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Dear Mike and Nigel

Direction of the 28th Supplemental Agreement (SA) to the Track Access Contract dated 11 December 2016 (the TAC) between Network Rail Infrastructure Limited (Network Rail) and DB Cargo (UK) Limited (DBC) (the parties)

1. The Office of Rail and Road (ORR) on 16 December 2020 under section 22A of the Railways Act¹ (1993) directed the parties to enter into the DBC 28th SA of the TAC. This letter explains our reasons for the decision to direct seven new **24-hour window firm rights**.
2. DBC's application for seven **1-hour firm rights** did not match Network Rail's offer of **24-hour contingent rights**. Therefore, DBC explained it could not reach agreement with Network Rail. Representations from the parties were provided. We have taken DBC's and Network Rail's evidence into account in our final directions. The body of this letter provides the background and summary of the parties' representations, ORR's review and conclusion is summarised from page 4.

Background

3. This application was for seven 1-hour firm rights covering one return intermodal service from Tees Dock to Mossend and one return intermodal service from Grangemouth to Tees Dock (with different service patterns according to the day of the week).
4. All of the services are already operating and have validated Train Slots in the May 2020 Working Timetable. The proposed rights, with 1-hour windows at origin and destination, are described as being required in order to support on-

¹ The Railways Act 1993 sets out the procedures and approach for ORR to follow for access applications under Schedule 4. It also provides the ORR with duties in section 4.

going time-critical intermodal services and is the default position as set out in ORR's letter of February 2016². The times of the rights applied for are summarised here:

Service Group Reference	File No.	Train Reporting Number	Minimum Turn Around Time at Origin	Days per Week	Departure Window From	Departure Window To	Origin	Origin Station	Destination	Arrival Window From	Arrival Window To
<i>Extracts from Service Group 4075, Phases 9, 10 and 11</i>											
4076 4075 S2407546	9-11 9	NOT-USED 4099		SX	03:52	04:52	TEES DOCK BSC EXPORT BERTH	15034	GRANGEMOUTH TGD (DBC)	12:36	13:36
4075 S2407546		4099		MO	15:40	16:40	GRANGEMOUTH TGD (DBC)	05077	TEES DOCK BSC EXPORT BERTH	23:39	00:39
4075 S2407546		4099		MSX	15:40	16:40	GRANGEMOUTH TGD (DBC)	05077	TEES DOCK BSC EXPORT BERTH	23:44	00:44
4075 S2407546	10	4096		MSX	07:54	08:54	MOSSEND EUROTHERMAL	07390	TEES DOCK BSC EXPORT BERTH	15:46	16:46
4075 S2407546		4096		SO	07:54	08:54	MOSSEND EUROTHERMAL	07390	TEES DOCK BSC EXPORT BERTH	15:55	16:55
4075 S2407546		4092		FSX	18:35	19:35	TEES DOCK BSC EXPORT BERTH	15034	MOSSEND EUROTHERMAL	01:32	02:32
4075 S2407546		4092		FO	18:35	19:35	TEES DOCK BSC EXPORT BERTH	15034	MOSSEND EUROTHERMAL	01:24	02:24

- Network Rail stated that it could not support firm rights with 1-hour windows. However, it was prepared to grant contingent rights with 24-hour windows. DBC did not agree to these terms, so formally submitted this section 22A application to ORR on 17 June 2020, along with another for the 27th SA.

The East Coast Mainline

- The services in this application use the East Coast Mainline (ECML), which faces a long standing issue of operator demand exceeding available capacity. The ECML Event Steering Group³ (ESG) was set up to evaluate service specifications, aspirations, journey times on the route and develop a possible timetable. The aim of Phase 3 of the ESG is to deliver a draft timetable by April 2021 in line with D-55 Notification of Significant Change milestone for the May 2022 timetable production timeline. Meanwhile, Network Rail published its ECML access rights policy which stated new rights would be sold on a contingent basis⁴.

Industry consultation

- Network Rail conducted an industry consultation between 22 April and 22 May 2020. Transport Focus, GBRf and Cross Country Trains responded. The latter had initial concerns over DBC performance at Edinburgh Haymarket but was satisfied that these had been addressed satisfactorily and supported the application following clarification by Network Rail. There were no other outstanding unresolved matters.

² <https://www.orr.gov.uk/sites/default/files/om/s17-db-schenker-rail-uk-limited-decision-letter.pdf>

³ This is in line with Part D of the Network Code

⁴ This was most recently updated on 7 December 2020.

Parties' representations

8. Relating to the rights contained in the 28th SA, Network Rail stated that it did not support a sale of new firm rights for the duration of DBC's contract (to 2026). It would consider supporting an application for contingent rights to expire on the Principal Change Date in December 2021 (PCD21), in line with its ECML letter of 19th June 2020. It would then reconsider the application, along with any other rights on the ECML, once the ESG concludes.
9. It also noted that the ESG Programme is in its third phase, with the final freight paths offered, subject to final detailed development, especially "flighting" of trains on dual-track sections of the ECML. Overselling capacity was noted by Network Rail as the biggest single risk to the ESG. Network Rail considers that until this work has concluded these rights should be sold as contingent and time limited. In a similar vein, any additional 1-hour window rights would be sold as contingent rights in line with the ECML Access Rights policy until completion of the ECML timetable re-write to retain as much flexibility as possible.
10. Network Rail explained the sale of access rights on the ECML was conducted in-line with its ECML access policy as described in its industry letters of 19 June 2020. Although we note that Network Rail must make provision for all access rights requests to be considered on a case by case basis. Therefore, individual services affected by the policy could still be sold as firm rights if evidence was available to demonstrate that capacity existed and that no clashes would be created.
11. Network Rail emphasised the key ECML ESG timetable dates:
 - i. 18 December 2020: Draft ECML May 2022 timetable to be issued for Industry consultation.
 - ii. April 2021: Final May 2022 timetable available.
 - iii. 23 April 2021: ECML ESG completes its function and the sale of access rights on the East Coast is expected to revert to a 'business as usual' state.

Specific constraints for the rights sought

12. Network Rail's initial letter of 15 July 2020 supported contingent rights to expire at PCD21 but also stated that ESG Phase 2 would identify standard-hour slots for freight to use. It said that Phase 2 would conclude by the end of July 2020. ORR therefore asked for further details of the outputs from Phase 2.
13. On 17 August Network Rail wrote that "*The completion of ECML ESG Phase 2 has provided some improvement in confidence to sell some firm rights on a case-by-case basis. Analysis of the ECML north of Newcastle has concluded that one freight train per hour (tph) can be accommodated alongside the passenger services*". Therefore, it could now offer firm rights with 24-hour windows on all services between Teesport and Grangemouth and Mossend.

14. DBC responded to Network Rail's representations on 10 September 2020. Whilst it noted the improved offer of firm rights for all services, DBC maintained its need to secure 1-hour windows for continued operation of intermodal services with a reasonable degree of certainty.
15. DBC said: "*Network Rail's offer of '24-hour' rather than 'one-hour' arrival and departure windows, is made on the basis that such an expansive window offers Network Rail the opportunity to retime these intermodal services earlier to provide an 'optimum fit'. DBC is uncertain as to why Network Rail has concluded that these intermodal services may all need to be retimed earlier to provide an 'optimum fit' as this is not fully explained in the letter. In any case, any size arrival and departure window (including those sized at '1-hour') will provide a degree of flexibility for Network Rail to retime services earlier, and also indeed, later.*"
16. Network Rail responded on 1 October 2020 saying retiming of freight schedules in Teeside was unavoidable, in the ESG context, so flexibility of 24-hour windows was required. On 23 October it sent an annex of further information showing operational constraints on ECML north of York (mostly 2 track). These included lack of passing loops, flat junctions, time taken for freight trains to accelerate and decelerate at these junctions all of which require careful "flighting" of passenger trains to fit on the busy route. Its analysis demonstrated that sufficient capacity exists on the ECML to sell firm rights to DBC but the exact timings of these paths was not yet developed. It added windows less than 24-hour would add constraints to developing the draft May 2022 timetable.

ORR review

17. We acknowledge that Network Rail is reaching the final stages of the ECML ESG and has been working with TOCs and FOCs. This complex project aims to resolve the long term issue of demand exceeding network capacity on the ECML. Our review has taken into account the context of the complex planning issue affecting numerous operators and the pressures faced by FOCs like DBC, which need certainty as to the times their services can run.
18. ORR recognises that the ECML is facing total aggregate demand from operators that, in the round, exceeds capacity. The work of the ESG is scheduled to reach its conclusion relatively soon. Network Rail has stated that it will have a full understanding of available capacity in April 2021. These two points are central to our conclusions in this case. We expect Network Rail to work with FOCs when the draft timetable is known. That will be an opportunity to review again the rights which can be offered. Network Rail must ensure its capacity analysis is accessible and transparent to all FOCs.
19. Network Rail explained its decision making and has also provided a convincing high level description of the challenges that the ESG is addressing across the ECML.

20. ORR reviewed the annex on operational constraints north of York which accompanied Networks Rail's representations of 23 October 2020. This examined the conflicts with passenger operators on the twin tracked railway with a lack of passing points (long enough for intermodal trains) and restrictions through Newcastle station for W10/12 gauge trains. We are aware of ambitions for a fast London to Edinburgh passenger service. We also note that the recast of the Middlesbrough to Darlington timetable to align with ECML revisions will result in the "flexing" of all freight paths between these two points before/after joining the main line.
21. It is important to note that Network Rail has stated that the rights sought in this application are included in the ESG's Indicative Train Service Specification (ITSS). As such, it remains an objective of the ESG to accommodate the rights in the long term. We encourage the parties to continue to work together in that process and note that clarity on ESG's conclusions will increase from December 2020 and the final position known in April 2021.

Conclusions

Rights applied for in this application

22. ORR accepts that overselling ECML capacity is the biggest risk to the ESG. Based on our review of the information available, ORR cannot be confident that it is appropriate to issue a direction for the sale of the 1-hour window firm rights sought in this application, without complicating/undoing the work of the ESG study or distorting the long term efficient allocation of capacity. We accept that, in this instance, Network Rail requires more flexibility due to the constraints mentioned above and until the ESG concludes its work, for the benefit of all operators and rail users on the ECML. We do however conclude that the sale of firm rights is appropriate, but with wider windows than those applied for.
23. **We therefore direct that the rights applied for should be directed as firm 24-hour windows. ORR has directed the sale of the following rights:**
Firm rights with 24-hour windows: 4S99; 4E99; 4E96; 4E98; 4S92.

Provision of evidence and Network Rail Access policy

24. ORR expects Network Rail to consider all applications for additional access rights on their individual merits and following a detailed consideration of whether capacity is available to fulfil requested rights without an unacceptable impact on wider performance. Network Rail's decisions should be supported by evidence. We note, even with the conclusions of this case, the existence of an ESG and the development of a provisional timetable does not mean that Network Rail can dismiss other requests for capacity without considering them on their merits. ORR must and will continue to consider applications under section 22A of the Act on their own merits.
25. In considering the agreement and in reaching our decision, we have had to weigh and strike the appropriate balance in discharging our statutory duties

under section 4 of the Act. In making these decisions, we have taken into account the following duties in particular:

- to protect the interests of users of railway assets;
- 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;
- to promote efficiency and economy on the part of the persons providing railway services; and
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

Conformed copy of the track access contract

26. Under clause 18.2.4 of the track access contract, Network Rail is required to produce a conformed copy, within 28 days of any amendment being made, and send copies to ORR and the Train Operator. Please send the conformed copy to me at ORR.
27. Copies of the approval notice and the agreement will be placed on ORR's public register and copies of this letter and the agreement will be placed on the ORR website. I am also copying this letter without enclosures to the Regulatory Reform Team at Network Rail and the Department for Transport.

Yours sincerely

S Jones

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