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All passenger & freight train operators using the ECML
All holders of and/or potential applicants for track access
rights or track access options on the ECML
Network Rail Infrastructure Ltd
Transport Scotland
Department for Transport
South Yorkshire, West Yorkshire and Tyne & Wear
Passenger Transport Executives
Passenger Focus
London TravelWatch

Dear Colleagues

East Coast Main Line (ECML) – outstanding track access applications

1. The Office of Rail Regulation (ORR) has today issued directions in respect of three applications and approved a fourth application for the track access rights necessary to run additional and/or amended passenger services on the ECML. The period for which some of the rights are held has also been extended. The purpose of this letter is to explain the reasons why we have issued the three directions and granted the approval.

The rights

2. The rights directed/approved are as follows:

- East Coast Main Line Company Limited (East Coast) – an application made under section 22A of the Railways Act 1993 (the Act) by its predecessor, NXC Trains Limited (NXC): Firm Rights to operate the proposed enhanced Service Level Commitment 2 (SLC2) standard pattern timetable with effect from May 2011. This includes additional off-peak services between Lincoln/York and King's Cross;
- Grand Central Railway Company Limited (Grand Central) – an application made under section 22 of the Act (the nineteenth supplemental agreement): Firm Rights for four return services on Weekdays and Saturdays and three return services on Sundays between Sunderland and King's Cross until December 2016, subject to Grand Central undertaking an agreed investment programme;

- Grand Central – an application made under section 17 of the Act by its associate company, Grand Northern Railway Company Limited (Grand Northern): Firm Rights for three return services each day between Bradford and King's Cross until December 2016, subject to Grand Central undertaking an agreed investment programme; and
- Hull Trains Company Limited (Hull Trains) under section 17 of the Act: Firm Rights to operate its current quantum of services until December 2016, subject to Hull Trains undertaking an agreed investment programme. This new contract will come into effect in May 2011, when its current contract expires and when the standard pattern timetable is now planned to commence.

Our decision

3. Three of these applications were received during 2008 and were under consideration, along with a number of other applications, in the period leading up to the issue of *The Office of Rail Regulation's decision on a series of applications for track access rights for passenger services on the East Coast Main Line* on 27 February 2009 (our February 2009 decision), which is available on our website¹. The fourth application, Grand Central's section 22 application, was submitted subsequently.

4. In our February 2009 decision, we said that we would grant the following rights to the three operators:

- NXC - approve Firm Rights for NXC's application for SLC2b² until December 2015, except for the sections of route between Leeds and Bradford/Harrogate where we would approve Contingent Rights only. These rights would be designed to ensure that they could not impede the future development of the ECML timetable. All SLC2b rights would be made subject to the resolution of any conflict that arose with another operator's existing Firm Rights. The Department for Transport (DfT) had told us that it would facilitate the resolution of specific conflicts if that was necessary to enable the operation of "core" SLC2 services. However, this did not include the then-proposed services beyond Leeds to Bradford and Harrogate, which were likely to require a recast of the West Yorkshire timetable. Until that took place, we said that we could approve only Contingent Rights for those services, which would allow NXC to develop the services where the conflicts could be resolved;
- Grand Central - approve Firm Rights for a fourth Weekday and Saturday Sunderland return service, until May 2012 (when its current track access agreement expires), with a calling pattern of London, York, Thirsk, Northallerton, Eaglescliffe, Hartlepool and

¹ http://www.rail-reg.gov.uk/upload/pdf/ecml-finaldec_270209.pdf.

² SLC2 was NXC's franchise commitment, from December 2010, for a fifth hourly off-peak franchised service from/to King's Cross alternating between Lincoln and York; SLC2b was a variation of that commitment as set out in NXC's track access application, with the York service re-directed to Harrogate via Leeds and a number of the existing King's Cross to Leeds services being extended to Bradford.

Sunderland. These rights would be designed to ensure that they were sufficiently flexible so that they could not impede either the introduction of a standard pattern timetable which included the other access rights we had decided to approve, or the future development of the ECML timetable;

- Grand Northern - approve Firm Rights for three daily Bradford return services, until December 2014, with a calling pattern of London, Doncaster, Pontefract, Wakefield Kirkgate, Brighouse, Halifax and Bradford Interchange. The rights for intermediate calls between London and Bradford would be Contingent. These rights would be designed to ensure that they were sufficiently flexible so that they could not impede either the introduction of a standard pattern timetable which included the other access rights we had decided to approve, or the future development of the ECML timetable. The rights would lapse if the services were not in operation by the end of September 2010; and
- Hull Trains - approve continuation of the current access rights, but all as Firm Rights rather than a mix of Firm and Contingent rights, for seven Weekday and five weekend Hull return services until December 2016 with a calling pattern of London, Stevenage³, Grantham, Retford, Doncaster, Selby, Howden, Brough and Hull. These rights would lapse in December 2014 if the investment proposed by Hull Trains (refurbishment of rolling stock and enhancement of some station facilities) had not been completed, and would be designed to ensure that they were sufficiently flexible so that they could not impede either the introduction of a standard pattern timetable which included the other access rights we had decided to approve, or the future development of the ECML timetable.

5. Since February 2009 there have been some changes in circumstances which we have had to consider. In summary, we have received new information making the case for a longer term access contract for Grand Central, and there have been changes to the rights sought by East Coast as a consequence of the further development of the standard pattern timetable. These changes have led to changes to our February 2009 decision in respect of their applications which are explained below.

Timetable development

6. Prior to our February 2009 decision, Network Rail had produced a capacity analysis, including an indicative standard pattern timetable, which indicated that it would be possible to accommodate the quantum of services we said we would approve for Grand Central and Hull Trains alongside the increased quantum of services approved for NXEC within such a timetable, as well as providing increased capacity for freight trains. We said that we expected our decision would lead to the introduction of a standard pattern timetable.

7. In our February 2009 decision we said that we would meet Network Rail to agree how best to take forward the work necessary to enable us to issue directions on the

³ Calls limited to two northbound pick up only, and three southbound set down only per day.

successful applications. We duly met Network Rail and it has subsequently continued its timetable development work, its remit being to accommodate the existing passenger and freight services and the quantum of additional and amended passenger services which we said we would approve, whilst ensuring that there was sufficient capacity for future freight growth. On 3 July 2009 Network Rail issued its *ECML Standard Pattern Timetable Options* document, which included the first of a number of iterations of the standard pattern timetable which Network Rail issued during the course of the year and on which the applicants, other potentially affected train operators and other key stakeholders were invited to comment, both by Network Rail and ORR. A number of industry workshops were also held to inform the ongoing work.

8. Copies of various reports issued by Network Rail, correspondence between Network Rail and ORR, and letters from ORR to the industry both updating it on progress and inviting comments on Network Rail's *ECML SLC2 Timetable* report of 16 October 2009, together with the responses received, can be found on our website⁴. One of the key statements in the report was that it had not been possible to identify an up path from Leeds for the fifth path without a consequential overtaking move at Newark by two other NXEC trains, an obvious operational concern, but Network Rail had identified an up path from York without the overtaking move, a timetable solution which was acceptable to DfT and NXEC.

9. Operationally, the 2008 draft timetable, on which our February 2009 decision was based, was inefficient in its use of capacity in that platform availability at Leeds was at a premium, and a third train from Leeds would have been required to stand at Hambleton for up to 11 minutes awaiting a path on the ECML. The overtaking moves would also have presented a performance risk. We therefore agree that East Coast's revised application to run the fifth path to York, supported by DfT, is operationally more robust than NXEC's previous aspiration to run the fifth path to Leeds.

10. We have stressed throughout that it is Network Rail's responsibility to produce the final timetable, through the process in Part D of the Network Code. The work it has been undertaking to date is to allow Network Rail and the train operators to develop the detail of the rights to be included in the track access contracts/agreements.

11. Most of the responses to our consultation⁵ on the report of 16 October 2009 were timetable related, so we forwarded them to Network Rail to inform its ongoing development of the timetable, given that it is Network Rail's responsibility to develop the timetable. Two other issues raised were addressed initially in our letter to the industry of 25 November 2009⁶, namely East Coast's proposal that the destination of its fifth hourly off-peak path from King's Cross should alternate between York and Lincoln rather than

⁴ <http://www.rail-reg.gov.uk/server/show/nav.1993>.

⁵ <http://www.rail-reg.gov.uk/upload/pdf/ecml-orr-letter-191009.pdf>

⁶ <http://www.rail-reg.gov.uk/upload/pdf/ecml-orr-letter-251109.pdf>

Leeds and Lincoln, and Grand Central's concerns about the effect that the standard pattern timetable as then developed would have on Grand Central.

12. Both of these issues are considered further in the sections of this letter headed *East Coast's rights* and *Grand Central's rights* respectively.

Conflicts with existing firm rights and defeasance

13. The capacity analysis undertaken by Network Rail before we issued our February 2009 decision indicated it was unlikely that it would be able to produce a standard pattern timetable including the proposed additional passenger services without the necessary rights conflicting with some of the Firm Rights of existing operators. DfT wanted the additional NXC services introduced, as they would add to the long-term value of the franchise, as well as meet passenger demand. DfT said it believed that most of the conflicts identified in the then latest iteration of the timetable that Network Rail had developed could be resolved, but accepted it would not be possible to resolve them all. In our February 2009 decision we said that all SLC2b rights would be made subject to the resolution of any conflict that arose with another operator's existing Firm Rights, and that DfT had told us that it would facilitate the resolution of specific conflicts if that was necessary to enable the operation of "core"⁷ SLC2 services."

14. Whilst we did not specifically set out in our February 2009 decision the mechanism by which conflicts were to be resolved, having taken into account the further timetable development work, we have decided that the most appropriate way to address this issue is to include a defeasance provision in each of the four contracts detailed in paragraph 2.

15. In our *Criteria and procedures for the approval of track access contracts* (criteria and procedures)⁸ we explain that we are forbidden from directing new⁹ or revised¹⁰ access rights that, if exercised, will necessarily clash with the exercise of a right held under an existing access agreement. Where there is a risk that there might be such a clash, we would expect to include a defeasance¹¹ provision in the new contract. The defeasance provision defeases (i.e. nullifies) any right in the new contract that is found to conflict with the exercise of a right held in another pre-existing contract to the extent and for the timetable development periods necessary to avoid the conflict.

⁷ The core services excluded the then-proposed extensions from Leeds to Bradford and Harrogate. East Coast is not now intending to operate these services.

⁸ Available on the ORR website - <http://www.rail-reg.gov.uk/upload/pdf/408.pdf>.

⁹ Under section 17(1)(b) of the Act.

¹⁰ Under section 22A(4)(b) of the Act.

¹¹ The rationale and application of defeasibility is set out at greater length in Chapter 2 of [EWS-
Railtrack, Rail Regulator's conclusions on application under section 17 of the Railways Act 1993](#), Office of the Rail Regulator, May 2002.

16. We also explain that we would only expect to consider directing the inclusion of a defeasance provision in an access contract where it had not been possible to be certain about the adequacy of capacity. We believe that Network Rail should generally be in a position to know what capacity exists and what it has sold, and that inclusion of such provisions should be exceptional.

17. Whilst timetable development has been under way for some time, it is still relatively early in the formal timetable development process, with some fifteen months still to go before the start of the timetable. In an ideal world, neither the train operator nor Network Rail would have the uncertainty that defeasance brings but, at the present time, Network Rail cannot say with certainty that it knows all the conflicts with existing rights. However, the existence of a draft timetable serves to reduce the level of uncertainty.

18. Network Rail has been undertaking a compliance check to establish the extent to which the rights necessary to deliver the standard pattern timetable might result in conflicts with existing rights. We understand that the rights sought by the three operators, particularly those sought by East Coast, might result in a number of conflicts with the existing access rights of franchised passenger operators.

19. DfT has confirmed that if further timetable development work identifies any conflicts with franchised train operators' requirements, which Network Rail is unable to resolve by normal timetabling methods within the constraints of those operators' track access contracts, or where to do so would appear to compromise the structure of the new East Coast timetable, it would wish to discuss the available options with Network Rail and the affected train operators and would facilitate a solution, if necessary by amending its service specification to one or more of the train operators or by funding the buying-out of access rights. On the basis of DfT's commitment, we do not consider it is necessary to make East Coast's rights which potentially conflict with franchised train operators' rights contingent. However, should it not prove possible to resolve these conflicts through this process, the defeasance provisions would apply. They would also apply to any further conflicts that come to light as Network Rail completes its compliance checking, including any conflicts with the rights of freight operators.

20. We are also aware of a potential conflict between the rights sought by East Coast and an existing Grand Central Firm Right, which it holds until May 2012, for a departure from King's Cross between 11:10 and 11:40. So far, Network Rail has been unable to produce a timetable solution to this potential conflict.

21. In cases of conflicts involving open access operators, DfT has said it would also wish to discuss options and facilitate a solution, but in general it does not consider that it would be appropriate for DfT to pay compensation to an open access operator. Therefore, in those circumstances, it would expect to work with Network Rail to identify a solution that delivered the open access operator's access rights whilst minimising the impact on the overall timetable structure, in accordance with Network Rail's obligations in respect of the Decision Criteria in Part D of the Network Code.

22. In practice, the approval of contingent rights and the inclusion of defeasance provisions could both achieve the same result and in response to our consultation on our proposed directions, East Coast and DfT argued that the conflict with Grand Central's rights should be dealt with through the defeasance provision. However, we consider it is right to distinguish between the general uncertainty arising from the fact that the timetable is not yet fully developed, and the apparent conflict between East Coast's new rights and Grand Central's existing Firm Right. In the former case, we think defeasance provisions are the appropriate mechanism, particularly given DfT's preparedness to take a role in resolving those conflicts which are identified. In the latter case, although this conflict has been expressed as a straightforward conflict between East Coast's new rights and Grand Central's existing rights, we do not believe that the existing rights of other operators can be ignored. There have already been attempts to resolve the known conflict, so far without success, and we consider that this should be explicitly recognised in the rights we approve. We have, therefore, directed that East Coast's rights to departures from King's Cross during this half hour will be contingent. Network Rail will continue to seek a timetable solution and, if one is found, the contingent rights will allow East Coast's services to operate, either in the established clockface pattern, or as close to the clockface pattern as possible.

23. In its representations on the proposed directions East Coast asked that if ORR concluded that its rights for a Clockface Departure between 11:10 and 11:40 should be contingent, whether the contingency could be limited to the specific rights of Grand Central rather than contingent on the rights of all operators. Our view is that the rights should be contingent on all operators' existing rights because, for the reasons described above, we do not currently know precisely what changes might be necessary for Network Rail to resolve the conflict.

Weekend rights

24. Network Rail has concentrated all its efforts to date on the development of the Weekday timetable. It has yet to commence work on the Saturday and Sunday timetables. In the absence of a weekend timetable, we have reviewed the extent to which we can direct Firm Rights in Schedule 5 for weekend services beyond quantum (Table 2.1) and Specified Equipment (Table 5.1), given that we have not seen any analysis to show that Network Rail can deliver other Firm Rights, even Regular Calling Patterns (Table 4.1), alongside the rights of existing operators whose weekend services, especially on Sundays, tend to be different from those on Weekdays. There is no certainty that the Weekday standard pattern timetable, which has been designed to fit around the services of other operators, will fit around them at weekends, given especially that First Capital Connect (FCC) operates additional services into King's Cross on Saturdays and Sundays, and the timings of some Northern Rail, TransPennine Express and CrossCountry services are completely different on Sundays.

25. We consider that Network Rail is not in a position at the present time to offer the level of Firm Rights for weekend services sought by the three operators, in particular those sought by East Coast. Accordingly, we have directed the three applications on the basis that we are not prepared to direct Firm Rights for weekend services beyond the quantum

of services in Table 2.1 and Specified Equipment in Table 5.1. We have removed all other Firm Rights and directed Contingent Rights for all calling patterns as train operators require rights in Table 4.1, either firm or contingent, in order to make station calls.

26. When we consulted East Coast on our proposal to grant only Contingent Rights for weekend services, it asked if it could retain Firm Rights to earliest and latest trains in Table 3.3. It argued that such rights did not require a validated timetable because they are merely rights for a first train to depart no later, and a last train to depart no earlier, than specified times from certain points of origin. DfT made similar representations. East Coast asked for such rights in order to protect early and late trains from future changes to the Rules of the Route which Network Rail may propose. East Coast acknowledged that these rights would not prevent Network Rail from making such proposals but said they would have to be assessed against the Decision Criteria.

27. In response Network Rail said that it had agreed rights to earliest and latest trains on Weekdays and the rights table had been populated around the Weekday timetable. It said it would be prepared to agree rights to earliest and latest trains on weekends once the weekend timetable had been validated. Network Rail also provided three examples where the rights proposed by East Coast either conflicted or may conflict with the current Rules of the Route and said it would not be in a position to confirm that these rights could be accommodated until the weekend timetable had been developed.

28. As mentioned above, East Coast said that if it had rights to earliest and latest trains, any proposals by Network Rail to amend the Rules of the Route would have to be assessed against the Decision Criteria. We would point out that any changes to the opening times of the network must be assessed against the Decision Criteria in accordance with Part D of the Network Code, and if Network Rail failed to do so this would be a legitimate ground for appeal under Condition D5.1.

29. We consider that specifying Firm Rights to earliest and latest trains on weekends for East Coast in advance of a validated time would be premature. We would expect to approve appropriate Firm Rights for weekend services when Network Rail has developed a weekend timetable and there is some degree of certainty as to the detail of the rights which can be granted to East Coast and other operators.

East Coast's rights

Quantum of rights

30. The quantum of rights we are directing varies from that sought by NXEC and on which we made our February 2009 decision as follows:

- East Coast advised that it did not require any Contingent Rights for additional services between Leeds and Bradford or between Leeds and Harrogate;
- York has replaced Leeds as the destination for the alternating fifth path ; and

- East Coast advised that it only required rights to operate one service each way between Edinburgh and Glasgow.

There are a number of other minor changes to the quantum of rights originally sought by NXC, and which also reflect the service specification issued by the DfT to East Coast after East Coast replaced NXC as operator of the long distance services on the ECML.

31. We have considered whether we should consult the industry on the minor changes, but have decided that further consultation is not necessary, as the changes are indeed not significant, some involve a reduction against the number of services originally proposed, Network Rail has been able to accommodate all of the revised rights in its standard pattern timetable, and we do not believe that the changes raise any operational, performance or economic issues not already covered during our comprehensive review of this and the other applications for new and/or extended rights for passenger services on the ECML.

Destination of the fifth path

32. As mentioned earlier, we consulted the industry on Network Rail's report of 16 October 2009, which included the proposed change to the destination of the alternating fifth path, received comments and responded in our letter of 25 November 2009.

33. As we explained in that letter, we undertook a large amount of economic analysis to inform our original decision on the ECML applications. This analysis included an economic appraisal of each of the open access service proposals and NXC's SLC2b application based on the indicative Network Rail timetable at that time. As part of this analysis we considered the impact of the SLC2b timetable if Harrogate services went via York instead of via Leeds. We identified that there were substantial economic benefits from both options, with slightly higher economic benefits from going to York instead of Leeds. We also identified that these benefits could increase substantially if journey times could be improved.

34. We subsequently carried out further economic analysis, which indicated that the economic benefits from the 16 October 2009 timetable were likely to be greater than those from the indicative timetable at the time of our February 2009 decision. We were therefore content that the operation of services to York instead of Leeds produces economic benefits.

35. In view of the representations received, we decided to consider whether or not the proposed services to York pass our not primarily abstractive test. We considered that, when undertaking the test, we should assess services to York as part of the overall SLC2 timetable package – as it is unlikely that East Coast would operate this timetable unless they were serving York or Leeds. Moreover it is difficult to separate these services from the rest of the timetable as they pick up calls at intermediate stations. Our assessment therefore considered whether the SLC2 timetable including services to York would pass the test. We did not take account of the impact on the fourth Grand Central Sunderland service as this was one of the series of applications under consideration at the same time as the SLC2b timetable. Based on the 16 October 2009 timetable, the SLC2 timetable to York had a generation to abstraction ratio far in excess of that which we have previously

considered passed the not primarily abstractive test. Our assessment demonstrated that this was also the case if we considered the additional stops at York on their own.

36. We added that Network Rail's timetable development work had brought to light new information. This further information meant that we had to consider this particular aspect of our decision and it was clear that, having regard to our statutory duties and in particular taking into account the performance and journey time issues, it would be better if the new services continued beyond Doncaster to York rather than to Leeds. Redirecting the services to York allowed improvements to the overall ECML standard pattern timetable which were beneficial from a passenger perspective. Therefore, we considered it would not be in the best overall interests of passengers, East Coast, DfT or other operators using the ECML, if we were to insist that the services ran to Leeds as per our February 2009 decision.

37. We are satisfied that our decision to agree to the change in destination to York is consistent with our section 4 duties, in particular:

- to promote improvements in railway service performance (section 4(1)(zb));
- otherwise to protect the interests of users of railway services (section 4(1)(a));
- to promote the use of the railway network in Great Britain for the carriage of passengers and goods...(section 4(1)(b)); and
- to have regard to the funds available to the Secretary for State for the purposes of his functions in relation to railways and railway services (section 4(5)(c)).

In balancing our duties we also considered our duty to promote competition in the provision of railway services for the benefit of users of railway services (section 4(1)(d)). This is discussed further in paragraphs 50 – 59 below.

Departure time ranges

38. East Coast sought departure time ranges of two minutes from King's Cross giving its hourly Anglo-Scottish services firm rights to depart between XX:00 and XX:02. Together with the Clockface Departure provisions this would also give East Coast Firm Rights to departures between XX:30 and XX:32 throughout the day. In support of its request, East Coast said its customers had enjoyed memorable XX:00 and XX:30 departure times for many years and that those specific departure times had customer value and benefit. It added that an arrival time in Edinburgh at XX:20 allowed for connections at XX:30 to Glasgow and Fife and at XX:35 to the Stirling/Perth/Highland line. It said that its SLC required that its departures should be as close as possible to XX:00 and XX:30. East Coast added that as the paths in question had been validated, it could see no commercial reason for not granting Firm Rights to these departure time ranges because of some unknown potential future requirement.

39. Network Rail did not support departure time ranges. It quoted ORR's criteria and procedures, which state that all rights in section 8 of Schedule 5 (such as departure time

ranges) were for use only in exceptional circumstances; that the train operator would need to demonstrate that such rights were an important commercial requirement; that Network Rail would have to demonstrate that they would not create an undue constraint on its ability to exercise flexing rights; and that they would not unduly constrain the aspirations of other users or potential users of the network. Network Rail's view was that agreeing Clockface Departures as well as the proposed departure time ranges would indeed create an undue constraint on its ability to exercise its flexing rights. It said that it would be close to hardwiring only one timetable option, which would clearly impact on other users or potential users of the network.

40. In deciding whether to direct or approve new or amended access rights, a major part of our role is to ensure the fair and efficient allocation of network capacity. We do this in line with our published criteria and procedures which have been developed in order for us to discharge our section 4 duties. This includes making judgements about the appropriate balance between certainty for train operators and flexibility for Network Rail to accommodate the needs of all other passenger and freight train operators.

41. Rights to Clockface Departures give train operators rights for services to depart at the same time each hour throughout the day. Under the model contract provisions, Network Rail has flexibility to determine where on the clockface to timetable the trains but, once the pattern is established, it must timetable them at the same time every hour subject to a small amount of flex. This flex allows individual services within the established clockface pattern to be scheduled in the Working Timetable up to two or three minutes later than the clockface pattern but the expectation is that the public timetable will show the regular clockface pattern. This memorable pattern has obvious benefits to passengers.

42. Whilst we appreciate East Coast's desire for departures at XX:00 and XX:30 and the benefits of such memorable times for passengers, we consider that this is outweighed by the constraint it would place on Network Rail's ability to exercise flexing rights in order to make best use of capacity to accommodate the needs of all other passenger and freight train operators.

43. We have therefore removed the departure time ranges from the directed contract. This, of course, does not mean that East Coast services will not continue to enjoy departures at XX:00 and XX:30 as it has done for many years without the benefit of such hardwired rights. It will no doubt continue to bid for services at those times and Network Rail will consider its bids as usual in accordance with the Decision Criteria. If East Coast is not satisfied with Network Rail's decisions it has recourse to the timetable panel and ultimately to ORR.

44. When considering proposals for such hardwired rights, we also need to ensure that any rights we approve would not be inconsistent with regulations 16(9) and 18(3) of The Railways Infrastructure (Access and Management) Regulations 2005 which state:

16-(9) The infrastructure manager must not allocate capacity in the form of specific train paths for any period in excess of one working timetable period.

18-(3) Whilst seeking to meet the legitimate commercial needs of the applicant, a framework agreement must not specify any train path in detail.

45. In its representations on our proposed modifications East Coast argued that with the rights it was seeking, Network Rail would not be unduly constrained in its ability to exercise flexing rights as it would have a two minute departure time window and the Maximum Journey Time contains flex. We disagree. We consider that a two minute departure time window in combination with Firm Rights to Clockface Departures, Calling Patterns and Maximum Journey Times throughout the day would constrain Network Rail's ability to develop the timetable to an unacceptable degree and that only minor variations on the timetable solution that has been developed would be possible. We consider such hardwired rights would specify train paths in detail and therefore, in our opinion, would be inconsistent with the Access and Management Regulations and our criteria and procedures.

46. East Coast also said that the rights in its application only covered the period from May 2011 to December 2011, one Working Timetable period, so would not contravene regulation 16-(9). Whilst this may be true, we have previously only approved such hardwired rights for one timetable in exceptional circumstances after a fully validated timetable had been completed, offered and accepted by all operators under Part D. This is far from the case in this instance and we do not consider that it is appropriate for us to do this.

Maximum Journey Times

47. East Coast sought journey time protection through Maximum Journey Times for most of its services, a reduction in journey times between London and Leeds/Newcastle/Edinburgh being one of the key aspects of the planned introduction of the standard pattern timetable, with the new York/Lincoln services taking up some of the intermediate stops.

48. Network Rail supported the Maximum Journey Times proposed by East Coast. We questioned Network Rail as to whether it was keeping sufficient flex to enable it to develop future timetables. Network Rail re-iterated that it was content with the times submitted.

49. We have examined the journey times submitted and ascertained that Network Rail has up to five minutes headroom on the 'clean path' for each flow, i.e. the sum of journey times, station dwell times and allowances for each service. We believe that this represents a reasonable balance between the parties, giving Network Rail some ability to include pathing time where necessary, while at the same time providing reasonable certainty to the operator, its funders and its passengers.

Grand Central's rights¹²

Impact of the standard pattern timetable on Grand Central

50. As mentioned above, Grand Central responded to our consultation on Network Rail's report of 16 October 2009, advising that it had undertaken an analysis of the impact on its revenues of the proposed standard pattern timetable compared with the current timetable, and was concerned by the results of that analysis. It provided us with a confidential copy of that analysis, describing the impact as "truly frightening" and adding that these were "big numbers".

51. In our letter of 25 November 2009, we said that as part of our not primarily abstractive test, if additional services compete with open access services, we consider whether there is a real likelihood that they would cause the open access operator to withdraw from the market, reducing competition to the disbenefit of passengers¹³. We therefore considered whether the latest SLC2 timetable was likely to cause Grand Central to withdraw from the market. We reviewed the analysis provided by Grand Central. Our own analysis indicated that the SLC2 timetable was likely to reduce the revenues of Grand Central (as indeed would the SLC2b timetable, albeit to a lesser extent).

52. However, our analysis suggested that the forecast effect of Grand Central's fourth service to Sunderland on the profitability of the business as whole would be positive, even with the introduction of the SLC2 timetable by East Coast. Furthermore, we estimated that very little of the revenue reduction would be due to the additional stops at York. We therefore did not consider that the introduction of the new SLC2 timetable and the additional stops at York should necessarily cause Grand Central to withdraw from the market.

53. Grand Central had also expressed concern about the paths it was being offered in the standard pattern timetable, saying that half of them weren't standard and the priority seemed to have been to give East Coast better journey times at the expense of other operators. Following the issue of our letter of 25 November 2009, Grand Central wrote to us on 8 December 2009 saying that our letter had not addressed all its concerns.

54. We subsequently met Grand Central on 16 December 2009 to discuss the five issues set out in its letter:

¹² We had hoped to combine the rights for the Sunderland and Bradford services in one contract, when it was decided that Grand Central, rather than Grand Northern, would hold the track access rights for the Bradford services (a decision agreed jointly between Grand Central, Network Rail and ORR). However, as we had received separate applications, this was not possible.

¹³ Also see our letter of 19 August 2008 - http://www.rail-reg.gov.uk/upload/pdf/s17-ECML_stkhldrs_update3.pdf

- Grand Central did not accept that the semi-fast services to York have to be provided by East Coast. Rather, they could be provided by any train operator, and could form part of potentially useful extensions north of York to places not currently served by trains to/from London;
- patronage on Grand Central's services would be affected by slower journey times for Grand Central, faster journey times for East Coast, additional East Coast calls at Northallerton, additional East Coast services between York and London and the shifting of Grand Central's current slots;
- the main objective of the standard pattern timetable seemed to have moved away from best use of capacity to the reduction in journey times for East Coast, with the effect that Grand Central's journey times had deteriorated significantly, thus affecting revenue allocation;
- Grand Central considered that the standard pattern timetable would have prevented its entry into the market; and
- how did ORR plan to decide "fair play" in relation to the paths, slots, journey times and stopping patterns that have such a significant financial impact and also affect passengers' access to the network, both positively and negatively?

55. During our meeting Grand Central said that the timetable appeared to have been driven by DfT's requirements. We pointed out that DfT was only one, albeit an important, stakeholder. We believe this issue was to a great extent addressed in our letter of 25 November 2009, where we set out that we saw the standard pattern timetable as a package, with a number of key benefits. It is perhaps worth adding that if we had rejected the rights sought by East Coast between King's Cross and York, allowing applications from other operators to be submitted and considered, we have every reason to believe that East Coast would not have proceeded with the standard pattern timetable, thus negating all the benefits which we see as being derived from its introduction.

56. Grand Central accepted that the increased journey times, although not breaching Grand Central's current rights to Maximum Journey Times, were mainly responsible for the financial effect. In fact, we said in our February 2009 decision: "we do acknowledge that the standard pattern timetable may result in the paths for some open access services being sub-optimal". At this stage in the timetable development process that is the expected outcome, but further work on the timetable may reduce the negative impact.

57. Whilst Grand Central said that the standard pattern timetable would have prevented its entry into the market, it did not claim that it would result in its withdrawal from the market. However, it did say that it was very possible that if the standard pattern timetable was introduced broadly as proposed, Grand Central would indeed be forced to withdraw services and it would certainly prevent new investment and must obstruct new services with their consequent consumer benefits.

58. Grand Central acknowledged that it would be financially better off as a result of our decision to grant it rights for the additional services as part of our February 2009 decision (even assuming a standard pattern timetable), although the benefits of these rights was reduced by the introduction of the standard pattern timetable. Given that the additional services provide a financial benefit to Grand Central, our decision to approve these rights should make it less, rather than more, likely that Grand Central would withdraw from the market, although we do acknowledge the detrimental impact on Grand Central's profitability of the standard pattern timetable.

59. It is worth noting that the decision of East Coast not to proceed with NXEC's planned hourly services between Bradford and King's Cross means that Grand Central can expect its own Bradford services to produce more revenue than would have been the case if it had faced competition from hourly East Coast services. Instead, it will only compete for those passengers preferring a through service with one East Coast service.

60. ORR's role in determining the fair allocation of paths, and their characteristics such as departure times, journey times and stopping patterns, derives from our statutory role in the approval of track access applications and as the ultimate appeal body in respect of timetable disputes. We have used Network Rail's draft timetable to demonstrate that we can approve the totality of rights for which the operators have applied. It is now for Network Rail to develop the Working Timetable in line with the Decision Criteria in Part D of the Network Code. We acknowledge that the draft timetable that has been developed so far reflects choices made on the quality of paths for different destinations. Some of Grand Central's Sunderland services, for example, will have extended journey times compared with the present, whilst passengers travelling to many other destinations will benefit from improvements to their journey. It is unlikely to be possible to produce a new timetable which benefits every operator and passenger in the same way, and we consider that the access rights we have approved represent the best outcome in the current circumstances.

Sunderland services

61. We have already approved an application by Grand Central for Contingent Rights to operate a fourth London to Sunderland return service on Weekdays and Saturdays until May 2012, under the fourteenth supplemental agreement. Directions were issued in August 2009, so that the service could commence ahead of us being in a position to grant Firm Rights, which we are now able to do.

Bradford services

62. In respect of the proposed London to Bradford return services, we said that we could only approve Contingent Rights for the proposed intermediate calls, as there was some uncertainty as to whether all services could be timetabled to call at all stations, particularly prior to the introduction of a standard pattern timetable. Network Rail has now timetabled the services to call at all stations in both the current and the standard pattern timetable, with the exception of one service which is unable to call at Pontefract Monkhill in the current timetable. Therefore, we are now in a position to grant Grand Central Firm Rights to the intermediate calls – with that one exception.

Term of Grand Central's rights

63. In September 2009, Network Rail submitted a section 22 application (the nineteenth supplemental agreement) on behalf of Grand Central, the main purpose of which was to extend the period for which Grand Central was to hold track access rights from May 2012, in respect of Sunderland, and December 2014, in respect of Bradford, to December 2019. Grand Central was seeking a ten-year term in return for making a substantial investment in its fleet of High Speed Trains (HSTs) and Class 180 diesel multiple units, together with further investment in some of the stations at which its services either currently call or will call when the Bradford services are operational.

64. Much of the investment is aimed at improving the reliability of the rolling stock, including fitting the HST power cars with new MTU engines. The latter will reduce the risk of failures and the consequent impact on performance, benefitting all operators using the ECML. The MTU engines are also quieter and are more fuel efficient than the current engines. Full details of the investment are set out in the supplemental agreement amending the existing Sunderland contract and the new Bradford contract¹⁴.

65. Network Rail undertook the usual industry consultation on this application and received comments from DfT, Northern Rail Limited (Northern) and Passenger Focus. It responded to the latter, and Passenger Focus subsequently confirmed that it was content with the response.

66. Northern raised a number of concerns, particularly in relation to the timetabling of services and the potential impact on Northern's passengers, performance risks, likely recruitment of Northern staff by Grand Central and revenue abstraction. It did not object to the proposed extended term. Network Rail advised Northern that, in coming to the February 2009 decision, ORR had considered a range of issues, and in the view of Network Rail and Grand Central, those issues included the ones now being raised by Northern. Network Rail added that the agreement sought to provide contractual rights in line with the February 2009 decision, albeit for a longer term.

67. We have reviewed the comments made by Northern and agree with the position taken by Network Rail and Grand Central. The rights sought, except for the term, are consistent with our February 2009 decision.

68. DfT stated that the Secretary of State offered continued support for the ORR ruling made when it last heard a Grand Central request for access rights on the ECML beyond 2014 and considered there not to have been any material changes that should alter that ruling.

¹⁴ The agreement will shortly be available on page 213 of our website - <http://www.rail-reg.gov.uk/server/show/nav.213>, and the contract on page 210 of our website – <http://www.rail-reg.gov.uk/server/show/nav.210>

69. However, Grand Central had provided us, on a confidential basis, with a detailed economic justification for the term sought. We reviewed the evidence provided, and concluded that the revenue and cost reduction forecasts if the investment did not go ahead appeared reasonable, as did Grand Central's projection that the payback for the investment would occur around 2016.

70. We also concluded that the evidence provided did amount to a material change sufficient to justify us taking a different view than that we had previously taken regarding the term of Grand Central's rights.

71. Therefore, we advised Grand Central that we considered the investment justified a term of seven years rather than the ten years sought, and that we were prepared to grant rights until December 2016. We asked Grand Central if it wished to proceed on that basis, or present any further evidence to support the requested ten-year term. Grand Central advised that it wished to proceed on the basis of a seven-year term.

72. The contract includes investment provisions, under which the rights will expire in December 2014 if Grand Central does not undertake the necessary works.

Hull Trains' rights

73. The rights granted to Hull Trains are consistent with our February 2009 decision, except that the number of calls at Stevenage on Saturdays and Sundays is greater, as per the terms of the thirty-third supplemental agreement approved in December 2009.

74. The Hull Trains' contract includes investment provisions, under which the rights will expire in December 2014 if Hull Trains does not undertake the works it said it would undertake to justify the approved seven-year term. These are expressed as outputs rather than inputs, at the request of and as agreed with Hull Trains. We acknowledge that it is likely that there will be some minor variations in the work actually undertaken by Hull Trains compared with that detailed in the contract. However, we would expect Hull Trains to be able to fully justify any such variations.

75. Our decision to grant Hull Trains a term of seven years was based on a submission setting out the estimated total cost of its planned investment. In late 2013, when we are assessing whether Hull Trains has undertaken sufficient work to justify the contract remaining in place until December 2016, we would expect, as part of that assessment, to review the total sum spent by Hull Trains compared with its original estimate.

Appendix 1 to Schedule 8

76. Appendix 1 to Schedule 8 in Hull Trains' existing track access agreement is the subject of a re-opener, in the form of Relevant Schedule 8 Modifications, as Network Rail and Hull Trains have been unable as yet to agree the benchmarks going forward into CP4. We have advised them that, if they are unable to agree, they should separately submit their proposals to us, including a full justification for their position, and we will reach a determination. We expect them to submit their proposals within twenty-eight days from

today, and the benchmarks we determine will be backdated to have effect from 1 April 2009, the start of CP4.

77. The new Hull Trains contract includes the current Appendix 1 to Schedule 8, together with a re-opener, in the form of Relevant Schedule 8 Modifications, to allow Appendix 1 to be amended as necessary to take account of the impact of the standard pattern timetable. It is our intention that the Appendix 1 in the new contract will be amended as necessary in line with the changes we will be directing in respect of Appendix 1 in the current contract, so that when the new contract comes into effect in May 2011 it will include the then-existing benchmarks.

Future development of the ECML timetable

78. As mentioned earlier, we said that the rights of all three operators would be designed to ensure that they were sufficiently flexible so that they could not impede the future development of the ECML timetable. We referred in our February 2009 decision to the fact that Network Rail was funded to carry out significant enhancement work designed to improve capacity on the ECML and that further changes to the ECML timetable would be required in four to five years time. We also referred to the planned introduction of the new Super Express Trains (formerly Intercity Express Programme Trains), also then expected by 2014/2015, but now possibly in 2016.

79. Suitable provisions have been included in all four contracts/agreements, as follows: "in the event that a revised timetable is introduced on the East Coast Main Line, the Train Operator shall use best endeavours to Bid into such revised timetable."

Next steps

80. Network Rail will continue its compliance checking to identify all potential conflicts with existing access rights. It will also continue with its development of the timetable. In respect of the Weekday timetable, this will include seeking timetable solutions to the currently identified potential conflicts with existing rights, in particular the potential conflict with Grand Central's right mentioned earlier, as well as any conflicts identified during the remainder of the compliance checking.

81. Network Rail will also produce a weekend timetable, following which we will expect Network Rail to agree suitable rights with the three operators and submit agreed proposals for our approval.

82. Re-openers have been included in the track access contracts where it has not proved possible to finalise the specific terms. This applies particularly to Appendices 1 and 3 of Schedule 8, where the impact of moving to the standard pattern timetable can only be estimated at this stage.

83. East Coast still has outstanding an application made by NXEC under section 17 of the Act to extend its rights, as now amended, from their current expiry in December 2011 to December 2015. Our February 2009 decision said that we would approve such a term.

We will be working with Network Rail and East Coast so that we can issue the necessary directions.

84. We are conscious that whilst East Coast, Hull Trains and Grand Central (for its Bradford services) will have qualitative rights till the end of their track access contracts, in respect of its Sunderland services Grand Central will not enjoy the same level of rights. In our February 2009 decision we said that we would approve Firm Rights for open access services – those of Grand Central and Hull Trains – to quantum, with journey times and departure times expressed in ranges. Therefore, should Grand Central submit an application for qualitative rights for its Sunderland services beyond May 2012, subject to our usual criteria and procedures, it would be our intention to approve appropriate rights.

85. May I take this opportunity to thank everyone for their contributions to the process so far, which have allowed us to reach a position where we are finally able to issue directions in respect of three applications and approve a fourth application.

Yours sincerely

A handwritten signature in black ink, reading "Brian Kogan". The signature is written in a cursive, flowing style with a large initial 'B'.

Brian Kogan