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Dear Andriana and John,

Approval of the Forty Second Supplemental Agreement to the Track Access Contract between Network Rail Infrastructure Limited and First Capital Connect Limited

The Office of Rail Regulation (ORR) has today approved the forty second supplemental agreement to the track access contract between Network Rail Infrastructure Limited (Network Rail) and First Capital Connect Limited (jointly the parties), submitted to us formally on 27th February 2012 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

The purpose of this agreement is to permit First Capital Connect Limited to amend Schedule 7 of its Track Access Contract to facilitate the switch from modelled billing to metered billing of EC4T charges back dated to the beginning of Billing Period 7 (18 September 2011). At this stage the application applies to two Class 319 units and three Class 365 units only.



The rights are to be effective from 18 September 2011 and terminate on the Subsidiary Change Date 2016, when First Capital Connect's track access contract expires.

Consultation

Network Rail undertook the usual industry consultation. No concerns were raised by any of the parties consulted.

Passenger Focus responded to the consultation by making a statement emphasising the importance of installing on-train meters, especially for passengers.

Three relevant operators had, however, been missed from the consultation and at ORR's request these were subsequently sent the consultation paperwork by Network Rail. There were no representations made by these additional consultees.

ORR review

In reviewing the submitted documents some drafting errors were discovered when comparing the Supplemental Agreement with that relating to the London Midland 23rd Supplemental Agreement which is seen as the definitive text in this context. An exchange of e-mails remedied these deficiencies.

Technical queries were raised relating to the billing process for these trains and an omitted power factor figure for Class 365 rolling stock. These issues were satisfactorily resolved.

The issue of sufficient consultation was raised with Network Rail and it was established that the list of consultees in Form 22 did not represent the full scope of the consultation undertake. However it was still the view of the ORR that three further operators who share Electricity Supply Tariff Areas should be consulted. As mentioned above Network Rail willingly undertook this consultation.

ORR's conclusions

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 supplemental agreement is consistent with our section 4 duties, in particular those relating to protecting the interests of users of railway services (section 4(1)(a)), promoting the use of the railway network for the carriage of passengers (section 4(1)(b)) and enabling persons providing railway services to plan their businesses with a reasonable degree of assurance (section 4(1)(g)).



Conformed copy of the track access contract

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 the Train Operator. Please send the conformed copy to me at ORR.

Copies of this letter, the approval notice and the agreement will be sent to Keith Merritt at DfT. Copies of the approval notice and the agreement will be placed on ORR's public register and copies of this letter and the agreement will be placed on the ORR website. I am also copying this letter without enclosures to Steven Saunders at Network Rail.

Yours sincerely

Andrew Whittington