

## Katherine Goulding

Senior Executive, Access and Licensing

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25 August 2017

Stewart Smith  
Industry Contracts Manager  
DB Cargo International Limited  
McBeath House  
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London  
EC1V 7LW

Andrew McIntosh  
Head of Concession Management  
Rail for London Limited  
Windsor House  
42-50 Victoria Street  
London  
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Dear Stewart and Andrew,

### Facility access contract between DB Cargo International Limited (DBC) and Rail for London Limited (RfL) at Wembley EFOC “C” Sidings

1. On 25 August 2017 the Office of Rail and Road (**ORR**) approved the facility access contract between DBC and RfL (**the parties**), which was submitted to us on 11 April 2017 under section 18 of the Railways Act 1993 (**the Act**). This letter sets out the reasons for our decision.

#### Background

2. In 2014, DBC sold its interest in part of Wembley Yard to RfL, which allowed RfL to construct stabling sidings for its electric multiple units. The new depot comprises of three sidings, which connect at either end with DBC’s infrastructure before continuing onto Network Rail’s network. The parties therefore want a facility access contract with access rights for RfL to use DBC’s infrastructure.
3. RfL first contacted us about the facility access contract in January 2015, at which time we provided advice regarding what is required in a facility access contract, particularly regarding a performance regime, confirmed there was no model contract issued by ORR for facility access and that the initial tri-party contract RfL were considering would need supporting evidence to be approved. RfL later decided that the contract would be not be tri-party. We also offered some general advice on an early draft of the facility access contract in May 2015.
4. RfL initially were considering applying for a 37 years contract, then later an “evergreen” contract. We explained that our policy is not to approve track access contracts for long term access contracts unless there were exceptional circumstances. Section 17 of the Act also allows RfL to protect itself from any unfair termination of the contract by applying to us.
5. RfL noted this and told us that it would apply for a ten-year duration. We explained what kind of evidence would be required for us to approve such an application when meeting with RfL in November 2015. Since then the Railways (Access,



Management and Licensing) Regulations 2016 (**2016 Regulations**) superseded the Railways Infrastructure (Access and Management) Regulations 2005, and we have refreshed our policy on duration of framework agreements. The general principles have remained the same, and while the 2016 Regulations only covers framework agreements<sup>1</sup>, we apply the same policy to facility access contracts.

6. We also approved a connection contract between the parties at this site on 4 April 2017<sup>2</sup>.

## Consultation

7. A full industry consultation for the facility access contract has been carried out by DBC, running from 4 November 2016 to 2 December 2016. DBC confirmed that no consultee raised any objections in the consultation.

## ORR Review

8. The proposed contract is based on an industry-developed template. It includes charging provisions, a performance regime and “use it or lose it” provisions.
9. The parties applied for a contract duration of nine years. In line with our policy on the duration of framework agreements<sup>3</sup>, we asked the parties for justification and evidence for a duration longer than five years. We received this evidence from RfL on 23 August 2017. RfL said that the large and long-scale investment RfL is making in both the site and the rolling stock that uses the depot would be at risk if it did not have the necessary access rights for the length of the concession. This evidence is sufficient and therefore we are content to approve the contract duration of nine years.

## ORR Decision

10. This application is under section 18 of the Act and therefore is agreed between the parties, who are prepared to enter into the agreement as submitted. Therefore we are content to approve this agreement.
11. In making this decision, we are satisfied that this decision reflects our duties under section 4 of the Act, in particular:
  - (i) to protect the interests of users of railway assets;
  - (ii) to promote the use of railway network in Great Britain for the carriage of passengers and goods and the development of that railway network, to the greatest extent ...economically practicable;
  - (iii) to promote efficiency and economy on the part of the persons providing railway services; and

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<sup>1</sup>

<sup>2</sup> [http://orr.gov.uk/\\_data/assets/pdf\\_file/0003/24582/wembley-sidings-dec-letter.pdf](http://orr.gov.uk/_data/assets/pdf_file/0003/24582/wembley-sidings-dec-letter.pdf)

<sup>3</sup> [http://www.orr.gov.uk/\\_data/assets/pdf\\_file/0018/22815/duration-guidance-publication-sept-2016.pdf](http://www.orr.gov.uk/_data/assets/pdf_file/0018/22815/duration-guidance-publication-sept-2016.pdf)

- (iv) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.
12. Once the agreement is signed, in accordance with section 72(5) of the Act, you must send a copy to us within 28 days and in accordance with section 72(2)(b)(iii), a copy will be placed on our public register and website.
  13. In entering any provision on the register, we are required to have regard to the need to exclude, as far as is practicable, the matters specified in section 71(2)(a) and (b) of the Act. These sections refer to:
    - (i) any matter which relates to the affairs of an individual, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that individual; and
    - (ii) any matter which relates to the affairs of a particular body of persons, whether corporate or incorporate, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that body.
  14. When submitting the copy of the signed agreement would you therefore please identify any matters which you would like us to consider redacting before publication. You will need to give reasons for each request explaining why you consider that publication would seriously and prejudicially affect your interests.
  15. This letter and the associated directions will be copied to Michael Bray of Burges-Salmon.

Yours sincerely,

**Katherine Goulding**