

John Trippier
Senior Executive, Access & Licensing
Telephone 020 7282 2122
E-mail john.trippier@orr.gsi.gov.uk



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Liz Hudson
Assistant track Access Manager
Northern Rail Limited
4th Floor
Northern House
9 Rougier Street
York
YO1 6JT

Janet Turlington
Customer Manager
Network Rail Infrastructure Limited
George Stevenson House
Toft Green
York
YO1 6JT

Dear Liz and Janet,

Directions in respect of a track access contract between Network Rail Infrastructure Limited and Northern Rail Limited

1. The Office of Rail and Road (ORR) has today issued directions under section 17 of the Railways Act 1993 (the Act) to Network Rail Infrastructure Limited (Network Rail) to enter into a track access contract (TAC) with Northern Rail Limited (Northern). The application was submitted to ORR by Northern on 12 August 2015. This letter explains our decision.

The application

2. On 10 July 2015 Network Rail conducted a consultation on behalf of Northern on its proposal to submit an application under section 17 of the Railways Act to the ORR.

3. The proposed application used the December 2015 timetable as its base and explained that Northern had been instructed by the Secretary of State for Transport to secure access rights to commence at the end of its existing TAC and to continue for 10 years, to the Principal Change Date (PCD) 2026 to align with the new franchise term. The proposal was intended to protect the current base level of services in the North of England for the incoming new franchisee and did not include any increase in quantum of rights. The proposal did however seek specification of Departure Time Ranges; Service Intervals; and, Maximum Journey Times, in all of its service groups.

4. It is intended that the new TAC will be transferred to the new franchisee on 1 April 2016 under the transfer scheme in the Act.



5. Network Rail indicated that although it was willing to support the quantum of services sought - as the capacity existed to support that level of service beyond December 2016, it was not willing to support the specificity of rights.

6. On 7 September 2015, the Department for Transport wrote to ORR to set out its support for the application, including for the continuation of all existing journey time protection and specified service intervals in the current track access contract. DfT considered that a new TAC with “quantum only” rights would be insufficient for the current services and a future operator of the franchise.

Industry consultation

7. The consultation process was carried out for four weeks ending 7 August 2015. Nexus; London Midland; Transport Focus; Mersey Travel; and, West Yorkshire combined Authority responded to the consultation but raised no objections.

8. Other respondents advised that they did not support/ fully support the application:

- (i) Alliance Rail – Considered that there was uncertainty over the precise services that would form the Northern franchise and that, as a result of this, considered that ORR would not be able to support an access contract exceeding five years in duration. Also, any contract should allow for greater flex in relation to service intervals and departure ranges.
- (ii) Arriva Trains Wales – Did not support the amount of specification of access rights sought in the application (beyond quantum) in the wider Manchester area. It considered that Northern did not have sufficient justification for such specification and to allow them would reduce Network’s Rail’s ability to accommodate future timetable changes.
- (iii) GB Railfreight – No objection to the specification of some rights, however, it did not support specificity for services from Newcastle via Sunderland, or, Preston via the Cumbrian coast.

Statutory consultation

9. Schedule 4 to the Act requires ORR to undertake a statutory consultation process for applications made under section 17. We wrote to Network Rail on 18 August 2015 to invite written representations in respect of the application.

10. Formal representations on the application were received from Network Rail on 9 September 2015 and Northern responded to those representations on 26 October 2015.



Issues considered by ORR

11. In its formal representations Network Rail said it would support a new contract with a duration of one year. It did not support the 10 year duration sought by Northern as the outcome of the franchise competition was not known at that time and it did not wish to ossify capacity that might not be appropriate to the needs of a future franchisee.

12. Network Rail also noted that, in all of its service groups, Northern's application included specified rights in relation to Departure Time Ranges; Service Intervals; and, Maximum Journey Times. This differed from the specified rights in the current Northern TAC, which mainly applied to services in the eastern part of the franchise. Network Rail set out that it did not consider that evidence of demonstrable need had been provided for these protections within the application.

13. Overall, Network Rail considered that in order to retain its ability to plan, develop, and optimise future timetables, it could not support rights other than quantum and calling pattern for these services.

Duration of rights

14. Network Rail noted that the requested duration of the rights was 10 years. It did not consider that this duration was justified in light of the requirements of The Railways Infrastructure (Access and Management) Regulations 2005 (the Regulations), which states that "A framework agreement for a period of between five and ten years must be justified by the existence of commercial contracts, specified investments or risks".

15. Northern noted that the new Northern franchise would be in place during December 2015, i.e. 12 months before the commencement of the new TAC. We note that the franchise has now been let, removing concerns brought about by the application of the Regulations to this contract.

Specification of rights

16. Network Rail objected to the specification of rights within the TAC beyond quantum and calling pattern. It set out that to have the level of specification sought by Northern would remove its ability to optimise future timetables.

17. We agree that extending the specification of the current contract for a further 10 years would likely not allow Network Rail to make the best use of the available capacity on the Network. We note that there are some significant changes expected over the next few years, including changes to Northern's own timetable. In addition, we are currently considering applications for access to the ECML, which will require a recast of services. To



direct highly specified access rights to Northern now could frustrate the process to achieve the best overall timetable to take account of all operator's needs. On this basis the directed contract does not include the specification sought by Northern.

Period End Provision

18. Network Rail noted that the proposed length of contract would see the end of two control periods. In light of this, it sought to include a Schedule describing the arrangements that would apply in the event that there were to be any delay in the implementation of either of the new charging regimes. Northern did not agree with the inclusion of this Schedule, and set out its view that ORR should lead on matters linked to the Periodic Review process.

19. We note both positions and consider that Network Rail should conduct an industry consultation on the content of such a Schedule. It would not be appropriate to direct inclusion of the Schedule prior to such a development and consultation process.

Inclusion of an ETCS schedule

20. In anticipation of the ETCS programme of works commencing during the lifetime of the proposed contract, Network Rail sought to include a Schedule which it said would provide for obligations and arrangements in respect of that programme of works to ensure that funding of costs associated with on-train equipment and related infrastructure aligned with wider agreed industry arrangements.

21. Northern was not content to incorporate this schedule within the contract until it had a clear understanding of what the franchise would be committed to in this regard.

22. Network Rail approached ORR with a proposal to include an ETCS schedule in track access contracts in mid-2015. We told Network Rail that as this was such a huge project with very significant associated costs, we did not intend to include such provisions in individual track access contracts until we were satisfied that there was a consensus in the industry on how the costs would be dealt with and network Rail had consulted on a template schedule. As this has still not happened, we will not direct the inclusion of the schedule at this time.

23. We understand that discussions are progressing well with the industry and agreement should soon be reached on how ETCS costs will be dealt with for each different category of operator. Once this is done, Network Rail will consult the industry with regard to a number of model schedules that might contractualise this agreement which we would then expect to see incorporated in all track access contracts.



ORR's conclusions

24. In considering the contract 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. We concluded that issuing directions in respect of this contract is consistent with our section 4 duties, in particular those relating to:

- a) promoting improvements in railway service performance;
- b) protecting the interests of users of railway services;
- c) promoting the use of the railway network for the carriage of passengers and goods;
and,
- d) enabling persons providing railway services to plan their businesses with a reasonable degree of assurance.

Administration

25. A copy of the Directions and the signed contract will be placed on our public register, copies of this letter and the contract will also be placed on the ORR website. I am also copying this letter to Peter Craig at Network Rail and Keith Merritt at DfT.

26. Once the agreement is signed, in accordance with section 72(5) of the Act, you must send a copy to ORR within 14 days.

Yours sincerely,



John Trippier

