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North Yorkshire Moors  
Railway Enterprises PLC  
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Pickering  
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Jon Plowright  
Customer Relationship Executive  
Network Rail  
George Stephenson House  
York  
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Dear Mr Benham and Mr Plowright,

**PR13: Conclusions on bespoke arrangements in the track access contract (TAC) between Network Rail and North Yorkshire Moors Railway Enterprises PLC (NYMR)**

1. The purpose of this letter is to set out our conclusions on the bespoke elements of the NYMR track access contract for the purposes of implementing PR13. In summary, our conclusions are the same as those set out in our draft conclusions letter on 3 December 2013.

**Introduction**

2. On 12 July 2013, John Larkinson, ORR programme director for PR13, wrote to NYMR and Network Rail setting out our proposals for how the bespoke elements of Schedules 4, 7 and 8 in the NYMR TAC should be treated for CP5. Jon Plowright replied to our letter on behalf of Network Rail on 23 October 2013. Philip Benham replied to our letter and Network Rail's letter on behalf of NYMR on 29 October 2013.
3. You explained in these letters that Network Rail and NYMR had reached agreement on most of the bespoke elements of Schedules 4, 7 and 8 for CP5. The only area of disagreement was in respect of the variable usage charge (VUC) for steam locomotives, for which NYMR expressed concern amongst other things, about the scale of increase proposed by Network Rail compared to the existing rate. You each provided your own proposals on this, and we responded with our draft conclusions in a

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<sup>1</sup> This letter was originally sent to NYMR and Network Rail on 18 December 2013. In preparation for publication and after communications from NYMR and Network Rail, we have clarified in paragraph 9 why we consider it appropriate for NYMR to retain bespoke rates at the current time.

letter on 3 December 2013 with an alternative approach. You have each responded and confirmed that you are content with the contractual wording and the approach we proposed with respect to the VUC for steam locomotives.

4. We have structured our conclusions as follows:
  - (a) Schedules 4 and 8;
  - (b) Schedule 7:
    - (i) bespoke provisions and additional permitted charges;
    - (ii) track access charges; and
  - (c) CP5 price lists and publication of the NYMR rates.

#### **Conclusions on Schedules 4 and 8**

5. Schedule 4 of the passenger and freight TACs sets out the arrangements for compensation paid to operators when Network Rail takes possession of the network. Both Network Rail and NYMR agree and **our conclusion is that there should continue to be no Schedule 4 provisions** in this contract. This is because the costs of implementing a Schedule 4 regime in this case would outweigh the benefits.
6. The performance regime, Schedule 8 of the TAC, compensates train operators for unplanned service disruption caused by Network Rail and/or other train operators. Again, we understand that both NYMR and Network Rail are content to keep the bespoke Schedule 8 regime the same as it was for CP4. Noting that the TAC allows the parties to revisit the regime at the end of every financial year, we welcome Network Rail's plan to keep this regime under review throughout CP5 to ensure it remains fit for purpose. We conclude that **retaining the current bespoke Schedule 8 regime is appropriate at this time**.

#### **Conclusions on Schedule 7**

##### *Bespoke provisions and additional permitted charges*

7. Following our 12 July 2013 letter, Network Rail and NYMR have confirmed that the bespoke provisions and additional permitted charges in Schedule 7 of the CP4 TAC between Network Rail and NYMR should be retained for CP5. **We confirm that these will be retained for CP5.**

##### *Track access charges – variable usage charge*

8. In light of the different positions of Network Rail and NYMR's in respect of the VUC for steam locomotives, we have considered the representations of both parties carefully. In reaching our decision we have had regard to the cumulative impact on total charges income to be paid by NYMR. We have carried out scenario analysis which has taken account of income from the introduction of the capacity charge, the other changes to published CP5 VUC rates and various scenarios for the proposed changes to the bespoke VUC rates under different vehicle characteristic assumptions. Our conclusion has been made in the round and has taken account of our statutory duties and the materiality of the charge on Network Rail and NYMR.
9. During CP4, whilst most of the VUC rates payable by NYMR for operating its services are set out in the published Track Usage Price List, it also has two specific VUC rates set out in Schedule 7 of its track access contract (in paragraph 1.1). These are the steam locomotive and diesel locomotive VUC rate (the diesel rate applies to those vehicles not otherwise on the price list). The mileage operated by NYMR is very small relative to other operators and due to the bespoke nature of its operations it is also more likely to operate vehicles that are not on the published price list. Providing a price for each vehicle type NYMR uses at this time would generate large administrative costs. We consider that these bespoke rates provide a proportionate approach to charging for these vehicle types.
10. Following our review of your letters and our draft conclusions of 3 December 2013, we conclude that Network Rail's proposed application of the VUC methodology to both the steam locomotive rate and diesel locomotive VUC rate (for those vehicles not otherwise on the price list) for NYMR is reasonable and provides a good estimate of the costs incurred. On this basis, **our conclusion is that we:**
  - (a) accept, as agreed by both NYMR and Network Rail, that the VUC rate for diesel locomotives (not otherwise on the price list) **will be based on the rate for a Class 37/4 locomotive as published on Network Rail's price list on or around 20 December 2013;** and
  - (b) accept in principle **Network Rail's methodology that the bespoke steam locomotive VUC rate for NYMR should be derived by taking the average of the rates on the published CP5 price list for Class 98/4 and Class 98/5 vehicle types, including the assumptions regarding vehicle characteristics for those vehicles, but that for CP5 the increase in this rate should be capped at 50% above NYMR's equivalent CP4 rate.** Taking account of the introduction of the capacity charge, we consider that an increase of more than this would be inconsistent with increases faced by other operators which we have taken steps to mitigate as part of PR13.

*Our comments on issues raised by Network Rail and NYMR*

11. NYMR has stated that it still disagrees with the methodology used on the basis that it considers that the Class 98/5 vehicle rate was calculated using an assumed maximum speed that was too high for the route over which it operates. However NYMR has stated that it accepts the conclusion due to the 50% cap on the steam locomotive VUC rate. For the purpose of CP5 therefore, both parties are content with our alternative proposal for the steam locomotive VUC rate as expressed above.
12. For the period following CP5, these rates will be reviewed as part of the next periodic review along with other VUC rates. We expect that there will be close engagement between Network Rail and train operators (including NYMR) as part of this process along with review of relevant evidence, ahead of us making decisions on rates for CP6. NYMR will be able to make representations in respect of the VUC at this time and these will be considered.
13. In its response to our draft conclusions, Network Rail asked for clarification that the methodology we proposed for the steam locomotive variable usage charge (VUC) would be a transitional arrangement for CP5. The cap on the increase in the steam locomotive VUC rate at 50% relative to CP4 rates will remain in place for the whole of CP5 subject to relevant inflation indexing each year. As mentioned above, the VUC will be subject to review in in the next periodic review process.
14. Network Rail also asked for clarification that the rate we quoted in our draft conclusions for the Class 37/4 vehicles is a provisional one, which will need to be finalised by Network Rail in the final version of the price list that it issues. We can confirm that all the rates used in our letter were the latest provisional rates we had available at the time of writing. These are subject to any refinements that may be made ahead of the final rates being published by Network Rail on or around 20 December 2013.

*Track access charges – capacity charge*

15. The capacity charge was introduced as part of the Access Charge Review 2000 and in CP4 has been levied on passenger and freight traffic. It has not been levied on NYMR services during CP4.
16. Network Rail has agreed with NYMR that NYMR should pay a capacity charge in CP5. The introduction of the capacity charge for CP5 is an improvement in cost reflective charges and **we accept the proposal of Network Rail and NYMR that NYMR should pay the capacity charge in CP5.** While for other open access (as well as freight and charter) operators we have taken steps to mitigate the increase of the capacity charge in CP5, in part through introducing arrangements for a year-end wash-up, we consider

such arrangements are unnecessary in the case of NYMR where we have already mitigated the impacts of overall increases in track access charges by capping the increase in the VUC rate for steam locomotives.

*Provisional VUC and capacity charge rates*

17. From the recent version of the draft price list, supplied to us by Network Rail on 22 November 2013, the rates set out below would apply:

<b>Vehicle type /charge description</b>	<b>Provisional rate in 2012-13 prices</b>
VUC: Steam locomotive and any tender	32.58 pence per vehicle mile
VUC: Diesel locomotive	45.20 pence per vehicle mile (as Class 37/4) <i>(To be applied where a price does not exist in the passenger section of the Track Usage Price List issued for CP5)</i>
Capacity Charge	0.0467 ( <b>pound</b> per <b>train</b> mile, weekday rate) 0.0313 ( <b>pound</b> per <b>train</b> mile, weekend rate)

18. As explained above, these rates are provisional and Network Rail will publish the final rates on its price lists on or around 20 December 2013.

**CP5 price lists and publication of the NYMR rates**

19. The two existing bespoke VUC rates for NYMR were not on Network Rail’s published Track Usage Price List for CP4. These were instead set out in Schedule 7 of the NYMR TAC. Charge rates for vehicles are not something that we expect to redact prior to publication of approved agreements on our public register or website<sup>2</sup>. As such, the CP4 rates have been publicly available for some time. In our letter of 3 December 2013, we set out our proposal that NYMR’s VUC rates should be included on the Track Usage Price List for CP5, consistent with the rates for other vehicles and in the interests of greater transparency.

20. We have considered the concerns that were raised about this – in particular, that including the rates on the price list might cause confusion as these bespoke rates

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<sup>2</sup> Section 71(2) of the Railways Act 1993 sets out the circumstances in which we may exclude material from our public register. See <http://www.legislation.gov.uk/ukpga/1993/43/section/71>.

would be available only to NYMR and not to other operators (reflecting in particular the cap that we have applied for NYMR). We have since worked with Network Rail on this to ensure that the price list is clear that these rates are specific to NYMR. Similarly, we have also included provisions in the new version of Schedule 7 that will be included in NYMR's TAC from 1 April 2014 (as part of PR13 implementation) that clarify which VUC rates are payable in which circumstances.

21. We therefore confirm our conclusion that the **NYMR rates should be published on the CP5 price list.**

#### **Next steps**

22. On 20 December 2013, we will issue review notices in respect of all relevant track access agreements (including NYMR's) setting out the changes that we plan to make as part of PR13 implementation. As mentioned above, Network Rail also expects to publish its price lists on the same day.

23. In the interest of transparency – in particular to ensure the rationale for the capped steam rate is more widely understood (as suggested by NYMR) – it is also our intention to publish this letter on our website.

**Yours sincerely**

A handwritten signature in black ink, appearing to read 'Emily Bulman', with a stylized flourish at the end.

**Emily Bulman**