

**Proposed Track Access Contract Between  
Network Rail Infrastructure Limited and East  
Coast Main Line Company Limited under Section  
17 of the Railways Act 1993**

**Network Rail's Representations**

**8 April 2015**

## **Executive Summary**

The East Coast Main Line (“ECML”) is a valuable asset in the national transport system. It is a multi user route that combines freight, commuter and long distance passenger services, with the long distance passenger services including both Franchised and Open Access. Infrastructure enhancements have been completed in Control Period (“CP”) 4 and more are due to be completed in CP5.

Network Rail Infrastructure Limited (“NR”) welcomes the opportunity to develop and enable growth for this service. Further discussions are required, as there are elements of this Application that NR may be able to support in the future, but can not at this time due to insufficient information being available. These are outlined in our response below.

NR is continuing to work constructively with East Coast Main Line Company Limited (Virgin Trains East Coast - “VTEC”) regarding this Application, and will keep ORR up to date as those discussions progress.

## **Comments on the Form P application form**

VTEC state that the agreement proposed is based upon the model contract. Whilst the model contract has been used as a base there are several bespoke elements to the track access contract (“the contract”) proposed which are discussed in more detail below.

### Contract duration

VTEC state the “new contract commences at the Principal Change Date in December 2016 and is for nine years (from the expiry of the existing contract) based upon commercial justification supplied to ORR”.

This commercial justification has not yet been provided to NR.

### Section 4.3

Section 4.3 states: “The value of the business is vested in the quality of the rights held, allowing the business to be managed with a degree of certainty and to maximise premium payments back to government, thereby reducing the level of taxpayer support to the industry as a whole.”

NR understands the request for access rights in order to safeguard revenue generation and potentially maximise premium payments back to government), however, such rights can constrain NR’s ability to plan, develop and optimise future timetables.

### Section 4.5

Section 4.5 states: “The fleet will consist of Class 800 (bi-mode) and Class 801 series (electric) and will have the following improvements (compared to the existing fleets):

Uniform operating characteristics (braking and acceleration), enhanced speed capability (140 mph), higher capacity (627 seats for 9 car Class 800/801 v 537 seats for a 225) so can achieve improved journey times on all core routes.

The fleet consists of the following formation:

10 x 9 car bi-mode plus 3 x 9 car bi-mode spare sets (Class 800 series)

26 x 9 car electrics plus 4 x 9 car electric spare sets (Class 801 series)

8 x 5 car bi-modes plus 2 x 5 car bi-mode spare sets (Class 800 series)

10 x 5 car electrics plus 2 x 5 car bi-mode spare sets (Class 801 series)

(54 diagrams per day) plus 11 spare sets per day”

NR would need to understand whether different unit formations performed differently in deriving and applying timing loads.

## Comments on the proposed contract

### 1 INTERPRETATION

#### 1.1 Definitions

“*Expiry Date*” means the Principal Change Date 2025”, i.e. 01:59 on the Principal Change Date in December 2025.

This application requests a contract length of nine years (as the new contract commences from the expiry date of the existing contract, which is the Principal Change Date 2016). The application form states that the reason for making an application for a long term contract is to provide the owner of VTEC with business continuity and an appropriate level of protection to enable it to plan its business with a degree of certainty.

In the Railways Infrastructure (Access and Management) Regulations 2005, 18.8 states: ‘A framework agreement for a period of between five and ten years must be justified by the existence of commercial contracts, specialised investments or risks.’

NR recognises the importance of scrutinising applications to determine whether evidence of such contracts, investments or risks has been supplied by the applicant. In this case investments being made in new Specified Equipment are such that the case for this duration can be made. However, NR is undertaking a Capacity Study for the ECML (please see further comments on page 8), which may indicate whether or not NR is able to agree to sell any proposed rights for the full duration sought or for a shorter timeframe.

NR wishes to see a break clause inserted in clause 3 of the contract that would curtail the duration of the rights to five years should this new Specified Equipment not enter into service as planned.

“*Longstop Date*” means [date to be added];”

NR requires the insertion of an agreed date and would like to work with EC to agree such a date.

### 3 CONDITIONS PRECEDENT AND DURATION

#### 3.2 Conditions precedent to Clause 5:

NR would like additional clauses added in after 3.2 (d) to cover the following:

- NR and VTEC to have agreed a robust service recovery / contingency plan to mitigate the impact on performance of the enhanced services. NR is aware that these plans will require a holistic route approach with

all operators on the ECML, with templated clauses added to all contracts for operators on the ECML.

- The firm rights to use Class 800 and Class 801 vehicles contained within table 5.1 of parts A, B, C to Schedule 5 are subject to all processes concerning the introduction of these vehicles being completed and the agreement of any compensation due to NR associated with the costs of accommodating this new Specified Equipment. Use of the vehicles to operate the Passenger Train Slots in table 2.1 would be dependent upon their performance being equal to or exceeding that of the relevant timing load and the sufficiency of the traction current supply.

The current 3.2 (e) would become 3.2 (g) with the above provisions added in as 3.2 (e) and 3.2 (f).

#### Contingency provisions in case of delay to implementation of future control periods

NR requests that the contract should include a bespoke provision to require VTEC to enter into a contingency provision in case of delay to the implementation of a future CP (given franchised operators' charges effectively 'time out' at the end of each CP).

NR recommends using the text below for the CP end clause:

“

### **1 TREATMENT OF FUTURE PERIODIC REVIEWS**

#### **1.1 Interim Treatment prior to implementation**

If a Proposed Review Notice proposing amendments to the Contract is outstanding and the terms have not been implemented in accordance with paragraph 7 of Schedule 4A to the Act on or before the last day of a Control Period (the “**CP End Date**”) for any reason, then, irrespective of such terms not having been so implemented, each proposed amendment to the Contract set out in the Proposed Review Notice shall have effect for the period (the “**Interim Period**”) commencing on and from the day immediately following the CP End Date or on and from any later date (or dates) specified in the Proposed Review Notice in respect of any individual amendment, in each case until such time as:

- (i) a Review Implementation Notice is served; or
- (ii) following a reference to the Competition and Markets Authority in accordance with paragraph 9 of Schedule 4A to the Act, any amendments to the Contract, made in accordance with paragraphs 12(8), 12(9) or 14 of Schedule 4A to the Act, come into operation.

## 1.2 Reconciliation Payment

- (i) Within [30] days after the end of the Interim Period, Network Rail shall calculate whether a reconciliation payment is due to or from the Train Operator by reference to the total amount paid by each party during the Interim Period and the total amount which should have been paid in light of the implementation of the amendments to the Contract (the “**Reconciliation Payment**”), and shall provide to the Train Operator:
  - (a) a statement of the amount due to or by the Train Operator; and
  - (b) such background workings as may reasonably be required for a proper understanding of the calculation.
- (ii) Within [30] days after the date upon which Network Rail shall have provided to the Train Operator the information referred to in clause 20.2(a), any amount due shall be invoiced for payment, and payable, as provided under this Contract.

### 1.3 Definitions

In this Clause 20:

**“Control Period”** means the regulatory control period determined by the ORR, the first such Control Period being the Initial Control Period;

**“Initial Control Period”** means the control period operating as at the date of the Contract (which commenced on 1 April 2014 and is due to end on 31 March 2019);

**“Proposed Review Notice”** means as at the last day of the Control Period ending immediately prior to the relevant New Control Period the most recently proposed Review Notice given by ORR in accordance with Schedule 4A of the Act;

**“Review Implementation Notice”** has the meaning given to “review implementation notice” in paragraph 7 of Schedule 4A to the Act; and

**“Review Notice”** has the meaning given to “review notice” in paragraph 4 of Schedule 4A of the Act.

”

SCHEDULE 4: ENGINEERING ACCESS STATEMENT, TIMETABLE  
PLANNING RULES AND RESTRICTIONS OF USE  
PART 3: COMPENSATION FOR RESTRICTIONS OF USE

Annex B to Part 3 [Look up Table for EBM Weights, and the Viable Transfer Point diagram]:

NR notes that this section requires updating when the contract is finalised.

In Annex C to Part 3 [Payment Rate per train mile]:

NR notes that rates will need to be agreed in due course.

SCHEDULE 5 –THE SERVICES AND THE SPECIFIED EQUIPMENT

Whilst NR is interested in further discussions with VTEC regarding its proposals in Schedule 5, it cannot yet confirm that the capacity exists to offer the sale of the track access rights described within it. We are currently undertaking a Capacity Study to determine if capacity exists to provide for the rights requested in both this Application and other relevant Applications, including an analysis of the proposed timetables against performance implications, in order to ascertain whether or not NR can support the rights requested by VTEC in Schedule 5.

NR will only consider the agreement of more protection than table 2.1 provides, if the customer can provide evidence of a commercial need.

SCHEDULE 5 – Detailed Comments

The following comments are made regarding the drafting of the proposed rights, whilst noting that the provision of commercial justification would be prerequisite to any further discussion.

*Comments specific to Schedule 5, Parts A, B, C:*

NR notes that a new service group structure has been proposed and welcomes the numbering in the Description section of the tables which makes it easier to understand the make up of the rights.

Paragraph 3, Intervals:

- NR notes the Train Service Codes (“TSC”) are to be confirmed (“TBC”) for each Service Group in Table 3.1.
- NR notes the table heading in Table 3.1 is bespoke as it includes explicit reference to clockface departures. In its “Reform of Access Contractual Arrangements Schedule 5 Conclusions” ORR recognised that the revised Service Interval table could potentially be used for such one way flex, but did not contemplate bespoking of the table heading.



- NR notes the heading above paragraph 3.1 is bespoke as it includes “& Clockface” and paragraphs 3.1 to 3.4 include bespoke wording when compared to the Model Contract.
- In the absence of commercial justification, it is merely noted that the proposed level of flex is minimal and is less than the signalling headway, thus it effectively hardwires the train path to an extent that NR would not support. Paragraph 3.4 (b) appears to provide that consecutive trains should be at fixed intervals providing no scope for the effective use of the already limited flex.

Table 6.1:

This table seeks journey time protection. NR would like to see evidence of the commercial justification so that it can consider whether it would be appropriate to negotiate the Maximum Journey Times described in Table 6.1.

*Comments specific to Schedule 5, Part A:*

Section 2, Passenger Train Slots:

VTEC are asking for an increased number of passenger train slots. NR does not support the inclusion of firm rights for passenger train slots where the same rights are currently held on a contingent basis.

Paragraph 2.6 (d):

This seeks a bespoke provision, not included in the Model Contract, for the use of a class 08 locomotive for ancillary moves. NR does not support this and believes that the locomotive should appear as a firm right under paragraph 5.1 (a) with the contingent right under 5.1 (b) being sufficient to cover any other vehicles that it might be hauling. NR would like justification from EC as to why this specific clause is required for ancillary moves.

Table 4.1:

NR notes the TSC is TBC for Service Group HB05 (between Sunderland and London King’s Cross).

Paragraphs 5.3.1 (a)-(c):

This seeks a bespoke provision for the use of a class 67 locomotives for rescue purposes. NR suggests that the locomotive should appear as a firm right under paragraph 5.1 (a).

*Comments specific to Schedule 5, Part B:*

NR notes the TSCs are TBC for all tables.

In 2.3 (*under Passenger Train Slots*), NR notes VTEC are asking for Firm Rights to couple and uncouple trains at Leeds and Doncaster. NR will require justification as to why Firm Rights are required instead of Contingent Rights.

*Comments specific to Schedule 5, Part C:*

NR notes the TSCs are TBC for all tables.

In 2.3 (*under Passenger Train Slots*), NR notes VTEC are asking for Firm Rights to couple and uncouple trains at Leeds and Doncaster. NR will require justification as to why Firm Rights are required instead of Contingent Rights.

SCHEDULE 8, Appendix 1

NR notes that this section requires updating when rights in the contract are finalised, and will require updating for the CP change in 2019.

Proving period

NR believes that a proving period provision should be included within this contract with regard to the rights contained in Parts B and C of Schedule 5. Such a provision needs to be negotiated between NR and VTEC and would essentially provide a mechanism for addressing any deterioration of network performance caused by the introduction of the services contained within this application. This would provide that any train service performance disbenefits from the introduction of the new services do not outweigh the benefits of the additional services to passengers.

Any such mechanism should include an obligation on VTEC to remedy any significant deterioration as soon as reasonably practicable rather than at the end of the proving period. In the case of minor deterioration, the provision should oblige both VTEC and NR to meet promptly to take remedial action.

ERTMS

The draft contract spans the period when ERTMS introduction is planned on the route. NR wishes to see a provision in the contract which makes it explicit that the train operator shall be liable for the costs of providing for this in relation to all of its Specified Equipment.

Access Rights Modification Provision

NR would expect the contract to include the modification provision required in all new access contracts to provide for better use of capacity, as per the Network Code now agreed by the Class Representatives Committee.