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Network Rail Infrastructure Ltd
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B1 2ND

Chris Hassall
Head of Commercial Contracts
First Transpennine Express Ltd
8th Floor, Bridgewater House
60 Whitworth Street
Manchester
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Dear Rob and Chris

Approval of the 36th supplemental agreement to the track access contract between Network Rail Infrastructure Limited and First Transpennine Express Limited dated 3 March 2016

We have today approved the above supplemental agreement, submitted to us formally on 8 October 2021 under section 22 of the Railways Act 1993 (the Act). This follows an earlier informal submission of a draft agreement for our consideration. This letter explains the reasons for our decision.

Purpose

The purpose of this agreement is to extend the expiry date of a number of First Transpennine's contingent rights, in line with the Network Rail Rights Sales Policy on access rights on the East Coast Mainline. The rights are to commence on the Principal Change Date 2021 and will expire on the Subsidiary Change Date 2022.

Industry consultation

Network Rail undertook the usual industry consultation. Responses in support or statements of "no objection" were received from Transport Focus, Greater Western, and West Yorkshire Combined Authority.

Nexus sought confirmation that these services would not impact on the Tyne and Wear Metro, which the applicants were able to provide.

Cross Country asked for further information about timing loads, which the applicants provided, and subsequently closed the query.

The application was submitted with an outstanding objection from LNER on the grounds that the proposed services impacted on the performance of LNER's services, and that they were abstractive of LNER's revenue. It asked ORR to carry out a full economic assessment including an Not Primarily Abstractive (NPA) test. First Transpennine disputed that an NPA test should be required, as the services are operated on behalf of the same funding authority, and the proposed services were invited by and contractualised by that authority (the Department for Transport (DfT)). In addition, neither of the parties to the objection is an open access operator.

ORR approached DfT to request that they assist in resolving this matter, and following discussions with LNER, the latter has now withdrawn its request for an NPA test. As the funding authority for cost and revenue risk for both LNER and Transpennine Express, DfT is aware of the financial consequences of this application and is in the best position to carry out its own impact assessment of these. We consider this objection to now be resolved.

We did not deem the assertion that First Transpennine's services have been impacting on the performance of LNER's services to be persuasive, as it was based on performance analysis data from May 2018 and presumably does not accurately reflect the current situation in its entirety.

ORR review

We identified some wording errors referring to contingent rights as firm, which First Transpennine has amended on a revised draft of the application. We identified no other operational, performance or economic concerns.

Our duties under section 4 of the Act and our decision

We have concluded that approval of this supplemental agreement strikes the appropriate balance in discharging our statutory duties under section 4 of the Act; 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)).

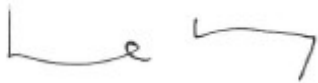
Conformed copy of the track access agreement

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.

Public register and administration

Electronic copies of this letter, the approval notice and the agreement will be sent to the Department for Transport and Network Rail's Policy and Access Team. Copies of the approval notice and the agreement will be placed on ORR's public register (website) and copies of this letter and the agreement will be placed on the ORR website.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Louise Beilby'.

Louise Beilby