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1 March 2016

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Dear Lanita and Julie,

Directions in respect of a track access contract between Network Rail Infrastructure Limited and East Midlands Trains 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 with East Midlands Trains Limited (EMT). The application was submitted to ORR by EMT on 29 January 2016. This letter explains our decision.

The application

2. EMT's application was for an extension of their current track access contract from the Principle Change Date (PCD) in 2016 to the PCD in 2020, which will enable EMT to continue to operate passenger services up until the end date of the Direct Award.
3. EMT initially wanted existing specifications regarding journey time and interval protection to be carried forward into the new contract but Network Rail did not support this. At this stage, we asked Network Rail and EMT to revisit this issue, in light of Network Rail's revised Access Rights Policy, which was published on 23 September 2015.
4. After further discussion, both parties agreed to submit an application extending the contract on a quantum only basis, excluding any journey time or interval protection. Subsequently, Network Rail stated that they would not agree to an extension of the contract without a European Rail Traffic Management System (ERTMS) schedule. EMT expressed concern that this schedule had not been agreed with other operating companies or consulted on a cross industry basis. They stated they did not want to include this schedule and, on 29 January 2016, asked us for directions under section 17.



Industry consultation

5. The consultation process was carried out, for four weeks ending 10 August 2015, by Network Rail on behalf of EMT. At this stage, the draft contract still contained journey and interval time protection.

6. Consultation responses were received Chiltern Railways, First TransPennine Express and GB Railfreight. All had concerns about EMT's proposal to carry forward existing protections. Now EMT has proposed a contract which no longer contains these protections, this is no longer an issue.

Statutory consultation

7. Schedule 4 to the Act requires us to undertake a statutory consultation process for applications made under section 17. In response to our statutory notice, we received notification, on 18 February 2016, that there were no Interested Persons within the statutory definition of Paragraph 1 of Schedule 4 to the Act. Formal representations on the application were received from Network Rail on 22 February 2016 and EMT's response to these representations was received on 24 February 2016.

8. In their representations about EMT's application, Network Rail explained that they had been given the role of coordinating the whole rail industry towards achieving the ERTMS implementation plan. They went on to say that EMT, like all franchisees, are responsible for the costs as stated in the franchise agreement and the ERTMS clause simply confirms this in the Track Access Contract. In addition, Network Rail anticipated consulting on this in due course

9. EMT commented on Network Rail's representations. They say that they were notified at short notice of the requirement for the inclusion of the ERTMS schedule, there was a lack of communication and transparency regarding the issue and Network Rail had not consulted the industry more widely. EMT also said that they are not aware of the liability for ERTMS costs being set out in the franchise agreement.

Issues considered by ORR

10. As already explained above, ORR had asked Network Rail and EMT to revisit the protections which were included in the original application and it was agreed that these would be taken out. Therefore, the only remaining unresolved issue was Network Rail's proposal to include an ERTMS schedule in the contract.

11. Network Rail approached ORR with a proposal to include an ERTMS 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.

12. We understand that discussions are progressing well with the industry and agreement should soon be reached on how ERTMS 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

13. 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.

14. Once the agreement is signed, in accordance with section 72(5) of the Act, you must send a copy to ORR within 28 days.

Administration

15. 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.

Yours sincerely



Jonathan Rodgers

