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Dear Mark and Phil,

Approval of the eighth supplemental agreement to the track access contract between Network Rail Infrastructure Limited and East Coast Main Line Company Limited

1. The Office of Rail and Road (ORR) has today approved the eighth supplemental agreement to the track access contract between Network Rail Infrastructure Limited (Network Rail) and East Coast Main Line Company Limited (Virgin Trains East Coast "VTEC"), submitted to us formally on 13 April 2018 under section 22 of the Railways Act 1993 (the Act). This follows an earlier informal submission of a draft agreement for our consideration. The purpose of this letter is to set out the reasons for our decision.

Purpose of the agreement

2. This agreement provides VTEC with the necessary rights to one additional Sunday service each way between Leeds and London King's Cross, from the Subsidiary Change Date in May 2018 to the Subsidiary Change Date in May 2019.

3. Network Rail has only been willing to support these incremental rights on a timetable by timetable period basis, due to uncertainty as to the timing and effect of projected capacity enhancement schemes on the East Coast Main Line (ECML).

Consultation

4. Network Rail consulted the industry on this proposal in December 2017 and January 2018. Transport Focus, South Yorkshire Passenger Transport Executive and West Yorkshire Combined Authority supported the application; Great Western Railway noted it had no objection to the proposal.



5. HS2 Ltd responded asking Network Rail to be mindful of any access application that might impact on the construction or operation of the route and services of the High Speed Railway, and that any such application should be limited in time to a point where it will in no way obstruct the construction or operation of HS2.

6. Alliance Rail responded on behalf of Grand Central. Alliance noted the following areas of concern with the application:

- a) that the Not Primarily Abstractive (“NPA”) test had not been carried out;
- b) that VTEC is using franchised assets to provide a service that is not a Public Service Obligation; VTEC does not accept that the service is an open access service, and advised that the service will be operated by VTEC using franchised assets as “Franchise Services” as defined by its Franchise Agreement; and
- c) that the proposed contract perpetuates the use of multiple rolling stock, with different performance characteristics, within the same service description.

ORR’s review

7. We reviewed the application and in particular the concerns raised by Alliance Rail.

The NPA test and our analysis

8. Our published Criteria and Procedures state that we would expect to apply the NPA test to new services, which might be open access or franchised, which would compete with an existing open access service and which, if it caused the existing open access operator to withdraw from the market, could reduce overall competition on the network. In line with this, we conducted the NPA test and considered the financial impact of the new services on existing open access operators.

9. The new services comfortably passed the NPA test; we assessed the financial impact on Grand Central of the proposed additional services and found that they will not impact negatively on the financial viability of Grand Central.

Public Service Obligations

10. We have considered the points raised by Alliance Rail in relation to previous decisions, in particular VTEC’s 57th supplemental agreement. In general, our view is that the definition of Public Service Obligation services is a matter for DfT, not for us, as regulator. The charging regime for franchise and open access operators on Network Rail is being considered through the 2018 Periodic Review of Network Rail (PR18), and comments from operators will be considered where they are raised in the relevant consultations. Additionally, we are not clear why using the assets required to discharge the franchise obligations for the provision of other services would necessarily distort competition, or otherwise constitute prohibited conduct under competition law.

Rolling stock performance

11. We made further enquiries with Network Rail in relation to rolling stock performance. Network Rail advised that the use of two timing loads was an historic error within the contract, and it was agreed that the proposed supplemental would be updated to only include the HST 2+9 timing load.

ORR's conclusions

12. Following our review of the application, we are content that there are no operational, performance or economic concerns which should preclude our approval.

13. 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

14. 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 VTEC. ORR's copy should be sent for my attention.

Public register and administration

15. 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.

16. Copies of this letter, the approval notice and the agreement will be sent to Keith Merritt at the Department for Transport. Copies of this letter and the agreement will be placed on the ORR website. I am also copying this letter without enclosures to Peter Craig at Network Rail and Jonathan Cooper at Alliance Rail.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'David Reed', is written over a horizontal line.

David Reed