi Rail is seeking to understand this difference based upon our analysis of available information.

Hitachi Rail requests the ORR to consider the charges proposed by the Depot Facility Owner in respect of the Beneficiary Depot Services (as set out at Enclosure 3) in light of the Depot Facility Owner's obligations under applicable legislation and ORR guidance to provide access and services on a non-discriminatory basis and pricing for such services on a transparent basis. The ORR's guidance issued in connection with the Railways (Access, Management and Licensing of Railway Undertaking) 2016 at paragraphs 3.4 to 3.6 include the following statements:

*"3.4 Paragraph 1(6) of Schedule 3 of the 2016 Regulations requires that the charge imposed for track access and the supply of services within these service facilities must not exceed the cost of providing it, plus 'a reasonable profit'. We expect the service provider to be able to demonstrate how charges reflect the cost of providing access to its service facilities and/or the supply of services within those facilities, if requested.*

*[...]*

*3.6 Service providers may publish their charges in different ways, but we expect them to be open and transparent about charges for services.... "*

**3.3 Departure from ORR's template depot access contract:** Please set out here, with reasons, any areas where the drafting of the proposed contract or amendment omits, amends or adds to the ORR's published template depot access contract (as appropriate, cross-referencing to the answers below). Wherever the proposed contract or amendment contains a new process (e.g. a self-modification provision) the ORR will wish to see a flowchart illustrating that the process is robust, internally consistent and leaves no loose ends

None – but see section 7.3.

**3.4 Duration of contract:** Please indicate the commencement date sought for the proposed contract or amendment, and provide justification for the proposed duration if appropriate

Commencement date: 1 April 2020.

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## 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 contract or amendment. In particular, please describe any new rights sought or significant changes in the facilities or services to be used, their benefits and any impact on existing beneficiaries.

The provision of the Beneficiary Depot Services are essential to the continuing introduction of the class 800/801 Azuma fleet and the provision of LNER's passenger services on the route London-Leeds. The class 800/801 Azuma fleet is likely (following fleet delivery in summer of 2020) to replace the existing LNER fleet on the basis of 'one in one out' (in general with minor exceptions depending on diagrams), with Hitachi Rail replacing LNER as the beneficiary at Neville Hill Depot.

In preparation for the introduction of the class 800/801 Azuma Fleet Hitachi Rail has undertaken a significant amount of infrastructure investment at Neville Hill Depot (as detailed more fully in 6. Enhancements below).

Hitachi Rail is not seeking any new enhanced rights of access other than those detailed in the standard Depot Access Agreements and Depot Access Conditions.

**4.2 Adequacy:** Please set out to what extent and by what process (if any) the applicant has satisfied himself that the facilities and services required can be supplied at the depot in question.

As described in section 4.1 the class 800/801 Azuma fleet will replace the existing LNER fleet on the basis of 'one in one out' (in general with minor exceptions depending on diagrams). Hitachi Rail has carried out desk-top modelling exercises with the Depot Facility Owner and third party consultants that demonstrate that the existing depot Throughput will be no worse than it is at present, and will be improved by May 2020.

Hitachi Rail has provided class 800/801 Azuma units to the Depot Facility Owner at Neville Hill Depot for the purpose of allowing the Depot Facility Owner to assess its capacity/capability in respect of the Beneficiary Depot Services.

Hitachi Rail and the Depot Facility Owner have carried out joint exercises at the depot to satisfy both parties that the Beneficiary Depot Services are achievable.

Please see sections 3.1 and 7.3 together with Enclosure 2 (draft Side Letter) and Enclosure 4.

**4.3 Franchise obligations:** Please indicate the extent to which the use of the depot in the proposed contract is necessary to fulfil obligations under a franchise agreement.

The provision of the Beneficiary Depot Services at Neville Hill Depot is critical to delivery of passenger services between Leeds and London Kings Cross pursuant to the terms of the LNER franchise and will replace (on a one out one in basis – see 4.2 above) similar services currently provided by the Depot Facility Owner to LNER in respect of LNER's outgoing fleet.

**4.4 Public funding:** Please indicate whether (and if so to what extent) the services in the proposed contract are subject to financial support from central or local government (other than the Secretary of State), and provide a point of contact at that body

The services proposed are not subject to any financial support from central or local government.

**4.5 General guidance** given by the Secretary of State and/or Scottish Ministers: Please state here any general guidance given by the Secretary of State or the Scottish Ministers considered relevant to this application and why

We are not aware of any guidance given by the Secretary of State and/or Scottish Ministers. We would refer to the ORR's guidance on the supply of services, referred to in section 3.2 of this application.

## 5. Charges

Please indicate, and explain the reasons for, how the proposed charges were determined.

For the reasons explained at section 3.2 of this application, Hitachi Rail are unable to provide any substantive detail on how the proposed charges were determined by the Depot Facility Owner.

## 6. Enhancement

**6.1 Enhancement details:** Where the proposed contract or amendment provides for the delivery of any depot enhancements, or the services in the proposed contract or amendment are predicated on any planned depot 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 depot change procedure in the depot access conditions (Part

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C) has been completed (where appropriate, by reference to submissions made under the ORR's enhancement reporting framework)

The Proposed DAA does not include any requirement for the delivery of any depot enhancements.

However, the ORR should note that Hitachi Rail has procured at its cost investment in infrastructure at Neville Hill Depot to facilitate the introduction and maintenance of the class 800/801 Azuma fleet at Neville Hill Depot. This investment has included the re-modelling of four reception roads, installation of fueling and ad-blue dispensing systems and installation of additional shore supply points. The work carried out has had no adverse implication for existing Beneficiaries, but provides additional potential opportunities for the Depot Facility Owner to provide services to future Beneficiaries.

**6.2 Enhancement charges:** Please confirm that the arrangements for the funding of any depot enhancements are consistent with the ORR's enhancement framework, and summarise the level and duration of payments, and the assumed rate of return

Not applicable.

## 7. Other

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

There are no associated or parallel applications to the ORR.

**7.2 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)

Enclosures:

1. Proposed DAA
2. Transition Period Side Letter
3. Summary of charges for Proposed Beneficiary Depot Services at Neville Hill Depot and comparison with charging at other depots within the same/similar geographic region
4. Enclosure 4 – Minimum and Maximum Level of Beneficiary Depot Services post-Transition Period

**7.3 Side letters and collateral agreements:** Please confirm here that the whole of the proposed contract or 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 contract

- Please see Enclosure 2 (Draft Neville Hill Side Letter). This side letter is necessary to manage the provision of Beneficiary Depot Services during the withdrawal of the existing LNER fleet and its replacement with class 800/801 Azuma fleet. The aim of this side letter is to agree that the Beneficiary and the Depot Facility Owner will regularly review service levels and increase the Minimum and Maximum Levels of Services for each category of Beneficiary Depot Service in the Proposed DAA, subject to receiving ORR approval in respect of such variation, following the withdrawal of LNER's existing fleet from Neville Hill Depot.

**7.4 Confidentiality exclusions:** Please indicate clearly any elements in the application and the proposed contract or amendment that the applicant 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 its decision on such exclusions, it is the ORR's intention to publish this application and the proposed contract or amendment on the ORR website. (NB under the process established by Schedule 4 of the Railways Act 1993, the ORR is obliged to send a copy of the application **in full** to the facility owner)

- Any information that falling within the definition of personal data, as such term is defined by the Data Protection Act 2018. (Please note that we have sought to redact any names from correspondence).
- Enclosure 3 "Summary of Access Charging in respect of Beneficiary Depot Services at similar light maintenance facilities located in the north of England". This relates to charges provided by the Depot Facility Owner at light maintenance facilities to the extent this is regarded as commercially sensitive.

## 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

Signed [Redacted] .....

Date 21/2/2020 .....

Name (in caps) ANDREW ROGERS .....

Job title HEAD OF PROJECTS & CONTRACTS EAST .....

For (company) HITACHI RAIL LIMITED .....

## 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 or amending document/agreement, copies of any documents incorporated by reference (other than established standard industry codes or other instruments) and any other attachments, supporting documents or information.

Please also supply the application, the proposed contract or amending document/agreement and, insofar as it is possible, any other supporting information, in electronic form, by E-mail, **either in Microsoft Word format or OpenDocument Text (.odt) format** (excluding any macros, auto-paragraph or page numbering, or other auto-formatting).

### 9.2 Where to send it

Head of Stations and Depots  
Directorate of Railway Markets and Economics  
Office of Rail and Road  
One Kemble Street  
London  
WC2B 4AN

Email: [stations.depots@orr.gsi.gov.uk](mailto:stations.depots@orr.gsi.gov.uk)