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Dear Helen and Kerry,

Directions in respect of a track access contract between Network Rail Infrastructure Limited and First Transpennine Limited

1. On 1 March 2015 the Office of Rail and Road (ORR) 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 First Transpennine Limited (FTPE). The application was submitted to ORR by FTPE on 5 November. This letter explains our decision.

The application

2. On 17 September 2015 Network Rail conducted a consultation on behalf of FTPE on its proposal to submit an application under section 17 of the Railways Act to the ORR.

3. The proposed application explained that FTPE had been instructed by the Secretary of State for Transport to enter into negotiations to secure a Track Access Contract (TAC) to commence at the end of its existing TAC and to continue for 10 years, to the Principal Change Date (PCD) 2026. The proposal was intended to protect the current base level of services in the North of England for the incoming new franchisee and did not include any increase in either quantum or specification of rights.

4. Access rights for current FKTPE services that will be remapped to the Northern franchise were not included in the proposed new contract.

5. Although Network Rail largely supported the application on the terms sought by FTPE, there were a number of elements that it did not support. In particular it was not



willing to agree the requested duration. At that time Network Rail was willing to offer a twelve month extension.

Industry consultation

6. The consultation process was carried out for four weeks ending 15 October 2015. London Midland; Mersey Travel; Transport Focus; West Yorkshire Combined Authority; and Northern Rail responded to the consultation but raised no objections.

Statutory consultation

7. Schedule 4 to the Act requires ORR to undertake a statutory consultation process for applications made under section 17. We wrote to Network Rail on 20 November 2015 to invite written representations in respect of the application. In response we received notification, on 3 December 2015, 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 11 December 2015 and FTPE responded to those representations on 15 January 2016.

Issues considered by ORR

8. In its formal representations Network Rail said it was supportive of the base line service structure that FTPE had been instructed to request, but that there were elements of the application that it and FTPE would require further discussion on, in particular, the duration of the rights and the inclusion of a schedule that would provide for obligations and arrangements in respect of the prospective ETCS programme of works.

9. The Transpennine franchise was awarded to FTPE on 9 December 2015, and it was against this back-drop that the parties continued their discussions and reached agreement on all of the points of contention. The issues were resolved as follows:

Duration of rights

10. Network Rail noted that the requested duration of the rights was 10 years. It did not consider that this duration was justified in light of the requirements of The Railways Infrastructure (Access and Management) Regulations 2005, which states that “A framework agreement for a period of between five and ten years must be justified by the existence of commercial contracts, specified investments or risks”.

11. After the announcement of the franchise award on 9 December 2015, FTPE considered itself in a position to better articulate the requirement to secure an access contract greater than five years in duration. Network Rail wrote to ORR on 16 February



2016 setting out that on the basis of the new franchise and the detailed rolling stock proposals and plans for fleet introduction that it had seen, it was in a position to support contract duration of seven years plus an additional timetable period. FTPE accepted this duration and we are content to approve the contract to Subsidiary Change Date 2024.

Inclusion of an ETCS schedule

12. In anticipation of the ETCS programme of works commencing during the lifetime of the proposed contract, Network Rail sought to include a Schedule which it said would provide for obligations and arrangements in respect of that programme of works to ensure that funding of costs associated with on-train equipment and related infrastructure aligned with wider agreed industry arrangements.

13. FTPE was not content to incorporate this schedule within the contract. In its view, the stipulation of the schedule that FTPE would become liable for any costs arising from the adoption of ETCS was unduly restrictive and placed unjustified liability on the operator. FTPE also considered that ETCS would form part of the new Franchise Agreement and its inclusion in the track access contract was therefore unnecessary.

14. Network Rail approached ORR with a proposal to include an ETCS 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.

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

16. 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.

Administration

17. 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.

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

Yours sincerely,



John Trippier

