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Andy Wylie  
Head of Regulation and Open Access  
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Dear Mark and Andy,

## **Approval of the 6th supplemental agreement to the track access contract between Network Rail Infrastructure Limited and East Coast Trains Limited**

The Office of Rail and Road (ORR) has today approved the 6th supplemental agreement to the track access contract between Network Rail Infrastructure Limited (Network Rail) and East Coast Trains Limited (Lumo), submitted to us formally on 15 September 2022 under section 22 of the Railways Act 1993 (the Act). This follows an earlier informal submission of a draft agreement for our consideration. This letter explains our decision.

### **Purpose of the agreement**

This agreement provides a two-year extension to Lumo's track access contract for services between London, the North East and Edinburgh, from the Subsidiary Change Date in May 2031 to the Subsidiary Change Date in May 2033.

The extension of the contract is required in order to continue the security of the financial investments made possible via the current term of rights. This is because it has proved necessary for Lumo to adjust its business model as a result of the unprecedented financial impact on Lumo of the suspension of passenger services due to the COVID-19 pandemic.

### **Consultation**

Network Rail consulted the industry on this supplemental agreement for 1 month from 4 May 2022. Cross Country, First Greater Western, Transport Focus and West Yorkshire Combined Authority responded supporting the application.



Northern Trains (NTL) opposed the application, as it believed the sale of these access rights was inconsistent with Network Rail's current ECML May 2023 re-write and the ongoing challenges in accommodating services due to the lack of available capacity and the performance of the route if all desired services are accommodated. Network Rail responded to NTL saying it supported this specific proposal as it merely extends firm rights that were part of the ECML baseline prior to the ORR directions on 12 May 2016 and so are part of the base quantum for the ECML. Further, Network Rail noted that since 12 May 2016 it has offered operators additional access rights on top of the ECML baseline following a case-by-case review that is in place to protect the future rights that ORR directed on 12 May 2016.

As Lumo's access rights already extend to May 2031, extending them further will have very little or no impact on how they will be treated in the review being undertaken as part of the ECML May 2023 rewrite.

London North Eastern Railway (LNER) objected on the grounds that the rail network is likely to be subject to significant structural change in the next few years; that it does not make sense to agree to an extension of rights until this work has been completed; and that it may be that the ability to grant further rights does not sit with Network Rail at the time they would come into operation. NTL also raised the same objection.

Network Rail responded that it is seeking consistency of treatment with two other open access operators that have both sought and had approved contract extensions as a response to the pandemic. Although the future position of Network Rail is unclear, investors require all industry parties to comply with the current rules in ensuring the continuation of business and the return on their investments. Open access operators are obliged to act in the best interests of their businesses within the current legal framework. No further response was received to this so the objection remains unresolved.

As of the time of informal submission, all objections were still outstanding.

### **ORR's review and conclusions**

We reviewed the application and a confidential financial submission made by Lumo.

Under The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, contracts longer than 5 years must be justified by the existence of commercial contracts, specialised investments or risks. Lumo's access contract was put in place in 2016 for a length of 15 years (representing a start-up period to 2021, and 10 years of access rights between 2021 and 2031) based on proposed investment in rolling stock and infrastructure costs.

We have reviewed the evidence submitted by Lumo and accept that due to the unprecedented impact of the COVID-19 pandemic there has been a material change to the basis on which we originally approved the contract duration, and that a term of an



additional two years is required to safeguard Lumo's original investment relating to start-up revenue assumptions.

For the reasons given above, we do not consider that NTL's or LNER's objections should preclude us from approving this application.

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. We have concluded that approval of this agreement is consistent with our section 4 duties, in particular those relating to:

- protecting the interests of users of rail services;
- promoting the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of the railway network, to the greatest extent that ORR considers economically practicable;
- contributing to the development of an integrated system of transport of passengers and goods;
- promoting competition in the provision of railway services for the benefit of users of railway services; and
- enabling persons providing railway service to plan the future of their businesses with a reasonable degree of assurance.

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

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 Lumo. ORR's copy should be sent for my attention.

### **Public register and administration**

In accordance with section 72 of the Act, we will place a copy of the approval notice and the agreement on our public register. The parties have not asked us to redact anything (as provided for by section 71(2) of the Act) prior to placing it on the register.

Copies of this letter, the approval notice and the agreement will be sent to the Department for Transport. Copies of this letter and the agreement will be placed on the ORR website. I am also copying this letter to Network Rail, to Nicola Eyre of Northern Trains, and to Malcolm Knight of LNER.



Yours sincerely,

A handwritten signature in dark blue ink, consisting of a stylized 'L' followed by a cursive 'e' and a short horizontal line ending in a small hook.

**Louise Beilby**