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Jonathan James
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Dear Joanna and Jonathan

Approval of the 15th supplemental agreement to the track access contract between Network Rail Infrastructure Limited (Network Rail) and MTR Corporation (Crossrail) Limited (MTR Crossrail) (jointly, “the parties”)

1. We have today approved the above supplemental agreement submitted to us formally on 30 May 2018 under section 22 of the Railways Act 1993 (the Act). This letter sets out the reasons for our decision.

Purpose of the agreement

2. The purpose of this agreement is to amend Paragraph 9.11 (a) of Part 2 in Schedule 7 of the parties' Track Access Contract (TAC) to enable the parties to supplement the Traction Electricity Consumption Rates List with Class 345 vehicles retrospectively to the 2017/2018 financial year only for the purposes of the 2017/2018 Electric Current for Traction (EC4T) volume reconciliation.

Background

3. During the 2017/2018 financial year, MTR Crossrail began operating class 345 vehicles. It was initially expected that these units would be billed based on meter readings. Consequently, a modelled consumption rate was not estimated for these vehicles. Instead, these vehicles were billed on the basis of a temporary consumption rate. Unfortunately, technical issues have prevented these vehicles from being opted-in to on-train metering.

In addition, it has not been possible to estimate modelled consumption rates for these vehicles using the standard methodology due to complex technical issues.

4. A joint application by Network Rail and MTR Crossrail was made on 10 May 2018 requesting to supplement the Traction Electricity Modelled Consumption Rates List for Class 345 vehicles to be applied retrospectively to the 2017/2018 financial year.

5. We advised the parties that we were not able to consent to their request as it sought a retrospective effective date to the 2017/2018 financial year and Paragraph 9.11 (a) of Part 2 in Schedule 7 in the Model Contract ensures that the volume reconciliation for previous years cannot be reopened.

6. The parties therefore proposed to amend these provisions under this supplemental agreement to permit the Class 345 modelled rate to be supplemented and applied retrospectively for the purposes of the 2017/2018 EC4T volume-reconciliation.

Industry Consultation

7. As part of our review of the parties' application to supplement the Traction Electricity Consumption Rates List with Class 345 vehicles we requested a short consultation be undertaken with other operators in the same Energy Supply Tariff Areas (ESTAs) in respect of these applications to gather their view. Some queries were raised by Virgin Trains but were closed out after a number of email exchanges with Network Rail. Southeastern and c2c confirmed no objections.

ORR review

8. Network Rail explained that without approved rates for Class 345s, its ability to carry out the volume reconciliation for ESTAs in which these vehicles operated would be compromised. There would therefore be a significant risk that EC4T cost incurred from the operation of Class 345s during the 2017/2018 financial year would be unfairly exposed to third parties undermining the integrity of the EC4T volume reconciliation process.

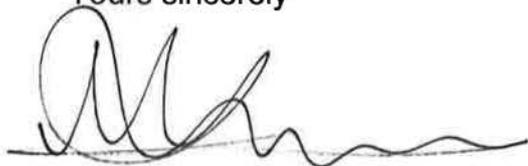
9. We carefully considered Network Rail's justifications to amend this provision in the parties' TAC and on balance, accepted its approach for this case. We agreed with the importance of completing the 2017/2018 volume reconciliation on time with the Traction Electricity Consumption Rates List up-to-date to ensure that no third parties would be adversely affected. We also advised the parties that we would only support a contractual change that applied solely to the 2017-18 financial year. The parties agreed with our view and the draft of the agreement was amended accordingly to ensure this is time limited and the supplemented rate cannot be used in the future. We also acknowledged that the risk of a future repeat of this case was mitigated in a change to EC4T policy for CP 6 where a default rate is being introduced for those vehicles operated on the network without a confirmed modelled rate on the Traction Electricity Consumption Rates List. For these reasons, we have agreed to this change.

10. 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)).

11. 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.

12. Electronic copies of this letter, the approval notice and the agreement will be sent to Keith Merritt at Department for Transport and to Peter Craig at Network Rail. 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 'Michael Albon', written over a horizontal line.

Michael Albon