



OFFICE OF RAIL AND ROAD

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29 February 2016

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Dear Peter and Andy

Directions in respect of a track access contract between Network Rail Infrastructure Limited and Freightliner Heavy Haul Limited

PART ONE: OVERVIEW

Introduction

1. On 29 February 2016 the Office of Rail and Road (**ORR**) issued directions under section 17 of the Railways Act 1993 (**the Act**) to Network Rail Infrastructure Limited (**Network Rail**) to enter into a track access contract (**TAC**) with Freightliner Heavy Haul Limited (**FHH**), as formally requested by FHH on 27 August 2015. The TAC we have directed contains some amendments to that originally submitted by FHH. This letter explains our directions and the reasons for them.
2. We also received similar applications (**the Applications**) for contracts under section 17 of the Act from other freight operating companies (**FOCs**). There were issues that were common to all the Applications and where they had not been able to reach agreement with Network Rail. This enabled us to adopt a broad perspective and to try to achieve consistency between the FOCs making these applications (**the Applicants**).

Summary

3. FHH and the other Applicants were unable to agree terms for new TACs with Network Rail. We are today issuing directions and decision letters in respect of all the Applications. ORR has directed Network Rail to enter into TACs that include the following terms:
 - All Level One Rights in existing contracts to be carried over as one hour windows.
 - All Level Two Rights in existing contracts to be carried over as twenty four hour windows.
 - New traffic in freight TACs, typically, to be designated as one hour windows; but with exceptions on a case by case basis.
 - All the contracts to include ORR's new model Schedule 5 and new format Rights Table.



- Schedule 11 of each TAC concerning the Channel Tunnel Rail Link (**CTRL**) construction to be removed and replaced with a schedule concerning Crossrail service operation.
 - All TACs to last until Principal Change Date (**PCD**) 2026.
 - All the new TACs will start at the expiration of the current TACs.
4. There are some issues specific to FHH's application. These are:
- Rights in the Rights Table.
 - Modifications to the submitted TAC.

Structure

5. The structure of this letter is as follows:
- Part One outlines the application made to ORR by FHH and summarises ORR's approach and directions.
 - [Part Two](#) focuses on the cross-industry issues. Part Two is essentially the same for all the decision letters issued today to the FOCs and Network Rail, as those issues are common to all of them.
 - [Part Three](#) explains the issues specific to FHH's application.
 - [Part Four](#) of this letter sets out ORR's decision and the reasons for it.
6. The Applications raised several detailed and complex issues. This letter only provides a summary of the parties' representations. Please see our website for copies of their formal submissions¹.

Submission to ORR

7. The FHH application was submitted to ORR with the contract to be effective from PCD 2016 when the current contract expires.
8. The application consisted of:
- Form F – Application form.
 - Appendix A – *Draft of the amended Schedule 4 and Schedule 5 wording contained in the track access contract.*
 - Appendix B – ORR's model freight track access contract.
 - Appendix C – Rights Table.
 - Appendix D – *Paper detailing rationale for the requirement for one hour arrival time and departure time windows.*

Form and content

9. FHH completed and modified the relevant parts of the ORR model TAC and resubmitted it on 15 September 2015, after observations by Network Rail that these needed to be filled in. FHH subsequently requested some other changes, as mentioned [below](#).

¹ <http://orr.gov.uk/consultations/access-consultations/track-access-decisions/new-disputed-contracts-section-17> See also [Disclosure](#).

ORR's approach

10. We followed ORR's track access guidance (**Guidance**)² and the procedures set out in Schedule 4 of the Act (**Schedule 4**) for considering the Applications. We have also had regard to the duties under section 4 of the Act (**the section 4 duties**)³.
11. It is for each party to make its case in relation to the proposed TAC. FHH's Application explained the areas where it could not reach agreement with Network Rail. There were further iterations between the parties and us to clarify their concerns. On 16 February 2016 we shared the draft directions with FHH and Network Rail to consult them on our proposed modifications and to seek their comments on factual accuracy.

Industry wide issues

12. We also received applications from:
 - Freightliner Ltd (**Freightliner**) on 5 August 2015.
 - GB Railfreight Ltd (**GBRf**) on 1 September 2015.
 - Colas Rail Ltd (**Colas**) on 27 November 2015.
 - DB Schenker (UK) Rail Ltd (**DBSR**) on 11 December 2015.
13. The only FOC with a TAC containing Firm Rights which did not make an application was Direct Rail Services Ltd, as its contract will not expire until PCD 2019.
14. The other Applications raised similar issues to FHH's application. We therefore sought to adopt a uniform approach across all the Applicants so that they have consistent outcomes. The timing of the Applications is particularly opportune as they will apply to the scheduled timetable for PCD 2016 onwards. We have also been mindful of the directions made in respect of new TACs for passenger train operators.

Disclosure

15. FHH requested several redactions to its submission and subsequent representations. It said that certain information was commercially sensitive and/or disclosure was prevented under USA listing rules. ORR is an open and transparent regulator however we recognise that some information should be redacted. The test we applied was that under section 71(2) of the Act concerning the *Publication of Information and Advice*. We allowed the redaction of information where we consider that its publication might seriously and prejudicially affect FHH's interests⁴. FHH's redacted application and representations were placed on our website⁵.
16. We did not, generally, redact the information passed on to Network Rail. This is because of its interest as the other party to the TAC and its specialist role as Infrastructure Manager equipped for dealing with sensitive information.
17. FHH's representations are summarised in this letter in general terms.

² <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

³ <http://orr.gov.uk/about-orr/what-we-do/the-law/our-duties>

⁴ ORR's disclosure policy in respect of TAC applications is part of our track access guidance at <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

⁵ <http://orr.gov.uk/consultations/access-consultations/current-track-access-applications/new-contracts-section-17-and-18>

Representations

18. Network Rail responded to the Application on 8 October 2015 in accordance with the procedure set out in Schedule 4. FHH responded to those representations in turn on 29 October 2015.
19. Some of FHH's representations were made by Freightliner Group Limited (**Freightliner Group**) on behalf jointly of its subsidiaries - Freightliner and FHH, as both made TAC applications under section 17⁶.
20. We had meetings with FHH and discussions with Network Rail. Network Rail and FHH continued to hold meetings about the detail of FHH's proposed TAC. FHH provided an update on 26 November 2015. Network Rail provided a progress update in a letter dated 15 January 2016. FHH subsequently provided further versions of its proposed Rights Table, as discussed [below](#).
21. On 17 December 2016 Freightliner Group submitted a paper supporting a ten year duration for its TAC. This was replaced on 27 January 2016.
22. We placed redacted versions of the representations and the Rights Table on our website⁷.

Interested persons

23. We asked Network Rail to provide the details of any Interested Persons as defined under Schedule 4. Network Rail identified Transport for London (**TfL**) as an Interested Person, due to the Crossrail Access Option. We then wrote to invite TfL to invite their representations. We did not receive any representations from TfL. We have taken the view that as the Rights in this application are essentially mostly carried over from the existing TACs, with windows; Crossrail traffic is unlikely to be affected but if it is then the Crossrail Schedule will cover it ([see below](#)).

Consultation

24. On 30 September 2015 we started an industry consultation on FHH's Application in line with the *Industry code of practice for track access application consultations*⁸. Responses were received from West Yorkshire Combined Authority, First Greater Western and Merseytravel. London Overground Rail Operations confirmed it had no objections. The responses have been taken into account and the issues are summarised as part of this decision letter.

Schedule 5

25. On 6 November 2015, ORR issued an industry consultation on improvements to Schedule 5 of our model freight TAC. We made it clear that the findings of that consultation would affect the decisions made in respect of the Applications. Our conclusions were published on our website⁹.

⁶ <http://orr.gov.uk/consultations/access-consultations/current-track-access-applications/new-contracts-section-17-and-18>

⁷ <http://orr.gov.uk/consultations/access-consultations/current-track-access-applications/new-contracts-section-17-and-18>

⁸ http://orr.gov.uk/_data/assets/pdf_file/0006/17592/code-of-practice-for-track-access-application-consultations.pdf

⁹ <http://orr.gov.uk/what-and-how-we-regulate/track-access/current-work/industry-reform>

Schedule 11

26. Between 29 January and 12 February 2016 we consulted the Applicants and other relevant parties on removing Schedule 11 of our model freight TAC covering CTRL and replacing it with a new schedule for Crossrail modifications. Our conclusions are reflected in the directions ([see below](#)).

ORR's directions

27. In reaching our decision, we took into account the representations made by FHH and Network Rail, comments made by other parties, the results of our consultations on Schedules 5 and 11 of our model freight TAC, our Guidance and the section 4 duties.

PART TWO – INDUSTRY WIDE ISSUES

Background

28. Over the past two years Network Rail has been seeking industry agreement to more flexibility in respect of Access Rights in freight TACs. Network Rail argued that this would enable more efficient and effective use of network capacity¹⁰. We supported this.
29. Network Rail's effort to apply a more formal and rigorous approach to implementing its lesser prescription policy has been through meetings of Rail Delivery Group's (RDG's)¹¹ Contracts & Regulatory Reform Working Group (CRRWG) Sub-Group and RDG's Freight Sub-Group. ORR was represented on these sub-groups. Although the introduction of windows for departure and arrival times, instead of specific times with degrees of flex, was agreed, the sizes of these windows were not.
30. As the Applicants did not reach agreement with Network Rail and with their current TACs due to expire in 2016, they submitted the Applications to ORR under section 17 of the Act. The particular concern of the Applicants was the window size proposed by Network Rail for Access Rights. Meanwhile, Network Rail's *Access Rights Policy* was published on 23 September 2015¹².
31. As the Applications were submitted before the Applicants and Network Rail had entered into detailed negotiations, there were other unresolved issues or matters where there were deviations from our freight model TAC. These issues, as well as window size, were considered as part of the Applications.

Window size

The parties' representations

32. Previously in ORR's model freight TACs individual Access Rights have been identified as either Level One, Two or Three (**L1**, **L2**, **L3** respectively). L1 Rights are Firm Rights based on origin and destination around a fixed time, subject to limited 'flexing' by Network Rail. L2 Rights are Firm Rights to quantum but do not specify the timing of the service or its routing. L3 Rights are Contingent Rights, with no specificity other than origin and destination. This is explained in our track access guidance¹³.

¹⁰ See <http://www.networkrail.co.uk/Network-Rail-Access-Rights-Policy.pdf>

¹¹ <http://www.raildeliverygroup.com/>

¹² <http://www.networkrail.co.uk/using-our-network/Sale-of-Access-Rights.aspx>

¹³ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

Network Rail argued that the level of specification in L1 Rights needed reform to reflect the demands of an increasingly busy rail network.

33. The Freight Sub-Group has considered this issue and other ways of achieving greater flexibility in FOCs' Access Rights. Agreement was achieved on replacing L1 and L2 Rights with 'windows'. Windows would specify the range of contractual departure and arrival times at origin and destination. However agreement on window size was not reached.

Network Rail's initial position

34. Network Rail said that it needs to make the best use of network capacity to ensure a high performing railway that can deliver growth and meet the needs of customers at an efficient cost. It said that more flexibility within TACs was key.
35. Network Rail, in its *Access Rights Policy*, set out its position on more flexible Access Rights in the context of increasing demand for network capacity to run train services. It confirmed it will replace the existing hierarchy of L1, L2 and L3 Rights with a single tier structure of window times associated with the departure and arrival times of services. Network Rail said that this would provide FOCs and end-customers with a time window relevant to business needs¹⁴.
36. Network Rail recognised that the window size could be critical to a FOC's customer but it would also have had a fundamental impact on its own ability to flex services when constructing the national rail timetable. Network Rail's approach was to develop the concept of 'default' windows based on commodity type as the starting point for negotiations. This concept would bring consistency between competing FOCs at the start of negotiations. Any greater specificity in terms of narrower windows than the default position would have to be based on demonstrable need.
37. In response to the Applications, Network Rail confirmed its position on freight Access Rights. It argued that there should be one hour windows for intermodal, automotive and 'just in time' traffic; and two hour windows for all other freight that previously had L1 Rights, including 'bulk traffic'¹⁵. The rationale was that intermodal traffic is price sensitive and prone to 'modal shift'. However, bulk traffic was less so and more scope for flexing these services would allow the optimal use of capacity¹⁶.
38. Network Rail also said that flexibility was important to develop timetables and improve performance. Inflexible Access Rights should not inhibit usage so that returns on investment are maximised.

The Applicants' positions

39. All of the Applicants' current TACs expire at PCD 2016. They therefore wanted new TACs in place before the Priority Date (4 March 2016) for the December 2016 timetable. In general, they accepted the case for more flexible Access Rights in their new TACs. They agreed to relinquish the timings for Intermediate Points and the provision in TACs for L1 Rights that limited the maximum flex for Network Rail between timetable periods to +/- 30 minutes (sub-paragraph 3.1 of Schedule 5). This meant revisions to ORR's model freight TAC would be needed, see [below](#).

¹⁴ Page 10 <http://www.networkrail.co.uk/using-our-network/Sale-of-Access-Rights.aspx>

¹⁵ See annex D of its response to Freightliner's Application.

¹⁶ See Network Rail's representations of 8 January 2016 on DBSR's Application.

40. However, the Applicants were concerned that two hour windows for their bulk traffic would not give them the certainty they needed from their TACs with Network Rail to meet the needs of their customers. They generally preferred one hour windows for all their traffic. They disputed whether Network Rail had made the case for two hour windows and the benefits that would accrue.
41. Colas was concerned that as velocity becomes an increasingly important factor for freight customers, a significant increase in total journey time could constrain its ability to offer services¹⁷. It was concerned that wider windows could increase resources required for services, which would end up being passed onto the customer and disadvantage rail against road haulage, making it harder to retain and gain business.
42. FHH provided data on how inefficient train schedules increase equipment and driver costs¹⁸ and said one hour windows would enable FOCs to plan and organise their train movements and meet customer demands better than two hour windows.

Timetabling issues

43. GBRf¹⁹ believed that the congestion of the timetable described by Network Rail, as part of its argument for two hour windows, was partly caused by Network Rail not fully using the mechanisms and flex already available to secure additional paths for passenger and freight growth. Colas said that existing mechanisms could be used to gain additional capacity.
44. On pathing time, Network Rail stated that without it, it was possible it would not be able to offer suitable paths. Network Rail said that it was the FOCs, if anyone, who benefited from pathing time. The Applicants did not agree that pathing and looping time were to their benefit. DBSR²⁰ said that *“the majority of Freight Train Slots contain a significant amount of ‘hidden flex’ which is additional time added into journey times for pathing, performance and engineering as well as time spent in freight loops”*. This, it said, was a further buffer for Network Rail.
45. Applicants also commented that the Capacity Management Review Group²¹ workstream had returned over 1800 paths to Network Rail from FOCs since February 2014. GBRf said²² that where paths had been removed, other paths had not been revised and were pathed around services that were no longer running. GBRf said that the lack of maintenance of the Working Timetable (**WTT**) causes problems and pushes risk onto the FOCs.

¹⁷ Paragraph 4.3 of its Form F.

¹⁸ See FHH’s *Appendix D1: Information supporting the requirement for one hour time windows within a new Track Access Contract for FHH (coal) trains and other application documents*.

¹⁹ GBRf’s *detailed reply to NR detailed response to GBRf section 17*.

²⁰ Paragraph 3.2 of its Form F.

²¹ GBRf’s Form F explained “This is the joint Freight Operating Companies & Network Rail capacity working group, having started in early 2014 as a result of the CP5 Freight Access Charges determination. Its purpose is to review and amend current and future rail freight paths based on a “usefulness” and “reasonableness” test.”

²² GBRf’s *detailed reply to NR detailed response to GBRf section 17*.

Intermodal traffic

46. Freightliner's application concerned mainly intermodal traffic. In negotiations after the Application was submitted, Network Rail agreed to the proposals of one hour windows for this traffic.

Bulk traffic

47. Network Rail argued that bulk traffic is more captive to rail due to its bulk nature compared to intermodal traffic. The difference in window size, between intermodal at one hour and bulk at two hours, would strike the balance between flexibility and making rail attractive for end customers.
48. Network Rail noted it was important to be able to use the full spectrum of standard timetabling practices to optimise capacity²³. It said that there were 40 train operators with TACs, and on many routes there were a number of operators with different demands. Each TAC worked around existing TACs and so each additional layer of specified Access Rights reduced the flexibility for accommodating additional services.
49. Network Rail's view was that, although some bulk traffic was now at L1, this was a reflection of the inadequacy of the alternative (L2 Rights) rather than demonstrating the need for one hour windows.
50. Colas however said many bulk services work on a 'just in time' basis which was not compatible with two hour windows²⁴. DBSR considered that "the vast majority of freight traffic flows were now time-sensitive"²⁵. As an example, with bulk flows of steel, the rail transportation link is often considered part of the production line. GBRf stated that one hour windows would keep current rail business and prevent its loss to road haulage²⁶. GBRf disagreed with Network Rail's argument that bulk traffic was captive to rail and less price-sensitive than intermodal, noting that aggregates were as easy to transfer to road as containers and the pricing even more competitive, with aggregates traffic shifting to road hauliers due to a lack of realistic paths and increased pricing that resulted.
51. Colas said it serves a number of bulk goods industries such as aviation fuel and construction which required consistent and robust arrival and departure times to align with often complex terminal plans²⁷. Temperature sensitive products such as bitumen, which have a limited shelf life once loaded, require a definitive path on the network and specific arrival times.
52. FHH also supplied a justification for one hour windows for non-coal bulk traffic²⁸. Relevant factors included:
- Aggregates traffic – need to optimise loading capacity at constrained sites;
 - Cement – stocking and loading restrictions;
 - Waste – robust plans were needed with trains un/loaded efficiently; and

²³ *Network Rail's Representations* of 8 October 2015 on FHH's application.

²⁴ Para 3.2 of its Form F.

²⁵ Para 3.2 of its Form F.

²⁶ Para 3.2 of its Form F and elsewhere.

²⁷ Para 4.3 of its Form F.

²⁸ See its Appendix D2.

- Off network locations – the need to avoid peak traffic.

53. Network Rail disagreed and said that there is less price sensitivity for traffic, like petrochemicals and timber, between rail and road. Bulk traffic would still use rail even with two hour windows²⁹. Colas in turn said that flexing of up to two hours could have a detrimental effect on its customers and turn them away from rail freight³⁰.

Coal

54. FOCs generally operate a coal train on behalf of a single customer (such as a power station). FHH said that these trains only ran when requested by the power station. Demand fluctuates and train planners have to adjust accordingly. On time sensitivity FHH explained that coal was often dropped straight into burners on arrival rather than onto stockpiles³¹.

55. FHH said that there is a complicated matrix of customers (the power stations), ports, rail operators and blends of coal, and a requirement for 'just in time' delivery of trains in the right sequence. This model demanded a degree of certainty over delivery times. FHH said that one hour windows were adequate.

56. Meanwhile the nature of the market is changing. FHH stated that there are fewer power stations demanding coal and departure points have shifted from collieries to ports. So, FHH said, the high concentration of coal services running along the same corridors into a reduced number of off-network locations made it essential that there was a workable slot plan. It contended that one hour windows provided a better basis for planning than two hour windows.

57. Network Rail referenced, in response to the Colas application, the wider slot plan which provides flexibility for coal traffic. However, slots associated with L1 Rights were almost always out-of-date as a consequence. Two hour windows would reduce the amount of changes needed to reflect changing slot plans, compared to one hour windows. Network Rail made a reference to 'trading slots' being made easier where coal Access Rights were not contractual in its discussion of slot plans. Network Rail subsequently clarified its reference to 'trading slots' as meaning the *"collaborative process of exchanging non contractual time slots into power stations and ports, rather than any reference to the 'trading' of access rights."*³² Network Rail explained that the point was that if departure and arrival windows were too restrictive then the exchange of slots would require Supplemental Agreements to update individual Access Rights each time, whereas with wider windows the slot could be moved within that window.

Biomass

58. GBRf said that, like coal services, FOCs operate biomass trains on behalf of power station customers with a limited number of both origin and destination points. Biomass is dropped straight into the burners instead of being stockpiled on arrival³³.

²⁹ See NR representations on the Colas application.

³⁰ Colas representations 14 January 2016.

³¹ See Form F and Appendix D1 of the FHH application.

³² Network Rail email of 12 January 2016.

³³ Form F, GBRf's detailed reply to NR detailed response to GBRf section 17 and an email of 21 December 2015.

59. GBRf said that there are issues relating to the storage of biomass that need to be considered. There is an increased risk of fire when biomass is stored as it degrades quickly, even when kept dry in covered silos, alongside limited storage for biomass at ports and power stations. There are also different types of biomass, which need to be segregated both when stored and burnt. GBRf provided an example of a recent import of peanut biomass that could not be stored with other types of biomass due to peanut allergy issues.
60. GBRf also said that Drax Power Station can cope with a maximum of one biomass train every thirty minutes. Currently Drax has occasionally received three trains from the various ports that serve the power station in an hour, which causes performance issues for both the power station and the rail network. GBRf said this was due to variations in the timing flexibility of services.
61. Network Rail said that it had agreed to two hour windows for these services instead of the L2 Rights (twenty four hour windows) that had previously been considered³⁴, which Network Rail said was due to the commercial factors GBRf had provided to it³⁵.

Royal Mail

62. DBSR said that its current Royal Mail traffic has a flex of +/-15 minutes. Consequently the Access Rights in the proposed agreement were presented by DBSR as thirty minute windows. It set out the penalties it might face for untimely delivery.
63. DBSR acknowledged that a time window of 30 minutes was more restrictive than a 60 minute window (from Network Rail's perspective), but it contended that this created an appropriate balance between the commercial need for tight time windows and the ability for Network Rail to make efficient use of capacity on the network.

GWML

64. First Greater Western Ltd³⁶ responded to our consultations. It wanted consideration to be given to being flexible enough to permit accommodation of its franchise requirements as modernisation of the Great Western Main Line (**GWML**) continued. Freightliner commented that it was well aware of the changes to passenger services on the GWML. There was engagement with all industry stakeholders through:

- Western Route Study;
- Western Industry Plan Group; and
- Western and Wales Events Steering Group.

It said the timetable development for December 2016 and December 2018 could accommodate existing freight Access Rights with some headroom for growth into CP6. It was Freightliner's view that a one hour window would be sufficient to accommodate any need to adjust or move slots/paths for the planned timetable changes.

³⁴ NR's Representations on GBRf's application 2 October 2015.

³⁵ Meeting between Network Rail and GBRf, 21 December 2015.

³⁶ <http://orr.gov.uk/consultations/access-consultations/current-track-access-applications/new-contracts-section-17-and-18>

Off-network capacity

65. Colas said that while much consideration had been given to increased use of infrastructure, less consideration had been given to the associated impact on off-network capacity³⁷. Off-network locations often have complex slots or occupation plans to ensure that all services could be handled in sufficient time and resources used efficiently, especially when different FOCs were using the same locations. Flex of more than one hour therefore could make a difference between a plan working and it not working. Services could need to be retimed to accommodate longer windows and could reduce off-network capacity.
66. Network Rail argued that slot plans at terminals were not a suitable justification for one hour windows, as two hour windows could easily accommodate these off-network constraints by careful timing of the arrival and departure windows. Network Rail³⁸ said that if it ever were to happen that a schedule was offered that did not comply with terminal planning constraints or loading requirements, there is adequate provision within Network Code Part D to resolve these issues. It argued for flexibility to achieve growth. Colas however remained concerned that occupational plans could be rendered unworkable, especially at terminals with mixed intermodal and bulk traffic³⁹.

ORR conclusions on window size

Specification

67. ORR has expressed support for windows throughout the CRRWG initiative. As a result of the Applications, however, we have had to consider the arguments presented in terms of their size. There is a balance to be struck between greater flexibility for Network Rail and the certainty needed by FOCs for planning their businesses.
68. Network Rail has argued for different window sizes according to commodity type. This fuelled a debate about which commodity type should have what sized windows. There is also a consideration about whether these windows should be further flexible according to network capacity. There is no guarantee however that in every situation narrower windows will be more appropriate for one type of cargo than another. It will vary according to end-users' needs.
69. Network Rail said that smaller windows would result in the need for more Supplemental Agreements as traffic changes ([see above](#)). We do not find that convincing given that the parties will still need to prepare regular Supplemental Agreements as Access Rights are removed or added.
70. Further, one of the section 4 duties is for ORR to protect the interests of rail users. We would be concerned if the services offered to users varied on the basis of whether they could readily switch to road haulage or not. Our view is that it is better to focus on what they ask from the railway and how it can meet their needs.
71. Access Rights were, in the past, frequently granted for coal traffic on a L2 basis. However, the coal market has changed since L2 Rights were first introduced, and

³⁷ Paragraph 4.3 of its Form F.

³⁸ NR's Representations on GBR's application 2 October 2015 and elsewhere.

³⁹ Colas response to NR representations, 14 January 2016.

many coal flows are now supported by a smaller number of L1 Rights. We have been told by the Applicants that operators of busy ports and end-customers demand certainty about when traffic is scheduled.

72. Existing L1 Rights (with +/-30 minutes' flex) are similar to a one hour window. L2 Rights translate into a twenty four hour window. On that basis, we have decided that L1 Rights in current TACs that are carried over to new TACs should be granted as one hour windows. (There is one exception; we agree with DBSR that the Royal Mail traffic should be 30 minute windows, [see below](#)). Existing L2 Rights carried over should be as twenty four hour windows.
73. We consider that this:
- will cause the minimum disruption to FOCs' businesses (currently with L1 Rights and protected by the +/-30 minute flex) compared to the uncertainty of two hour windows for some services;
 - will preserve end-users' confidence in FOCs' abilities to provide the train services and timings they need;
 - will provide certainty for freight terminals and other rail facilities as well as the Applicants when planning their operations.
 - will still enhance Network Rail's overall flexibility, given the other changes being made to Schedule 5 and the Rights Tables;
 - is consistent between the Applicants, and minimises market distortions;
 - is simpler to apply than a multi-layered approach based on cargo type;
 - is generally consistent between different types of freight traffic; and
 - is a proportionate response to the issues involved.
74. For the reasons outlined in the Applicants' representations and in this letter it also properly balances the section 4 duties including:
- promoting improvements in railway service performance;
 - protecting the interests of users of the railway; and
 - enabling persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

Thirty minute windows

75. In relation to 30 minute windows for Royal Mail business, we do not regard it as necessarily relevant that DBSR has committed itself to a long term delivery contract with tight specifications and potential penalties. The specifications within commercial contracts that FOCs may have signed are a matter for them. It is inherent in the system that FOCs cannot guarantee that they will always get the TACs they demand as a consequence. They must have due regard to this when entering into their commercial arrangements.
76. However, in this instance we note that:
- Similar Access Rights already exist in the DBSR Rights Table, with +/- 15 minutes flex, and associated paths in the WTT.

- The customer demands in this instance are exceptional, with very particular delivery and timing requirements (that are driven by onward transfers from the terminals).
- The trains assigned to this traffic are unlike other freight trains, being higher speed, dedicated, and limited in number, with few stopping points. They are therefore comparatively easy to accommodate into the WTT.
- Network Rail did not specifically object to these rights.

77. ORR's position in this instance should not be read as assuming all future mail traffic (whether Royal Mail or otherwise) will qualify for 30 minute windows. The relative merits will depend on the circumstances of the case. The arguments justifying 30 minute windows have to be exceptional.

Reopener provision

78. Network Rail also stated that it would object to any TACs of duration of more than five years if ORR decided in favour of the FOCs' position on the size of departure and arrival windows. If longer term TACs were agreed, the opportunity to review the level of the specification would be lost for 'many years'.

79. Given the nature and length of the TACs we are directing, we have included a provision allowing either party to review window sizes and propose adjustments, subject to our approval. This is explained in our conclusions letter for the consultation on improving Schedule 5 of the freight model TAC (see [below](#)).

Future Rights

80. We expect the default position for window size of freight Firm Rights, backed by commercial contracts with end users, to effectively be one hour windows. This should not be regarded as precluding future windows being agreed at different sizes. Windows may be larger depending on the circumstances, including twenty four hour windows if that is appropriate. In exceptional cases they might be smaller. ORR will however expect consistency of treatment by Network Rail between train operators. Differences from the one hour window should be explained and justified in any applications made to us. These should be on the basis of a study of the impact including on the FOC and the customers concerned.

Congested infrastructure

81. Where Network Rail has formally declared network as *Congested Infrastructure*⁴⁰, we would not normally expect one hour windows for new Access Rights to be granted, especially for busy times of the day. In such cases, windows of up to twenty four hours might be expected.

Shunting and ancillary moves

82. Specified windows will not normally be appropriate for maintenance and shunting moves as Schedule 5 of each TAC ensures that FOCs have rights for ancillary moves to the extent necessary or reasonably required to give full effect to other Firm Rights.

⁴⁰ see <http://www.networkrail.co.uk/guide/operational-rules/congested-infrastructure/>

TAC duration

The issue

83. All the Applicants applied for TACs with duration of ten years, with an expiry date of PCD 2026. Under the legislation it is for each Applicant to justify its proposed TAC duration where it is for longer than five years.
84. Each Applicant has previously entered into TACs to last until PCD 2016 as follows:
- DBS through a Supplemental Agreement⁴¹ to its 2006 TAC in 2015.
 - Freightliner in 2007.
 - Freightliner Heavy Haul in 2007.
 - GBRf in 2008.
 - Colas through a Supplemental Agreement⁴² to its 2006 TAC in 2015.

The parties' representations

85. GBRf's justification included statements about⁴³:
- new locomotives due to be delivered during the period of the new TAC along with refurbishment of existing locomotives;
 - commercial leases running beyond 2026;
 - the importance of a ten year TAC for retaining existing and gaining new customers;
 - installation of forward facing CCTV cameras to 50 Class 66 locomotives; and
 - investment in its maintenance facilities and depots.
86. DBSR's justification noted⁴⁴:
- the need to provide certainty to its customers;
 - long term investment in locomotives, wagons and facilities since privatisation during the late 1990s;
 - long term commercial contracts with customers; and
 - future investment in existing as well as new facilities.
87. Colas's justification referred to⁴⁵:
- long term commercial contracts with customers;
 - providing certainty to customers with a ten year TAC;
 - further investment in new locomotives during the duration of the new TAC;
 - future investment in maintenance and staff facilities; and

⁴¹ [DBS 116th Supplemental Agreement.](#)

⁴² [Colas 7th Supplemental Agreement.](#)

⁴³ GBRf Form F.

⁴⁴ DBSR Form F.

⁴⁵ Appendix A of the Application and its response to Network Rail's representations.

- purchases of new wagons for a new long term commercial contract.
88. Freightliner and FHH's justification was presented by Freightliner Group⁴⁶. Freightliner Group emphasised:
- the capital intensive nature of the industry;
 - the need for a stable environment where the FOCs are not protected by franchises;
 - the demands of FOCs' customers; and
 - investments in locomotives, rolling stock leases and maintenance facilities.
89. Network Rail did not object in principle to longer term TACs. Network Rail⁴⁷ did note that each FOC would need to satisfy the requirements of the legislation. Network Rail said it would object to TACs of longer than five years (**LTACs**) if we decided in favour of the Applicants' position on the size of departure and arrival windows. The Applicants in turn argued that the two issues should not be interlinked. DBSR⁴⁸ pointed out the other flexibilities offered in the new TACs, which include the removal of the dampener provision (paragraph 3.1 of old Schedule 5).
90. No-one else objected to the proposed duration for the TACs.

ORR analysis

91. The relevant legislation is *The Railways Infrastructure (Access and Management) Regulations 2005* as amended by *The Railways Infrastructure (Access and Management) (Amendment) Regulations 2009* (together: **the Regulations**). The Regulations say⁴⁹ that framework agreements of longer than five years must be justified by the existence of commercial contracts or specialised investments or risks.
92. ORR's policy is explained in our guidance *The duration of access contracts, June 2005*⁵⁰ (**2005 Guidance**) in the context of the Regulations. We make it clear that each case will be considered on its merits. It is for each Applicant to make its case. At paragraph 2.24 we say that freight operators in particular are likely to be capable of meeting the criteria for a *long term access contract*. We indicate⁵¹ that freight TACs of between 5 and 10 years can be approved if there are commercial contracts, underlying investment or to secure investment, or a specialised risk profile.
93. We are aware the Regulations are due to be replaced by new regulations in 2016 (**the new Regulations**)⁵². The new Regulations as drafted have very similar provisions to the current Regulations and so we have not needed to consider their potential impact further.

⁴⁶ See Freightliner - Information supporting a 10 year Track Access Contract 27 January 2016.

⁴⁷ See Network Rail's representations in respect of each application.

⁴⁸ DBSR response to Network Rail's representations 21 January 2016.

⁴⁹ Regulation 18(8), as amended.

⁵⁰ http://orr.gov.uk/_data/assets/pdf_file/0004/1678/240.pdf

⁵¹ At para 3.15.

⁵² See draft statutory instrument on Railways Infrastructure (Access and Management) and Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2015 at <https://www.gov.uk/government/consultations/recast-first-railway-package>

94. All the Applicants explained the wide range of investments they have made, are making or will make in the context of their current TACs. This included locomotives, rolling stock, land, technology and training.
95. The Applicants also provided some evidence of long-term commercial contracts with customers, though to differing degrees. Freightliner is especially constrained in this area given recent commitments provided to ORR⁵³.
96. We have previously recognised that the Applicants have specialised risk profiles reflecting factors such as the legislative framework, demand and supply conditions (including constrained capacity) and competition from other modes of transport.
97. We have considered the impact of LTACs on the availability of network capacity for competitors. DBSR pointed out there are mechanisms in Part J of the Network Code which allow for the review and/or removal of Rights. These are:
 - J2 – Adjustment of Access Rights.
 - J4 – Failure to Use.
 - J5 – Failure to Use: third party application.
 - J7 – Freight transfer mechanism.
 - J9 – Rights Review Meetings.
 - J10 – Rights of Network Rail to make an Access Rights Change.

There is also the new reopener mechanism in paragraph 5 of Schedule 5 ([see below](#)).

98. ORR is aware of industry discussions⁵⁴ and commitments to improve this part of the Network Code. In particular, we expect the industry to come forward by the end of March 2016 with proposals to better handle intermodal freight from different customers where capacity is constrained. We have already said that if no industry agreement is reached, we have the power to intervene to propose our own modifications to the Network Code⁵⁵.

Conclusion

99. Overall we consider the Applicants fulfil the criteria for TACs of longer than five years, mainly because they face specialised risk profiles. There have been no objections to the Applicants' proposed TAC duration, except for Network Rail's comments addressed above.
100. Directing TACs with expiry dates of PCD 2026, as requested by the Applicants, is consistent with the section 4 duties to 'protect the users of railway services', to 'promote the use of the railway network for the carriage of passengers and goods' and 'to enable users of railway services to plan their businesses with a reasonable degree of assurance'. It is consistent with our previous decisions on LTACs and our current policy. It also achieves consistency between these FOCs. Also, recognising

⁵³ <http://orr.gov.uk/news-and-media/email-alerts/2015/orr-accepts-freightliner-commitments-to-strengthen-competition-in-rail-freight-sector>

⁵⁴ The Network Policy Group - Part D/J workstream.

⁵⁵ Para 25 Provision of [Deep Sea Container rail transport services between ports and key inland destinations in Great Britain 18 December 2015](#)

our duty to promote competition, we consider that the improvements being developed by the industry to the Network Code are particularly important.

101. Further, the common expiry date will allow us to consider and review our approach to LTACs and the management of Access Rights for the next generation of TACs (although this does not mean we would limit new TACs for other FOCs to the same expiry date). We will review and consult on our contract duration guidance as we continue to update our track access guidance⁵⁶.

Modifications

Schedules 1 and 3

102. DBSR's Application included a new clause 1.4 which stated that Schedules 1 and 3 shall have effect. We have directed that this clause is added for all the new TACs.

Schedule 5

103. As mentioned above, on 6 November 2015 ORR commenced a consultation on proposed changes to Schedule 5 and the associated Rights Table in ORR's model freight TAC⁵⁷. This built on the CRRWG's work described above. We published our conclusions on 20 January 2016.
104. Network Rail and the Applicants were generally content with our proposals. ORR's model freight TAC has been updated. Given the responses by Network Rail and the FOCs, we consider it appropriate to implement the changes as part of this decision.

Electronic invoices

105. As part of that consultation we noted that Network Rail said that the wording of clause 16.1.2, regarding the delivery of invoices, should contain provision for invoices to be sent by electronic means. We agreed with Network Rail that invoices may be sent by electronic means where suitable. We have amended clauses 16.1.2 and 18.4.3 of our model TAC accordingly and reflected this in our directions.

Rights Table

106. The Rights Table forms a part of the TAC between Network Rail and each FOC with Access Rights. As a result of our consultation on Schedule 5 to the model TAC, we have updated our template Rights Table.

Unused Rights

107. Network Rail noted that there were a number of Access Rights that had not been used for over 90 days in the Rights Table contained in some of the Applications; and that these should be removed. Network Rail pointed out that it could remove unused Access Rights under Part J of the Network Code. Network Rail also noted that many of the Access Rights included were either materially 'altered' or new, and said that the Applicants should have highlighted these changes and discussed these proposed Access Rights prior to making any section 17 applications.

⁵⁶ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

⁵⁷ <http://orr.gov.uk/what-and-how-we-regulate/track-access/current-work/industry-reform>

108. Subsequently, as part of the application process, Network Rail agreed with each of the FOCs involved to review separately whether individual Access Rights were used or not. Network Rail withdrew its objections.
109. We reserve our position in respect of Access Rights which straddle the current and new TAC but remain unused for a total of 90 days. This is a matter which is covered by the Network Code, under which ORR has an appeal role. We do however expect Network Rail and each FOC to keep the Rights Tables up to date and under review, with regular Rights Review Meetings.

Contract Miles

110. Network Rail noted that the Contract Miles listed in Schedule 5 for some services differed from the actual mileage in the WTT. While this had not been raised by Network Rail as a potential change to Schedule 5, Network Rail considered that there was no need for Contract Miles in Freight TACs. It said that the FOCs also received compensation for diversions under Schedules 4 and 8, thus compensating them twice for the same diversion.
111. Network Rail said that Contract Miles should be removed. If however the decision was that Contract Miles should remain, it would want all Contract Miles fully updated to reflect WTT schedule mileage.
112. The Applicants all disagreed with Network Rail's proposal for removing Contract Miles. Colas pointed out that contract miles are essential for calculating the costs of diversions⁵⁸.
113. Contract Miles should measure the distance between the origin and destination points on Network Rail's network. It is important for Network Rail's billing purposes. It is essentially a matter of fact on which the parties should be able to agree. Otherwise the details in the WTT should be quoted until they are properly established.
114. The compensation FOCs receive under Schedule 4 (*Restrictions of Use*) is intended to compensate for extra costs incurred during diversions, such as extra fuel, crews, locomotives and rolling stock, use of alternative types of traction, and reduced loads. Contract Miles prevent FOCs being charged extra track access costs when they are diverted via a longer route.
115. Schedule 4 compensates FOCs with a lump sum, which depends on the notice given. The Contract Miles however establish, in the event of diversions, how much Network Rail can bill for despite the extra mileage involved.
116. ORR has directed that the Contract Miles should be carried over on the same terms as the current TACs. Network Rail and the FOCs should, however, review the contract mileage jointly in due course and calculate the relevant mileage.
117. As Colas does not have Contract Miles in its current TAC, we would expect Colas and Network Rail to agree Contract Miles together through its regular Rights Review meetings. Schedule 7 establishes a mechanism for Contract Miles, and if the parties cannot agree, Access Dispute mechanisms would apply.

⁵⁸ Colas response to NR representations, 14 January 2016.
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118. GBRf asked ORR to consider if GBRf should receive a rebate from Network Rail for previous errors in contract mileage, for example including non-Network Rail network. We have not considered GBRf's request as essentially that is a matter of contractual interpretation for the parties to determine using dispute mechanisms as appropriate.

Routing and Intermediate Points

119. Initially all the Applicants routinely included specific routings in their proposed Rights Tables. Specified routings give a FOC Firm Rights to that particular route, except for Restrictions of Use⁵⁹ due to track possessions and engineering works. This restricts Network Rail's planners' scope for fitting services on to its increasingly busy network and can have knock-on effects for other services, including new ones.
120. Further, the network itself is dynamic and subject to change, especially in the context of TACs lasting until PCD 2026. Enhancements could improve alternative routes. Investment in such enhancements could be undermined if utilisation is limited by route specifications. For freight services, while it is the destination and arrival points that are crucial, the particular routings assigned can be less so.
121. We appreciate that FOCs want certainty over their operations. But on the other hand we need to ensure that the timetable planners can make the best use of the network, which means incorporating flexibility where appropriate. There are however important safeguards for FOCs:
- In constructing the timetable, Network Rail must have regard to the Decision Criteria in paragraph 4.6 of Part D of the Network Code. This includes enabling operators to utilise their assets efficiently. This is supported by an appeals mechanism.
 - The assigned paths have to correspond with the relevant arrival and departure windows. Routes should not be assigned outside those windows, unless the FOC agrees.
 - There is provision for citing Intermediate Points where these are needed, such as for refuelling, crew or locomotive changes.
 - We have retained the Contract Miles column in the model Rights Table, which Network Rail should use for billing purposes ([see above](#)). This will incentivise Network Rail not to assign unnecessarily long routes.
 - Network Rail may not route services where it conflicts with operational constraints, contractualised in the Rights Table, such as Timing Loads or Loading Gauge.
122. Further, FOCs may present their preferred routings paths or additional detail in their Rights Tables as '*non-contractual comments*'. These rows can inform and assist planners. However they do not form part of the formal contract and are not binding on the parties. This is provided for in paragraph 4.3 of Schedule 5 to each of the TACs we have directed ([see above](#)).

⁵⁹ As in Schedule 4 of the TAC and the Network Code.
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123. It might be argued that if there is only one feasible route then it is okay to specify it. On the other hand, specification in that instance is not necessary anyway. Further it requires decisions to be hardwired and disregards possible future network changes.
124. Provision against engineering works is also generally insufficient justification, on its own, as this could restrict capacity and Network Rail should provide alternative routes, or compensation, in the case of engineering works in any event⁶⁰.
125. DBSR⁶¹ said that some routings related to preferred trailing load or driver route knowledge reasons. ORR notes that gauge limitations and other operational issues will determine which routes are viable, and so can be specified. ORR's view is that Network Rail will have to take these factors into account anyway. On route knowledge, if a FOC is assigned a route different to one previously used it will have to acquire the necessary route knowledge. Issues, which may vary even over the short term, should not be fixed in Rights Tables in a TAC that could be in operation for several years.
126. Operational factors can be pertinent. For example, there may be instances where the length of journey or other interfaces will necessitate events at particular points. This would include crew change, for example. However, this should be reflected by specifying Intermediate Points in the relevant column in the Rights Table rather than through routings, which would be otiose.
127. However if a FOC can demonstrate that there is a need for routing, such as maintenance of driver knowledge for infrequently used routes, and Network Rail agrees, this could justify route specification. This should be explained in the Special Terms column. As examples, we have allowed:
- DBSR specifying routing via Edinburgh Waverley in order to retain Route Knowledge for diversions, outside of peak hours [head code 6S92];
 - DBSR specifying a routing on a Y-Path for Class 7 traffic for engineering works, due to the slow speed and unusual weight of the train which makes finding alternative paths exceptionally difficult [head code 4O20]; and
 - GBRf specifying routing on some services between Hornsey and Cricklewood as that permits all of its clients' different classes of EMU to be moved and alternative routes are not suitable [for example: head code 5M19].
128. DBSR said that in the case of international freight traffic there is a legal requirement to maintain paths via suitable alternative routes in the night hours and weekends. In certain specific cases, in our view, such an obligation could be sufficient justification for specifying particular routings. We discussed this approach with each of the Applicants. Most of the Applicants agreed to review their proposed Rights Tables and in several instances removed or amended their entries in the routings column. Colas maintained that all its routings were commercially justified based on "running at the lowest possible cost"⁶². We do not regard these arguments as sufficient justification. We have amended the routings in Colas's Rights Table in our directions, to make

⁶⁰ Part G of the Network Code, Schedule 4 of the TAC, as relevant.

⁶¹ DBSR email to ORR 8 January 2016.

⁶² Colas representations dated 14 January 2016.

them less specific. We have however transposed the removed information to be non-contractual comments, as explained above.

129. Freightliner had earlier referenced Schedule 5 definitions as implying that the routings column has to be populated. That is not our interpretation of that schedule in its old or new form. We will revisit our track access guidance to ensure our position is clear.
130. Our view is that specific routings should not be routinely contractualised by specification in FOCs' Rights Tables. In our directions, we have only allowed a few specific routings where exceptional cases have been made. We expect all routings in Access Rights to be sufficiently justified.

Schedule 7

Paragraph 2.1.2

131. Network Rail said that Paragraph 2.1.2 of Schedule 7 of the model freight TAC was poorly worded, as it could mean that no charges were payable for an entire Train Slot even if the train stopped only a short distance from its planned destination⁶³. This appeared to Network Rail to be a case of the FOC getting compensation twice alongside Schedule 8's provisions. Network Rail wanted this paragraph to be reworded or removed.
132. The Applicants generally disagreed that this was a case of receiving compensation twice. Freightliner and FHH noted that track access charges are paid to secure a path on the network for a specific journey, and if that journey could not be completed due to a Network Rail attributable cause it would be inappropriate to pay for that path.
133. When a FOC runs a train service, the requirement is for it to deliver its customers' goods to their destination. If the train does not reach its final destination, even if it is stopped only a short distance away, this requirement will have not been met. Therefore we disagree with Network Rail that this paragraph is not serving its intended purpose. It provides an appropriate incentive on Network Rail to ensure that trains reach their destinations.

Indexation

134. Schedule 7 was updated in November 2015 to correct a discrepancy in indexation uplifts for new TACs. This was due to a minor misalignment between the FOCs' current TACs and the then ORR model freight TAC. The Applications of Freightliner, FHH and GBRf were made before the ORR model TAC was updated, and in particular paragraph 2.7. We are taking this opportunity to direct that the revised Schedule 7 is used for all the FOCs' TACs.

Supplement price lists

135. As part of the implementation of the 2013 Periodic Review, Network Rail published the Traction Electricity Modelled Consumption Rates List, the Track Usage Price List and the List of Capacity Charge Rates. Whilst these published lists cannot be changed outside of a Periodic Review, provisions in Schedule 7 of each TAC allow

⁶³ NR's responses to the FOC applications.

them to be supplemented for the purpose of the relevant TAC. This involves submitting the proposed supplement to us. We can then issue a notice of consent or determination.

136. As matters stood, if a train operator's TAC expires or is terminated and it obtained a new TAC, it would have to repeat the process to supplement the relevant price list. In order to remove this requirement we have inserted an amendment to Schedule 7 as paragraph 2.2.14. This maintains the supplement for the purpose of any new TAC.

Route-Level Efficiency Benefit Share Mechanism (REBS)

137. Schedule 7 also contains provisions covering REBS, with an opt-out mechanism⁶⁴. GBRf raised a question about that opt out mechanism and whether it would be re-triggered by a new TAC. All the Applicants originally opted out of REBS. Those notices still apply irrespective of whether a new TAC has been entered into. The opt outs will continue until 31 March 2019. Paragraph 4.4 could apply in certain circumstances.

138. For the avoidance of doubt, the specific details, indicated by brackets [], in the opt out notice at Appendix 2 of Schedule 7 do not need to be filled in at the time the TAC is entered into; it is a standard template. It should be completed as and when needed. Where any of the Applicants sought to complete these details we have removed them and reverted to the template form.

Schedule 11: CTRL and Crossrail

CTRL

139. DBSR's Application highlighted that ORR's model TAC needs to reflect the situation that Schedule 11, concerning the construction of the CTRL, was now redundant. DBS pointed out that it had been removed from its current TAC as part of its 40th Supplemental Agreement. ORR is satisfied that Schedule 11 CTRL is not relevant for any of the Applicants and we confirm that it has not been included in the directed TACs.

Crossrail

140. DBSR's application also highlighted the need to ensure the inclusion of a Schedule for Crossrail services. This appeared as Schedule 14 in its current TAC. We consulted all the Applicants and other parties concerned by letter dated 29 January 2016 on the insertion of an updated Schedule for Crossrail. In particular to recognise that Crossrail services will extend to Reading rather than Maidenhead. DBSR confirmed by letter that it was content. We made some minor drafting changes to the version we consulted on. We consider that all the Applicants should have this updated Schedule in their TACs and this is reflected in our directions as a new Schedule 11 in place of the removed CTRL Schedule.

⁶⁴ <http://orr.gov.uk/what-and-how-we-regulate/regulation-of-network-rail/how-we-regulate-network-rail/periodic-review-2013/pr13-publications/route-level-efficiency-benefit-sharing>

ETCS Schedule

141. In its representations, Network Rail provided a proposed schedule to be added to the TAC to cover the obligations and arrangements for the European Train Control System (**ETCS**) programme of works.
142. The Applicants disagreed with the inclusion of the proposed Schedule into the TAC with the scope of the ETCS not yet fully decided. Once such a scope and the commercial principles were decided, a supplemental agreement to the TAC would be proposed.
143. After negotiations with the Applicants, Network Rail withdrew its request for this provision and it does not form part of our directions.

Control Period End Provision Schedule

144. Due to the proposed TACs spanning two price control periods (CP5 and CP6), Network Rail wanted to include a schedule for all new TACs setting out arrangements that would apply in the event that there is any delay in implementation of the new charging regime with a new Control Period.
145. The Applicants did not consider it was appropriate to contractualise a new Control Period payment schedule, when the terms of any such change had not been implemented in accordance with paragraph 7 of Schedule 4A to the Act. GBRf, for example, was not persuaded by this approach.
146. In part of wider discussions between Network Rail and us, we explained that we would not accept the schedule as proposed. Once a Periodic Review is closed, it cannot be legally reopened in the manner proposed by Network Rail. If Network Rail still required this protection, it would need to use another method.
147. After negotiations with the Applicants, Network Rail withdrew its request for this provision and it does not form part of our directions⁶⁵. This does not preclude future consultation and discussion of the issue.

Liability caps - 2012/13 Prices

148. For Schedules 7 and 8 of the TACs, 2012/13 prices should be used otherwise the uplifts could be applied incorrectly. This is explained in our interim guidance note⁶⁶. Network Rail agreed to use the 2012/13 price base for the caps⁶⁷ and 2012/13 prices are used in the TACs we have directed.

Clause 14.2: Entitlement to divulge

149. In DBSR's Application, at clause 14.2 in its proposed TAC, it added London Underground Limited (**LUL**) to the list of organisations that Confidential Information can be divulged to in certain circumstances. DBSR said that LUL has been added because of the possible interaction over certain parts of the network between DBSR's and LUL's services.

⁶⁵ See Network Rail's letters of 15 January 2016 of the applications by FL and FHH.

⁶⁶ http://orr.gov.uk/_data/assets/pdf_file/0004/19858/interim-note-schedules-4-7-8.pdf.

⁶⁷ Network Rail email of 12 January 2016 and others.

150. Network Rail agreed to this modification. We agree to include it in our directed TACs for all the Applications as the other Applicants also already have, or potentially will have, similar interactions with LUL's services.

Industry consultations

151. An industry consultation was carried out by us for each Application⁶⁸. Some consultees replied with expressions of no objection or comment. Merseytravel and West Yorkshire Combined Authority in particular sought assurances that the flexibility in *Network Rail's Access Rights Policy* would not be used to constrain the provision of passenger services. We consider that the changes to TACs will assist Network Rail in planning future rail timetables.

PART THREE: ISSUES SPECIFIC TO FHH'S APPLICATION

Specific issues

152. In this part we deal with all the issues that are specific to FHH's Application. These are:

- Rights in the Rights Table.
- Modifications to the TAC.

Rights Table

153. The Rights Table presented as part of the proposed TAC reflected the Access Rights that FHH sought from PCD 2016 (split between coal and non-coal traffic). ORR reviewed the proposed Rights Table and raised some operational issues. These included querying a number of route specifications ([see above](#)). Also since the Application was made some Access Rights have been transferred between FOCs through the Freight Transfer Mechanism in Part J of the Network Code⁶⁹. DBSR has agreed to the transfer to FHH of one set of rights [Tunstead to Hunslet and Briggs 6E28 MO Y, 6E28 MSX Y, 6M22 SX Y, 6H29 SUN]. The respective Rights Tables have been updated accordingly, in anticipation of Network Rail's formal confirmation of the transfer.

154. Network Rail did not support the inclusion of Access Rights that had not been used for 90 days⁷⁰. FHH⁷¹ disputed the circumstances and indicated many of the 'unused' paths were due to be running regularly. Network Rail and FHH agreed to review the situation again, after our directions have been made, from April 2016.

155. FHH provided a refreshed version of its Rights Table on 2 February 2016. This was forwarded to Network Rail on 5 February 2016. FHH provided a further version to ORR and Network Rail on 15 February 2016 to reflect the removal of Access Right 4S31 MSX through the Freight Transfer Mechanism and other consequent changes to Y paths for 4S28 and 4S41.

156. FHH and Network Rail also worked on the positioning of some windows to better fit Network Rail's operational requirements.

⁶⁸ <http://orr.gov.uk/consultations/access-consultations/current-track-access-applications/new-contracts-section-17-and-18>

⁶⁹ See for example http://orr.gov.uk/_data/assets/pdf_file/0015/20175/s17-fhh-train-slots.pdf

⁷⁰ Network Rail's Representations 2 September 2015, page 5.

⁷¹ Section 6, Response to Network Rail's representations to section 17 submission, 17 September 2015.
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157. ORR's directions amend FHH's proposed Rights Table by placing a 24 hour window for Right 6L44 SX [Tunstead BLI to West Thurrock] instead of the 60 minute window applied for. This reflects our conclusion that existing L2 Rights should be carried over as 24 hour windows.

Modifications to the TAC

Effective date

158. FHH requested an effective date as follows:

Effective date

The provisions of this contract take effect from the later of the signature of this contract and the Commencement Date other than clause 1, clause 11.6.5, paragraph 2.7 and paragraph 3 of Schedule 7, the definition of Liability Cap in paragraph 1 of Schedule 9, Schedule 13 and Schedule 14, including any relevant definitions, which are used in any of these provisions and which are defined elsewhere in this contract, which shall take effect from the signature of this contract.

159. FHH said that this reflected the clauses used in its existing TAC and to protect indexations. Our view is that the terms of the model contract should be used. Indexation would not be an issue where all base values should be set at 2012/13 prices in the context of a new TAC with a clear start date. FHH accepted this and we have modified the relevant provisions accordingly⁷².
160. For the avoidance of doubt, while the TAC does not take effect until PCD 2016 the Rights Table in the directed TAC, subject to any subsequent amendments, is the table to be used in the planning process for the timetables commencing PCD 2016 onwards.

Schedule 8

161. In the proposed TAC, FHH included at Appendix 1 of Schedule 8 a cap in 2015/16 prices as well as 2012/13 levels. As explained in ORR's interim note⁷³, "*Guidance on what price base to use in schedules 4, 7 and 8 when using the model passenger and freight track access contracts*", the baseline only needs to be completed for the 2012/13 levels. We have therefore removed the 2015/16 figures.
162. FHH's Application had not included the Baseline Annual Contract Mileage in Appendix 1 of its proposed TAC. FHH subsequently provided this information⁷⁴ and it is included in the directed TAC.

Updates to the model

163. FHH's application was based on the version of ORR's model freight TAC before it was updated to reflect our name change from the "Office of Rail Regulation" to the "Office of Rail and Road" and other matters. The directed TAC therefore brings it up to date with ORR's model freight TAC, with minor formatting and other changes, in addition to those discussed above.

⁷² Definition of Contract Year and clause 3.1 Effective date.

⁷³ http://orr.gov.uk/_data/assets/pdf_file/0004/19858/interim-note-schedules-4-7-8.pdf

⁷⁴ Email of 8 February 2016.

PART 4: ORR DECISION

164. We are satisfied that this decision takes into account the 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
- iv. to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

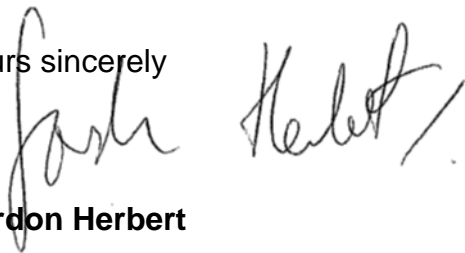
165. Once the agreement is signed, in accordance with section 72(5) of the Act, you must send a copy to ORR within 28 days and in accordance with section 72(2)(b)(iii), a copy will be placed on our public register and website.

166. In entering any provision on the register, ORR is 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.

167. When submitting the copy of the signed agreement would you therefore identify any matters which you would like ORR 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.

Yours sincerely



Gordon Herbert