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Dear Benjamin and Aiden

## **Directions in respect of the proposed track access contract between Network Rail Infrastructure Limited and XC Trains Limited**

1. On 4 August 2017 the Office of Rail and Road (ORR) issued directions under section 17 of the Railways Act 1993 (the Act) to Network Rail Infrastructure Limited (Network Rail) to enter into a track access contract with XC Trains Limited (XCTL). The purpose of this letter is to set out the reasons for our decision.

### **The application**

2. XCTL submitted an application to ORR on 15 May 2015, with a proposed track access contract to commence on the Principal Change Date (PCD) 2017 and expire on the Subsidiary Change Date (SCD) 2020. The track access contract between the parties dated 11 November 2007 was due to expire on PCD 2017.

3. The purpose of the proposed new contract was to secure access rights to cover the period of the proposed (at that time) direct award for the Cross Country franchise. The DfT subsequently announced on 29 September 2016 that the Cross Country franchise would be extended until October 2019.

4. The main issues on which the parties could not agree were journey time protection and service interval protection as, at the time, Network Rail was reviewing its access rights

policy and was not prepared to agree additional specification above 'quantum only' rights before the policy was finalised.

5. An industry consultation on the proposed contract, including service interval and journey time protection, was undertaken between 13 May and 10 June 2015. There were three responses. Transport Focus said that they supported the application. First Great Western Railway said that it had no objection to the proposal and intended to consult on a new track access contract for itself on a similar basis as XCTL (i.e. retention of existing right to elements such as interval and journey time). Chiltern Railways said it had no objection to the proposal.

6. As required by the Act, on 19 May 2015, we sought Network Rail's representations on the application. In its response, dated 24 June 2015, it made a number of comments regarding the drafting of the proposed contract. It also said that (at that time) the application was one of a number seeking rights for services on the East Coast Mainline (ECML) and work to determine what capacity existed needed to be completed before it could agree to any of the additional protections. Network Rail went on to say it would only consider agreeing to the additional protections if XCTL provided evidence of a commercial justification and they had not done this. It also proposed the inclusion of a schedule in the contract regarding the costs of the introduction of the European Rail Traffic Management System (ERTMS).

7. On 26 June 2015, we invited XCTL to comment on Network Rail's representations. XCTL replied on 17 July 2015 and outlined its commercial justification for service interval and journey time protection. It also said it could not agree with Network Rail regarding the proposed ERTMS schedule. Regarding ORR's consideration of a number of applications for services on the ECML, XCTL said it awaited ORR's decision (subsequently, we made our decision on the ECML applications on 12 May 2016). XCTL noted the comments Network Rail had made regarding the drafting of the contract.

8. On 15 September 2015 we asked XCTL to discuss its requirements with Network Rail in light of its recently published 'Access Rights Policy' to see if the parties could reach agreement and they agreed to do so.

### **The parties' justification for service interval and journey time protection**

9. On 26 May 2016, XCTL and Network Rail met ORR to explain their respective positions. Network Rail said it was prepared to agree a one-year contract from PCD 2017 to PCD 2018 with journey time and service interval protection. XCTL said that it would reluctantly agree to journey time protection expiring at PCD 2018 but wanted to retain service interval protection until SCD 2020.

10. As this was one of the first times that Network Rail had agreed to more specific access rights than 'quantum only' since it had published its new access rights policy, and the potential precedents this may set, we asked the parties to provide us with a joint letter explaining the justification for these additional protections, which we said we would share with the industry for comment.

11. The parties submitted a joint letter to us on 19 July 2016. We felt the reasons given in the letter were not particularly unique or compelling and, without more detailed explanation, the letter seemed unlikely to give other operators a clear understanding of why Network Rail had agreed to XCTL's requests when it had refused similar requests from others. We wrote to the parties on 12 August 2016 asking them to provide a revised letter setting out more clearly the justification for the additional protections.

12. On 16 November 2016 the parties submitted a revised letter and a revised version of the proposed track access contract with fewer protections sought than in the original application. The protections which Network Rail was prepared to agree from PCD 2017 to PCD 2018 were:

*Journey Time protection* in each direction between:

Derby and Leeds;  
Derby and Newcastle; and  
Leeds and Newcastle.

*Service Intervals protection* at Birmingham New St for services in each direction between:

Cardiff and Nottingham;  
Birmingham New St and Leicester/Stansted airport; and  
Birmingham New St and Nottingham.

13. In respect of journey time protection the parties said that fast journey times were key to passenger retention on XCTL's Plymouth to Edinburgh and Newcastle to Reading service groups. The reasons given included:

- XCTL was particularly susceptible to modal shift due to the unique profile of its customers, being predominantly leisure and irregular business travellers for whom elasticity of demand is greater than other types of traveller such as regular business commuters.
- 57% of XCTL's passengers considered the car a viable alternative because:
  - XCTL is the only long distance operator primarily serving non-London destinations where car parking is comparably available and cost effective;
  - XCTL's services mirror the motorway network so closely that road journey times are highly competitive;
  - a relatively high proportion of passengers changed trains during their journeys resulting in much greater generalised journey times than for a similar distance on a single train. A small increase in journey time could break a connection time at a station forcing an extended wait for the next service.

- XCTL competes more directly with air than other passenger operators and with airlines using regional airports which have lower charges than London airports so lower fares.
- The average speed between competing rail operations puts XCTL at a disadvantage.
- Journey time protection has only been requested where XCTL is concerned that journey times are at risk during the supported one year's duration of the protection owing to infrastructure capability and the journey time implications of competing services. In light of the multiple points of competition that XCTL faced it did not want to see the current position deteriorate ahead of planned service and network improvements in 2018.

14. In respect of service interval protection the parties said that many XCTL services were prone to overcrowding, including at Birmingham New Street and that interval protection would minimise the risk of uneven timetables exacerbating this. They also said that interval protection also impacted on the journey time issues mentioned previously. The justification which Network Rail accepted fell into the following categories:

- The availability and characteristics of XCTL's rolling stock was highly constrained and does not allow it to strengthen individual services at busier times.
- XCTL does not have defined peaks in passenger loading and must provide a more evenly spread number of seats throughout the day.
- Irregular service intervals are likely to adversely affect passenger's perception of the service. e.g if 2 trains per hour ran 10 minutes apart rather than 30, passengers would gravitate to the optimal train, worsening overcrowding and giving the perception of an hourly service rather than a half-hourly service.
- The combination of the above results in a need to keep passengers steadily moving, managing the flow in as controlled a manner as possible, including onto other operators' services.

### **Industry Consultation**

15. On 22 December 2016, we shared the revised joint letter with the industry for comment and requested responses by 27 January 2017. Supportive responses were received from Transport Focus, West Yorkshire Combined Authority and South Yorkshire Passenger Transport Executive. Nexus noted the protections that had been agreed with Network Rail but did not provide any further comment. Objections were received from Virgin Trains West Coast, Virgin Trains East Coast, Great Western Railway (previously First Greater Western), GB Railfreight, East Midlands Trains and London Midland.

16. At the same time, we also received confirmation from Network Rail that it supported approval of a "quantum only" contract from PCD 2018 to SCD 2020. It did not support any

protections above quantum rights beyond PCD 2018 because of uncertainty surrounding capacity on the ECML and explained its wish to include a schedule relating to ERTMS.

17. The consultation responses are summarised below:

*West Yorkshire Combined Authority*

18. West Yorkshire Combined Authority said it disagreed with Network Rail's approach to agreeing quantum only and supported XCTL's application for journey time and service interval protection. It said that a "pure quantum" approach to network access could lead to timetables that are inefficient, costly and unattractive to passengers. It believed XCTL and Network Rail had made a strong case for journey time protection, in particular because of the competitive position of rail as against car.

*South Yorkshire Passenger Transport Executive*

19. South Yorkshire Passenger Transport Executive said that XCTL and Network Rail had made a strong case for journey time protection, in particular because of the close mirroring of the M1 motorway route resulting in strong competition with car travel. It believed introducing journey time protections for the Derby – Leeds – Newcastle corridor may help to maintain a high standard of rail journey experience for passengers and will help to improve customer confidence with rail and provide an attractive alternative to other modes.

*Transport Focus*

20. Transport Focus supported the application.

*East Midlands Trains (EMT)*

21. EMT said it accepted Network Rail's new policy of selling access rights on a quantum only basis which will give Network Rail flexibility to deliver better network utilisation and timetables that can robustly deliver performance targets. But this is only achievable if the rules provide a level playing field for all train operators and Network Rail applies the policy consistently. EMT said it was struggling to comprehend Network Rail's justification for agreeing to XCTL's request because the business needs outlined in the letter were not unique to XCTL.

22. EMT said that fast journey times were key to passenger retention on all long distance and intercity services. Based on research using the Passenger Demand Forecasting Handbook passengers were more sensitive to journey times on long distance services to and from London than non-London services such as XCTL's. EMT said it had a mixed customer profile so similar elasticities to XCTL's applied to its regional service group Norwich - Liverpool and even more so on its intercity services. It also said it and other long distance and intercity operators were susceptible to modal shift and faced similar competition from other modes of transport and there was no compelling case for giving XCTL special protection.

23. EMT objected to the inclusion of additional specification above 'quantum only' as giving this to one operator on a route would disadvantage the others. It expected Network Rail and ORR to recognise their duties to treat all train operators fairly and equally and to maintain a level playing field in a competitive rail transport environment.

#### *GB Railfreight*

24. GB Railfreight opposed the application. It accepted the protections were desirable for XCTL and its passengers but considered the effect would likely be disproportionate on other users of the railway. It would give XCTL priority over other operators and place undue constraints on Network Rail in preparing future timetables and limit its ability to develop timetables that share capacity effectively and efficiently, particularly so on routes where there is a mix of fast and stopping services together with freight. It also noted some inconsistency in the arguments used to support the proposal in that the susceptibility to modal shift did not ring true with the journey time protection requested i.e. between Newcastle, Leeds and Derby, as there were no competing air services and a gap in the motorway network.

#### *Great Western Railway (GWR)*

25. GWR said that it initially supported XCTL's approach because, at that time, it was consistent with access rights policy and the then agreed approach to the renewal of its own track access contract. However, once Network Rail's new access policy was established, Network Rail withdrew support for more highly specified rights for GWR. GWR said it accepted this position as it was in line with emerging RDG and perceived ORR policy. In response to the justifications provided GWR said that there was no material difference in markets, network capacity or resourcing between XCTL and GWR and did not believe that special circumstances applied to XCTL or that a special or unique case existed. GWR referred to the need for a "level playing field" and said that the cases made appeared either unconvincing or ubiquitous.

#### *London Midland*

26. London Midland said that while the desire to protect journey times was understandable it noted that XCTL had progressively improved journey times since 2008 without the benefit of journey time protection which has been largely absent from its track access contract since the start of the franchise in 2007. While the example given of a 2tph service being spaced 10 minutes apart would inevitably cause an imbalance in loadings from walk-up passengers, it was incredibly unlikely and probably not even possible that this scenario would ever occur due to the sheer number of services operating out of Birmingham New Street.

27. London Midland said the significant number of services departing the station on a daily basis largely fixes the timetable in its current pattern, which is why departure slots have hardly changed in years. It contended that the only time in recent years when the pattern of XCTL's departure slots have deviated to any extent was the retiming of the xx.12 Bristol departures to xx.20, which was at XCTL's request as it provided a faster

end-to-end journey to Bristol. London Midland therefore found it difficult to understand the justification for the service interval protection proposed.

#### *Virgin Trains West Coast (VTWC)*

28. VTWC said it was broadly supportive of Network Rail's move towards more flexible access rights which will enable it to make best use of the increasingly scarce network capacity. However, this is only achievable by means of a 'level playing field' amongst train operators and Network Rail applying the policy consistently. VTWC objected to the inclusion of the additional protections in XCTL's contract and set out some detailed comments to support this view. It said it failed to understand how and on what merits XCTL's request for protections met the strict requirements as set out in Network Rail's policy. In addition, it did not see how the demonstrable business needs or logic applied by XCTL in its application differentiates from that of other InterCity Operators. VTWC did not support XCTL's position that its flows were any more susceptible or at risk than any other longer distance operator and said it was unclear how the case presented by XCTL was sufficiently different or unique to meet the criteria in Network Rail's policy.

#### *Virgin Train East Coast (VTEC)*

29. VTEC said it was firmly of the view that so called 'quantum only' rights are inappropriate for high value flows that return significant premium payments to the UK government in order to reduce the burden of rail on the UK taxpayer. However, the case put forward by XCTL for interval and journey time protection could be made by any long distance high-speed (LDHS) operators most of whom compete with air and road. VTEC said it would not expect these arguments to succeed for these relatively low value flows and contrasted the Leeds – Newcastle flow worth c £7m p.a. with the London Leeds flow worth over £90m p.a. But, if XCTL was successful, VTEC would expect similar protections to be given to all LDHS operators for the same period. VTEC said it was surprised that Network Rail had agreed such protections based on the unconvincing arguments put forward by XCTL.

#### *The parties' response*

30. On 31 January 2017, we asked the parties if they would like to comment on any of the consultation responses. Network Rail did not reply. XCTL replied on 6 February 2017 noting the support of three of the consultees; that East Midland Trains was supportive of interval and journey time protection as a concept; and that VTEC felt that quantum only rights were inappropriate for high value flows. It said that XCTL "has applied for protections that are supported by the majority of respondents as a concept, in line with the ORR guidance on track access applications and with the support of Network Rail" however, the merits would be for ORR to decide.

### *ORR's consideration*

31. In September 2015, following lengthy discussions and consultation with the industry Network Rail published a revised [Access Rights Policy](#). This moved away from the previous position where access rights in most track access contracts were highly specified, to one where access rights would be much more flexible. This flexibility is intended to allow Network Rail to make the most effective and efficient use of capacity in the overall interests of users and service providers whilst providing train operators with the certainty and assurances they require to run their businesses and meet their contractual commitments.

32. According to the policy Network Rail's starting position when negotiating new access rights will be to offer rights to a quantum of services between the point of origin and destination, the calling pattern of those services and the rolling stock to be used. This is generally referred to as 'quantum only' rights. Any additional specification such as journey time protection or service interval protection must be justified and based on demonstrable need.

33. Other than for the Abellio ScotRail track access contract (where a different policy applies to services specified in franchises let by Transport Scotland with the exception of the East and West Coast Main Lines) Network Rail has not agreed to any journey time or services interval protection when agreeing new track access contracts or extending existing ones. This is despite a number of requests for them. It is therefore clear that Network Rail has set quite a high test against which it judges such applications for these additional protections.

34. With regard to journey time, the protection agreed was for one year only from December 2017 to December 2018 between Derby and Leeds, Derby and Newcastle and Leeds and Newcastle. XCTL said that it was concerned that journey times were at risk during this time owing to existing infrastructure capability and the journey time implications of competing services. Without any major timetable changes planned during this period it is not clear why XCTL's journey times would be at risk, or why they would be any more so than any other operator on the route, none of which has journey time protection. XCTL said that fast journey times were key to passenger retention on its Plymouth to Edinburgh and Newcastle to Reading service groups but it is not clear why journey time protection on these relatively short sections of the overall route would protect the much longer journeys undertaken by XCTL's passengers such as those who might also consider travelling by air.

35. With regard to interval protection XCTL was concerned about overcrowding and the impact on generalised journey time should Network Rail put trains in the timetable at uneven intervals. As both VTWC and London Midland mentioned, the example of a 2tph service been scheduled 10 minutes apart is highly unlikely if not impossible given the constraints at Birmingham New Street. It is also difficult to imagine how the proper application of the Decision Criteria in Part D of the Network Code would support such a thing. As 40% of XCTL's passengers change trains during their journey, having interval protection on one service cannot protect interchange times with other services when there



is no contractual link between the service on which passengers would arrive at Birmingham and the service on which they would depart. Even with regular arrival and departure times, the interval between the arriving and departing service could be varied through the timetable process and could be lengthened or shortened.

36. We have carefully considered the justifications provided by the parties for the requested journey time and service interval protection and the views of the respondents to the consultation. We fully accept that fast journey times and evenly spaced intervals are key factors in attracting and retaining passengers. However, the parties have not demonstrated that the circumstances faced by XCTL are significantly different from those faced by other LDHS operators or that XCTL is more at risk than others to increases in journey times or uneven service intervals to the extent that XCTL should have these additional protections which have been denied to other train operators.

37. Under Part D of the Network Code, Network Rail's objective when compiling the timetable is to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services. In doing so it must apply the Considerations which include:

- that the spread of services reflects demand;
- maintaining and improving train service performance;
- that journey times are as short as reasonably possible;
- maintaining and improving an integrated system of transport for passengers and goods;
- the commercial interests of any timetable participant (train operator);
- enabling operators of trains to utilise their assets efficiently.

This gives train operators protection that Network Rail will not unnecessarily extend journey times or flex service intervals away from an appropriately spaced pattern. If a train operator considers Network Rail has done so in any timetable, it can appeal to the Timetabling Panel of the Access Disputes Committee and ultimately to ORR.

### *ERTMS*

38. Network Rail approached ORR with a proposal to include an ERTMS schedule in track access contracts in mid-2015. We told Network Rail that as this was such a huge project with very significant associated costs, we did not intend to include such provisions in individual track access contracts until we were satisfied that there was a consensus in the industry on how the costs would be dealt with and Network Rail had consulted on a template schedule. As this has still not happened, we will not direct the inclusion of the schedule at this time.

39. Once agreement is reached on how ERTMS costs will be dealt with for each different category of operator, Network Rail will consult the industry with regard to a number of model schedules that might contractualise this agreement which we would then expect to see incorporated in all track access contracts.

40. In considering the contract 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 concluded that issuing directions in respect of this contract is consistent with our section 4 duties, in particular those relating to:

- promoting the use of the railway network for the carriage of passengers and goods;
- promoting improvements in railway service performance;
- protecting the interests of users of railway services; and
- enabling persons providing railway services to plan their businesses with a reasonable degree of assurance.

41. In February 2017 we advised the parties that we would approve the contract until SCD 2020 as requested but without journey time and service interval protection. In order to give the parties sufficient time to provide us with a revised contract that was fit for purpose, reflected our decision, and to enable XCTL to make an access proposal for the December 2017 timetable with firm access rights, we agreed to approve a supplemental agreement extending the expiry date of their previous contract to SCD 2018. This was subsequently approved on 3 March 2017. The parties will terminate the previous contract when they enter into the new contract.

### **Copies**

42. A copy of the Directions and the signed contract will be placed on our public register, copies of this letter and the contract will also be placed on our website. I am also copying this letter to Peter Craig at Network Rail and Keith Merritt at DfT.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Rodgers', with a long horizontal flourish extending to the right.

**Jonathan Rodgers**