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Dear Tim and Shaun

Approval of the 20th SG Supplemental Agreement to the Track Access Agreement between Network Rail Infrastructure Limited and NXEC Trains Limited

1. The Office of Rail Regulation (ORR) has today approved the 20th SG supplemental agreement to the track access agreement between Network Rail Infrastructure Limited (Network Rail) and NXEC Trains Limited (NXEC) submitted to ORR on 15 August 2008 under section 22 of the Railways Act 1993 (the Act). The purpose of this letter is to set out the reasons for our decision.

Purpose of the agreement

2. The agreement grants NXEC contingent rights to the following additional services:

- (a) 1803 King's Cross to Leeds on Saturdays;
- (b) 0940 from Leeds to King's Cross on Sundays;
- (c) 1110 King's Cross to Leeds service on Sundays; and
- (d) 1140 from Leeds to King's Cross on Sundays.

3. These services have been operating since the Subsidiary Change Date in May 2008 under rights in a supplemental agreement granted under the passenger General Approval, which expires on 16 August 2008. This agreement ensures the continuation of those rights.

Consultation

4. Network Rail carried out the industry consultation on this application. We were content that it consulted all potentially affected operators, however it did not consult DfT. We invited DfT to comment on the proposed agreement. DfT said that it had no objection to ORR granting a further period of contingent rights to ensure the continuation of existing services on the ECML. Of the operators that Network Rail consulted, EWS, First Capital Connect (FCC) and Hull Trains made comments.

EWS

5. EWS questioned the parties' statement in section 4.1 of their application form that one of the benefits of the services was that they represented more efficient use of network capacity. EWS said that it did not consider running additional trains was more efficient use of capacity. Network Rail said that it had meant that running trains with 530 seats was more efficient use of network capacity than running smaller trains which either cannot carry that capacity or require more paths to do so. Network Rail has accommodated paths for these services in the current timetable and has offered NXEC these paths in the December 2008 timetable. We were therefore content that granting these rights would not affect the efficiency of the network.

6. EWS also questioned the omission of the freight RUS from section 4.13 of the parties' application form which asks the parties to list all RUSs relevant to the application. Network Rail acknowledged that this had been an oversight. As the rights in this agreement are contingent we are satisfied that they will not impact on any recommendations in the freight RUS, or the ECML RUS, which has been established since the parties consulted the industry on this application.

7. EWS said that it was highlighted at a King's Cross Station Projects Working Group meeting that the Sunday timetable does not work with one platform removed. This is in the context of operating the station during the major works that will be taking place over the coming years. EWS asked whether the three additional Sunday trains would exacerbate these problems, and, if so, what mitigation measures the parties proposed to address this. Network Rail said that there was significant uncertainty as to what the ECML timetable will look like during the proposed King's Cross station refurbishment period. Network Rail also said that whilst NXEC did not wish to see a problem which required a solution detrimental to its passenger service, it remained open minded to potential solutions such as amending rolling stock balances or additional ECS movements out of King's Cross to free up platforms. EWS was content with this response. We were content that granting these additional contingent rights would not have an impact upon the availability of platforms at Kings Cross during redevelopment work.

FCC

8. FCC was also concerned that under the Kings Cross station redevelopment programme, these additional services would place further pressure on a facility where paths, track and station access would be inhibited. Network Rail repeated the response

that it had given to EWS on this point in paragraph 7 above. We were content that granting these additional contingent rights would not affect the availability of platforms at Kings Cross during redevelopment work.

Hull Trains

9. Hull Trains said that the proposed additional services potentially conflicted with its proposed services between Harrogate and London from December 2008. Our view is that our granting these contingent rights until May 2009 would not necessarily preclude our approval of the firm rights sought by Hull Trains in its section 17 application to ORR, which we are currently considering.

10. Hull Trains was also concerned about the effect of these additional services on platform capacity at Kings Cross during redevelopment works and said that it thought the rights should therefore be contingent. This agreement contains contingent rights only. I have addressed this issue in paragraph 7 above.

11. Hull Trains also requested assurance that extended layovers of NXEC services would not be allowed unnecessarily to consume platform capacity at King's Cross so as to prevent the development of new paths on the network arriving and departing from King's Cross. Network Rail has confirmed that the paths for these services are Rules of the Plan compliant. We are therefore content that our granting of these contingent rights should not adversely affect platform capacity at King's Cross.

Our review

Operational issues

12. We were content that our approval of this agreement until May 2009 did not raise any operational or performance issues. The services have been running since May 2008 and have validated paths in the current timetable which are Rules of the Route and Rules of the Plan compliant. Network Rail has also offered NXEC these paths in the December 2008 timetable.

Duration

13. The parties requested our approval of these rights until the expiry of the NXEC contract, in December 2011. In line with our letter of 8 August 2008 to the industry on how we propose to deal with applications for the renewal of rights for services already running on the ECML¹, we were content to approve this agreement until the Subsidiary Change Date in May 2009. This duration will give sufficient certainty to NXEC, to sell tickets for these services, and to passengers wishing to use the services. The parties amended the expiry date in the final version of the agreement accordingly. We will consider any

¹ Available at http://www.rail-reg.gov.uk/upload/pdf/s18-ecml_stkhldrs_080808.pdf

application to extend the duration of these rights on its merits and in line with our published criteria and procedures.

Consultation issues

14. We were not content with several aspects of the way in which Network Rail dealt with the industry consultation on this application:

- (a) From the application submitted to us on 6 August 2008, Network Rail did not appear to have attempted to resolve any of the issues that were raised by consultees in April until August. This considerably reduced the time available to us to consider this application;
- (b) Section 8.2 of the parties' application form said that all consultation issues had been resolved, despite Network Rail not having resolved the concerns of EWS, FCC and Hull Trains to their satisfaction. This has meant that we have needed to seek further comments from those operators and make a judgement on those issues, within the extremely short time available to us to make a decision on the application; and
- (c) As mentioned above, Network Rail did not consult DfT on the application meaning that we needed to seek confirmation that it was content with the proposed rights.

15. We would like to remind the parties of the requirements of the industry code of practice for consultations². Network Rail and the Train Operator should "respond to every consultation response that raises issues using all reasonable endeavours to resolve the concerns raised". When responding to comments received in response to a consultation, Network Rail and/or the Train Operator should "give that consultee a reasonable period of time to make a further response". We do not consider that the parties met either of these requirements when they carried out this industry consultation and would expect them to have addressed these before submitting any future applications to us. Where the parties consider that they cannot resolve all issues raised, they have the option of submitting the application to ORR for us to consider the issue(s) and determine the outcome. Such issues should be detailed in section 8.3 of the application form.

Our conclusions

16. In considering the application 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:

- (a) protecting the interests of users of railway services (section 4(1)(a));

² See paragraphs 29-31 of *Industry Code of Practice for track access application consultations*, available at <http://www.rail-reg.gov.uk/upload/pdf/candp-CofP-120608.pdf>.

- (b) promoting the use of the railway network for the carriage of passengers (section 4(1)(b)); and
- (c) enabling persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g)).

17. Please find enclosed a copy of the approval notice together with a copy of the supplemental agreement. I am copying this letter and both documents to Robin Marie at DfT. Copies of the approval notice and the supplemental agreement will be placed on our public register and copies of this letter and the supplemental agreement will be placed on the ORR website. I am also emailing this letter without enclosures to Steven Saunders at Network Rail, Nigel Oatway at EWS, John Beer at FCC and Mark Leving at Hull Trains.

Yours sincerely

Sam Gibbins