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Dear Mr Dawson

**Response on behalf of First to "Changes to Access Rights and Moderation of Competition: Draft Conclusions"**

This letter sets out the response on behalf of FirstGroup plc and its train operating companies to the draft conclusions referred to above. We do not require any element of this response to be kept confidential.

This response is structured so as to comment in turn on the chapters of the draft conclusions document.

In summary we are generally supportive of the draft conclusions, but offer comments on the refinement of the UIOLI mechanism; the application of compensation to UIOLI in the same way as for voluntary adjustments; the operation of MOC, including for rolling stock investment and to projects currently under way; and the significance of protected rights to the introduction of UIOLI.

**Removal and Adjustment of Access Rights**

While recognising the need for a UIOLI mechanism, we have concerns that the version proposed, applying the principle to non-exercise of rights for a year and extending the loss beyond the path to the underlying rights, may have unintended and adverse effects. It suggests that any room for flexibility of operation established in access agreements may be attacked unless exercised each year. This will tend to remove certainty that any range or choice of responses provided for in an access agreement will be available to a train operator and could lead to the restriction of access rights to the scope of each particular timetable emerging from the timetable development process. This reduces the certainty required by train operators for forwards business planning. This is likely to be relevant in particular to a range of ancillary rights, for example on stabling, stopping patterns and connections and where services are being built up or restructured through a planned process over time.

The proposed grounds for rejecting a UIOLI challenge will not protect against this type of trimming back of rights. Instead operators will need to rely on a combination of Network Rail exercising its discretion not to apply the mechanism and the potential availability of a process under section 22A to reinstate rights removed. In order to protect against this, consideration might be given to applying a longer period than one year for non-use of ancillary rights or focussing the UIOLI on quantum rights in respect of loaded passenger carrying services, with a clear potential for forward contracting for the development of access rights to be possible outside of UIOLI. In essence the latter would be similar to the Network Rail major project concept.

In any event the drafting of the proposed condition J3.2(a) should be clarified so that securing a single Train Slot in a year constitutes use. The current wording might imply that the Train Slot itself must be for a consecutive 365 day period.

We support the revised formulations on non-use of Train Slots once timetabled and (subject as noted above) the grounds for objecting to challenge. The protection derived from the connection of rights with a Network Rail enhancement project should be developed: for example if the project were delayed or cancelled the rights might be expected to be subject to UIOLI.

Where UIOLI is applied, there should be an application of the same mechanism as applies on the voluntary surrender of rights in order to adjust the levels of payments in relation to the rights given up. The exercise of UIOLI should not permit a windfall for Network Rail or a situation where Network Rail is then either paid twice for the rights by the original holder and then by the successor or the successor secures the rights at a lower charge.

We welcome the position now being adopted regarding mandatory removal or adjustment.

### Moderation of Competition

We wish to underline the importance of the continuation of the policy against granting access rights which are primarily abstractive or do not increase the overall market appreciably. We would wish to see added to this a stronger appreciation of the importance of performance. As measures are increasingly being taken to manage congestion and provide capacity for better service recovery, it is critical that these initiatives are not inappropriately exploited for other open access opportunities.

We welcome the strong statements made in support of protection against cherry-picking. However we would prefer still to see specific protection possible for critical flows, recognising the importance of revenue certainty in generating value for money in the franchising process and that, even if new style-franchises include better protection from franchise on franchise competition, open access risks remain. The absence of this specific protection underlines the requirement for a robust application of the principles outlined above where new access rights are being considered.

The prospect of future MOC protection to support investment is noted. We do not accept the manner in which new train investment is distinguished from other investments as not requiring protection. In practice there are often serious constraints on the reallocation of rolling stock and the revenue from the flows where it is deployed will be critical to fund the investment. As policy on MOC is now moving towards a conclusion, we believe that we should be entitled to raise and have considered significant projects which are in the course of being established and that stronger guidelines should be available to steer Network Rail towards the type of MOC which it should be prepared to agree (subject to approval by the Regulator). The application of MOC to worthy projects should not be prejudiced because of current timing constraints which have adversely affected the ability to develop or negotiate MOC rights.

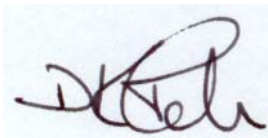
#### Compensation for Removal or Adjustment of Access Rights

We support the move from a mechanistic to a negotiated or determined approach. The criteria to be published giving guidance on the approach will be important and we look forward to the opportunity to review and comment on these. As indicated above, we consider that compensation should also apply where the UIOLI mechanism is applied.

#### Protected Rights

We are concerned that the application of the UIOLI mechanism to existing protected rights may prevent to a material extent the exercise of those rights, since those rights could thereby be lost with the consequence that they could no longer then be exercised. The mechanism might therefore be qualified insofar as it might otherwise apply to existing protected rights. It might be confirmed that in the future rights might continue to be designated as protected, but in that case subject to the application of the UIOLI mechanism.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'D Finch', written over a light blue rectangular background.

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