

10 September 2021

Track access issues arising from East West Rail Phase 2 (EWR-2)

Introduction

1. On 20 July 2021, the Department for Transport (DfT) wrote to us to explain its plans to deliver the East West Rail (EWR) project between Cambridge and Oxford, in particular the second phase, for services from Oxford to Bletchley/Milton Keynes.

2. In its letter DfT also asked us to set out the approach we will take when considering future track access applications by other parties relevant to the introduction of EWR services. In response, we considered it would be helpful in this letter if we explained our proposed approach. In essence, we expect applicants to apply for access rights following the processes set out by the relevant infrastructure manager and we will consider those applications using the same approach to access issues that we take for the existing network today under the current regulatory framework. This approach is explained in further detail in paragraphs 12 to 31 below.

Background

3. The letter explained that the EWR project is intended to improve connectivity and unlock the economic potential of the corridor between Oxford and Cambridge. It will be delivered in three phases, previously known as programmes and now known as Connection Stages:

- EWR-1 was completed on 12 December 2016, and enabled Chiltern Railways to run services from Oxford to London Marylebone via Bicester; and
- The EWR 2 & 3 programmes are now broken down into the following connection stages:
 - i. Connection Stage 1 (CS1) – 2 train paths per hour (tph) Oxford to Milton Keynes, scheduled to commence from December 2024;
 - ii. CS2 – 2 tph Oxford to Bedford; and
 - iii. CS3 – 2 tph Oxford to Cambridge (extension of CS2 services) and 2tph Bletchley to Cambridge.

CS1 includes the development of a new station at Winslow and new platforms at Bletchley. Services between Aylesbury and Milton Keynes will continue to be developed (as CS 2.5) but there is currently no firm date for when these will commence.

4. In 2016, DfT established a new organisation, East West Rail Company Limited (EWR Co), to be responsible for the delivery and development of the EWR project. The operational model by which the services will operate is still to be decided and will need to take into account the outcome of the Williams-Shapps Plan for Rail. DfT has not yet specified who will be the infrastructure manager for the next phases of EWR.

5. CS1 is expected to operate from December 2024 between Oxford and Bletchley/Milton Keynes. The DfT's website¹ sets out the benefits of EWR-2 and how it meets government priorities for transport by facilitating economic growth and new housing and employment opportunities in the Cambridge – Oxford corridor through the provision of improved rail connectivity.

6. The EWR project will interface with several current publicly commissioned operators across its route including Chiltern Railways, Great Western Railway, Avanti West Coast, Cross Country, London Northwestern Railway, Govia Thameslink Railway, Southern Railway and East Midlands Railway.

7. Current assumptions are that the EWR-2 train service specification (TSS) will be implemented without significant changes to existing services.

8. Although EWR services are not planned to commence until December 2024, rights can be applied for by other operators and approved years in advance.

9. DfT's letter asks ORR to set out the approach we will take when considering future track access applications by other parties relevant to the introduction of CS1 and 2 services. It also said, *"To ensure optimal use of existing and future capacity on the network, we ask that the Office of Rail and Road (ORR) allow East West Rail Company (EWR Co) the opportunity to finalise plans for CS1 services before concluding any decision to grant future track access rights to other parties which would conflict with prospective CS1 services."*

10. We are discussing with DfT several regulatory issues EWR raises. This letter focuses on one issue, track access.

11. We think that it will be helpful to the industry if we explain, in this letter, our proposed approach to considering track access applications relevant to the introduction of EWR services. We took a similar approach to track access issues relevant to HS2 services, as explained on our [website](#).

Access regulation

12. This letter sets out the same approach to access issues involving EWR that we take for the existing network today under the current regulatory framework. Of course, the creation of a new regulatory framework which might be needed to realise the Williams-

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762575/case-for-east-west-rail-western-section-phase-2.pdf

Schapps Plan for Rail would require us to review this advice as well as consider any transitional issues.

13. If a train operator wants to run trains on the network, its track access agreement usually requires ORR's approval. We do not yet know who will own the EWR-2 infrastructure and become the EWR-2 infrastructure manager.

14. All operators operating on Network Rail's network are required to enter into a track access contract with Network Rail which sets out the conditions of access. In accordance with the Railways Act 1993, all such access contracts require ORR's approval.

15. We therefore expect that the EWR-2 operator must enter into new track access contracts with the EWR-2 infrastructure manager in respect of the EWR-2 infrastructure and with Network Rail in respect of the Network Rail infrastructure it will use to operate these services.

Our approach

16. When we make decisions on track access applications, we must do so in accordance with our statutory duties. Where these duties do not align we consider the weight to be attached to each relevant duty in the circumstances of the case.

17. The duties most likely to be relevant are:

- Protecting the interests of users of railway services;
- Promoting the use of the network for passengers and freight;
- Promoting competition for the benefit of rail users;
- Taking into account the Secretary of State for Transport's funds and guidance; and
- Promoting improvements in railway service performance.

18. Our published guidance² explains that we typically consider the following factors when making track access decisions:

- Whether there is fair and efficient use of capacity. We determine what that is in cases where an operator and Network Rail cannot agree a contract;
- What impact proposed services could have on train performance, especially on a busy network;
- The effect on the Secretary of State's funds, recognising the need to work within fixed government budgets;
- Whether new services would support more competition resulting in overall benefits for passengers (e.g. through lower fares);
- Whether proposed services are consistent with the industry's long term plans;
- Whether new competing services would generate new revenue, rather than just taking it away from current services. We call this the 'not primarily abstractive' test; and

² <https://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

- Where we have competing applications for limited capacity, the costs and benefits of the available proposals.

19. We will consider access applications when they are made and will make decisions within six weeks of having all the relevant information. We consider case by case what the relevant information is that will enable us to make a robust decision about the best overall use of capacity. As a minimum, we will normally need to see the network operator's view of capacity and performance on a route. However, where the application is from an open access operator, we may also carry out our 'not primarily abstractive' test.³

20. In circumstances where we have applications that compete for the same capacity, we may "batch up" applications, as we did in order to reach our decision⁴ on competing applications on the ECML in 2016 and how we approached potentially competing applications on the WCML in 2019⁵. In other cases, we may hold an application that comes in during a franchise competition until the franchise proposals are clear.

21. Access contracts are time limited, generally we would not expect an access contract to last beyond 10 years, in line with our guidance. We have therefore set out in our guidance how we will take into consideration the fact that it is most likely that the train operator or funder will intend the services (or similar services) to continue running after the expiry date of the contract. In our guidance we state that:

"While framework agreements are time limited, with specified expiry dates, it is most likely that the train operator or funder will intend the services (or similar services) to continue running after the expiry date of the framework agreement. When planning new services, existing or prospective train operators should therefore anticipate applications will be forthcoming for the continuation of existing services and that the capacity they are using will not be freely available beyond the expiry date of any current framework agreements.

Reflecting this, there is a strong presumption in our approach in favour of the extension of current access rights except where we have said otherwise (for example, where there was uncertainty about capacity or performance impacts, or if we anticipate a significant change in infrastructure configuration/capacity). Any applications for new services that could preclude the extension of existing services, or adversely impact them, would need to demonstrate that their benefits clearly outweighed the disbenefits to passengers or freight users from the loss of, or impact on, the existing services. We will reach any decision in accordance with our section 4 duties.

Although the 2016 Regulations say that framework agreements can be renewable for periods equal to their original duration (or shorter or longer in specific cases) we will also consider applications to extend the duration of a framework agreement, subject

³ Further information on these tests and when we would carry them out can be found in our track access guidance, <https://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

⁴ https://orr.gov.uk/data/assets/pdf_file/0006/21885/2016-05-12-ecml-decision-letter.pdf

⁵ <https://www.orr.gov.uk/sites/default/files/om/access-to-the-west-coast-main-line-wcml-2019-10-11.pdf>

to the total remaining duration being justified and consistent with the rest of our policy.”⁶

DfT asked us to set out how this approach would apply to EWR-2 and we have described this below.

Interactions with existing access rights on Network Rail infrastructure

22. We understand that the access rights required by EWR to operate their services will include access rights on the existing Network Rail network, particularly between Bletchley and Milton Keynes Central. Operators have existing access rights for this part of the network. As noted above, our approach is that there is strong presumption in favour of these rights continuing except where we have stated otherwise.

Applications for new access rights on Network Rail infrastructure

23. We understand from DfT’s letter that an industry Concept Train Plan working group (CTPWG) has been set up to validate the EWR-2 TSS, led by Network Rail, through their role as System Operator. The letter states that:

“The Department intend that the development of the TSS through the CTPWG will enable the delivery of an integrated, well designed rail service optimised for the wider network.”

24. We therefore anticipate that any access rights sought by publicly commissioned operators, including the operator of EWR, on this part of the network will take into account the requirements of DfT to deliver the EWR-2 TSS.

25. We will also take into account the outputs of the CTPWG or any future Event Steering Group (or similar group) set up to consider the development of the timetable for EWR in our decision making.

26. In respect of new open access services or freight services we will assess applications on a case by case basis in line with our statutory duties. When exercising our duties to have regard to the funds available to the Secretary of State for railway services and to have regard to securing value for money for funders of the railway, we will take into account the strategic enhancement of the rail network, the level of Government investment and anticipated revenue return from EWR services. Where any rights sought might interact with EWR services, EWR and DfT will have the opportunity to comment on the impact this might have on its plans through the usual industry consultation processes.

27. We would encourage EWR to apply for access rights as soon as possible once its requirements are known and we will take into account in our consideration of that application the capacity required to deliver the EWR business plan, as outlined in this letter.

28. With regard to the question asked by DfT and set out in paragraph 9 above, it is not our approach to specify a date beyond which we will not approve access rights on a part of the network. However, we will consider the appropriate length for contracts on a case-by-

⁶ https://orr.gov.uk/data/assets/pdf_file/0018/22815/duration-of-framework-agreements-guidance.pdf

case basis and may, in some circumstances, make it clear when approving an access contract that the operator should not rely on the presumption in favour of extending those access rights. We will balance this against other considerations, such as the need to give operators certainty in order to be able to plan their business.

29. We took this approach for Alliance Rail (GNWR) for access rights on the West Coast Main Line. In that case, we granted access rights up until December 2026 in order not to conflict with HS2.

30. In our decision letter⁷ on that application we made it clear that GNWR should not rely on the usual presumption in favour on those rights being extended. This still gave GNWR a track access contract of 7 years which we considered was sufficient time for the operator to recoup its investment.

Applications for access rights on EWR-2 infrastructure

31. Applicants will need to apply for access rights on EWR-2 infrastructure, following the processes set out by the relevant infrastructure manager. We will take into account the same considerations as set out above, including those relating to the funds available to the Secretary of State, when reaching on our decision on whether to approve the proposed access contracts.

32. If you have any comments or questions on the approach discussed in this letter please address them to jonathan.rodgers@orr.gov.uk by **11 October 2021**. We will publish a final version of this letter once we have considered any comments.

33. We note that the commercial structure for EWR is in early stages of development. We are happy to provide support to EWR and DfT as required on the regulatory implications of different structures and we would also welcome further update meetings to discuss ongoing progress with this project

Yours sincerely



p.p.

Dan Brown

⁷ https://orr.gov.uk/data/assets/pdf_file/0011/27929/2018-06-07-gnwr-decision-letter.pdf