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Dear Philip,

On-rail competition: Consultation on options for change in open access, June 2013

This is the Department for Transport's response to the ORR's consultation document 'Periodic Review 2013: On-rail competition: Consultation on options for change in open access'.

The ORR's consultation and the Department's response are focused solely on on-rail competition from timetabled open access passenger operations. Open access freight operations and irregular passenger trains are a separate issue and not addressed in the consultation. Our response should therefore be read in that context.

The Department agrees that on-rail competition can bring benefits and welcomes the ORR's decision to consider changes to the access charging structure that would promote beneficial competition.

As was highlighted in our response to your previous consultation in November 2011, however, the Department's primary concern relates to the funds available to the Secretary of State for the purpose of his functions in relation to the railways. This includes the revenue impact from future (as yet unidentified) open access as the partial relaxation of the NPA test allows access to new services and stations.

Increasing open access services could also impact on the Department's ability to invest in infrastructure projects, particularly where the aim is to enhance capacity on the network. The business cases developed for these schemes assume that the capacity provided will be used for particular purposes, and – in some cases – that future fares revenue growth or cost reductions to franchise operators will help support the capital cost incurred. Where this is not the case the Department cannot be certain as to the delivery of benefits from very substantial amounts of public expenditure, nor about future projections of rail funding (an issue highlighted in ORR's recent Long Term Regulatory Statement). Increasing uncertainty around access to the enhanced capacity may therefore place the Department

and other public bodies in a very difficult position when deciding whether to invest in future rail infrastructure projects.

Whilst options 2 and 3 in your consultation provide a mark up to compensate on the basis of the additional abstraction or fixed costs of the additional service, the theoretical nature of the proposals and lack of quantum mean that we are not currently persuaded that it would provide adequate compensation for the impact they would have on the franchised service above the level permitted by the NPA test. Also, the mark up is paid to Network Rail, though the consultation proposals appears to anticipate that those parties who lose out as a result of abstraction above the level that is anticipated by the NPA would receive some benefit. We are unclear how it is intended the funding structure would work in practice to ensure that affected parties were adequately compensated.

Whilst there is potential for long term benefits from greater on-rail competition, in particular in driving increased passenger benefits, we are not yet able to conclude (based on the evidence available in the consultation) that either of the options proposed would provide adequate mitigation to the risk of an adverse impact on the funds available to the Secretary of State. That would be a matter of substantive concern at any time, but particularly now given the overall fiscal and public finance imperatives.

That having been said, Ministers have asked me to assure you of the Department's commitment to exploring opportunities to promote fair competition on the network. In this respect, we would be particularly interested to explore the role that a more equitable structure of charges, between open access and franchised operators, could play and how quickly any such change might be introduced.

We would also encourage you to consider policy in this area in the light of developments at a European level in the 4th Railway Package. Whilst we note that you will continue to monitor developments and review policies accordingly, we would encourage caution when introducing policies which could be superseded soon after to reduce the regulatory risk priced into franchise bids. We would welcome more information about, and would be very happy to discuss, how options 2 and 3 might interact with the proposed 'economic equilibrium' test in the 4th package.

Lastly the Department's revised rail franchising timetable in March 2013 commits us to a long term programme of franchising, designed to provide certainty to the market. In the near term, this includes (but is not limited to) the re-letting of the franchise on the East Coast Main Line (ECML), on which there are currently two open access operators, Hull Trains and Grand Central. While we welcome your consultation, you will appreciate that we are concerned that bidders have clarity around the likely extent of potential on-rail competition to ensure that regulatory uncertainty does not undermine the value of franchises.

Yours sincerely,



Nick Bisson