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## **APPROVAL OF A TRACK ACCESS CONTRACT BETWEEN NETWORK RAIL INFRASTRUCTURE LIMITED AND NORTH YORKSHIRE MOORS RAILWAY ENTERPRISES PLC**

### **Introduction**

1. The Office of Rail Regulation (“ORR”) has today approved the terms of the track access contract submitted by Network Rail Infrastructure Limited (“Network Rail”), with the agreement of North Yorkshire Moors Railway Enterprises PLC (“NYMR”), under section 18 of the Railways Act 1993 (“the Act”) on 1 August 2006, and has directed Network Rail to enter into it. In approving the terms of the contract, ORR has also directed Network Rail under section 18(7) of the Act to make certain modifications. In considering the application and in reaching its decision, ORR has had regard to its statutory duties under section 4 of the Act. The purpose of this letter is to explain ORR’s reasons for its decision.

### **The contract**

2. The contract gives NYMR permission to use Network Rail’s network in order to operate passenger train services. The contract will come into effect from the date of signature and will expire on the Principal Change Date in December 2009. The terms of the contract are based on the model clause passenger contract<sup>1</sup> although a number of bespoke provisions have been approved, for reasons that are described below.

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<sup>1</sup> *Model passenger track access contract*, Office of the Rail Regulator, London, December 2003  
[http://www.rail-reg.gov.uk/upload/doc/ta-pasmodcontract\\_oct04w.doc](http://www.rail-reg.gov.uk/upload/doc/ta-pasmodcontract_oct04w.doc)

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3. NYMR is a heritage steam railway operating over an 18 mile stretch of track in the North York Moors national park. The contract gives NYMR rights to extend some of its services out into the national network to run a scheduled steam service between Glaisdale (occasionally extending to Battersby) and the seaside town of Whitby between spring and autumn.

4. The contract grants firm rights for 2 services each way between Whitby and Glaisdale and 1 each way between Whitby and Grosmont on a selection of weekdays and Saturdays, specified in the contract. The rights are to quantum and calling pattern only.

5. The contract also grants a small number of contingent rights to run services between Battersby and Whitby, which services are expected to be occasional. Of these contingent rights, those applying on Sundays have an additional contingency on top of that defined in the model contract (the prior satisfaction of all bids under firm rights) which is that Northern Rail or its successors must not also be running services on that day.

### **Departures from model contract**

6. The proposed contract submitted by Network Rail contained a number of departures from the model contract, principally in relation to the economic and performance provisions. ORR believes that part of the value of a model contract is the knowledge that other operators' contracts contain the same, or very largely the same, terms and conditions. ORR is therefore concerned to ensure that it approves only those departures which are strictly necessary. In this particular instance, ORR believes that the bespoke provisions applied for are justified.

#### *Economic Provisions*

7. The key difference between the proposed charging regime for this and for other passenger applications is that NYMR would not pay a fixed charge as part of the track access charge. This is consistent with decisions we have taken on applications from other open access operators.

8. In addition, NYMR will not pay the capacity charge. This is because, under the capacity charge mechanism, there are different vehicle mile rates for different routes. For certain routes the value is zero, including the routes on which NYMR proposes to run. Therefore, no capacity charge is payable. NYMR would only be liable to pay the capacity charge if it later applied to run on different routes whose value in respect of the capacity charge was not zero

9. Since this is an open access application, our economic advisers considered whether or not our Moderation of Competition (MoC) policy and the "five stage test" should be applied, that is to assess the impact of the applicant's services on the financial viability of any franchised TOC(s) with whom it might compete. The principle reason for our

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conclusion that revenue abstraction would not give rise to a material concern warranting application of the “five stage test” or further consideration of MoC is that, Northern, the only franchised operator on the route, has raised no objections to the application in this respect.

10. It should also be noted that an assessment on this question would centre on whether the revenue gained from the new services is primarily abstractive of the incumbent TOC's revenue. However, at paragraph 3.17 of our “Moderation of Competition: Final Conclusions” document we say we will consider whether MoC should apply, “Where there is clear evidence that revenue abstraction may be a material concern”. In this case, NYMR propose to run services totalling approximately 72640 km pa, less than 0.2% of Northern Rail's (the only competitor on this route) 45.7 million km pa. This underlines the point that potential revenue abstraction is not a material concern in respect of this application.

#### *Performance Regime*

11. The parties applied for a bespoke performance regime based on that used in the Freight Model Contract. Given that this is not a regular timetabled passenger service comparable to that run by franchised operators, ORR accepts the parties rationale for taking this approach.

12. The parties had proposed that a “Schedule 8 Modifications” schedule be used. They argued that since this is a new service using a bespoke performance regime, a reopener was required so that the adequacy of the provisions could be reviewed after a year of operation.

13. However, “Schedule 8 Modifications” provisions are generally used where the parties have been unable to agree a performance regime prior to submission of their application, which is not the case here. We therefore took the view that the review mechanism in Schedule 8 of the freight model contract, which allows the parties to instigate a review if performance drops below or rises above certain agreed levels, would be sufficient. The parties agreed to this and the proposed “Schedule 8 Modifications” provisions have been replaced with the standard freight model review provisions in the final contract.

#### *Operation of Steam Driven Equipment*

14. The contract contains a number of pieces of bespoke drafting in respect of the use of steam driven equipment. ORR accepts the necessity of these provisions, has conducted a full legal review of them, and is content that they are fit for purpose,.

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## Consultation

15. West Coast Railway Company (WCRC), another heritage operator, responded to our consultation opposing NYMR's application for firm rights. Its view was that the granting of firm rights would exclude other operators potentially serving Whitby, thereby giving an unfair advantage to NYMR. WCRC's view was that NYMR should therefore only be granted contingent rights. We do not agree with WCRC for the following reasons.

16. Firstly, Network Rail has confirmed that capacity is available to accommodate the rights applied for. In addition, there will continue to be some spare capacity after the rights are sold, which we believe should be sufficient to run the sort of one-off special trains that WCRC operates. Plainly, any sale of access rights consumes capacity, but we do not consider that approval of these firm rights would "exclude" other operators.

17. Secondly, not only is there capacity available for the rights applied for, but NYMR has firm and developed plans to make use of it. NYMR is investing in improvements to both Network Rail and NYMR signalling at the junction interface at Grosmont. This investment and NYMR's plans to expand their operations have in part been prompted by the fact that the Esk Valley line from Middlesbrough to Whitby is designated under the Government's Community Rail strategy. NYMR argues that it is essential for it to have the certainty afforded by firm contractual rights in order for it to be able to invest in, plan, develop and market its new service with a reasonable degree of assurance. These are considerations that ORR is obliged to have regard to under section 4 of the Railways Act, along with the potential benefits for passengers of NYMR being able to carry their plans through.

18. Finally, WCRC argued that approving firm rights would limit competition or give unfair advantage to NYMR. All operators or potential operators - including both NYMR and WCRC - have the equal right to apply to ORR under sections 17 or 18 of the Railways Act for access rights to run train services and to have their applications judged according to ORR's published policies.

### *Northern Rail*

19. Northern Rail did not object to the parties application, but asked for clarification on a number of points relating to the drafting of the contract. These points have been answered by the parties and Northern has no further issues to raise. In addition, Northern asked for clarification on the appropriate use of the capacity charge and the status of unused access rights. These issues are covered in paragraphs 8 and 20 respectively.

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## **ORR review**

### *Unused access rights*

20. The parties had originally applied for firm rights to apply throughout spring and autumn though they did not actually intend to use those rights on each day. Our policy, as set out in paragraph 4.28 of our Criteria and Procedures document<sup>2</sup>, is that we will not approve access rights unless the train operator satisfies us as to its intention and ability to use the capacity in question. Otherwise, scarce capacity would be wasted by Network Rail's obligation to reserve that capacity. The contract now specifies the precise days upon which the firm rights apply, via a bespoke appendix to schedule 5, leaving the unused capacity on the remaining days available for other operators.

### *Services to Middlesbrough*

21. The parties had included a route to Middlesbrough in Schedule 2 but with no corresponding rights in Schedule 5 of the contract. This was because the operator wished to have the option to be able to 'spot bid' for services to that destination. It was the parties understanding that an operator could not make a spot bid unless the route was listed in schedule 2 but it was not necessary to include rights in schedule 5. At the point NYMR wanted to operate a service to Middlesbrough they had planned to seek to change the schedule 5 rights.

22. The parties understanding was not correct. In the case of passenger access agreements, the train operator does not have the right to operate a service without having a corresponding firm or contingent right in Schedule 5. The train operator can bid for a slot whether or not it has the corresponding route in Schedule 2, as long as Schedules 2 and 5 are amended accordingly in advance of the service being operated. We therefore advised that since Middlesbrough services are currently aspirational, these changes should be made in a later supplemental agreement. The route to Middlesbrough has therefore been removed from Schedule 2.

### *Consistency with available resources*

23. In approving access contracts we are always concerned to ensure that train operators have adequate resources available for the services they propose to operate. This is important not only for the success of the proposed services, but also because of

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<sup>2</sup> *Criteria and procedures for the approval of passenger track access agreements: fourth edition*, Office of Rail Regulation, London, May 2006, [http://www.rail-reg.gov.uk/upload/pdf/288-pass\\_candp4ed.pdf](http://www.rail-reg.gov.uk/upload/pdf/288-pass_candp4ed.pdf)

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the adverse effect on network performance of inadequate resourcing. We have therefore confirmed that NYMR's resources are appropriate to the level of services implied by the proposed contract.

### *Errors and inconsistencies*

24. A number of relatively minor errors were identified in the proposed contract, as well as some points of drafting that could be improved in terms of clarity. These have all been discussed with the parties and will be corrected by the modifications required by the directions.

### **ORR's public register**

25. ORR is required under section 72 of the Act to maintain a public register which must include, *inter alia*, every direction to enter into an access contract. Would you therefore please send me of this office two copies of the signed contract no later than 14 days after the date upon which the contract is entered into, as required by section 72(5) of the Act.

26. In placing any contract on the public register, ORR is required to have regard to the need for excluding, so far as that is practicable, the matters referred to in section 71(2)(a) and (b) of the Act. These cover:

- (a) any matter which relates to the affairs of an individual, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that individual; and
- (b) any matter which relates specifically to the affairs of a particular body of persons, whether corporate or unincorporate, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that body.

27. When you submit the copies of the signed contract would you therefore please list any aspects of the contract which you wish us to consider excluding from our register and explain why you consider how they meet the requirements of sections 71(2)(a) or (b).

28. I am copying this letter without enclosures to Mike Scott at Network Rail, James Shuttleworth at WCRC, Niel Wilson at Northern Rail, and to David Hibbs at the DfT.

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