

Ian Williams
Track Access Manager
Railway Markets and Economics
Telephone 020 7282 2092
E-mail: ian.williams@orr.gsi.gov.uk



22 April 2014

Sue Yeo
Customer Manager
Network Rail Infrastructure Limited
Western House
1 Holbrook Way
Swindon
Wilts SN1 1BD

Robert Holder
Network Access Manager
First Greater Western Limited
Milford House
1 Milford Street
Swindon
Wilts SN1 1HL

Dear Sue and Robert

Directions relating to your track access contract

1. On 6 March 2014 the Office of Rail Regulation (ORR) directed Network Rail Infrastructure Limited (Network Rail) and First Greater Western Limited (FGW) to enter into a new track access contract under section 17 of the Railways Act 1993 (the Act). This letter explains the reasons for our decision.
2. On 17 December 2013 FGW submitted an application for a new contract to take effect on the expiry of FGW's current contract on the Principal Change Date (PCD) 2014 and to run until PCD 2016. The contract proposed by FGW was on the same commercial terms as its current contract and contained rights for the same train services except that:
 - a) It included the additional rights introduced for 90 days from 8 December 2013 by means of a General Approval (an all year round earlier service start on Sundays on the Falmouth branch);
 - b) It contained certain corrections to the quantum of train slots in Schedule 5; and
 - c) It was updated to reflect ORR's latest model contract with simplified routes, reduced Schedule 5 rights for journey time and with rights to earliest and latest trains removed.
3. The application was submitted under section 17 of the Act as the parties were unable to agree all the terms of the contract. Network Rail was unwilling to carry forward certain rights in FGW's current contract, in particular firm rights to:



INVESTOR IN PEOPLE

- a) services which are not currently operating due to planned restrictions of use on certain Sundays and weeknights;
- b) journey time and service interval protection; and
- c) stabling at Bristol Temple Meads.

Consultation

4. No industry consultation had been undertaken before the application was submitted. In line with the procedure in our published criteria and procedures we consulted the industry from 19 December 2013 to 17 January 2014.

5. For applications made under section 17, schedule 4 to the Act also requires ORR to undertake a statutory consultation of Network Rail and “interested persons” as defined in paragraph 1 of schedule 4. Network Rail confirmed that there were no interested persons as defined. Network Rail made representations on 10 January 2014. These were copied to FGW who responded on 23 January 2014.

Industry views

6. Alliance Rail Holdings supported FGW’s application and said it was concerned by Network Rail’s approach to removing access rights in these circumstances.

7. Chiltern Railways also supported the application and said it was important for an operator to have sufficient certainty in its contract to earn the revenue needed to be viable and to comply with its franchise.

8. XC Trains did not support some aspects of FGW’s application. XCT explained that Network Rail had been unable to agree XCT’s aspiration for service interval protection at Reading Station from May 2014 on the basis that that the current infrastructure work has led to uncertainty about whether Schedule 5 rights above quantum only could compromise the Western Route’s ability to deliver a robust timetable. Consequently, XCT said it could not support other operators having a level of access rights that would conflict with this. XCT said this was not limited to protections that applied only to Reading itself, but also those that would de facto constrain the station, for example service interval protection at both London Paddington and Plymouth stations, in addition to the proposed journey time protection on the same journeys, would in its opinion place significant timetable constraints on Reading as an intermediate station.

9. However, XCT said that in principle it supported operators having the contractual ability to fulfil their obligations to customers and the Secretary of State via the protections available in schedule 5 and would regard this as commercially essential absent timetabling constraints such as the Reading project or a timetable rewrite.

10. Passenger Focus noted that passengers suffered problems caused by inadequate timetable specification when the previous Great Western franchise began. Passengers also needed reassurance that FGW will be able to maintain current service levels.

11. We note that the consultees generally supported FGW's proposal although XCT did not support service intervals and journey time protection on services which affected Reading station as it had itself agreed not to seek protection at Reading due to planned infrastructure works. The fact that XCT chose not to pursue these protections at Reading is not in itself a reason to deny such protections to FGW. Network Rail argued against giving FGW service interval and journey time protection for any services. Its argument and our decision on this (which apply equally to Reading) are covered in paragraphs 28 to 32 below.

12. The statutory process requires a formal consultation and various exchanges of responses and comments from the parties. The points at issue between the parties, the arguments made and ORR's views and conclusions on each are explained below.

Schedule 4

13. Although a lesser issue than those in paragraph 3, Network Rail proposed revisions to the Viable Transfer Points (VTP) in Schedule 4 due to the location of engineering blocks. In its response, FGW said that although discussions had started between the parties about the service response to forthcoming novel engineering possessions, the strategy had not yet been determined or approved. FGW therefore wanted to retain the existing VTP arrangements and where appropriate amend them later through a supplemental agreement. Network Rail did not respond further to FGW's suggestion, which we considered a reasonable approach. We have therefore left the existing VTP arrangements in place.

The quantum of train slots in schedule 5

14. Network Rail did not agree to FGW's request for the full quantum of rights in its existing contract to be included in the new contract. The two years of the proposed contract will see a large amount of infrastructure work on the route and Network Rail explained that its approach to the negotiations was that it should not sell access rights for services that could not be accommodated due to maintenance, renewal and enhancement obligations. Network Rail wanted to reduce the quantum to reflect the lower level of service which FGW is running as a result of engineering works and is likely to continue running throughout the duration of the new contract. Network Rail explained that the main disagreement over this contract was the principle of whether access rights should be sold on an engineering-free network or not.

15. FGW's view was that rights should be based on the capability of the open railway given the rights of others and said that this approach was consistent with the duties applying under section 4 of the Railways Act 1993 and the Network Code. FGW said that this is aligned with established practice which provides for firm rights for slots which are

then removed from or altered in the timetable as and when it is agreed or determined through the established timetable revision process set out in Part D that restrictions of use apply. It said that for Network Rail to deny FGW rights on account of future engineering works while other operators retained access rights in respect of the same routes and times of operation would be unfair and discriminatory. FGW said that removal of the rights would also defeat the established industry mechanisms for compensation in accordance with schedule 4.

16. We asked Network Rail to clarify whether it was funded in CP5 to compensate FGW for the services it would run, but for the engineering works. Network Rail confirmed that FGW's access charge supplement (ACS) for CP5 (which funds expected schedule 4 payments for possessions for maintenance and renewal) had been calculated based on 2011/12 traffic levels and that no adjustment had been made for any subsequent changes to access rights. It also confirmed that in respect of enhancements, the cost of schedule 4 payments were included in the funding of the project based on knowledge of possessions length and the train services which were operating at the time the estimate was created.

17. Network Rail acknowledged that, taken in isolation, the reduced level of access rights it was seeking would save it schedule 4 costs which it had been funded to incur. However Network Rail said that this should not be considered in isolation. It pointed out that the regulatory approach in previous control periods had been that once the ACS has been set, or funding for enhancements agreed, they had not been adjusted for changes in access rights (other than in exceptional large scale changes). Network Rail had borne the risk of changes in access rights affecting schedule 4 costs, despite the fact that such changes have generally resulted in more services and hence, in general, increased schedule 4 costs for which it is not funded.

18. Network Rail argued that it would be inconsistent with past regulatory practice to take into account the fact that in this instance, unusually, Network Rail will save schedule 4 costs. Alternately it argued that if the savings to Network Rail *are* taken into account, for example by reducing Network Rail's funding or by insisting that the access rights are included despite the fact that in practice the trains will not run, it would expect this approach to be followed consistently in future track access applications and anticipate that in most cases this would be likely to mean increasing Network Rail's funding as access rights are increased.

19. We also asked Network Rail to give any examples where it had refused to sell access rights due to planned engineering works. Network Rail said that with the standard process for the development of a new franchise it would have had the opportunity to comment on the deliverability of the timetable to be included in the ITT so would not usually be put in a position of refusing access rights in the subsequent track access contract. It did not, however, provide any examples where an ITT had specified a lower level of access rights than had previously been operating because of engineering works.

20. The example it provided was in the West Coast Trains contract where journey time protection for a small proportion of services between London and Wolverhampton had considerably extended journey time to reflect 2-track operation.
21. We considered the arguments of both parties. We agreed with FGW that the access rights should be sold on the basis of the open railway, and any suspension should be managed using the usual arrangements in part D of the Network Code and compensated under schedule 4 for which Network Rail has been funded.
22. The principle that all disruptive possessions should be compensated was established in the Periodic Review implemented in April 2001 and has applied since then. As well as compensating operators for disruption to services which affect passengers, this also incentivises Network Rail to undertake any necessary engineering work as efficiently as possible. In normal circumstances this principle would not be in question and FGW's access rights would be based on the capability of the engineering-free network. The unusual situation here is that over the two-year period of the new contract, significant additional engineering access is required to cater for Crossrail, Reading area enhancements and electrification works.
23. Under part D of the Network Code, at the start of each timetable development process Network Rail consults all timetable participants, compiles the Engineering Access Statement which includes the location, number, timing and duration of planned Restrictions of Use. Network Rail then produces the timetable taking account of the Restrictions of Use contained in it. Part D also contains a process for Network Rail to amend the finalised timetable to take account of additional or amended Restrictions of Use. In all of these cases Network Rail must apply the Decision Criteria with the objective of sharing capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services.
24. If FGW holds access rights for services which are affected by proposed Restrictions of Use then Network Rail must take them into account alongside those rights of any other operators in reaching a decision on the revised timetable which will operate. Without access rights, the intended services have no priority and will not be considered alongside other operators' rights. Suspending FGW's access rights in this way would predetermine which services should be suspended to take account of the Restrictions of Use rather than sharing the capacity in the most efficient and economical manner in the overall interest of users and providers of railway services. Of course, this does not mean that the services in question will not be suspended, just as they are currently, even though FGW holds rights for them in its current contract. But they only will be if that is the correct decision after proper consideration of the Decision Criteria.
25. We also disagree with Network Rail's arguments in paragraphs 16 to 18 above in relation to schedule 4. Network Rail correctly points out that once the ACS has been set, or funding for enhancements agreed, they are not usually adjusted for changes in access

rights, other than for exceptional large scale changes. Network Rail says that it has borne the risk of changes in access rights affecting schedule 4 costs, despite the fact that such changes have generally resulted in more services and hence, in general, increased schedule 4 costs for which it claims it is not funded.

26. Whilst it is the case that Network Rail faces the risk of higher schedule 4 payments where more services operate than those assumed at the time schedule 4 funding was set, it is also able to retain schedule 4 funding where it subsequently takes fewer possessions over the control period than was originally assumed. Not to include rights when engineering work is planned would remove the schedule 4 incentive to minimise disruption. We therefore do not consider that this case is inconsistent with how the balance of risk between the schedule 4 funding available to Network Rail and the amount it pays out operates more generally.

27. We do not consider the example provided by Network Rail (see paragraph 20) of another case where it had refused to sell access rights due to planned engineering works is a useful comparison. It is not unusual for journey time protection to be extended for some services at the beginning or end of the day to account for regular maintenance and renewal and examples can be found in various track access contracts. The two-track operation referred to is also a permanent engineering strategy in order to undertake maintenance and renewal and we would expect access rights to reflect the usual hours when the network is available. The difference here is that the restrictions of use are temporary (albeit quite lengthy) for specific enhancement projects.

Rights to journey time and service intervals

28. Network Rail did not wish to grant FGW any rights to journey times or service intervals. It said this was in order to provide flexibility required to deliver a robust timetable during a period of major infrastructure works. Network Rail said that operators are adequately protected by its licence obligations and the Network Code.

29. FGW argued that journey time and intervals were fundamental to attracting custom to rail and the resulting revenue was critical to securing the Network and funding investment for the future. FGW said that it required journey time and interval protection to secure this and to protect its interests from the activities of other operators who may have firm rights or who may otherwise secure advantage through a particular interpretation of the Decision Criteria. FGW said that journey time and interval protections were significant in laying down the outputs which the timetable has to deliver and made those requirements clear to Network Rail and other operators. It said they also enabled resource levels to be set, given known service patterns based on guaranteed frequency and journey times which promoted efficiency.

30. Whilst acknowledging the significant amount of engineering work taking place on the route over the next few years we are satisfied that the existing processes under Part D of the Network Code, properly exercised, will provide Network Rail with the certainty it requires in order to take any necessary Restrictions of Use and it does not require the

removal of journey time and interval protection to achieve this. However, there is one aspect of FGW's journey time protection which we consider should be relaxed.

31. There are two types of journey time protection - maximum journey times and maximum key journey times. The difference is that maximum journey times are increased or decreased to reflect any changes to the Engineering Access Statement and/or the Timetable Planning Rules whereas maximum key journey times are not. Given the engineering access required over the period of this new contract we think it is reasonable that the additional constraint of maximum key journey times should be removed.

32. We are aware that Network Rail has reviewed its policy for the sale of access rights and is aiming to agree less highly specified rights with all operators from December 2016 onwards. We would stress that our decision on this contract is in respect of rights up to December 2016 only and has been reached in the context of most operators having relatively highly specified access rights. Our decision should not be considered a precedent for how we may treat any application for access rights from December 2016 onwards.

Stabling at Bristol Temple Meads

33. Network Rail did not want to agree the continuation of firm rights to stable trains at Bristol Temple Meads on the basis that the area is the subject of major renewal works during the term of the contract.

34. FGW said that discussions so far had shown that the level of stabling it required was consistent with the revised infrastructure maintenance required by Network Rail and the need for alternative solutions had yet to be established. FGW explained that the station is used as a holding point for sets released from servicing at St Philips Marsh (so enabling the smooth operation of the depot) and as a holding point for sets not requiring servicing but which are required to reach service starting points easily reached by any route from Temple Meads. As such, this stabling was material to the ongoing delivery of the timetable.

35. Other than a general statement about the amount of engineering work around the station Network Rail did not counter any of FGW's arguments. FGW's firm rights to stable are subject to the Engineering Access Statement and Timetable Planning Rules and if, as a result, stabling is unavailable, Network Rail can provide alternative stabling arrangements. We therefore agree with FGW that it should retain firm rights to stable at Bristol Temple Meads station.

Schedule 7 track charges

36. FGW has a contract with Heathrow Airport Ltd (HAL) under which HAL is responsible for traction current arrangements for both Heathrow Express and Heathrow Connect services, so that all the traction current arrangements for operations over this route are addressed in a consistent way. FGW wanted to continue this bespoke

arrangement which is reflected in both the FGW and Heathrow Express track access contracts. Network Rail was mindful that negotiations on a new contract for Heathrow Express were ongoing and depending on the negotiations with Heathrow Express, Network Rail might wish to reinstate the model contract drafting.

37. We saw no reason to change the existing arrangements and confirmed to Network Rail that we would ensure that the corresponding provisions would be maintained in the Heathrow Express contract over the same period.

Implementation of PR13

38. The contract submitted by FGW was based on its current contract including the CP4 schedules 4, 7 and 8. New schedules 4, 7 and 8 and some other necessary amendments for CP5 were inserted into FGW's current contract when the periodic review was implemented on 1 April. As FGW wanted the new contract in place by 7 March 2014, the Priority Date for the December 2014 timetable, we provided a new schedule 12 for the new contract which allows a bespoke review notice to be issued in order to make the same changes to the new contract as were made to the existing contract from 1 April 2014.

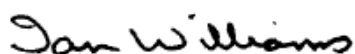
ORR's conclusions and directions

39. Once we notified the parties of our decision on all the points at issue between them we asked them to work together to prepare a revised version of the contract. They did this and FGW submitted a revised draft contract on 6 March 2014. We were then able to issue directions to the parties under section 17 of the Act on 6 March 2014 and they entered into it on 7 March 2014.

40. In considering the application and in reaching our decision, we have had to weigh and strike the appropriate balance across our statutory duties under section 4 of the Act. We have concluded that our decision is consistent with our duties, in particular those relating to: promoting the use of the railway network in Great Britain for the carriage of passengers and goods and the development of that railway network to the greatest extent we consider economically practicable; protecting the interests of users of railway services; and enabling persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

41. A copy of the directions will be placed on the public register. A copy of this letter and the directions will be posted on the ORR website. I am also copying this letter to Keith Merritt at the DfT, Jashim Uddin at Network Rail, Jonathan Cooper at Alliance Rail, Graham Cross at Chiltern, Tamzin Cloke at XCT and John Sears at Passenger Focus.

Yours sincerely



Ian Williams