

**Proposed Track Access Contract Between
Network Rail Infrastructure Limited and the Great
North Eastern Railway Company Limited under
Section 17 of the Railways Act 1993**

Network Rail's Representations

6 March 2014

Executive Summary

The East Coast Main Line is an exceptionally valuable asset in the national transport system. It provides the fastest surface transport between London, North East England and Edinburgh, and is faster than or competitive with air over these distances. It is a multi user route, combining freight, commuter services and long distance passenger service, both franchise and Open Access. Substantial infrastructure enhancements have been completed in CP4 and more are due to be completed in CP5 in order to grow both freight and passenger traffic.

Network Rail welcomes the opportunity to potentially add to this list of enhancements, and add to the competition with air travel through further discussions with Great North Eastern Railway Company Limited (GNER) regarding the proposals in this Section 17 Application. Further discussions are required, due to the fact that there are elements of this Application that Network Rail may be able to support in the future, but can't at this time due to insufficient information. These are outlined below in Network Rail's response.

Network Rail is disappointed it was not invited to negotiate a jointly agreed contract under Section 18 of the Railways Act 1993 with GNER. This Section 17 was issued before and negotiations had taken place.

Network Rail is continuing to work constructively with GNER regarding this Application, and will keep ORR up to date as those discussions progress.

This is an innovative Application which envisages a step change in train service offering, which Network Rail is interested in discussing further. With that innovation though comes a greater degree of risk, and therefore requires a greater degree of modelling and development to determine what might be deliverable.

Since submitting its Application to ORR, GNER has issued a further Section 17 to industry consultation, for services between Kings Cross and Bradford Forster Square and between Kings Cross and Cleethorpes. GNER has requested that these services start from December 2017. Any further negotiation on this Edinburgh Section 17 will need to consider the West Yorkshire and Cleethorpes application in parallel.

The proposed contract

Definitions

“Expiry Date” means 01:59 on the Principal Change Date in December 2031.

Any expiry date needs to be expressed as Principal Change Date in a specified year, rather than as Principal Change Date in a specified month of a specified year. This is to allow for any changes to the frequency of Principal Change Dates that may occur in the future.

This application requests a contract length of 15 years. Network Rail understands that GNER requires this contract length to facilitate the investments it is intending to make. Network Rail is undertaking a Capacity Study which is described below, which may indicate whether or not NR is able to agree to sell any proposed rights for 15 years, or a shorter timeframe.

Legislation currently states (regulation 18.9) that ‘A framework agreement for a period in excess of 10 years may only be made in exceptional cases, in particular where there is a large scale and long term investment, and particularly where such investment is covered by contractual commitments.’ Network Rail recognises the importance of scrutinising applications as to whether investments being made by an applicant are such that the argument of an "exceptional case" can be made out in order to justify extended rights to capacity, as required by both The Railways Infrastructure (Access and Management) Regulations and by Art.42 of EU Directive 2012/34. In doing so, the ORR could consider the differential nature of any identified potential investments on their individual merits, such as that of disposable assets such as rolling stock; compared to fixed asset investments such as line side infrastructure or depots for example.

Network Rail would need to negotiate the detail of Schedule 13 with GNER before satisfying itself that the above requirements were met.

3.2 Conditions Precedent to Clause 5

This clause refers to ‘the investment conditions laid out in Schedule 13’ being ‘satisfied’. Schedule 13 is currently empty. Network Rail would need to negotiate any proposed contents of Schedule 13 with GNER. That negotiation would be subject to the outcomes of discussions ongoing with GNER regarding the scope of infrastructure investment.

Schedule 1 contract particulars

All notices should be copied to the Route Managing Director, rather than the Route Director.

Schedule 4- Engineering Access Statement, Timetable Planning Rules and Restrictions of Use

Definitions

Network Rail notes that sub paragraph numbering throughout this Schedule 4, in comparison to the Model Contract, appears to have become corrupted.

Network Rail notes that a definition of 'journey time' has been added to this Schedule 4. The reasons are not explained in the application form. Network Rail would need to understand the reasons for its inclusion before deciding if it could support it.

Type 1 and 2 compensation

The regulatory regime provides that GNER, as an Open Access Operator choosing not to pay an access charge supplement, would only be eligible for compensation for Type 3 possessions (those which exceed 120 hours). GNER appears to be seeking to bespoke the Model Contract to make themselves explicitly eligible for such compensation when triggered by an overrun of a Type 1 or Type 2 possession. Network Rail does not support this bespoking.

SPD Cost Thresholds

Network Rail notes that the figures quoted as SPD cost thresholds are lower than those provided for in the model contract and we would need to agree that they are appropriate for the scale of operations proposed in this application. Network Rail does not support the proposed figures, pending the conclusion of further discussions on this issue.

Schedule 5-The Services and the Specified Equipment

Whilst Network Rail is interested in further discussions with GNER regarding its proposals in Schedule 5, it cannot yet confirm that the capacity exists to offer the sale of the track access rights described within it.

We are undertaking a Capacity Study in order to ascertain whether or not Network Rail can support the rights requested by GNER in this Schedule 5.

The objective of the study is to determine if capacity exists to provide for one long distance high speed (LDHS) path per hour between London Kings Cross and Edinburgh / Edinburgh to Kings Cross with an average journey time of 3 hours 43.

When this work is complete, it may provide a better indication of whether we can agree to any of the proposals listed in this Schedule 5. It is anticipated that the study will be complete by the end of June. This date may change if the remit is broadened to include capacity analysis of GNER's West Yorkshire and Cleethorpes application.

Network Rail position on network wide sale of access rights

Network Rail has recently reviewed its position on the sale of access rights, and as a result would now only agree more protection than table 2.1 provides, if the customer can provide evidence of a commercial need.

GNER has stated in its application form that 'GNER would not be happy with quantum only rights for this proposal so is seeking some protection for journey time and interval', and 'GNER is seeking maximum journey time protection to protect the investment to be made. Achieving these journey times is paramount in the business case put forward.'

Network Rail would like to see evidence of this business case in order to justify the commercial need that GNER is claiming, so that Network Rail could consider whether it would be appropriate to negotiate the Maximum Journey Times described in Table 4.1 and the Intervals described in Table 3.1.

Network Rail notes that the Maximum Journey Time protection requested also applies to Sundays. Whilst the Capacity Study only currently intends to assess capacity for SX services, Network Rail will also in due course confirm whether or not it can agree to the proposed Maximum Journey Times on Sundays.

Specified Equipment

GNER has asked for rights to operate 9 car class 390 Pendolinos. In order for this to be achieved, infrastructure upgrades will be required. Network Rail and GNER are in discussion regarding the scope and cost of these infrastructure enhancements. Network Rail will keep ORR up to date as these discussions progress. In addition to such upgrades being completed, Network Rail would also need to satisfy itself that this Specified Equipment is fully route and gauge cleared.

Proving period

Network Rail believes that a proving period provision should be included within this contract. Such a provision needs to be negotiated between Network Rail and GNER, and would essentially provide a mechanism for addressing any deterioration of network performance caused by the introduction of the services contained within this Application. This would ensure that any train service performance disbenefits from the introduction of the new services do not outweigh the benefits of the additional services to passengers.

Any such mechanism should include an obligation on GNER to remedy any significant deterioration as soon as reasonably practicable rather than at the end of the proving period. In the case of minor deterioration, the provision should oblige both GNER and Network Rail to meet promptly to take remedial action.

Schedule 13-Programme of Works Specification

GNER has added a Schedule 13, which is empty apart from the heading 'Investment in Infrastructure'. Network Rail agrees that such a Schedule needs to exist, as this Long Term Access Contract is dependent on fulfilment of the Investment Conditions to be contained within this Schedule 13. The nature and scope of the investment required by GNER is likely to be considerable, and therefore the importance of the content within this Schedule should not be underestimated.

Network Rail would need to discuss and negotiate the Schedule 13 contents with GNER before confirming its agreement.