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Head of Access & Licensing



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Dear Paul and Navdeep

Approval of the 16th supplemental agreement to the track access contract between Network Rail Infrastructure Limited and West Midlands Trains Limited dated 15 May 2019

1. Today we approved the above supplemental agreement, submitted to us formally on 19 May 2023 under section 22 of the Railways Act 1993 (the Act). The approval is for one timetable period (until Principal Change Date 2023) rather than the requested expiry date of 20 September 2026 in the draft agreement informally submitted on 27 April 2023.
2. This application was submitted very late (within 15 working days of the 21 May 2023 timetable coming into effect) and is related to the Chiltern Railways 1st supplemental agreement, which was also submitted late. The absence of robust evidence on performance in the application meant it required considerable effort by ORR to assess the likely performance implications of the requested changes. Some of the evidence was only provided on 16 May.
3. This case has highlighted ORR's wider concern over the risks industry and funders have introduced into capacity planning on the rail network through their late decisions. For these reasons we did consider whether this application could be approved at all. This letter explains the reasons for our decision in more detail.

Purpose

3. The purpose of this agreement is to grant WMT the rights necessary to operate its proposed May 2023 timetable. WMT will relinquish a number of unused access rights as well as add new rights for services. The application simplifies Tables 2.1, 2.2, and 4.1 in Schedule 5 by removing 'through' services to facilitate WMT's response to changing demand.
4. These amendments constitute a net reduction in rights. WMT states the changes to the contract align with both passenger demand and provide firm rights for services that WMT are operating without approved access rights.
5. The Schedule 5 rights in the supplemental agreement commence on the Subsidiary Change Date (SCD) 2023 and expire on the Principal Change Date (PCD) 2023. To receive contractual rights beyond PCD 2023, West Midlands Trains will need to reapply and clearly set out the performance evidence which supports approval.
6. Additionally, Schedule 1 (Contract Particulars) is updated with the updated address for Network Rail's address for service of notices. The amendment also adds Class 730 rolling stock as Specified Equipment in Schedule 5 and adds Class 730 rolling stock to Schedule 7, Appendix 7D. The Schedule 1 and Schedule 7 rights in the supplemental agreement commence on the SCD 2023 and expire on the contract expiry date or earlier in the event of termination of the Contract.

Industry consultation

7. Network Rail undertook the standard industry consultation. No concerns or objections were raised during the consultation, and comments in agreement were received from Chiltern Railways, Great Western Railway, CrossCountry and Transport Focus.

ORR review

8. ORR received the informal submission of this application on 27 April, just over three weeks before the date the services were planned to commence. This put pressure on the ORR review, which protects industry and passengers in line with our duties. An important part of an ORR review is ensuring the proposed services are operationally sound, and detailed performance evidence was only submitted on 16 May.
9. ORR's guidance highlights that we usually expect reviews to take between six and twelve weeks depending upon the complexity. However, given that timetables

should be published twelve weeks before a change date, access rights applications should also be completed at that point. This is to align with the timescales specified in the current Network Code, something we have previously communicated to Network Rail and industry. Failure to adhere to these timescales increases the risk of adverse outcomes for passengers and industry. It also reduces the time available for ORR to work with applicants to resolve queries and consider the implications of its decision.

10. On reviewing this application, we had a number of performance-related concerns which required clarification. These included the extent of performance analysis undertaken and assurance of that analysis prior to the authorisation of the application at the Sale of Access Rights panel. For an application involving the rights to multiple routes through a major hub such as Birmingham, we expect applications to contain robust assurance of the impact on performance analysis.
11. No such evidence was provided in the initial stages of the application and, on enquiring, we were told that this had not been done due to cost and timescales. It was, therefore, not clear to us what evidence Network Rail had used as the basis of its support of the application. We asked the applicant and Network Rail to provide evidence of the performance analysis and relevant assurance work used in their decision making.
12. The evidence that was subsequently provided on 16 May did provide greater clarity. Our analysis of this information, in the time available, suggests that the risks of rejecting the application are greater than a time limited approval because some of our concerns have been addressed. As the information was so late (after the timetable had already been published), we have been unable to assess the long-term implications of approval in our decision making. It is also relevant that no objections were raised as part of the industry consultation process. However, we still have insufficient confidence that embedding these services in future timetables will improve efficiency and performance.
13. It should be noted that ORR has considered outright rejection of this application, which would have placed the relevant services outside of contractual protections if they had continued to run. However, we are also aware that, at this late stage, rejection would have led to a disruption of the planned timetable and the cancellation of train services, which would not ultimately be in the interests of the users of those services.
14. We have concluded that we will approve the proposed amendments to Schedule 5 for one timetable period only, with an expiry date of PCD 2023. Owing to there being no requirement for performance analysis and modelling for the Schedule 1



and Schedule 7 changes in the application, these are approved to commence on the SCD 2023 and will expire on the contract expiry date or earlier (if the contract is terminated). If the contract parties wish to apply for the Schedule 5 rights in this application to be extended beyond PCD 2023, they must submit a fully evidenced application to ORR in good time for us to make an informed decision. Failure to do this is likely to lead to a rejection of the application.

Our duties under section 4 of the Act

15. We have concluded that approval of this supplemental agreement with the abovementioned time-limited rights strikes the appropriate balance in discharging our statutory duties under section 4 of the Act. Of particular relevance are those duties relating to protecting the interests of users of railway services (section 4(1)(a)), promoting the use of the railway network for the carriage of passengers (section 4(1)(b)) and enabling persons providing railway services to plan their businesses with a reasonable degree of assurance (section 4(1)(g)).

Conformed copy of the track access agreement

16. 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.

Public register and administration

17. Electronic copies of this letter, the approval notice and the agreement will be sent to the Department for Transport and Network Rail's Policy and Access Team. Copies of the approval notice and the agreement will be placed on ORR's public register (website) and copies of this letter and the agreement will be placed on the ORR website.

Yours sincerely

Gareth Clancy