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19 August 2011

Our Ref: FLHH s17 application

Dear Kara

Freightliner Heavy Haul Limited application for a track access contract under Section 17 Railways Act 1993

Thank you for your letter dated 21st July 2011 and your invitation to respond to Freightliner Heavy Haul's (FLHH) application for a new Track Access Contract, please see our comments as set out below:

Network Rail broadly supports this s17 application however we have identified some specific issues in light of the proposed contract length moving out to ten years and our comments are mostly consistent with correspondence to date with both FLHH and ORR regarding the proposed contract extension.

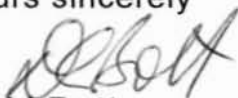
1. We note from the s17 application that FLHH ask for a contract to run from the Principle Change Date (PCD) 2016 of the existing contract to the PCD of 2021, an extension of five years, however within the proposed contract submitted they quote under definitions an ' "Expiry Date" means Principle Change Date 2020'.
2. We note under the contents page that FLHH have deleted Schedule 12 (West Coast Main Line) Network Rail (NR) have no objection to its removal for this contract however within the submitted proposed contract there are still numerous references to Schedule 12 and West Coast Main Line in that context. Page 62, contract amendments 18.9; pages 109-114 Schedule 5 – Services 4.6.

3. **Schedule 5** – ‘Network Rail Flexing Rights’ page 105 paragraph 3.1 & 3.2 this does not align with the current procedures and criteria regarding + or – 30 minutes flex on Level 1, 2 and 3 rights and is subject to the latest ORR determination on its meaning for CP4 as per Bill Hammill’s email dated 7th July 2011 to Freightliner Group and other Freight operating companies.
4. **Schedule 5** – ‘Services’ page 102-103 Cordons and Cordon Caps table within the contract is incorrect. Whilst there are pending changes via the FLHH 17th supplemental the stated Cordons and Cordon Caps within the contract is not consistent with the current table as of the FLHH 11th Supplemental approved by the ORR 22nd November 2010 or indeed the proposed changes via the 17th supplemental however the attached Cordons and Cordon Caps document to the application is consistent with the current table.
5. **Schedule 5** - With the GN/GE joint line project due to complete between 2016-2021 NR reserve the right to re-route East Coast Main Line (ECML) traffic via the new ‘joint line’ but would retain the mileage within the contract.
6. **Schedule 5** - With the Felixstowe to Nuneaton Freight Upgrade Phase 1 due to be completed by 2014 Network Rail (NR) reserves the right to re-route Heavy Haul (where applicable) services off the Great Eastern Mainline, North London Line and the Southern section of the West Coast Main Line and via the Cross Country route via Peterborough but would retain the mileage within the contract.
7. **Schedule 5** – The schedule 5 access rights in any new contract should align with those in the current contract and as exist immediately before any new contract comes into effect. NR would like to see a provision within the contract to state that all amendments via supplemental agreements to the schedule 5 access rights within the current contract PCD 2016 are reflected in any new contract due to commence with the PCD of 2021 and also reflect any Network Code section 7 Part J transfers to or from FLHH.
8. **Schedule 5** – Notwithstanding our comment above in point 6 NR believe there are various access rights currently held by FLHH that would not be applicable at the commencement of this new contract, either due to relevance or non use and NR seek to remove them from the schedule 5 rights table for this contract. A full list of rights NR wish to remove is attached in appendix A.
9. **Schedule 5** – Re-opener. NR wish to insert a re-opener with regard to increasing train flex to accommodate various committed projects as previously discussed with the ORR and FLHH however following a review of our committed projects we have increased the number of projects within the re-opener schedule than those previously discussed. A current proposed re-opener schedule and list of projects is attached in appendix B.

10. **Schedule 7** – ‘Definitions’ page 133 “Track Usage Price List” Based on current experience in maintaining the current contract NR would like to see an amendment to the wording of this definition to include the words ‘*or as amended from time to time*’ at the end of the sentence, NR believe that this would amend the contract in a more expedient manner when required.
11. **Schedule 8** – ‘Train Operator Benchmark’ page 190 paragraph 10.1.3. NR believe that the ‘base dates’ should be relevant for this contract and not 2007/2008.
12. **Schedule 8** – ‘Network Rail Cap and Train Operator Cap’ Page 196 paragraph 10.2.1. NR believe that the ‘base dates’ should be relevant for this contract and not 2010.
13. **Schedule 8** – ‘Benchmarks’ NR believe that all benchmarks should be at a relevant rate for the commencement of this contract in 2016.
14. **Schedule 8** – NR wish to make sure there is provision within the contract to account for any amendments to Schedule 8 as a result of any ORR or joint industry determination for CP5.
15. **Schedule 9** – ‘Definitions’ NR believe that this contract should have an appropriate and relevant amount for the liability cap for the commencement of this contract in 2016.
16. **Schedule 14** – ‘Definitions’ “Start date” should be amended to the appropriate date in 2016.
17. **Page 236** – FLHH end notes are not applicable to this contact.
18. **Schedule 15** – NR propose an inclusion of schedule 15 to this contact to cover ERTMS, GSM-R and in addition to the Cambrian Coast to include ECML and MML, our proposed schedule 15 is attached as appendix C.

A copy of this response has been sent to Tom Jones and Lindsay Durham, Freightliner Group.

Yours sincerely



David Bott
Customer Manager - Freightliner

CC. Tom Jones
Lindsay Durham

A	B	C	D	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26
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Appendix A- Schedule 5 Rights for FLHH which NR believe should be removed from the Rights table due to lack of use or relevance.

For Information - not part of contract				Origin Data				Destination Data				Additional Data								Equipment Characteristics				Flexing Rights	Access Right Type					
Service Group	Flow Number	Customer	Train Reporting Number	Minimum Turn Around Time at Origin	Days per Week	Departure Time	Origin	Origin Stanox	Destination	Arrival Time	Destination Stanox	Minimum Turn Around Time at Destination	Routing	Intermediate Points	Arrival Time at Intermediate Point	Departure Times from Intermediate Points	Minimum Dwell Times at Intermediate Points	Electricity for Traction Y / N	Total / Maximum Services per Week	Total / Maximum Services per Day	Special Terms	Standard Specified Equipment (Timing Load)	Alternative Specified Equipment (Timing Load)	Maximum Length of Train	Route Availability Code ("RA")	Loading Gauge	Maximum Variation	Access Right Type	Contract Miles	Reason
6225		WRG	6M80		SX	13:20	DAGENHAM DOWN YARD	51403	CALVERT	17:04	70332		Acton, Princes Risborough					N	5	1		60CTR85		As RT3973 EA560CON			+/-30 mins	L1	71	Lack of use
6225		WRG	6L81	240 min	FSX	21:47	CALVERT	70332	DAGENHAM DOWN YARD	00:35	51403		Princes Risborough, Acton					N	4	1		60CTR40		As RT3973 EA560CON			+/-30 mins	L1	71	Lack of use
6225		WRG	6L81	240 min	FO	21:47	CALVERT	70332	DAGENHAM DOWN YARD	00:27	51403		Princes Risborough, Acton					N	1	1		60CTR40		As RT3973 EA560CON			+/-30 mins	L1	70	Lack of use
6225		WRG	6M80		SO	07:47	DAGENHAM DOWN YARD	51403	CALVERT	11:05	70332		Acton, Princes Risborough					N	1	1	Note 1 below applies	60CTR85		As RT3973 EA560CON			+/-30 mins	L1	71	Lack of use
6225		WRG	6L81	240 min	SO	1454	CALVERT	70332	DAGENHAM DOWN YARD	1757	51403		Princes Risborough, Acton					N	1	1	Note 1 below applies	60CTR40		As RT3973 EA560CON			+/-30 mins	L1	71	Lack of use
6207		Bardon Aggregates	6L84		SX	0844	CROFT QUARRY FLHH	59309	BOW EAST FLHH (OLYMPICS)	1229	52608	160*	Market Harborough, Kettering				2 mins	N	5	1		60-60S20			9		+/- 30 mins	L1	111	Not Relevant
6207		Bardon Aggregates	6L29	240*	SX	1010	STANTON GATE FLHH	56558	BOW EAST FLHH (OLYMPICS)	1713	52608	240*	Market Harborough, Kettering	Cricklewood Up Goods Loop			2 mins	N	5	1	Traincrew	60-60S20			9		+/- 30 mins	L1	130	Not Relevant
6207		Bardon Aggregates	6M30		FO	2142	BOW EAST FLHH (OLYMPICS)	52608	MANTLE LANE T.C.	0130	58040		Kettering, Market Harborough	Cricklewood Up Goods Loop	2230	2232	2 mins	N	1	1	Traincrew	60-60S06					+/- 30 mins	L1	119	Not Relevant
6207		Bardon Aggregates	6M84		SX-Y	1528	BOW EAST FLHH (OLYMPICS)	52608	CROFT QUARRY FLHH	1830	59309		Kettering, Market Harborough	Brent Curve Junction	1611	1613	2 mins	N	5	1	Traincrew	60-60S06					+/- 30 mins	L1	111	Not Relevant
6207		Bardon Aggregates	6M84		SX-Y	1528	BOW EAST FLHH (OLYMPICS)	52608	BARDON HILL QUARRY FLHH	1844	58114		Kettering, Market Harborough	Brent Curve Junction	1611	1613	2 mins	N	5	1	Traincrew	60-60S06					+/- 30 mins	L1	122	Not Relevant
6207		Bardon Aggregates	6V63		FSX	1607	BOW OLYMPIC	52608	NEWTON ABBOT HACKNEY YARD	0002	83613		Reading				2 mins	N	4	1	The rights on this flow expire no later than May 19 2012						+/-30 mins	L1		Not Relevant
6204		Lafarge Blue Circle		280 min	SX		OXWELLMAINS	04841	AYR HARBOUR		08608							N	5			60-TR70						L2	114	Lack of use
6204		Lafarge Blue Circle		280 min	SX		AYR HARBOUR	08608	OXWELLMAINS		04841							N	5			60-TR70						L2	114	Lack of use
6204		Lafarge Blue Circle	6M38		TThO	0430	HOPE EARLES SIDINGS	34004	CARLISLE BRUNTHILL	1114	09144		Settle & Carlisle	Calder Bridge Jn			2 mins	N	2		Traincrew	60-TR70					+/- 30 mins	L1	170	Lack of use
6204		Lafarge Blue Circle	6M39	160 min	TThO	1500	CARLISLE BRUNTHILL	09144	HOPE EARLES SIDINGS	2326	34004		Settle & Carlisle	Calder Bridge Jn			2 mins	N	2		Traincrew	60-TR40					+/- 30 mins	L1	170	Lack of use
6204		Lafarge Blue Circle	6M38		SO	0515	HOPE EARLES SIDINGS	34004	CARLISLE BRUNTHILL	1121	09144		Settle & Carlisle	Calder Bridge Jn			2 mins	N	1		Traincrew	60-TR70					+/- 30 mins	L1	170	Lack of use
6204		Lafarge Blue Circle	6M39	160 min	SO	1500	CARLISLE BRUNTHILL	09144	HOPE EARLES SIDINGS	2136	34004		Settle & Carlisle	Calder Bridge Jn			2 mins	N	1		Traincrew	60-TR40					+/- 30 mins	L1	170	Lack of use
6204		Lafarge Blue Circle	6M01		FO	0338	OXWELLMAINS	04841	CARLISLE BRUNTHILL	0909	09144		Edinburgh, Carstairs					N	1			60-TR70					+/- 30 mins	L1	135	Lack of use
6204		Lafarge Blue Circle	6S09	160 min	FO	1355	CARLISLE BRUNTHILL	09144	OXWELLMAINS	1823	04841		Carstairs, Edinburgh					N	1			60-TR40					+/- 30 mins	L1	135	Lack of use
6204		Lafarge Blue Circle		280 min	SX		OXWELLMAINS	04841	AYR HARBOUR		08608							N	5			60-TR70						L2	114	Lack of use
6204		Lafarge Blue Circle		280 min	SX		AYR HARBOUR	08608	OXWELLMAINS		04841							N	5			60-TR70						L2	114	Lack of use
6201			4S28		SX	1000	BASFORD HALL	42159	BARASSIE	1520	08408	120 min	Penrith, GSW					N	5	1		75-66S04					+/- 60 mins	L1	259	Lack of use
6201			4S05	90 mins	SX	1115	RUGELEY	65500	BARASSIE	0252	08408		Penrith, GSW					N	5	1		75-66S04					+/- 60 mins	L1	304	Lack of use
6201			4J12		SX	23:19	Longannet PS FHH	03343	Barassie FHH	01:35	08408	120*	Alloa, Stirling	n/a	n/a	n/a	n/a	N	5	1		75-66S06					+/- 30 mins	L1		Lack of use

ADDITIONAL FLEXING RIGHTS - RIDER

1. Clause 13.1.1(b) shall be deleted and replaced with the following:

“(b) any Part of Schedules 2, 5, 7, 8, 13 or 14 provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply;”

2. The following definitions shall be added to paragraph 1 of Schedule 5:

“**Additional Flexing Rights**” has the meaning ascribed to it in paragraph 3.4(a);

“**Affected Services**” means the Services which in Network Rail’s reasonable opinion may be affected by a Project;

“**Consultation Period**” has the meaning ascribed to it in paragraph 3.7;

“**Edinburgh to Glasgow Improvements Programme**” means the Edinburgh to Glasgow Improvements Programme which aims to improve rail services in Central Scotland;

“**Electrification of the Great Western Mainline**” means electrification of the Great Western Mainline on the routes where these works are funded by the Department for Transport;

“**HS2 Project**” means the proposed high-speed railway with a trunk from London to Birmingham, and then two spurs, one to Manchester, and the other to Leeds via the East Midlands;

“**North West Electrification Project**” means the electrification of the railway between Liverpool, Manchester, Preston and Blackpool;

“**East Coast Main Line Improvements**” means capacity relief on the ECML, Peterborough station area capacity enhancements, Alexandra Palace to Finsbury Park 3rd Up Line and 3rd Down line improvements, Hitchin grade separation, York Holgate Junction 4th line and Shaftholme Junction remodeling

“**West Coast Main Line Improvements**” means the West Coast power supply upgrade and Stafford area improvement project

“**Midland Main Line (MML) speed increase**” means St Pancras to Sheffield Line Speed Improvements means line speed improvements between St Pancras and Sheffield.

“**Bromsgrove Electrification**” means extension of electrification from Barnt Green to Bromsgrove.

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“**Westerleigh Junction to Barnt Green Line Speed Increase**” means enhanced linespeed on sections of track between Bristol Parkway and Gloucester and between Cheltenham and Birmingham.

“**Project**” means any of the Edinburgh to Glasgow Improvements Programme, the Electrification of the Great Western Mainline, the HS2 Project, the North West Electrification and the Thameslink Programme;

“**Project Notice**” means a formal notice issued by Network Rail to the Train Operator in accordance with paragraphs 3.10 to 3.12;

“**Project Proposal**” means a proposal issued by Network Rail to the Train Operator in accordance with paragraphs 3.4 to 3.6;

“**Rights Table Variation**” has the meaning ascribed to it in paragraph 3.4(b);

“**Thameslink Programme**” means the upgrade and expansion of the Thameslink rail network to provide new and longer trains between a wider range of stations to the north and to the south of London without requiring passengers to change trains in London.”

3. Paragraph 3.1 of Schedule 5 shall be deleted and replaced with the following:

“3.1 *Maximum Variation between Timetable Periods*

- (a) Subject to paragraph 3.1(b), the Maximum Variation in respect of any Service [to which the Level One Rights apply] [**Note: To be checked against ORR’s wording once available.**] shall be no more than 30 minutes from the corresponding time for the corresponding Train Slots in the preceding Timetable Period.
- (b) The exercise by Network Rail of its Additional Flexing Rights or the making by Network Rail of a Rights Table Variation in accordance with paragraphs 3.4 to 3.23 shall take precedence over the restriction on the Maximum Variation between Timetable Periods specified in paragraph 3.1(a) above.”

4. The following new paragraphs 3.4 to 3.23 shall be added to Schedule 5, as follows:

“3.4 *Additional Flexing Rights and Rights Table Variations*

Without prejudice to paragraph 3.2, if at any time following the Principal Change Date in 2016 Network Rail considers in its reasonable opinion that due to the occurrence of a Project it may be necessary or desirable either:

- (a) to increase the Maximum Variation specified in paragraph 3.1(a) in respect of any Affected Services from 30 minutes to 60 minutes (such increase being an “**Additional Flexing Right**”); or
- (b) to vary any Departure Times, Departure Times from Intermediate Points, Arrival Times or Arrival Times at Intermediate Points set out in the Rights

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Table by up to 60 minutes (such variation being a “**Rights Table Variation**”);

then it may issue a Project Proposal in accordance with paragraphs 3.5 to 3.8 below.

- 3.5 Network Rail shall not be entitled to issue more than one Project Proposal in respect of any particular Project.
- 3.6 A Project Proposal shall be issued to the Train Operator in writing and shall specify:
- (a) the relevant Project; and
 - (b) the reason for issuing the Project Proposal; and
 - (c) the Affected Services in respect of which Network Rail intends that either Additional Flexing Rights or a Rights Table Variation may apply; and
 - (d) the date(s) from which either the Additional Flexing Rights or Rights Table Variation, as the case may be, may come into effect.
- 3.7 Following the issue of a Project Proposal in accordance with paragraphs 3.4 to 3.6, Network Rail shall, in respect of Affected Services specified in the Project Proposal, elect that either Additional Flexing Rights or a Rights Table Variation shall apply. Network Rail shall notify the Train Operator in writing of such election, and such election shall form part of the relevant Project Proposal. In each election notice, Network Rail shall also specify the reasonable period within which the Train Operator shall provide any submissions and counter-proposals to Network Rail in respect of that Project Proposal (the “**Consultation Period**”).
- 3.8 In exercising its Additional Flexing Rights or in making a Rights Table Variation, Network Rail shall:
- (a) use reasonable endeavours to minimise the impact on the Train Operator’s terminal slots at Origins and Destinations;
 - (b) use reasonable endeavours to minimise any increase to journey times;
 - (c) use reasonable endeavours to minimise the impact on the Train Operator’s utilisation of resources, such as locomotives, rolling stock and drivers;
 - (d) have due regard for services characteristics such as gauge, weight and length; and
 - (e) use reasonable endeavours to minimise the impact on the Train Operator’s third party costs associated with an Affected Service,

provided that the Train Operator shall have provided Network Rail with all relevant and accurate information, documents and data as Network Rail may reasonably require and within sufficient time to enable Network Rail to comply with the provisions set out in paragraphs 3.8(a) to 3.8(e).

- 3.9 The Train Operator shall be entitled to make submissions and counter-proposals to Network Rail in respect of a Project Proposal, provided that any such submissions

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and counter-proposals must be made in writing and received by Network Rail within the Consultation Period for that Project Proposal.

- 3.10 Following the Consultation Period for a Project Proposal, Network Rail shall make its final decision concerning the matters set out in such Project Proposal, and will notify its decision to the Train Operator by means of a Project Notice made in accordance with paragraphs 3.11 and 3.12 below.
- 3.11 Network Rail shall not be entitled to issue more than one Project Notice in respect of any particular Project.
- 3.12 A Project Notice shall be issued to the Train Operator in writing and shall specify:
- (a) the relevant Project; and
 - (b) the reason for issuing the Project Notice; and
 - (c) the Affected Services in respect of which Additional Flexing Rights or a Rights Table Variation, as the case may be, shall apply; and
 - (d) the date(s) from which either the Additional Flexing Rights or Rights Table Variation, as the case may be, shall come into effect; and
 - (e) the election as to whether the Additional Flexing Rights or a Rights Table Variation shall apply; and
 - (f) in the event that Network Rail has rejected counter-proposals put to it by the Train Operator in accordance with paragraph 3.9, the reasons for that rejection.
- 3.13 Subject to paragraphs 3.14 to 3.23, following the issue of a Project Notice, either the Additional Flexing Rights or Rights Table Variation, as the case may be, shall take effect from the relevant date(s) specified in such Project Notice.
- 3.14 Where the Train Operator is dissatisfied with any aspect of a Project Notice, it may refer such matter for determination by a Timetabling Panel in accordance with the Access Dispute Resolution Rules, provided that any such referral must be made within twenty Working Days of receipt of such Project Notice.
- 3.15 Where either Network Rail or the Train Operator is dissatisfied with the decision of a Timetabling Panel under paragraph 3.14, it may refer the matter to the Office of Rail Regulation for determination under Part M of the Network Code, provided that any such referral must be made within ten Working Days of receipt of the Timetabling Panel's written reasoned determination to which objection is made.
- 3.16 In determining any appeal pursuant to this paragraph 3, any Timetabling Panel or the Office of Rail Regulation (as the case may be) may exercise one or more of the following powers:
- (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;
 - (b) it may direct that a challenged decision of Network Rail shall stand;
 - (c) it may substitute an alternative decision in place of a challenged decision of Network Rail;

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provided that the power described in (c) above shall only be exercised in exceptional circumstances.

- 3.17 Where general directions have been given in accordance with paragraph 3.16, the relevant appeal body may, on the application of Network Rail brought in accordance with 3.18, make such further orders as it shall consider appropriate in order to provide the parties with guidance as to the interpretation and application of such general directions.
- 3.18 Any application made by Network Rail pursuant to paragraph 3.17 must be made within ten Working Days of the relevant decision.
- 3.19 Where an appeal to a Timetabling Panel pertaining to this paragraph 3 is pending, the relevant decision of Network Rail shall remain binding until such time as the Timetabling Panel determines otherwise.
- 3.20 Where an appeal to the Office of Rail Regulation pertaining to this paragraph 3 is pending, the relevant decision of the Timetabling Panel shall remain binding until such time as the Office of Rail Regulation determines or orders otherwise.
- 3.21 Where an appeal is brought pursuant to this paragraph 3, the parties to the appeal shall be bound by:
 - (a) the ruling of the Timetabling Panel, unless or until ordered or determined otherwise by the Office of Rail Regulation;
 - (b) the ruling of the Office of Rail Regulation.
- 3.22 Network Rail shall be bound and empowered to take such steps as may be necessary to implement all rulings made by a Timetabling Panel or the Office of Rail Regulation pursuant to this paragraph 3. All such steps shall be taken promptly.
- 3.23 Where a decision of Network Rail is overturned on appeal, Network Rail shall only be liable to the Train Operator in damages in respect of that decision where it was made in bad faith or was unreasonable.”

Schedule 15 – FLHH contract

Definitions:

Cambrian Lines	means the line from Sutton Bridge Junction to Aberystwyth and Pwllheli.
ECML	East Coast Main Line (ECML) means the line from Kings Cross \ Moorgate to Doncaster via either Stevenage or Hertford North, and Grantham and Retford
MML	Midland Main Line (MML) means the line from Kentish Town to Wellingborough
GSM-R	means Global System for Mobile Communications – Railway.
ERTMS	means European Rail Traffic Management System.
National Fleet Census 2007	means a survey of all specified equipment operating on the UK rail network in 2007.

The parties agree that:

1. where GSM-R is required by Network Rail for the operation of the Train Operator's Services on the Network, the Train Operator shall be responsible for the fitment, operation, repair and maintenance and all associated costs of GSM-R on all Specified Equipment that was not included in the National Fleet Census 2007, and
 2. if the Train Operator is permitted to operate a service on the Cambrian Lines, ECML and MML the operator shall be responsible for the fitment, operation, repair and maintenance of ERTMS on the Specified Equipment, and all associated costs,
- and Network Rail shall not be liable to the Train Operator in respect of such costs whether under Parts F or G of the Network Code or otherwise.

Insert new clause in main body of track access contract:

- X. The parties must comply with the provisions of Schedule 15.