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Dear Robert and Ian

**Direction of the 8th Supplemental Agreement and approval of the 10th Supplemental Agreement to the Track Access Contract dated 11 December 2016 (the TAC) between Network Rail Infrastructure Limited (Network Rail) and GB Railfreight Limited (GBRf) (the Parties)**

1. The Office of Rail and Road (ORR) on 11 November 2019 approved the 10th Supplemental Agreement to the TAC under section 22 of the Railways Act 1993 (the Act) and on 15<sup>1</sup> November 2019 directed the parties to enter into the 8th Supplemental Agreement under section 22A of the Act .
2. This letter explains our reasons for these decisions.

**Background and purpose of the agreements**

3. Since December 2016, GBRf's business (measured in train miles) has grown by 48.3%, with a 28.1% growth over the last twelve months. To cater for this increase, GBRf has invested in: ten Class 66 locomotives; thirteen Class 60 locomotives; three Class 47 locomotives; and several hundred freight wagons. The increased business secured by GBRf includes the following traffic: intermodal; aggregates; coal; biomass; gypsum; cement; automotive; infrastructure services;

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<sup>1</sup> A Direction for the 8<sup>th</sup> SA was initially issued on 14 November, however the parties asked for minor changes to be made to two of the relevant rights. The Direction issued on 15 November replaced that of the 14<sup>th</sup>.

MoD movements; and rail services stock transfer movements<sup>2</sup>. These Supplemental Agreements give GBRf contractual certainty for its services.

4. When the industry consultation started on 4 June 2019, the parties had not reached agreement on any of the rights. All rights included in both supplemental agreements were initially included in one proposed 8th Supplemental Agreement which, following consultation, was submitted to ORR on 8 June 2019 under section 22A of the Act.
5. Following further discussions, the parties reached agreement on the majority of the proposed rights. These were separated out and submitted informally to ORR as a proposed 10th Supplemental Agreement on 26 July 2019. It included the addition of 154 new firm rights, the removal of 164 firm rights which are no longer required and the amendment of 308 existing firm rights. The rights will endure until the expiry of the TAC on the PCD in 2026.
6. Many of the new rights replace similar but less efficient existing rights. Following our review, it was formally submitted by the parties on 1 November 2019. The table appended to the 10th Supplemental Agreement shows the affected rights: new rights are highlighted in green, the amended rights are in yellow and the deleted rights are in red.
7. The rights still in dispute remained within a revised version of the 8th Supplemental Agreement. It contained 45 rights on which the parties could not reach agreement (this increased to 47 rights as two transferred from the 10th Supplemental Agreement during our review). We conducted the required statutory consultation with Network Rail in order to obtain its detailed views on these rights.

### **Industry Consultations**

8. In response to the industry consultation, several train operators raised queries and concerns over performance impacts on their own services. GBRf in turn engaged with the consultees. When the application was submitted to ORR, it was not clear if all the concerns had been addressed.
9. We wrote to consultees on 2 August asking them to confirm which matters remained outstanding. Those matters fell into two categories: first, concern that Network Rail's East Coast Main Line access policy (the ECML policy) was not being followed; and, secondly, specific performance concerns. These are discussed below.

### *CrossCountry*

10. XC Trains Limited (CrossCountry) expressed concern that the sale of firm rights to GBRf on the ECML until the PCD in 2026 was not consistent with Network Rail's ECML policy. It said its understanding of the ECML policy was that where new or

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<sup>2</sup> [See GBRf's Form F for more details](#)

amended ECML rights were agreed, they would only be sold on a Contingent basis until the PCD in December 2021. CrossCountry suggested that if ORR approved firm rights for GBRF, then the same should be extended to passenger train operators.

11. CrossCountry also raised specific performance concerns over seven rights (Headcodes: 6V35, 4L07, 4O059, 6E51, 4M11, 4M07, 6E17, 4E34, 6E89, 4M86, and 4Z81). ORR asked Network Rail to consider these concerns. Network Rail confirmed that seven of the rights were in the agreed 10th Supplemental Agreement. All of those rights had a Freight Delivery Metric (FDM) of between 77.5% and 100%. The remaining four rights were not agreed with Network Rail and were included in the 8th Supplemental Agreement.

#### *Govia Thameslink Railway (GTR)*

12. GTR queried whether the EMCL policy was being followed and raised performance concerns on two services (6C12 and 6D12). Following the provision of additional information from Network Rail, GTR agreed that the performance concerns had been addressed.

#### *Arriva Rail North (ARN)*

13. ARN queried whether the EMCL policy was being followed and raised performance concerns in relation to capacity around Leeds train station.
14. Network Rail confirmed that GBRf had sought nine new rights and to remove two old rights in this area. In line with its policy, Network Rail therefore agreed to the sale of two new rights (replacing those that were to be removed). The remaining seven rights were not agreed and remained in the 8th Supplemental Agreement.

#### *Greater Anglia*

15. Abellio East Anglia Limited (Greater Anglia or GA) raised specific performance queries relating to twenty-four rights. It provided detailed comments on each right. ORR asked Network Rail to consider each of the points raised.
16. Network Rail confirmed that 15 of the rights were not agreed and remained within the 8th Supplemental Agreement. Relating to the remaining nine rights, Network Rail confirmed that it maintained its position (not agreeing to their sale) for seven of them. In the case of two rights previously agreed rights (4L20 and 4Z26), Network Rail revised its position as a result of the GA concerns and withdrew its support. Those two rights were removed from the agreed 10th Supplemental Agreement and returned to the 8th Supplemental Agreement.

#### **Statutory consultation**

17. In line with the statutory process for consideration of applications under section 22A of the Act, ORR consulted Network Rail on 14 June, seeking its response by 8 July.

Network Rail advised that it was continuing to work with GBRf with a view to reaching agreement on many of the rights sought. As part of that process Network Rail would need to obtain internal agreement through its own Sale of Access Rights Panel (SOAR). Any response to ORR sent in advance of obtaining SOAR consent would be incomplete. On this basis, and after taking GBRf's views into account, ORR agreed to extend the period for Network Rail's response to 26 July.

18. In its 26 July response, Network Rail confirmed that it had reached agreement with GBRf on 626 of the rights, but not reached agreement on the remaining 45 rights. The agreed rights were then transferred into the 10th Supplemental Agreement.
19. The statutory consultation process calls for ORR to consult Network Rail and then offer the applicant an opportunity to comment on Network Rail's views. In this case, due to the nature of the counter-arguments offered by GBRf, ORR asked Network Rail to provide a further response on the matters raised. These matters are discussed below.

#### *ECML*

20. Network Rail said that, in line with its ECML policy, each requested right had been considered on its merits. As a result of this review Network Rail was unable to support 22 of the rights which operate over the ECML due to insufficient evidence of available capacity after May 2021. However it did support the rights as Contingent until the PCD in May 2021, and would reconsider these, along with all other rights on the ECML after the draft December 2021 timetable is developed and validated by the Events Steering Group (ESG).
21. GBRf responded that it did not believe waiting for an ESG output was appropriate when deciding whether or not to grant firm rights along the ECML.

#### *Western route*

22. Network Rail noted that it had been able to support the majority of the rights sought on the Western route and that these had been transferred to the 10th Supplemental Agreement. It was not able to support seven rights as its analysis had revealed that the rights could not be accommodated at the present time due to capacity constraints on the network. However, it was optimistic that further work with GBRf would enable more of these to be supported in the future.
23. GBRf responded with representations on all seven rights. In three cases it noted that the right sought was to replace a currently held less efficient right and that it would retain the original right if agreement could not be reached on the amended version. For the remaining cases GBRf set out arguments in support of the capacity being available.

24. ORR asked Network Rail to consider the arguments advanced by GBRf. After doing so, Network Rail amended its position and agreed to the sale of four of the seven rights.

#### *Great Eastern Main Line (GEML)*

25. Network Rail advised ORR that the Anglia Route ESG had previously identified a timetable constraint on the GEML which was currently subject to industry investigation into service provision for the May 2020 Working Timetable. Until that work was complete and all options fully reviewed by industry colleagues as well as the DfT and ORR, Network Rail advised that it was unable to support additional Firm Rights on the GEML. Network Rail further advised that this position was consistent with the messaging from the PMO to the wider industry for all operators with Firm Rights on the GEML and confirmed that this position included tonnage increase proposals to existing Firm Rights on the GEML or any timing load amendments that would slow services down compared to current provision.
26. Network Rail also said it was not able to support additional firm right traffic provision for services operating via Ely due to level crossing risk. Additional firm rights would limit the exploration of pathing potential at alternate hours where level crossing usage was low.
27. GBRf responded, noting its view that the ESG study was considering current and “aspired to” services for passenger and freight operators and, as such, did not mean that all of these aspirations will necessarily run come the timetable start-date. GBRf suggested that there was no compulsion to use the outputs of an ESG capacity study to bid (and therefore apply for firm rights), especially a study that has not yet been completed.
28. Relating to level crossing risk, GBRf did not agree that a perceived level-crossing risk assessment outcome should be used to limit trains being entered into the timetable if Part D of the Network Code has been compliantly followed. It noted that methods of mitigation against risk can be used as an alternative to rejecting rights.

#### **ORR review**

29. ORR reviewed the draft agreement, noting it was particularly complex. We therefore obtained reassurance from both parties that the agreement accurately reflected their intentions. After our own review we raised a number of points with the parties which they addressed. The matters we considered in both Supplemental Agreements are discussed below.

## **8th Supplemental Agreement**

### *ECML*

30. Network Rail has applied its ECML policy to the sale of additional rights on this route. We note that Network Rail has stated that it will reconsider the sale of longer-term firm rights on the ECML after the draft December 2021 timetable is developed and validated by the ESG.
31. We accept that it would be outwith that policy to sell the 22 firm rights on the ECML sought by GBRf. We do not consider there is a sufficient basis for directing Network Rail to sell rights in breach of that policy, given all the circumstances, at this time. We have therefore included the relevant rights within the contract as Contingent until May 2021.

### *Western route*

32. As a result of the exchange of additional information between the parties during the statutory consultation, Network Rail agreed to the sale of four of the disputed seven rights. We welcome this constructive engagement from the parties. For the remaining rights Network Rail provided specific performance and capacity reasons explaining its decision. We do not consider that there is a sufficient basis to overturn that decision. We have therefore included only the for agreed rights in the directed supplemental agreement.
33. Of the remaining three disputed rights, we note that one is an amendment to a right currently held. As such it was removed from the 8th Supplemental Agreement and GBRf will retain its current right instead.

### *GEML*

34. Network Rail stated that it had identified a timetable constraint on the GEML and was investigating service provision for the May 2020 timetable.
35. GBRf provided evidence that capacity is currently available for some of the rights it is seeking, but we are mindful of Network's Rail's response that although it can accommodate additional services in the short-term, it needs longer-term flexibility. Network Rail advised however that it would work to continue accommodating short-term rights.
36. Given the circumstances, and Network Rail's need for flexibility to deal with future capacity problems, we have therefore deleted those rights from the directed supplemental agreement.

## **10th Supplemental Agreement**

37. We noted that some consultees were concerned that the sale of firm rights on the ECML was not in line with Network Rail's ECML policy. Network Rail confirmed that

its approach with GBRf was consistent with that policy, and on 10 September offered more detailed explanation.

38. Network Rail emphasised that it was keen to support freight on its network and recognised that the dynamic nature of the freight market means that rights often need updating and replacing at regular intervals to reflect current traffic. It said it was important to do this in order to maintain up-to-date rights, to help facilitate rail freight. Network Rail noted that it had forensically analysed the application and supported rights where possible. In particular it noted that:

- GBRf already had rights in place in its TAC to 2026 and in the absence of any of these proposed supplemental changes those rights would continue to exist;
- The rights being proposed are more efficient than the current ones and are reflective of the current services;
- The rights have all been assessed on a case by case basis so that every right that is being added is replacing a less efficient/older right that operates in the same or very similar manner;
- Where GBRf have asked for a new right that does not replace an existing right this has been rejected and is included in the 8th Supplemental Agreement as not supported;
- Network Rail believes that due to the above reasons the overall change in capacity utilisation in this application is limited; and
- Where there has been an overall change, these have all been assessed on a case-by-case basis.

39. We consider that this adequately explains the approach that has been taken by Network Rail. It recognises the effect of the package of changes sought by GBRf on overall use of ECML capacity. With hindsight, this could have been better explained during the industry consultation. That might have resulted in fewer concerns over the application of the ECML policy. The application of the ECML policy in this area is consistent with our decision in GBRf's previous section 22A application to us, the Fourth Supplemental Agreement<sup>3</sup>.

## Conclusion

40. 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;

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<sup>3</sup> [GBRf-4th-sa-decision-letter.pdf](#)

- 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.

### **Timeline**

41. Exceptionally in this decision letter we should mention the time it has taken to process these applications. GBRf has raised concerns that it has taken too long from first initiation with Network Rail. There is of course a statutory process to follow. Further, this was an exceptionally complex case with several issues for all parties to work through, including consultee concerns about policy application on different routes through to individual services. Now that the decision has been made, GBRf and Network Rail will be better placed to make more routine changes through smaller supplemental agreements. However, we are very aware of GBRf's concerns about the process and would like to work with the parties to see what lessons we can learn from this case.

### **Conformed copy of the track access contract**

42. 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.
43. Copies of the direction 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 Peter Craig, Regulatory Reform Team at Network Rail and Keith Merritt at DfT.

Yours sincerely

A handwritten signature in black ink, appearing to be 'John Trippier', written over a light blue horizontal line.

**John Trippier**