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17 April 2013

Network Rail
Franchised and non-franchised passenger train operators
Freight operators and holders of freight customer track access contracts
Charter passenger train operators

Cc. Department for Transport
Transport Scotland
PTEs
Transport for London
Welsh Government

Dear sir/madam,

Consultation – contingency planning for implementation of the 2013 periodic review (control period 5)

1. We are consulting on our proposed contingency plan in the event that there is a delay to the formal implementation of the 2013 periodic review (PR13). Such a delay might occur, for example, if Network Rail formally objects to our final determination, or if there is a judicial review challenge to our decision¹. The plan is broadly similar to that implemented for the last periodic review.
2. Because key provisions in franchised and open access passenger contracts will time out at the end of control period 4 (CP4) (after 31 March 2014), we are asking parties to these contracts to make an approved amendment to them. This would provide for our PR13 review notices² to be implemented even if there was a subsequent delay to the statutory implementation process.
3. Then, depending on how any challenge is resolved, we may be required to issue new review notices with new charges and terms, which would then replace the original ones.
4. As freight and charter operators' provisions roll-forward, the contingency plan would still be workable if these operators did not adopt the amendment. However, we would like

¹ For the remainder of this letter, we use a Network Rail objection as the example, but a delay could be due to other reasons.

² Under the statutory process, we must issue review notices setting out the proposed changes to access contracts to give effect to our periodic review determination.



to give these operators the opportunity to enter into this arrangement should they wish to do so.

Background

5. PR13 will establish Network Rail's outputs, access charges and wider regulatory and incentive framework for CP5. We will publish our final determination on 31 October 2013 setting out our overall decisions on PR13. Following this, we will formally implement those decisions through track and station access contracts (and where applicable in linked licences) using the procedure set out in Schedule 4A to the Railways Act 1993 (the Act).

6. We must issue a 'review notice' specifying the changes to contracts and licences necessary to give effect to that determination. We plan to do this on 18 December 2013. Network Rail has the right to object to our review notice. If it does so, we can either:

- (a) accept its objection and make changes to the periodic review settlement and issue new review notices and restart the implementation process; or
- (b) refer the matter to the Competition Commission to determine.

In either scenario, it will be unlikely that PR13 will be implemented in time for 1 April 2014.

7. The Act does not specify what should happen in this scenario. We consider that it would mean a significant gap in Network Rail's funding because certain key charges (in particular the fixed charge paid by franchised operators) would not automatically roll-forward. There are two broad options: introduce a provision to either (1) roll-forward CP4 charges or (2) implement our PR13 determination. In either case, depending on how the delay to implementation is resolved, there may be a need to issue new review notices with new charges and terms.

8. We do not see roll-forward of CP4 charges as the best option because:

- (a) many of the charges in CP4 were profiled, and there is no reason to suppose that the charges payable for the final year of CP4 relate logically to the appropriate revenue which Network Rail should receive from 1 April 2014 onwards; and
- (b) the charges set for CP4 relate to the delivery of outputs specified in the PR08 final determination. Network Rail should be committed to the new outputs for CP5.

Our proposal

9. We favour implementing the amendments specified in our review notices on 1 April 2014, notwithstanding a delay to the process for any reason. This would then provide for Network Rail to start the delivery of regulated outputs as per our determination, with the appropriate revenue stream.

10. Ultimately, if, say, the Competition Commission disagreed with our determination, we would have to issue a revised review notice to take its findings into account. Overall, all parties to access contracts would be left in the financial position that they would have been

in had the revised determination been implemented on 1 April 2014 (which may require payment adjustments between Network Rail and train operators)³.

11. We propose to issue a template amendment to track access contracts so that train operators and Network Rail can implement this arrangement, should they agree to do so.

12. We discussed this arrangement with the Competition Commission and it raised no objections to it. It also noted that the plan would not in any way undermine Network Rail's statutory right to object to our review notice, nor would it prejudice the ability of ORR to take action following an objection such as issuing a new review notice or making a reference to the Competition Commission.

Application to passenger operators and interaction with franchise indemnity provisions

Franchised passenger operators

13. As the vast majority of provisions that will time expire are found in franchised passenger operator track access agreements, we are asking that franchised operators make the proposed amendment.

14. We have had discussions with DfT and Transport Scotland and they recognise and support the reasoning behind our proposed amendment. They have therefore agreed in principle that changes to track access contracts set out in our review notices should be dealt with as regulatory changes for the purposes of Clause 18.1 or Schedule 9 as appropriate, notwithstanding any delay to implementation.

Open access passenger operators

15. For open access passenger operators, if implementation was delayed, we believe the existing variable charges that they pay would roll-forward into CP5, uplifted by inflation. However, their Schedule 8 performance regime payment rates run up to 2013/14 and would appear to fall away thereafter. So, if open access operators make the amendment, it would ensure that these payments continue under the new CP5 regime. We therefore suggest that open access passenger operators enter into the amendment too.

Freight and charter operators

16. For freight and charter operators, the existing contractual provisions differ from those of passenger operators. Our view is that, in the event of a delay to PR13 implementation, the CP4 provisions in their contracts would roll-forward after 1 April 2014,

³ We intend to develop a model clause provision for track access contracts that would require Network Rail and the train operator to agree reasonable payment terms should there be a need to settle any financial differences e.g. as a result of the eventual conclusion to a Competition Commission referral.

The purpose of this would be to protect both parties by ensuring that neither faces the standard repayment provisions in the contract (i.e. repayment within 28 days) which, depending on the sums involved, may be difficult. We plan to consult on this in July 2013 along with the other contractual drafting for CP5 and, subject to consultation, implement it through our review notices.

indexed as provided for within the contract. Then, once the formal implementation of PR13 has taken place, the charges and other payments under their track access contracts would fall or rise depending on the settlement. There would also be the need for Network Rail and the train operator to make adjustments to ensure that they would both be left in the financial position that they would have been in had PR13 implementation not been delayed and PR13 had taken effect from 1 April 2014 (see footnote 3 above).

17. Should freight and charter operators wish to enter into this proposed contingency arrangement, they would be welcome to do so. However, we consider that it is desirable to make the charging and billing process administratively simple by requiring all operators in each particular sector (freight or charter) to be subject to the same arrangements. We are also concerned that a patchwork approach of some operators in a sector paying new charges and some not (for however short or long a period until the implementation of the periodic review is finalised) may give rise to inadvertent price discrimination. We therefore propose only to approve the amendment if all operators in each sector enter into it.

Arrangements for PR08

18. For PR08, we adopted a similar contingency arrangement for CP4 based on this approach which franchised and non-franchised passenger train operators entered into with Network Rail⁴.

Proposed drafting

19. The Annex sets out the proposed legal drafting to implement this proposal. This provides that the review notice issued by ORR in place immediately before 1 April 2014 would be implemented in the event of any delay to the statutory process.

Consultation questions

20. We would be grateful for the views of:

- (a) **franchised and open access passenger operators** on whether they agree with our proposed amendment to their track access contracts (paragraphs 5 to 15);
- (b) **freight and charter operators** on whether they would want to enter into the proposed amendment rather than letting the provisions in their existing contracts roll-forward, and also on whether they consider that (notwithstanding the points we have made about preferring the arrangements to apply to all operators, or none of them) they would want to adopt the contingency arrangements on an operator-by-operator basis (paragraphs 16 to 17); and
- (c) **all operators**, on the proposed drafting of the amendment.

⁴ http://www.rail-reg.gov.uk/upload/pdf/acr-orrlet_tac_SA_interim_treatment_231008.pdf.

Responses

Please send any responses to this letter in electronic format (or if not possible, in hard-copy format) by 17 May 2013 to:

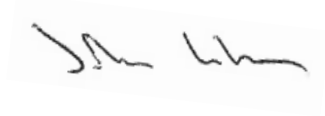
Richard Gusanie,
Office of Rail Regulation
One Kemble Street
London, WC2B 4AN
Tel: 020 7282 2065
Email: richard.gusanie@orr.gsi.gov.uk

We may publish the responses on our website and quote from them. Please indicate clearly if you wish all or part of your response to remain confidential to ORR. Where a response is made in confidence, please also provide a statement summarising the submission with it, which we can publish. We may also publish the names of respondents unless they indicate they want their name to be withheld.

Next steps

21. Depending on the responses to the consultation, we will issue the finalised drafting (taking into account consultees' comments) shortly afterwards to enable the amendment to be entered into as soon as possible.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John Larkinson', is written over a light grey rectangular background.

John Larkinson

Annex A to letter ‘Consultation – contingency planning for implementation of the 2013 periodic review (control period 5)’

SUPPLEMENTAL AGREEMENT

between

NETWORK RAIL INFRASTRUCTURE LIMITED

and

[insert name of train operator]

**relating to amendments to a Track Access
Contract (*[Non-Franchised Passenger/Passenger/Freight – delete as appropriate]*
Services) dated *[insert date]* –
Interim treatment of 2013 access charges review**

THIS SUPPLEMENTAL AGREEMENT is dated [insert date] 2013 and made between:

- (1) **NETWORK RAIL INFRASTRUCTURE LIMITED**, a private company registered in England under company number 02904587, having its registered office at Kings Place, 90 York Way, London N1 9AG ("**Network Rail**"); and
- (2) [insert name of train operator], a private company limited by shares registered in England and Wales under company number [insert number], having its registered office at [insert address] (the "**Train Operator**").

Background:

- (A) The parties entered into a Track Access Contract ([*Non-Franchised Passenger/Passenger/Freight – delete as appropriate*] Services) dated [insert date] as amended by various supplemental agreements (which track access contract as subsequently amended is hereafter referred to as the "**Contract**").
- (B) The parties wish to amend the Contract to incorporate a mechanism which will provide for the treatment of revised track access charges and certain other matters forming the subject of the Office of Rail Regulation's periodic review 2013 pending the conclusion of the periodic review process. This Supplemental Agreement provides for the insertion of a new Clause [insert relevant clause number] in order to incorporate such a mechanism into the Contract.

IT IS HEREBY AGREED as follows:

1. INTERPRETATION

In this Supplemental Agreement words and expressions defined in and rules of interpretation set out in the Contract shall have the same meaning and effect when used in this Supplemental Agreement except where the context requires otherwise.

2. EFFECTIVE DATE AND TERM

The amendments to the Contract made pursuant to this Supplemental Agreement shall have effect from [the date hereof] and shall cease to have effect at [insert time] hours on the Expiry Date or earlier termination of the Contract.

3. AMENDMENTS TO THE CONTRACT

[Delete Clause [insert number] "Interim Treatment of Access Charges Review" from the Contract.]¹ A new Clause [insert number] shall be inserted into the Contract as follows:

"[insert number] INTERIM TREATMENT OF ACCESS CHARGES REVIEW

¹ *Delete as appropriate according to the Contract*

[insert number].1 Treatment prior to implementation

If the terms of a Proposed Review Notice proposing amendments to the Contract are not implemented in accordance with paragraph 7 of Schedule 4A to the Act on 1 April 2014 for any reason, then, irrespective of such terms not having been so implemented, each proposed amendment to the Contract set out in the Proposed Review Notice shall have effect on that date or from any later date (or dates) specified in the Proposed Review Notice in respect of any individual amendment, in each case until such time as:

- (a) a Review Implementation Notice is served; or
- (b) following a reference to the Competition Commission in accordance with paragraph 9 of Schedule 4A to the Act, any amendments to the Contract, made in accordance with paragraphs 12(8), 12(9) or 14(3) of Schedule 4A to the Act, come into operation.

[insert number].2 Definitions

In this Clause *[insert number]*:

“Current Control Period” means the period of five years commencing at 0000 hours on 1 April 2009 and ending at 2359 hours on 31 March 2014;

“**Proposed Review Notice**” means as at the last day of the Current Control Period the most recently proposed Review Notice given by ORR in accordance with Schedule 4A of the Act;

“**Review Implementation Notice**” has the meaning given to “review implementation notice” in paragraph 7 of Schedule 4A to the Act; and

“**Review Notice**” has the meaning given to “review notice” in paragraph 4 of Schedule 4A of the Act.

4. EFFECT OF THIS SUPPLEMENTAL AGREEMENT ON THE CONTRACT

The parties agree that the Contract, as amended by this Supplemental Agreement, shall remain in full force and effect in accordance with its terms, and with effect from and including the date hereof and during the period in which the amendments made by this Supplemental Agreement are to have effect, all references in the Contract to the "Contract", "herein", "hereof", "hereunder" and other similar expressions shall, unless the context requires otherwise, be read and construed as a reference to the Contract as amended by this Supplemental Agreement.

5. LAW

This Supplemental Agreement shall be governed by, construed and given effect to in all respects in accordance with the laws of [England and Wales/Scotland – *delete as appropriate*].

6. THIRD PARTY RIGHTS

No person who is not a party to this Supplemental Agreement shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Supplemental Agreement.

7. COUNTERPARTS

This Supplemental Agreement may be executed in any number of counterparts, each of which when executed and delivered shall constitute an original, but all the counterparts shall together constitute one and the same instrument.

IN WITNESS of which Network Rail and the Train Operator have, by their duly authorised representatives, respectively entered into this Supplemental Agreement on the date first above written.

SIGNED BY)
for and on behalf of)
NETWORK RAIL)
INFRASTRUCTURE LIMITED)

SIGNED BY)
for and on behalf of)
[Relevant Train Operator])
)