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London & Birmingham Railway Limited 30th Supplemental Agreement: Access Rights on the West Coast Main Line

Introduction

1. I am writing to you regarding your application of 15 November 2011 to the Office of Rail Regulation (“ORR”) under section 22A of the Railways Act 1993 (the “Act”) for approval of an amendment to your current track access contract, granting additional access rights to operate train services.

2. You have previously indicated that London & Birmingham Railway Limited (“London Midland”) would appreciate a decision from ORR on this application by 15 December 2011, due to the timescales involved in ordering the rolling stock necessary to operate the second stage of the proposed services. As we have pointed out, our published Criteria and Procedures¹ state that we would normally expect our review of a section 22A application to take up to twelve weeks. As this is a contentious application and a number of issues remain outstanding, it has therefore not been possible for us to conclude our review by the date you mentioned.

3. However, having completed our initial assessment of your application, together with the views of consultees and the representations of Network Rail, we are now in a position to set out the decision we are minded to take, and the conditions that would have to be met in order for us to confirm that decision.

¹ Criteria and Procedures for the Approval of Track Access Contracts, 25 November 2009, p36
<http://www.rail-reg.gov.uk/upload/pdf/408.pdf>



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4. We are currently minded to approve the application subject to:
 - (a) confirmation of acceptable performance characteristics of the modified units;
 - (b) the outstanding performance and timetable planning rules issues being resolved;
 - (c) demonstration that the new rights can be accommodated alongside the existing rights of other operators;
 - (d) the rights having the minimal level of specification before December 2013, and being expressed as quantum only after that date; and
 - (e) the rights being contractually dependent on their being operated by rolling stock capable of running at 110mph.
5. The remainder of this letter sets out the reasons for this proposed decision.

Background

6. On 15 November London Midland submitted an application for approval of access rights under section 22A of the Railways Act 1993. Section 22A allows operators to apply to ORR for approval of amendments to a current track access agreement in order to make more extensive use of the network, where that amendment is not agreed by Network Rail.

7. The application is in conjunction with proposed investment in increasing the maximum speed of its existing fleet, and the purchase of additional vehicles in order to deal with existing and predicted overcrowding. It is for rights to introduce:

- (a) accelerated (110mph) off-peak services, together with additional off-peak services, on the West Coast Main Line ("WCML") from December 2012; and
- (b) additional 110mph peak services on the WCML from May 2014.

The requested rights would run until the expiry of London Midland's track access agreement, which is currently December 2014. The relevant franchise agreement expires in September 2013, or September 2015 subject to the operator meeting certain performance targets in the thirteen periods leading up to May 2012.

8. Network Rail has not agreed the application due to
 - (a) outstanding performance issues;
 - (b) what it perceives to be excessive specification in the way the proposed access rights are expressed; and
 - (c) the wish not to prejudice the outcome of the industry project it is leading to ascertain the best use of available capacity on the WCML from December 2013 onwards.

Network Rail has said that it would be prepared to agree access rights for off-peak services from December 2012 to December 2013, subject to the resolution of points (a) and (b) above. In respect of point (c), it has said that rights for the period post-December 2013 should be for quantum only.

9. In addition, objections and concerns have been raised by a number of consultees. These issues are discussed further below.

Capacity on the West Coast Main Line

10. In the spring of 2010, we began working with the industry on the long-term allocation of capacity on the WCML, in anticipation of both the existing Virgin West Coast franchise and the associated track access contract held by West Coast Trains Limited expiring on 1 April 2012 (the franchise was later extended to December 2012). We wrote to the industry, seeking to identify all operators' aspirations for new or amended access rights on the WCML. We then wrote to Network Rail, requesting that it produce a capacity and performance report analysing those various aspirations against the available capacity and taking account of any safety considerations. Once that report was produced, we invited track access applications from any operators with firm plans to make use of the capacity identified. We received a number of applications for either new or additional access rights, including one from the Department for Transport for the new franchise, and three "open access" applications from London Midland, Grand Central and Alliance Rail.

11. Having reviewed these applications, we wrote to the relevant parties on 2 March 2011, saying that the proposals could only be accommodated in the context of a complete recast of the WCML timetable, which should be carried out in increments, beginning in December 2013 and continuing through to December 2016, in line with the timescales for planned infrastructure enhancements (principally, the North West Electrification). We therefore rejected the applications for additional rights, approved a new ten-year track access agreement for the West Coast franchisee including a continuation of the existing level of rights (expressed as quantum only from December 2013), and commissioned Network Rail to commence work with the industry on the timetable recast.

Interim Policy Review

12. On 23 September 2011, we wrote to the industry to set out how we intended to deal with applications for track access rights in light of the conclusions of the Rail Value for Money Study ("the VfM Study"). Because the VfM study suggested a review of the way in which we dealt with track access applications and the way in which rights are expressed in track access agreements - and in light of our earlier decision on how we would deal with track access rights on the WCML - we said that, pending the outcome of our review in Spring 2012, we would not approve the extension of any track access contracts beyond December 2013, and we would deal with amendments to existing agreements that extend beyond that date on a case by case basis.

The Present Application

13. Three main issues arise in respect of London Midland's application: rolling stock, performance, and the implications of our future approach to the approval of access rights, particularly on the WCML, as set out above. Each of these issues is discussed in turn below, with references to the points raised by consultees and Network Rail where relevant.

Rolling Stock

14. The first set of proposed rights, to run in the off-peak commencing December 2012, requires some modifications to be made to London Midland's existing fleet to allow trains to run at 110mph. This technical development and the associated operational safety work has yet to be undertaken, but tests have demonstrated that this is a viable project. The second set of rights, to run in the peak commencing May 2014, requires the purchase of 10 new class 350 Desiro train sets for which funding from DfT is required. This in turn is dependent on agreement of the relevant High Level Output Statement ("HLOS"). It is because the window of opportunity to order the new rolling stock is both limited and approaching that London Midland requested our decision by 15 December 2011.

15. We do not believe that the need for technical development to be completed in order for the first set of rights to be exercised, and for funding to be secured for the second set of rights to be exercised, should necessarily present an obstacle to our approving these access rights. The approved supplemental agreement can include provision that makes the additional rights dependent on their being operated at 110mph. Therefore, if the technical development of the existing fleet or the funding for new rolling stock does not materialise for any reason, then the associated rights would fall away.

16. This would remove the danger of London Midland having rights that could be operated in such a way as to consume more capacity than originally envisaged. It would also provide London Midland with the certainty of knowing that, should it secure the operational capability, it will have the contractual rights to run the planned services. This is in line with our duty under Section 4 of the Act to enable providers of railway services to plan their business with a reasonable degree of assurance.

17. While London Midland has sufficient rolling stock with which to operate the proposed additional off-peak services, it requires more vehicles with which to operate the additional peak services. There is a very short window of opportunity in which to order the rolling stock as the preferred supplier will shortly be commencing work on production of the Thameslink fleet. There is also a requirement for DfT to order electric rolling stock for TransPennine Express ("TPE"), as the latter will require these with which to operate its Manchester – Scotland services once the first stage of North West Electrification is completed in December 2013 (the first trigger in the work Network Rail is undertaking on the WCML timetable). DfT's intention is to order a common fleet for both operators, with London Midland sub-leasing 10 units to TPE for their services. The window of opportunity closes at Christmas this year, and DfT would be unlikely to order the London Midland vehicles without at least an indication that they would be capable of being used, hence the

operator's desire to have the supplemental agreement in place by 15 December 2011. In the event that the order was not so placed, the next possible opportunity to order new trains for this operator could potentially see trains delivered from as late as 2018, which would see the existing problems continuing until then, a significant disbenefit for passengers.

Performance & Capacity

18. One of the reasons that Network Rail has not agreed to this application is that two of the proposed peak services do not fit within the timetable, as they breach the timetable planning rules ("TPR"), although work is being done to see if this can be resolved. However, performance modelling has shown that these are technical breaches of the TPR, and that, practically, there would be little or no effect on other services, because the TPR do not reflect the actual capability of the network. Indeed, it was for this reason that we instructed Network Rail to review the TPR as part of its work on the December 2013 timetable.

19. Network Rail raised the concern that the proposals would necessitate the flexing trains outside their existing rights from December 2013. Our view is that this cannot be correct, because only West Coast Trains has such protections in the affected part of the network, and those protections fall away in December 2013, as per the terms of their recently approved track access contract.

20. Network Rail also stated that it does not yet have final confirmation of the performance characteristics of the modified units, and thus cannot be certain that it will be able to meet the schedules London Midland has produced. This seems to be a low risk, since the trains already operate at 100mph, test runs have taken place at 110mph, and modelling is reliable in this area. London Midland is working on this, but satisfaction on this point is necessary before the rights can be approved.

21. In addition, some concerns over the performance and capacity implications were raised by Alliance Rail and West Coast Trains during the industry consultation conducted by Network Rail, while Chiltern Railways expressed concerns about the way the proposed rights had been expressed. We believe these issues are capable of resolution through our approval process for this application, so that any approval granted would be in accordance with our criteria and procedures.

22. The comments raised by GB Railfreight, Freightliner and DB Schenker required some further work to be done by Network Rail to assess the impact on their services, although Freightliner noted that the changes could create additional capacity for freight on the route north of Northampton. The results of that further analysis was sent to the freight operators for consideration, subsequent to our receipt of the application. The response from all three operators was to say that further information would be required from Network Rail before they could say definitively whether or not their rights would be affected. Therefore their concerns remain outstanding, but they are willing to work with the parties to resolve them.

23. If ORR were to approve the application, this would have to be subject to Network Rail being able to accommodate the new rights with the existing rights of other operators. Indeed, ORR is prohibited under section 22A(4)(b) of the Act from approving an application where the new rights could not be honoured by Network Rail without breaching the contractual rights of another operator.

Current access policy and capacity on the West Coast Main Line

24. As noted above, we have commissioned Network Rail to lead an industry project to recast the WCML timetable in increments, beginning in December 2013. We have also told the industry that we will not be extending highly specified rights beyond December 2013 anywhere on the network until our access policy review is complete, and will treat access applications on a case by case basis in light of that policy. Given that this application is for additional rights on the WCML, and beyond 2013, the question arises as to whether approval should be precluded by our current policies.

25. One of the reasons that Network Rail has not agreed to this application is due to the fact that the work of the WCML Event Steering Group on the post December 2013 timetable is still ongoing. In addition, both West Coast Trains and Alliance Rail have said that the London Midland application should be postponed, pending the outcome of that work. London Midland take the view that the project should not be constrained by its proposals since the recast is by its nature a work in progress. Moreover, given that the rights only run to 2014, long term planning should not be disrupted.

26. Our view is that, rather than consuming additional capacity, London Midland's proposal creates significantly better value from the capacity that it is already using. Alliance Rail and West Coast Trains have both made the point that capacity would be better utilised by rolling stock capable of running at 125mph rather than 110mph. However, the capacity to be used by the proposed new services is (entirely in the case of the off-peak services and almost entirely in the case of the peak services) capacity that does not currently exist and would be created by virtue of London Midland running the relevant services at 110mph. Running at this speed allows London Midland to run two trains in the capacity currently filled by one train, and thus deal with the overcrowding problems along this part of the network that were identified in the WCML Route Utilisation Strategy ("RUS").

27. In terms of the WCML, the proposed amendments involve no more than a minimal net increase of capacity consumed in the period beyond December 2013 that is affected by our interim access policy and the work of the WCML Event Steering Group. In terms of our interim access policy, the proposals do not involve the extension of the term of the access agreement beyond December 2013 (the current agreement lasts until 2014), and again, while additional rights are sought, they represent no more than a minimal net increase of capacity consumed.

28. Network Rail has argued that, in light of our letter of 23 September 2011, any rights approved for the period after December 2013, be they peak or off-peak, should be

expressed as quantum only. It has also argued that the rights applied for from December 2012 are over-specified in the current proposed draft supplemental, in particular proposed changes to Maximum Journey Times, including some that are not relevant to the additional rights being sought.

29. Approving rights with the minimal level of specification before December 2013, and as quantum only after that date, would be consistent with the approach we recently took with the new track access contract for the West Coast franchisee. The proposed changes to existing Maximum Journey Times should in any case be agreed separately from this supplemental which, as a section 22A application, should be limited to more extensive use of the network, in accordance with the Act. London Midland could negotiate more specified rights with Network Rail for the post December 2013 period once the timetable has been more fully developed and following the conclusions of our review of the specification of access rights.

Passenger benefits

30. The WCML RUS identified that there were significant present and predicted overcrowding issues on London Midland services from Euston. To give some examples by way of illustration, standing commences as far out as Milton Keynes on some London-bound services. In the evening peak, which would be the main beneficiary from the proposed changes, sixteen trains load in excess of seating capacity. Going out of London, one train loads in excess of 145% of seats to Cheddington, and another to Harrow & Wealdstone, and standing is common as far as Bletchley. Growth in excess of 30% is anticipated on these services over the next fifteen years, which indicates the potential scale of the problem.

31. Some of these issues could be dealt with by provision of additional rolling stock on existing services, but this would not resolve the whole problem. By enabling two trains to run where only one train can be accommodated at present, the problem can be largely resolved.

32. The proposal also provides a significantly accelerated service to Rugby and Nuneaton, which suffered a serious reduction in service with the introduction of the Very High Frequency timetable on the WCML, and to other stations along the Trent Valley.

33. All this aligns with our Section 4 duty to “promote the use of the railway network in Great Britain for the carriage of passengers”. Weighing these factors together, we do not believe our current policies should preclude us from approving a proposal that would carry significant benefits for passengers.

34. We believe that the following section 4 duties are of particular relevance in this case:

- (a) section 4(1)(a) - otherwise to protect the interests of users of railway services, because the proposals would address the problem of overcrowding;

- (b) section 4(1)(b) - to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [ORR] considers economically practicable, because the operator would be enabled to provide more frequent, faster and less crowded services;
- (c) section 4(1)(g) - to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance, because the operator can be given some assurance in terms of placing the required rolling stock order by our issuing our proposed decision now;
- (d) section 4(1)(zb) - to promote improvements in railway service performance, because of the significant passenger benefits mentioned above; and
- (e) section 4(5)(c) – to have regard to the funds available to the Secretary of State for the purposes of [her] functions in relation to railways and railways services, because issuing our proposed decision now can provide assurance not only to the operator but also to the DfT, which is funding the rolling stock purchase.

Conclusion

35. The DfT has expressed its support for the application, while noting that relevant HLOS and the associated change to the Service Level Commitment in the franchise, have yet to be agreed. As noted above, while a number of issues remain outstanding and approval of this application by 15 December 2011 has therefore not been possible, the proposal does have strong merits and the outstanding issues are not insurmountable.

36. We believe it is possible, in accordance with our section 4(1)(g) duty mentioned above, to give the applicant some of the assurance it needs to plan its business, which in this case means being able to order the required rolling stock in the window that is available. Therefore, as noted above, we are minded to approve the application subject to:

- (a) confirmation of acceptable performance characteristics of the modified units;
- (b) the outstanding performance and timetable planning rules issues being resolved;
- (c) demonstration that the new rights can be accommodated alongside the existing rights of other operators;
- (d) the rights having a minimal level of specification before December 2013, and being expressed as quantum only after that date; and
- (e) the rights being contractually dependent on their being operated by rolling stock capable of running at 110mph.

37. I am copying this letter to Catherine Olorenshaw at Network Rail, Peter Foot at DfT, Ian Yeowart at Alliance Rail Holdings, Richard Harper at Chiltern Railways, Nigel Oatway



at DB Schenker, Jason Bird at Freightliner, Ian Kapur at GB Railfreight and Robert Hodgkinson at West Coast Trains.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Robertson', is written over a horizontal line.

David Robertson