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Dear Mark and Phil,

Approval of the fifty-seventh supplemental agreement to the track access contract between Network Rail Infrastructure Limited and East Coast Main Line Company Limited

1. The Office of Rail and Road (ORR) has today approved the fifty-seventh supplemental agreement to the track access contract between Network Rail Infrastructure Limited (Network Rail) and East Coast Main Line Company Limited (Virgin Trains East Coast "VTEC"), submitted to us formally on 3 March 2017 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

2. The agreement will give VTEC the rights necessary to operate an additional seven Leeds to London King's Cross services and an additional eight London King's Cross to Leeds services on Saturdays between the Subsidiary Change Date in May 2017 and the Principal Change Date in December 2017.

3. For contractual convenience it was agreed with the parties to bring forward the expiry date of VTEC's Track Access Contract and the commencement date of its new Track Access Contract to 3 March 2017. The rights approved in this agreement will be reflected in the new contract up to the Principal Change Date in December 2017.



Consultation

4. VTEC consulted the industry on these services as part of its proposed 56th supplemental agreement under s22A. A subset of the rights originally proposed was approved in the 56th Supplemental Agreement under s22 in November 2016 following agreement with Network Rail. This 57th Supplemental Agreement contains a further subset of rights originally proposed in the 56th Supplemental Agreement.
5. Comments received from CrossCountry, Govia Thameslink Railway, Northern Rail, Transport Focus, Nexus / North East Combined Authority and West Yorkshire Combined Authority were all addressed through the 56th Supplemental Agreement process.
6. Alliance Rail (also on behalf of Grand Central) also responded to the consultation saying:
 - a) Article 4 of Regulation 1370 requires that PSO (Public Service Obligation) services and open access services are clearly defined and separately accounted for;
 - b) as the services were over and above the minimum service requirements set out in the franchise agreement they were commercially provided open access services and should not be supported by resources intended for the public services contract; and
 - c) the impact of the proposed services on existing open access operators would need to be assessed by the application of ORR's Not Primarily Abstractive (NPA) test.
7. In response VTEC said:
 - a) EC Regulation 1370 placed a number of obligations on competent authorities and any concerns regarding compliance with them should be addressed to the competent authority or relevant EU authority;
 - b) it did not accept that the services were open access. It said that the Train Service Requirement in its Franchise Agreement was a minimum train service specification and it was allowed to run additional services. Once the rights were secured and the services operated they would become Franchise Services and the provisions of the Franchise Agreement, including for example the profit share mechanism, would apply;
 - c) It was disappointed that Alliance/Grand Central felt it necessary to object to VTEC's proposals; and

d) The application of the NPA test was a matter for ORR.

ORR's review

8. We reviewed the application at the consultation stage and it did not raise any operational or performance concerns.

Alliance's objections

9. Alliance Rail has previously raised the issue of Regulation 1370/2007 with us and we explained our view that this was a matter for DfT, not for us, as regulator. Concerns relating to alleged infringements of EU legislation or alleged breaches of the state aid rules may be more appropriately raised with the EU Commission or tested in the Courts. We are not clear why using the assets required to discharge the franchise obligations for the provision of other services would necessarily distort competition, or otherwise constitute prohibited conduct under competition law.

10. We asked Alliance/Grand Central if it could be more specific about the proposed services with which it had concerns and some quantification of the effect it believed they would have on Grand Central's services. Whilst Grand Central maintained its objection with regard to the issues mentioned above, it did not provide any quantification of the financial effect on its business.

The NPA test and our analysis

11. Our published Criteria and Procedures state that we would expect to apply the NPA test to new services, which might be open access or franchised, which would compete with an existing open access service and which, if it caused the existing open access operator to withdraw from the market, could reduce overall competition on the network. In line with this, we conducted the NPA test and considered the financial impact of the new services on existing open access operators.

12. The new services comfortably passed the NPA test. Our analysis of the financial impact on Grand Central showed that the additional VTEC services would abstract revenue from Grand Central services, but at a level where it is unlikely that this would have an impact large enough to cause Grand Central to reduce its services or leave the market.

ORR's conclusions

13. Following our review of the application we are content that there are no operational, performance or economic concerns which should preclude our approval.

14. 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:

- protect the interests of users of rail services;
- promote 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;
- contribute to the development of an integrated system of transport of passengers and goods;
- promoting competition in the provision of railway services for the benefit of users of railway services; and
- enable persons providing railway service to plan the future of their businesses with a reasonable degree of assurance.

Conformed copy of the track access contract

15. 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 VTEC. ORR's copy should be sent for my attention.

Public register and administration

16. 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.

17. 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.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Reed', written in a cursive style.

David Reed