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OFFICE OF RAIL AND ROAD

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Dear Carew and Darren

Directions in respect of the 21st supplemental agreement to the track access contract between Network Rail Infrastructure Limited and West Coast Trains Limited

1. The Office of Rail and Road (ORR) has today issued directions under section 22A of the Railways Act 1993 (the Act) to Network Rail Infrastructure Limited (Network Rail) and West Coast Trains Limited (Virgin) (jointly the parties) to enter into the 21st supplemental agreement to the track access contract between them, as formally requested by Virgin on 7 September 2017. The purpose of this letter is to explain the reasons for our decision.

Purpose of the agreement

2. Virgin applied for Firm rights¹ to operate three additional return services between London Euston and Blackpool North from the Subsidiary Change Date in May 2018 to the end of Virgin's track access contract in December 2022. As explained further below, we have approved Firm rights for two additional return services and Contingent rights for one additional return service.

¹ Train operators can have two types of access rights: when compiling the timetable, Network Rail must first accommodate all **Firm rights** held by operators. **Contingent rights** are only accommodated if there is space after all firm rights are dealt with.



3. Rights to one additional return service are contingent rather than firm because Network Rail cannot at this stage confirm that there is sufficient capacity to accommodate all three services alongside those applied for by Alliance Rail.

Industry Consultation

4. Network Rail undertook the usual industry consultation in June 2017. Comments were received from:

- Arriva Rail North, which was supportive of improvements to Blackpool's rail connectivity, but raised concerns with potential clashes with its own May 2018 services and the performance risk of the increase in services;
- Alliance Rail, which at the time was also consulting on its own proposal to provide services to Blackpool under the name of GNWR. Alliance was supportive of the idea of additional services, said that competition was good for passengers and the taxpayer, and expressed its view that capacity existed for the services proposed by both operators. However, it was concerned that Virgin appeared to be seeking to provide open access services using franchised assets;
- Department for Transport (DfT), which responded to the consultation alongside its response on the concurrent Alliance Rail Blackpool application. DfT advised that it would be concerned if both operators' applications were granted, but that if ORR could satisfy itself on performance and capacity (in particular relating to HS2 construction works and Euston) then the Virgin proposal was likely to pose a lower risk than the Alliance proposal;
- TransPennine Express, which asked for further information on Network Rail's performance and capacity analysis in light of the application being submitted as a disputed section 22A; and
- Transport for Greater Manchester, which supported the application on the proviso that the rights would not negatively impact existing connectivity and the performance and reliability of existing Manchester Piccadilly and Wigan North Western services both now and during HS2 construction.

Statutory Consultation

5. As the application had been submitted as a disputed section 22A application, ORR undertook the necessary statutory consultation with Network Rail in September and October 2017. Network Rail did not initially agree to the application as performance modelling had not been completed. On 20 October 2017 Network Rail confirmed that

performance modelling had been completed and having further considered the matter, it would be content to enter into the contract.

6. However, on 22 December 2017 Network Rail clarified that it could only support Virgin's application between the Subsidiary Change Date in May 2018 and the Subsidiary Change Date in May 2019 as after this point the two competing applications from Virgin and from Alliance Rail to provide London-Blackpool services could not be accommodated together in their preferred slots.

ORR review

7. Following the conclusion of the industry and statutory consultation, we discussed the issues raised further with Network Rail, Virgin and Alliance.

PSO services

8. We have previously advised Alliance that the scope of Public Service Obligation services is a matter principally for the DfT. We did, however, confirm with DfT and Virgin that the proposed Virgin services are committed obligations under the Direct Award from April 2018.

Capacity and performance

9. In its capacity assessment Network Rail identified a clash between one of Alliance's preferred train slots and one of Virgin's in each direction. As part of Network Rail's statutory consultation response to Alliance's application on 17 November 2017, it noted:

"Network Rail has undertaken a review of the two competing aspirations together and found that the capacity is not available for both Alliance and Virgin Trains in their preferred slots ... GNWR 1P07 10:33 Euston to Blackpool service and Virgin Trains 1P93 10:36 Euston to Blackpool service cannot be accommodated within the same hour of departure. In addition to this service, in the Up direction Virgin Trains 1A93 Blackpool North to London Euston conflicts with GNWR path 1A94 on the approach to London Euston. Therefore, if Network Rail were now to consider both applications at the same time, then neither could be supported."

10. Alliance said it believed capacity existed for both operators and was confident a solution would be found. However, until there was a definitive agreement on this, it was concerned that Virgin would have the advantage if it had rights approved in advance, should it come down to a straight choice between the two.

11. In the analysis which Network Rail undertook for Alliance's previous Blackpool application in 2015, Network Rail concluded that there were 3 theoretical paths per off-peak hour available out of Euston but, because of concerns about performance, it was

only prepared to sell 1 path per off-peak hour. On that basis Network Rail agreed, and we approved, a contract to provide 6 off-peak return services from December 2017 for 10 years using rolling stock at least as capable as the class 390 operated by Virgin today. That contract lapsed in June 2017 due to failure to order the necessary rolling stock.

12. From a capacity perspective, if at least 1 off-peak path per hour was previously shown to be available and nothing else had changed, while Network Rail may not be able to accommodate both operators' preferred train slots in the same hour, it would seem logical that capacity should at least exist to accommodate the total quantum requested by both operators. It may be that one of the proposals may have to be flexed, perhaps to an alternative hour, to avoid the clash. We note that the rights requested are quantum only and have no entitlement to specific hours.

13. We raised this with Network Rail which said while this may seem logical, the nature of the route made this a difficult assumption to accept. There are interacting trains at several points on the WCML which mean that each hour is not standard. This was demonstrated by the complexity of working on the Alliance application as part of the capacity assessment. It said the number of consequential amendments required to the wider timetable was significant for each train slot, and it was not certain that a rules compliant solution could be found in alternative hours of operation.

14. At that time Network Rail had additional concerns over the performance implications of Alliance's proposals due to the performance characteristics of its proposed rolling stock. We noted that we would need to get to the bottom of this (and the economic modelling connected to it) before we could decide its application. We agreed to Alliance's suggestion of a 3-way meeting between ORR, Alliance and Network Rail to take this forward, which took place on 5 February 2018. At that meeting Network Rail confirmed the performance impact was acceptable for the Alliance services where capacity had been demonstrated to exist (5 of the 6 services applied for, each way between London Euston and Blackpool North, bar Wednesdays where capacity for only 4 services could be demonstrated in the down direction).

Other considerations

15. In early January 2018 Virgin explained to us that it needed to start mobilising very soon in order to introduce services in the May 2018 timetable. We therefore had to weigh the benefits, such as to passengers, of introducing these services in May 2018, against the seemingly small risk that, at least from a capacity perspective, a solution would not be found to the clash of one service each way.

16. We therefore decided we should approve Firm Rights for two of Virgin's services and Contingent Rights for one service. This allows Virgin to start services in the May 2018 timetable. In the unlikely event that not all requested rights can be accommodated after

May 2019, this would still allow us the option of approving Firm Rights for Alliance which would take precedence over Virgin's Contingent Rights, if we considered that was in the best overall interest of passengers.

17. We are usually reluctant to approve Contingent Rights for services where they may not be able to be accommodated in future timetables as subsequently withdrawing services has obvious disadvantages. But in this scenario, the end result would still be a net increase in Blackpool services which would be a positive benefit for passengers.

18. We informed Alliance of this decision on 23 January 2018. Following this, Alliance raised further concerns, in particular that Network Rail had not assessed:

- whether Virgin's additional services could be accommodated at London Euston following the start of HS2 works in May 2019; or
- the effect of calling at Milton Keynes Central, Poulton-le-Fylde and Kirkham & Wesham, for which Virgin had requested contingent rights.

19. We raised these concerns with Network Rail. Network Rail advised that it had used its professional judgment to inform its view that Virgin's three additional services per day could be accommodated at London Euston during the HS2 works without needing to undertake a specific piece of work to explicitly demonstrate this. Network Rail formed this view noting that the ability to accommodate the services may be assisted by the use of the operator's existing train fleet and the ability to find flexible timetable solutions. Network Rail advised that this approach was consistent with that adopted in relation to others and proportionate to the scale of change.

20. On the question of additional station calls, Network Rail advised it would assess any bids to call at those stations as and when any bid was received in the normal manner.

Existing Blackpool and Shrewsbury services

21. While preparing our directions we noticed that the rights for Virgin's existing Blackpool service (along with the rights for the Shrewsbury service) which were approved in Virgin's 9th supplemental agreement (SA) in September 2014, had been due to expire in December 2016. These services had however continued running.

22. The 9th SA added rights from Blackpool to Crewe and Preston to Blackpool and rights between Birmingham/Wolverhampton and Shrewsbury. Footnotes to Table 2.1. of the access contract at that time gave firm rights to combine them with services to and from London to provide through services. The 9th SA said that the amendments it made would cease to have effect on the Principal Change Date in December 2016.

23. On further investigation we found that the rights to the existing Blackpool and Shrewsbury service were inadvertently extended by the 15th SA in February 2016. The 15th SA changed the Timing Loads for various services. It did this by replacing the whole of Table 2.1 in Schedule 5 of the access contract even though only the Timing Loads were being changed. The 15th SA said that the amendments would have effect until the Expiry Date or earlier termination of the contract. This also effectively extended the Blackpool and Shrewsbury rights. Even though the footnotes mean the firm right to combine the services expired in December 2016, Virgin still has contingent rights to do so.

24. Introduction of these services was not controversial at the time and we have no reason to believe their extension beyond December 2016 would have been. The consultation on the Blackpool services in the 21st SA was clear that these were additional to the existing services. These services have also continued running since December 2016 with no issues. For these reasons we have not sought to correct the previous error.

25. In order to help prevent this issue arising again, future contract amendments with limited duration should be reflected on the face of the amended contract (perhaps through footnotes), rather than just relying on the date specified in the supplemental agreement.

ORR's conclusions

26. We have considered carefully the views of the applicant, Network Rail and consultees and have accepted Network Rail's conclusion that sufficient capacity exists for the introduction of Virgin's proposed services at an acceptable level of performance.

27. We have also been mindful that we have an outstanding application from Alliance and have been careful to avoid reaching a decision on this application which would unfairly affect Alliance's application. We therefore decided we should approve Firm Rights for two of Virgin's services and Contingent Rights for one service. This will allow Virgin to start services in the May 2018 timetable.

28. In the unlikely event that not all requested rights can be accommodated after May 2019, we will have the option of approving Firm Rights for Alliance which would take precedence over Virgin's Contingent Rights, if we considered that was in the best overall interest of passengers.

29. 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;
- 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

30. 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 Virgin. ORR's copy should be sent for my attention.

Public register and administration

31. 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.

32. 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 Ian Yeowart at Alliance Rail.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'David Reed', is written over a light blue horizontal line.

David Reed