

Robert Plaskitt
Head of Access & Licensing
Telephone 0207 282 2072
E-mail rob.plaskitt@orr.gsi.gov.uk



8 September 2015

Susan Cross
Head of Franchise Management and Development
Abellio Greater Anglia Limited
11th Floor, One Stratford Place
Montfitchet Road
London
E20 1EJ

Andrew Tinkler
Chief Executive
Stobart Group Limited
Solway Business Centre
Kingstown
Carlisle
Cumbria
CA6 4BY

Application for Access to Southend Airport Station

Application

1. On 31 March 2015, Abellio Greater Anglia (AGA) applied to the Office of Rail Regulation (ORR) under section 17 of the Railways Act 1993 (the Act). In its application, it asked us to direct Stobart Rail Limited (SRL) to enter into a Station Access Agreement (SAA) in respect of Southend Airport station (the station), where SRL is the Station Facility Owner (SFO). The current access agreement between SRL and AGA expires on 27 September 2015.

Grounds for disagreement

2. AGA has made the application because it has not been able to agree with SRL the access charge mechanism and revenue share arrangements at the station.

Decision

3. We have decided to direct SRL to enter into a SAA with AGA under section 17 of the Act.

4. In particular, and after considering the representations submitted by AGA, SRL and the Department for Transport (DfT), we have decided for the reasons set out below that it is appropriate for the SAA to be governed by the same Access Charge and review provisions that exist in Schedule 4 of the Stobart Station Access Conditions (Stobart SACs). These are also described in the current access agreement.



INVESTOR IN PEOPLE

5. The new SAA will commence at 02:00 hours on 27 September 2015 and include an expiry date of:

“The earlier of: (i) the date upon which the Station Facility Owner ceases to be the Station Facility Owner, (ii) the date of expiry or termination of the Franchise Agreement pursuant to which the Beneficiary provides railway passenger services to or from the Station, and (iii) the discontinuance of services calling at the Station in accordance with section 37 of the Railways Act 2005.”

6. Our directions are attached to this letter; AGA is not under any obligation to enter into the agreement. If it does not do so by **26 September 2015** SRL shall be released from the duty to enter into the access agreement.

7. The reasons for our decision are set out in paragraphs 26 to 48.

Process

8. We have conducted the section 17 process as required by Schedule 4 of the Act and, in the course of that, we have given careful consideration to the representations and information which both parties have provided. We have also taken into account the representations provided by DfT.

9. We have been conscious of the need to give all affected parties the opportunity to make representations to us and to provide us with relevant information. In particular, we have followed the following process:

- a. On 15 April 2015 we invited SRL to make written representations on the application from AGA and directed it to give us the names and addresses of every interested person as required by paragraphs 3(1) and 4(1) of Schedule 4 of the Act.
- b. On 27 April 2015, SRL confirmed there were no interested persons.
- c. On 1 May 2015 we received a response from SRL on AGA's application. The response was sent to AGA and its further representations were invited.
- d. On 17 May 2015 AGA wrote to us requesting an extension to the response time for comments on SRL representations. We agreed to an extension until 29 May 2015.



INVESTOR IN PEOPLE

- e. On 29 May 2015 we received a response from AGA on SRL's representations on the application. Included was a letter from DfT dated 21 May 2015.
- f. On 2 June 2015 ORR wrote to DfT as a key stakeholder to ascertain if its letter dated 21 May 2015 contained DfT's full comments on the application or whether there were additional representations DfT wished to make. DfT confirmed there were no further representations it wished to make.
- g. On 4 June 2015 ORR sent DfT's representations to SRL for comment.
- h. On 11 June 2015 SRL replied with comments on DfT's representations.
- i. On 23 June 2015 ORR received a letter from SRL requesting the opportunity to comment on AGA's representations dated 29 May 2015, which it had seen on ORR's website.
- j. ORR wrote to SRL requesting any comments by 6 July 2015. A copy of this letter was sent to AGA.
- k. On 6 July 2015 ORR received a letter from SRL with further comments on AGA's representations of 29 May 2015.

The Railways Act 1993

- 10. This section provides an overview of the relevant legislative provisions.
- 11. Under the Act, anyone seeking access to a station, which is subject to access regulation, for or in connection with the operation of trains, must enter into a contract with the facility owner at that station, as directed by us. If not, section 18(1) provides that the access contract will be void. Where an applicant for access cannot agree the terms of access with a facility owner it is entitled to apply to us under section 17 to direct those terms.
- 12. When we exercise our functions under Part 1 of the Act, we are governed by our statutory duties, which are set out in section 4 of the Act. These duties are not in any order of priority and it is for us to decide how to balance our duties in reaching a decision. In considering the application and in reaching our decision as to appropriate directions in this case, we have had regard to our duties under section 4 of the Act, complied with the statutory procedures, and adhered to the process and timescales set out in Schedule 4 of the Act.



INVESTOR IN PEOPLE

13. We have carefully considered all of our duties in reaching our decision on this application. Section 4 requires us to balance all of our duties and, in balancing these duties, we necessarily have to exercise our judgment, taking into account the particular circumstances of each case.

14. In relation to this case and for the reasons set out below, we have given particular weight to the following duties:

- otherwise to protect the interests of users of railway services;
- to promote the use of the railway network in Great Britain for the carriage of passengers and goods and the development of that network, to the greatest extent that we consider economically practicable;
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;
- to protect the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of the prices charged for such use; and
- to have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railways services.

Southend Airport station

15. In this and the following sections we set out the relevant background information on Southend Airport station. This has been obtained through the parties' various submissions, as well as correspondence we retain on file from the time of our approval of the Stobart SACs and the SAA between SRL and the train operator at the time, London Eastern Railway Limited (LER). We also comment on the contractual arrangements currently in place between SRL and AGA.

16. London Southend Airport is considered one of the key drivers for regeneration in the local area and so London Southend Airport Company Limited (LSACL) decided to pursue establishing a station at the airport.

17. The station is an independently owned station, i.e. is not owned or operated by Network Rail or a franchised operator.



INVESTOR IN PEOPLE

18. LSACL is owner of the airport and it has leased from Network Rail the land on which the station is built; the lease runs until 2144. All station build costs were met by LSACL and for the duration of the lease, all station operating costs fall to the station operator; these include operation, maintenance, renewal and staffing costs. The station is operated by SRL, an affiliate of LSACL.
19. The charging arrangements in place allow SRL to retain 91% of all ticket sales to and from the station, less season ticket sales. The arrangements also include review mechanisms (see also paragraph 29) that may be instigated by either party to the SAA. The access charge provisions set out in the Stobart SACs also permit a review to be called at any time where any stated assumptions which underpin the revenue sharing principles in the Stobart SACs cease to be correct.
20. The charging arrangements at the station were subject to extensive negotiation between SRL and LER. DfT was also closely involved in these negotiations and was fully sighted on, and supportive of, the charging regime that was established. We expressly sought and received DfT's confirmation at the time that it supported the regime. (See also paragraph 29).
21. SRL compensates the train operator for its short run marginal costs; these costs have been identified as the braking and electricity costs related to calling at the station as well as some incremental driver costs.
22. Since services started calling at the station, there has been significant growth in the number of passengers using the train service to access the airport.

Station Access Agreement

23. SRL entered into a SAA with the previous train operator LER on 18 July 2011. This agreement contained an expiry date of "the Passenger Change Date specified for December 2014 in accordance with Network Rail's Network Code",¹ (i.e. 10 December 2014). The terms of the original SAA as well as the revenue sharing provisions contained within Schedule 4 of the Stobart SACs were negotiated between SRL and LER. Whilst AGA was not part of these original negotiations, it did at the time of bidding for and subsequently taking over the franchise have full knowledge of the arrangements in place when entering into them.

¹ Station Access Agreement - SAA/283/190/01/11/01
<https://docs.google.com/file/d/0BxwiHVUqdJBhRXFncHRQbTZLWHM/edit>



24. On 17 September 2014 AGA served a notice on SRL to terminate the SAA. On 9 December 2014 SRL, with AGA's consent, submitted and ORR approved an amending agreement to extend the expiry date of the original SAA to 17 May 2015.² We understand that AGA intended to use this time to try to negotiate terms of a new agreement. SRL submitted a further amending agreement to ORR on 14 May 2015; once approved, this extended the expiry date of the existing SAA until 27 September 2015.³

Stobart Station Access Conditions

25. The station is governed by a bespoke set of Station Access Conditions, the Stobart SACs, which have been customised to reflect the particular arrangements in place at the station. The Access Charge outlined in Schedule 4 of the Stobart SACs describes a revenue sharing arrangement, which provides revenue to the station facility owner as well as the train operator. These principles establish the terms of the Access Charging Schedule, which the parties originally wanted only in the access agreement, but which ORR required to be added to the Stobart SACs. This allowed the charging principles and regime to be contained in a document capable of having multilateral effect in the event a third party operator sought to call at the station, this arrangement is further explained at paragraph 42. However, it is the multilateral Stobart SACs and not the bilateral SAA that governs the charging arrangements at the station.

Reasons for our decision

26. Neither SRL nor AGA has asked us to comment on matters relating to the passenger service being designated by DfT as experimental, nor on the Operating Agreement entered into by the parties. For the avoidance of doubt, these are matters that would in any event fall outside ORR's remit.

Access Charge

27. We have reviewed the parties' representations and in particular have considered AGA's proposal that the clause in the SAA for the relevant revenue share should not apply in any SAA ORR directs the parties to enter into. AGA has stated that the

² Amending Agreement - S/22/283/288/01/14/01

<https://docs.google.com/file/d/0BxwiHVUgdJBheFBQOU1wZFdxSk0/edit>

³ Amending Agreement - S/22/283/288/01/15/01

<https://drive.google.com/file/d/0BxwiHVUgdJBhRIFNS1p2VXhwZVE/view>



INVESTOR IN PEOPLE

current revenue share arrangements do not provide for a fair and sustainable commercial agreement between the two parties. And, in its application at section 3.1, AGA has requested that ORR directs SRL to enter into an "ORR approved Single Station Access Agreement which is the industry standard model."

28. For the majority of stations on the network the SFO pays a lease charge to Network Rail as well as a long term charge (LTC). The LTC covers the cost of maintenance, repair and renewal of station assets. The SFO can charge other operators that access its station(s) (beneficiaries) a proportion of the station LTC. The beneficiaries also pay a Qualifying Expenditure (QX) charge to the SFO; this charge is designed to recover a proportion of the day to day running costs incurred by the SFO in providing services and amenities at the station. A beneficiary's contribution to both of these charges is calculated in proportion to its departures from the station. Southend Airport station differs from this model as it was funded entirely at the cost of a private investor, and as such a bespoke set of charging arrangements at the station was created. Importantly, these charging arrangements were negotiated and agreed by the parties and DfT.
29. In our decision we have considered the particular circumstances of the case, as well as our statutory duties. In this instance, a private sector organisation has built the station entirely at its own cost (including the risks associated with building and operating a new station) and agreed revenue sharing arrangements. In negotiating these arrangements with LER and DfT review mechanisms were included; these principles are set out in a letter from DfT to LSACL dated 6 October 2009 (Annex 1), and included in SRL's representations. Extracts of these review mechanisms contained within Schedule 4 of the Stobart SACs are replicated below:

SCHEDULE 4 ACCESS CHARGE

- 3.4. *"If either party at any time considers that the Relevant Revenue may be affected by any act or omission which serves in any material way to distort or not accurately capture either passengers travelling to or from the Station by railway using the Beneficiary's services or (subject to retail commissions paid in the ordinary course of business to third parties) the amounts paid by those passengers for travel to or from the Station by railway using the Beneficiary's services..."*
- 5.1. *"There shall be a review of the Relevant Factor at the request of either party notified on or within three months after the fifth or any subsequent 5th anniversary of the date passenger services first call at the Station."*



INVESTOR IN PEOPLE

5.2. *On a review the Relevant Factor shall be re-calculated in accordance with the Model but using actual data over the relevant representative reference period in respect of that review for the values of NPF, NOF, PFAP, and OFAP as referred to in paragraph 4.3, but otherwise using the methodology specified in paragraph 4.3 (including the 0.91 factor)."*

- 5.3. *"A review of this Schedule may also be required by either party at any time to take into account any variation from the following assumptions:"*

(These assumptions are listed at paragraph 5.3 (a-g) of Schedule 4 of the Stobart SACs.)

30. In its representations of 29 May 2015 at paragraph 2.1.1, AGA states that the terms of the original SAA (including the Revenue Share) were only intended to apply during the term of the original SAA. Whilst the original agreement had an expiry date of December 2014, this contrasts with the review period in the Stobart SACs, which specifies a five yearly review. If this review mechanism was intended to apply only for the duration of the original SAA, the inclusion of a five yearly review period would have been illogical, and this supports our view that the duration of the bilateral SAA does not govern the charging arrangements as specified in the Stobart SACs. In any event, the Stobart SACs are incorporated by reference into a SAA and so the charging arrangements as included in the Stobart SACs are also incorporated into any SAA entered into by SRL and any beneficiary.
31. In the DfT letter dated 6 October 2009 addressed to the Managing Director of LSACL (attached at Annex 1), DfT confirmed that it was willing to continue negotiations for the development of the station based on a framework that included the principles that *"The franchisee to receive 9% commission on ticket sales to and from station..."*, and, *"Southend Airport to retain 91% of ticket sales to and from the station..."*. Importantly, DfT confirmed in the letter that the principles proposed by LSACL were *"in respect of successor franchises"*, and it was on this basis LSACL continued the development of the station.
32. SRL negotiated a SAA which provided it with a level of certainty over return on the investment in the station. These negotiations included specifying a review process, allowing the charging model to be updated on terms specified in the Stobart SACs. Given the clear review provisions that have been set out, we consider that any review should take effect in accordance with Schedule 4 of the Stobart SACs. The charging arrangements and associated review provisions also provide a level of contractual and financial certainty for any beneficiary who wishes to call passenger



INVESTOR IN PEOPLE

services at the station. And importantly, should there ever be multiple beneficiaries, a clear review process described in a multi-lateral document.

33. In the absence of a very good reason for doing so, we do not consider it appropriate to disturb arrangements entered into by the parties following commercial negotiation, which are enshrined in the contractual arrangements that govern the station (the SACs), and which set out the long term basis of charging for all train operators who want to access the station.

34. ORR accepts that the access charging arrangements at the station are bespoke. And after careful consideration of the representations from all parties we are not persuaded that it would be appropriate to depart from the contractual arrangements currently in place. We do not consider it is right to seek to overturn such arrangements because doing so could, among other things, put at risk the confidence of third parties to invest in the railway in the future. It is also contrary to the principle of providing contractual certainty to the parties whose charges are governed by those arrangements in the Stobart SACs which do not expire with the SAA.

Charging Principles

The Railways Infrastructure (Access and Management) Regulations 2005

35. We note that AGA refers to the responsibilities of SRL as an Infrastructure Manager under The Railways Infrastructure (Access and Management) Regulations 2005 (the Regulations).

36. The Regulations define an Infrastructure Manager as any body or undertaking that is responsible in particular for-

- (a) The establishment and maintenance of railway infrastructure; **and** [ORR emphasis]
- (b) The provision with respect to the infrastructure of the network services as defined in section 82 of the Act,

37. Section 82 of the Railways Act 1993 defines network services as-

““network services” means any service which consists of, or is comprised in, the provision or operation of a network (or of any of the track or other installations comprised in a network), but does **not** [ORR emphasis] include any service which falls within paragraphs (a) to (d) of subsection (1) above;”



INVESTOR IN PEOPLE

38. Subsection (1) as described in paragraph 37 above includes Stations Services.

39. As SRL is only providing Station Services as defined in the Act, it is therefore not an Infrastructure Manager as defined by the Regulations. As such, ORR considers that the requirements AGA highlights in its representations and also outlined in Schedule 3 of the Regulations, for example to produce a network statement, do not apply to SRL. The arguments that AGA makes in this respect therefore fall away and we do not comment further on them.

Request by AGA for ORR to direct SRL into a standard ORR approved Single Station Access Agreement which is the industry standard model.

40. The particular charging arrangement in place at Southend Airport station is for revenue sharing and not one to recover costs (including investment costs). In its application AGA requests that ORR directs SRL into a contract using a standard industry model. For a privately built station we are not aware of any "standard industry model". The land on which Southend Airport station is built is leased from Network Rail by LSACL on a lease lasting until 2144. As such, the station falls outside ORR's 5-yearly review of access charges and consequently ORR has no role in setting a long term charge at the station (like it does for those stations "owned" by Network Rail). In these particular circumstances, the "standard industry model" to which AGA refers is not appropriate. ORR accepts that the access charging arrangements at the station are bespoke; however, we have a longstanding policy of seeking to facilitate such bespoke arrangements when the parties involved agree to enter into them and where it facilitates investment in the railway.

Duration of the SAA

41. We hold correspondence from DfT specifying that the term of the SAA will run until the Passenger Change Date in December 2014, and that the SAA will be designated as a Key Contract until this date. We are unsure as to the reasons why this particular date was chosen, but speculate that it was initially chosen as it fitted with DfT's (re)franchising programme at that time. In any event, and irrespective of the reasons for the initial expiry date of the SAA, it has been subsequently extended on two occasions by agreement between the parties and approval by ORR, and currently expires on 27 September 2015.

42. In addition, the SAA establishes the direct contractual link between the parties to that agreement and sets out matters which relate solely to those parties. In contrast, the SACs create a multi-lateral set of arrangements that apply to all agreements



INVESTOR IN PEOPLE

that incorporate them. A beneficiary enters into a SAA in accordance with the principles set out in the SACs, of which the access charge is one. The charging principles are included within the SACs so that they would be visible for any access party wishing to call trains at a station. In this particular case, the review principles as set out in Schedule 4 of the Stobart SACs aren't restricted to the term of any particular SAA. Although SAAs may expire, the terms in the SACs do not, they continue until the parties formally amend them and it is for this reason we do not consider that the duration of the SAA in this case impacts upon the review period or charging arrangements specified in the Stobart SACs.

Termination of original SAA

43. AGA in its representations states that it issued a notice to terminate the SAA on 17 September 2014 and holds that the original agreement terminated in December 2014. However, before the agreement terminated, the parties extended it on 11 December 2014 (ORR reference S/22/283/288/01/14/01) and again on 15 May 2015 (ORR reference S/22/283/288/01/15/01). It currently has an expiry date of 27 September 2015.

Retrospective approval

44. AGA has asked in its application that ORR should direct that any new SAA should be backdated to the Passenger Change Date of December 2014. While our powers do not expressly rule out a direction from having retrospective effect, it is not ORR's usual policy to make such a direction in relation to entering into station access contracts. Furthermore, as identified above, the current SAA runs until 27 September 2015, so there is no scope for ORR to direct a retrospective start date for any new SAA which would conflict with the current arrangements.

Directive 2012/34/EU - "first railway package recast"

45. Both AGA and SRL have made reference to Directive 2012/34/EU. As this legislation is still under review and has not yet been transposed into English law it does not impact upon the current section 17 application submitted by AGA. However, once the Directive has been transposed, LSACL and SRL will need to consider if, and to what extent, it impacts upon them as owner and operator respectively of Southend Airport station.



INVESTOR IN PEOPLE

Overcrowding on services

46. In its application, AGA has stated that additional capacity for weekend services has been needed due to overcrowding and that this has been funded solely by AGA. The figures provided by AGA and SRL of the current percentage of passengers using rail to arrive or depart the airport vary drastically, 41% and 22% respectively. There is disagreement over the cause of the overcrowding on services: AGA suggests that overcrowding on a number of services, in large part, relates to passengers travelling to and from the station; SRL suggests that it is a consequence of people traveling to/from the new Westfield Shopping Centre at Stratford. Regardless of the reasons for the overcrowding, the opportunity for negotiations in the context of future arrangements for serving the station where additional services or capacity are required, is something that DfT is able to consider during the re-letting of the East Anglia Rail Franchise.
47. Furthermore, AGA in its representations of 29 May 2015 at paragraph 7.5, states that *"the Revenue Share makes the provision of railway services to the Station less efficient because services are now overcrowded, not cost-effective and AGA cannot invest in service enhancements."* The availability of funds to both SRL and AGA is a symptom of the detailed revenue sharing and review provisions in place. If there are unforeseen consequences, which might have been properly dealt with during negotiation, these are not grounds for ORR to impose new terms. This is perhaps also an issue that DfT could consider during the re-letting of the East Anglia Franchise.

Other ORR decisions

SRL subsidising its airport activities

48. AGA, in its application at section 3.4, and again in its representations of 29 May 2015 at paragraph 10.2 states that the current arrangements give SRL a level of income that subsidises its airport expansion, a claim which SRL considers is unsubstantiated. If AGA feels that this is the case, then it is for it to decide if it is appropriate to make a submission or appeal to the Civil Aviation Authority, and is not something ORR will comment on further as it falls outside our locus.

Next Steps

49. Please note that until the access agreement is entered into none of the provisions contained within it are applicable. The directions state that the SAA should be entered into no later than **26 September 2015**.



INVESTOR IN PEOPLE

50. The ORR unique reference number given in our directions should be inserted in the top right hand corner of the cover sheet of each document before signature to ensure all parties have a uniform referencing system.
51. SRL is required to send us a copy of the signed access agreement no later than 14 days after the date upon which it is entered into.
52. When we receive a copy of the signed access agreement we will retain it on our public register. No exclusions will be made prior to it being placed on the public register, unless a request for redaction is made to us. If you wish to request an exclusion of all or part of the agreement, or have any other questions, please contact my colleague, Michael Scarff, as soon as possible. Michael can be contacted on 020 7282 3671 or by email at michael.scarff@orr.gsi.gov.uk.

Yours sincerely



Robert Plaskitt



Annex 1

Department for
Transport

Managing Director
London Southend Airport
Southend on Sea
Essex
SS2 6YF

Director, Rail Strategy
Department for Transport
Great Minster House
Zone 5/27
76 Marsham Street
London
SW1P 4DR
Direct Line: [REDACTED]
Fax: 020 7944 2158

Web Site: www.dft.gov.uk

8 October 2009

Southend Airport Station

I refer to discussions which have been taking place between yourself and the Department.

Southend Airport is proposing that a railway station be constructed, entirely at its cost, on the Shenfield to Southend Victoria line, to serve Southend Airport. In the first instance, Network Rail is seeking assurance that the Department supports the station in principle, to enable it to enter into the requisite agreements with Southend Airport, to allow construction of the station to take place. Southend Airport is in discussion with the current franchisee, National Express East Anglia (NXEA), regarding terms under which NXEA would operate the station and stop trains there until the end of its franchise. Then, Southend Airport is seeking the Department's assurance that operation of the station and provision of a train service will be provided for in successor franchises.

The Department's policy is to support the provision of new stations, provided that they do not worsen the performance of the railway, disadvantage existing users, or cause any call on public funds. We are satisfied that this proposed station passes the first two tests. Furthermore, we recognise the station's potential, by supporting growth of the airport, to contribute to regeneration of East London and the Thames Estuary.

That leaves the impact on public finances. As already noted, you are in discussion with NXEA on terms acceptable to the franchisee – and to us – which will apply during the present franchise. In your letter of 4th August 2009, you proposed the following principles in respect of successor franchises:

1. *The franchisee to:*
 - i. *Ensure that all trains on the route call at the station;*
 - ii. *Operate and staff the station;*
 - iii. *Receive 9% commission on ticket sales to and from station, underwritten by Airport at an annual minimum of £84k, as compensation for staff costs.*
2. *Southend Airport to:*
 - i. *Retain 91% of ticket sales to and from the station (or a smaller amount if the franchisee's share is less than £84k per year);*
 - ii. *Maintain the station infrastructure;*

- iii. *Compensate the franchisee for revenue loss resulting from longer journey times, abstraction, and train stopping costs. The details of this compensation regime have yet to be agreed;*
- iv. *Pay Network Rail lease charges;*
- v. *Compensate the franchisee for direct station operating costs (such as heat and light but excluding staff costs)."*

We are now willing to continue negotiations based on the above framework, with a view to reaching commercial agreement, and executing legal documents. Please continue to deal with Andrew Nock in my directorate, Virginia Pamment in Rail Service Delivery, and Christian Destombes in Corporate Finance.

I note that some developments at Southend Airport needed to realise your plans for it in full are still subject to planning consent.

In short, provided that we can satisfy ourselves contractually on the financial aspects, the Department is content to see this development proceed.

James Swiready

