



OFFICE OF RAIL REGULATION

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*Dear Mr Beer & Mr Peberdy*

**SECTION 17 RAILWAYS ACT 1993: STATION ACCESS AGREEMENT BETWEEN  
FIRST CAPITAL CONNECT LIMITED AND EAST MIDLANDS TRAINS LIMITED IN  
RESPECT OF LUTON AIRPORT PARKWAY STATION**

**Application**

1. On 13 September 2007, East Midlands Trains Limited ("EMT") applied to us under section 17 of the Railways Act 1993 as amended ("the Act"). In its application, it asked us to issue directions to First Capital Connect Limited ("FCC") to enter into a station access agreement ("SAA") in respect of Luton Airport Parkway station ("the station"), where FCC is the station facility owner ("SFO").

**Grounds for disagreement**

2. EMT made an application under section 17 of the Act because the parties could not agree on the access charging arrangements to be included in an SAA between them.



3. In the application form, EMT said that it wished to enter into an SAA with FCC in the standard terms of our template. EMT stated that the data room for the East Midlands franchise contained a copy of the access agreement between FCC and EMT's predecessor beneficiary at the station, Midland Main Line Limited ("MML"). That agreement contained the charging system that is used in the template agreement and its bid for the franchise was based on the information available in the data room.
4. FCC was prepared to enter into an SAA with EMT, though not on terms acceptable to EMT. Specifically, FCC was not willing to enter into an agreement containing the charging system used in our template SAA. Through an Agreement for Lease, FCC pays Network Rail an annual fixed charge of £700,000, plus an additional charge, calculated with reference to the number of passengers using the station.
5. In the SAA that was offered to EMT, FCC proposed to levy an access charge on EMT calculated by adopting the same methodology used to determine the charge FCC pays to Network Rail through the Agreement for Lease.

### **Process**

6. In considering this application, we have followed the consultation procedure specified in Schedule 4 to the Act. The process we followed is summarised here:
  - On 19 September, we sent a letter to FCC together with a copy of the application form. In this letter we invited representations on the application and directed FCC to furnish us with the names of any interested persons, as required by sections 3(1) and 4(1) of Schedule 4 to the Act, respectively.
  - On 10 October, FCC sent to us representations on the application and a copy of a proposed SAA. FCC did not notify us of any interested persons.
  - On 11 October, we sent the FCC representations and the FCC-proposed SAA to EMT, inviting further representations.
  - On 18 October, we sent copies of the application form to the Department for Transport ("DfT") and to Network Rail Infrastructure Limited ("Network Rail") as we considered that both of these parties could have an interest in the case.
  - On 19 October, we received further representations from EMT. On the same day, we sent copies of these further representations to FCC.
  - We received representations from the DfT and Network Rail on 29 and 31 October, respectively. These representations were sent to both FCC and EMT on 31 October.

- In response to the representations from DfT and Network Rail, we received a response from EMT on 02 November.

## Consultation Responses

7. Network Rail did not make any substantive comments but said that it was happy for FCC to disclose the detail of the lease documentation relating to the station, if FCC thought it necessary to do so 'as evidence for their case'.
8. DfT submitted representations on the application. It stated that it considered that the access charges associated with the station were made clear to EMT and the other companies tendering bids for the east midlands franchise. The DfT representations also referred to a request for clarification received from another of the bidders relating to access charges for the station. The response was copied to all bidders, including the EMT bid team.
9. In that response, the DfT told all bidders for the franchise that
 

*"...MML pays one charge for Long Term Charge and Qualifying Expenditure at Luton Airport Parkway which was £216k in 2005 (no significant change expected for 2006)"*
10. In response to the DfT representations, EMT, whilst maintaining that it bid on the basis of the charging arrangements contained in the SAA between FCC and MML, noted that it did "bid numbers" of £220,000 as the annual access charge for the station.

## Decision

11. We have decided to issue directions to FCC to enter into an SAA with EMT for the station under section 17 of the Act.
12. In particular, and after considering the representations submitted by FCC, EMT and the DfT, we have decided for the reasons set out below that it is appropriate for the SAA to include an access charging mechanism based on passenger throughput at the station.
13. This mechanism is based on the one that is contained in the Agreement for Lease that exists between FCC and Network Rail. Specifically, the SAA states that EMT will pay a proportion of the fixed charge of £700,000 that FCC pays to Network Rail. This will be based on the number of EMT's passengers as a proportion of the total number of passengers travelling to and from the station by train. The number of passenger journeys attributable to EMT will be determined using the LENNON system. The proportion of the £700,000 Long Term Charge ("LTC"), as specified in the Station Specific Annexes for the station, payable by EMT to FCC shall be nil.
14. Under the SAA, EMT will also contribute to the variable charge paid by FCC to Network Rail under the Agreement for Lease. The variable charge in each accounting year shall be the sum of:

£0.55 per passenger for the first 1,000,000 passengers either alighting from or embarking on scheduled train services at the Station during the relevant Accounting Year; and

£0.25 per passenger for all passengers in excess of 1,000,000 (up to 2,000,000) either alighting from or embarking on scheduled train services at the Station during the relevant Accounting Year.

Again, the proportion of this total variable charge payable by EMT shall be calculated using the same method referred to in paragraph 13 above.

15. The section 17 process that EMT initiated in order for an access agreement for the station to be put in place would have been much more straightforward had EMT established from the beginning of that process the exact sum that had been included in its franchise bid in relation to the access charge for the station.
16. For the reasons set out below, we are content that this decision represents the appropriate balancing of our section 4 duties under the Act.
17. The directions stipulate that the contract must be entered into no later than **09 December 2007**. Our directions have been issued separately to EMT and will be published on our website (<http://www.rail-reg.gov.uk/server/show/nav.225>).

### **The Railways Act 1993**

18. Section 18(1) of the Act states that a facility owner shall not enter into an access agreement through which a beneficiary is granted permission to use a railway station unless that contract is approved or directed by us. Any such access contract not approved or directed by us will be void. Where an applicant for access cannot agree the terms of access with the facility owner the applicant is entitled to apply to us under section 17 to direct the facility owner to enter into the access contract on specified terms.
19. In exercising our functions under Part 1 of the Act, we are governed by our statutory duties, most of which are set out in section 4 of the Act. There is no statutory order of priority amongst these duties, and it is for us to balance them and give each appropriate weight in the circumstances of an individual case. In considering the application and in reaching our decision as to appropriate directions in this case, we have had regard to our duties under section 4 of the Act as amended, complied with the statutory procedures, and adhered to the process and timescales set out in Schedule 4 to the Act.
20. In relation to this case and for the reasons set out below, we have given particular weight to the following duties:
  - Section 4(1) (a) otherwise to protect the interests of users of railway services;

- Section 4(1) (b) to promote the use of the railway network in Great Britain for the carriage of passengers and goods and the development of that network, to the greatest extent that we consider reasonably practicable;
- Section 4(1) (g) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance; and
- Section 4(2) to exercise the functions assigned or transferred to it [ORR] under or by virtue of this Part [Part 1 of the Railways Act 1993] or the Railways Act 2005 that are not safety functions in the manner which it considers is best calculated to protect –

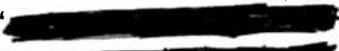
(b) the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of –

(i) the prices charged for such use.

#### **Relevance of the information in the DfT data room**

21. EMT, in particular, has raised the issue of what information was contained in the DfT data room as part of the re-franchising process. We do not think that the issue of the information contained in the DfT data room in relation access charging at the station is a directly relevant consideration for us. If EMT considers that the information supplied by the DfT was inaccurate or misleading, an application to us under section 17 of the Act is not an appropriate method for remedying the situation. Our role is to determine an appropriate charge to be paid by EMT to FCC for access to the station and to direct a contract accordingly. We have therefore not taken this issue into account in our determination of this application.

#### **Relevance of past decisions**

22. FCC has stated that the agreement that existed between FCC and MML (the agreement that was present in the DfT data room) was “”

The agreement in question was submitted to us under section 18 of the Act as an application for our approval, the terms of which had been agreed upon between FCC and MML. When an agreement is submitted for our approval and that agreement is on the standard terms of our template agreement, we do not as a matter of course investigate the funding arrangements underlying the access charge to which that agreement relates. As such, we approved the charging arrangements in the SAA in the form submitted.

23. There is a significant difference in this case, which is that the prospective parties to the access agreement have not been able to agree on all of the terms to be contained in the agreement.
24. A charging arrangement based on passenger throughput for the station was initially approved by us in 2000. At that time, and after careful consideration, we determined that the charging arrangements proposed to be included in an SAA between Thameslink Rail Limited (“Thameslink”) as facility owner and MML (“the Thameslink agreement”) were appropriate. This decision was based on the fact that the charging system proposed to be included in the SAA between the two parties amounted to an allocation to MML of a proportion of the charge paid by Thameslink to Railtrack through an agreement for lease, and based on MML’s passenger numbers.
25. Having examined the current agreement for lease that exists between FCC and Network Rail, we are satisfied that we should substantially replicate the earlier bespoke charging arrangements. We are satisfied that the charging arrangements we have directed in the SAA between FCC and EMT represent a fair allocation to EMT, based on its passenger numbers, of the charges paid by FCC to Network Rail through the agreement for lease..
26. The SAA we are directing now provides that the proportion of the LTC payable by EMT shall be nil. For the reasons given in paragraphs 25 and 26, it would not be appropriate for EMT to pay a proportion of the LTC in addition to the charges set out in Schedule 5 to the SAA (the throughput charge). This is in line with our previous decision on the throughput charge included in the Thameslink agreement. As such, the LTC that appears in the Station Specific Annexes for the station will not be used in the calculation of the access charge paid by EMT.

### **The decision in the context of our Policy Framework for Investments**

27. In consultation with Network Rail and industry stakeholders, we have established a framework for investments<sup>1</sup> with the objective of facilitating efficient, appropriate investment in the rail network. The investment framework emphasises the importance for all stakeholders in an investment scheme of establishing transparent, appropriate allocation of risks for the construction and operation of the investment.
28. Paragraph 1.10 of our October 2005 policy conclusions notes that “A key principle [of the investment framework] is that the responsibilities, risks and funding arrangements for all schemes should be clear to all stakeholders as early as possible in scheme development.” Directing an SAA under which EMT pays an access charge based on the mechanism contained in the agreement for lease is consistent with this principle

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<sup>1</sup> <http://www.rail-reg.gov.uk/upload/pdf/255.pdf>

and that of maintaining the funding arrangements in particular, which were established and agreed at the time of our decision in 2000.

29. Another relevant principle of the investment framework is that commercial parties who wish to enhance the railway should be free to negotiate terms and to agree an appropriate risk allocation, price and remuneration with all parties (or other relevant stakeholders). Our decision in this case is in accordance with these policy principles.

### **Future beneficiaries at the station**

30. We would expect that any other company operating regular timetabled passenger services entering into an access agreement for the station would pay an access charge calculated using the same methodology contained in the SAA that we are directing here, unless the specific circumstances surrounding any future case were to make such a charge inappropriate.

### **Next steps**

31. The parties entered into an interim access agreement for the station while we considered this case. The interim access agreement will terminate once the agreement hereby directed under section 17 of the Act is entered into by the parties. The interim agreement specifies that the access charge payable by EMT to FCC for the duration of the term of the interim agreement shall be calculated in accordance with the access charging provisions contained in the agreement that we are now directing.

32. Please note that until the access agreement is signed none of the provisions contained within it are applicable. The directions state that the access agreement should be entered into **not later than 08 December 2007**. As stipulated in section 72(5) of the Act, a copy of the signed access agreement must be sent to us **not later than 14 days** after the date upon which the access agreement is entered into.

33. We are required under section 72 of the Act to maintain a public register, which includes provisions of every direction to enter into an access contract and every access agreement. In entering any provision in the register, the Office of Rail Regulation is required to have regard to the need for excluding, as far as that is practicable, the matters referred to in section 72(3) of the Act.



34. I am therefore seeking representations from the parties about which (if any) aspects of the access agreement you wish us to consider excluding from the document that is placed on the public register (in addition to those matters already set out in our policy statement). Please submit your representations at the time you send the signed access agreement to me.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'B. Kogan', is written in black ink. To the left of the signature is a small, dark circular mark.

**Brian Kogan**