

NOTICE OF APPEAL

FROM THE ACCESS DISPUTES PANEL

REF: ADP 20

NETWORK RAIL INFRASTRUCTURE LIMITED

v

FIRST GREATER WESTERN LIMITED

NETWORK RAIL'S NOTICE OF APPEAL

Network Rail Infrastructure Limited ("Network Rail") wishes to appeal parts of the interim Determination of the Access Disputes Panel ("the Panel") in respect of reference ADP 20. Accordingly, Network Rail refers the matter to the Office of Rail Regulation for determination.

1. **Procedural Basis of the Appeal**

- 1.1 ADP 20 was a reference to the Panel, initiated by First Greater Western Limited (“FGW”), under paragraph 8.4 of Part 3 of Schedule 4 of the relevant Track Access Contracts.
- 1.2 The joint reference prepared by FGW and by Network Rail referred to issues arising under Schedule 4 and also under Part D of the Network Code.
- 1.3 The interim Determination of the Panel dealt with matters arising under both Schedule 4 and Part D. In its interim Determination at paragraph 57.1 the Panel stated the option of the parties to challenge the Determination by means of an appeal to the Office of Rail Regulation (“the ORR”) under the provisions of Condition D.5.2.
- 1.4 Accordingly, Network Rail brings this appeal under the provisions of Condition D.5.2 for Determination by the ORR in accordance with Part M.
- 1.5 It is arguable that aspects of the interim Determination relating to the operation of Schedule 4 should be appealed to an arbitrator under the provisions of paragraph 8.4 of Schedule 4. Network Rail wishes to have all aspects of its appeal of the interim Determination dealt with by the ORR. As a precautionary measure Network Rail has issued arbitration proceedings. Those proceedings have been stayed, with the consent of FGW, pending the outcome of this appeal to the ORR.
- 1.6 Copies of the Determination, Part D and the template Track Access Agreement with Schedule 4 only, are at Appendices 1, 2 and 3 respectively of File 1 of the Appeal Documents. The Joint Referral for ADP20 is at File 2 of the Appeal Documents.

2. The Interim Determination

- 2.1 Reference ADP 20 related to the question of which Notification Factor should be used in the calculation of compensation payments for various Restrictions of Use taken in weeks 1-24 in financial year 2006/07.
- 2.2 FGW claimed that Notification Factors under Columns D or E of Annex A to Schedule 4 should have been applied. Network Rail had generally applied the Notification Factor under Column C. FGW claimed additional compensation of approximately £12.5 million.
- 2.3 As part of the joint reference FGW provided substantial detail of the numerous Restrictions of Use it wished to be considered.
- 2.4 With the consent of the Parties the Panel decided to handle the determination of the dispute in three distinct stages as set out in a letter from the Panel Chairman quoted at paragraph 13 of the Determination. The stages were as follows:-
- 2.4.1 “The Panel at its first meeting will consider all the relevant provisions of Schedule 4 of the Track Access Contract, and of Part D of the Network Code, in order to establish what they mean, what they require each party to do and what, in principle, are the potential consequences of either party failing to do it. I envisage that the outcome may well be a first determination.
- 2.4.2 The next stage will be to establish, on the facts, whether and to what extent each party did what it was supposed to have done. This is a necessary preliminary to determining which Notification Factor should apply, and will require the Parties to review the evidence that they have assembled in the light of the initial Determination... above.
- 2.4.3 The third stage will be to determine the compensation payable.”
- 2.5 The Panel proceeded to determine 13 issues, which are set out at paragraph 56 of the

Determination, relating to the respective entitlements and obligations of the Parties. In reaching its interim findings the Panel analysed relevant clauses of the Track Access Agreements and Network Code. It did not undertake a review of the detailed factual background. Subject to appeal on the interim findings the Parties were invited to apply those principles to try to agree the appropriate Notification Factor for each Restriction of Use, with the option of returning to the Panel if agreement could not be reached.

- 2.6 The Panel's Determination amounts to a substantial departure from the current practice of Network Rail and of most Train Operators in the operation of procedures under Part 4 of the Network Code. Prior to significant and substantive changes being made to those practices consequent on the Determination Network Rail considers that some of the Panel's findings should be challenged. In other cases clarification of the findings is required.

Network Rail has not set out arguments relating to the Panel's findings at paragraphs 56.1, 4, 5 and 6 of the Determination. However, in the context of any decision the ORR may make and ensuring that the whole process is workable Network Rail seeks confirmation from the ORR that it agrees with the Panel's findings relating to those paragraphs.

3. **Basis of Interpretation of Relevant Contractual Provisions**

In considering the Panel's findings and in seeking to identify the correct analysis of the contractual arrangements between the Parties Network Rail has had regard to the following matters:-

3.1 Paragraph 4.1 of the Track Access Agreement provides as follows:

"General Standard

Without prejudice to all other obligations of the parties under this contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under, this contract, act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced:

(a) network owner and operator (in the case of Network Rail); and

(b) train operator (in the case of the Train Operator)."

3.2 Paragraph 5.2 of the Track Access Agreement provides that Network Rail's permission to use the Route:-

"...is subject, in each case and in all respects, to;

(i) the Network Code

(ii) the Applicable Rules of the Route; and

(iii) the Applicable Rules of the Plan."

3.3 The principal subject matter of the reference in this case is the question of Condition D.4.8 of the Network Code. That clause sets out detailed provisions for the Supplemental Timetable Revision Process. As with a number of similar provisions of the Network Code that paragraph requires a series of sequential steps to be carried

out by Network Rail and the Train Operator within specific time periods. If one of the Parties fails to carry out its obligations properly, or on time, this is likely to have an adverse effect on the next task in the sequence and risks disruption of the entire process. A high level of co-operation and competence is required by the Parties to make the clause operate effectively. The principal purpose of the detailed procedure at Condition D.4.8 is to achieve the effective provision of alternative services in the event of a Restriction of Use. The fact that Condition D.4.8 is also part of a compensation regime is an important but secondary feature of the Condition.

3.4 In considering this Appeal a number of well established legal principles applying to the interpretation of contracts are relevant. For ease of reference these include:

3.4.1 Words used in a contract should be given their ordinary and natural meaning, unless the context otherwise requires.

3.4.2 In order for a term to be implied into a contract the following conditions must be fulfilled;

- it must be reasonable and equitable
- it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it
- it must be obvious
- it must be capable of clear expression
- it must not contradict any express term of the contract

3.4.3 Individual provisions should be considered in the context of the contract as a whole.

3.4.4 A contract will be construed as far as possible in such a manner as not to permit one party to take advantage of its own defaults.

3.4.5 Where performance of a contract cannot take place without the co-operation of both parties, it is implied that co-operation will be given.

Set out below is Network Rail's analysis of the findings of the Panel that Network Rail wishes to appeal or where clarification is sought.

4. Panel's finding at Paragraph 56.2 of the Determination

4.1 *"A Revised Bid" must specify the Bidder's requirements (if any) under Condition D.3.3. If the Bidder specifies no requirements under one or more of the paragraphs within Condition D.3.3, Network Rail is entitled to assume that it has none;"*

The background to this finding is set out at paragraphs 37-39 of the Determination.

4.2 Network Rail agrees with the first sentence of this finding. The second sentence is also agreed but Network Rail considers that the Panel should have expanded on this determination to find that in the event of a Train Operator failing to provide relevant information under categories (a) – (k) of Condition D.3.3 then Network Rail should be entitled to proceed on the basis that the Train Operator has failed to submit a Revised Bid at all.

4.3 At paragraph 39.1 of the Determination the Panel consider the effect of the wording of Condition D.3.3 that "a Bidder shall... indicate... the extent of its requirements (if any) as to..." and then a number of specified categories are set out.

4.4 Network Rail considers that the phrase "if any" refers to categories of requirements that are not relevant to the Revised Bid. So, for example, there may be no "train connections with other railway passenger services" involved with a Revised Bid. In such circumstances the Train Operator would not have any requirements under those headings.

4.5 The phrase "if any" does not however permit a Train Operator to submit a Revised Bid that makes no reference to headings (a) – (k) that are clearly relevant for timetabling purposes.

4.6 The requirements under Condition D.3.3 should be interpreted in the light of paragraph 4.1 of the Track Access Agreement, set out at paragraph 3 above. The Train Operator should perform its obligations under the contract "in a timely manner...with skill, diligence, prudence and foresight." Failure to provide details

under relevant headings of Condition D.3.3 would be inconsistent with this obligation.

- 4.7 The requirements under Condition D.3.3 should also be considered in the light of the principal objective of the arrangements at Condition D.4.8, as set out at paragraph 3.3 above. Failing to provide details under relevant headings of Condition D.3.3 would be inconsistent with this objective since it would hamper the ability of Network Rail to deal with the amended timetabling arrangements in such a way that the timetable could be operated effectively. It would not assist the principal objective if Network Rail were to proceed without full details from the Train Operator. For example, if details of “the railway vehicle to be used “and/or” any Ancillary Movements” are not provided by a Train Operator at the relevant time, this could jeopardise the deliverability of the timetabling arrangements arrived at by Network Rail.
- 4.8 The sanction suggested by the Panel for failing to provide adequate details in accordance with Condition D.3.3 is that Network Rail is entitled to assume that the Train Operator has no requirements in respect of categories of information where no details have been provided. This is an inadequate remedy and is liable to lead to substantial uncertainty and disruption to the operation of Condition D.4.8, given current Network Rail and Train Operator practices.
- 4.9 The suggested remedy gives insufficient weight to the principle function of Condition D.4.8, which is to establish alternative services. Without the necessary information Network Rail cannot establish services that would definitely be capable of being operated. The fact that it can theoretically upload to TSDB at T-12 and thereby take advantage of Column C level compensation is a secondary consideration.
- 4.10 Network Rail invite the ORR to find that a failure by the Train Operator to submit details under the categories set out at Condition D 3.3, when such information is relevant to the timetable exercise, entitles Network Rail to assume that no Revised Bid has been made at all.
- 4.11 It would still be open to the Train Operator to challenge such an assessment under the disputes procedure. However, such a finding would greatly assist in allowing the

procedure under Condition D.4.8 to proceed as intended with the objective of achieving alternative services.

5. **Panel's findings at Paragraph 56.3 of the Determination**

5.1 *“Notwithstanding the use of “shall” in Condition D.4.8.3, a Train Operator is not required to submit a Revised Bid, in the sense that if it did not do so it would be in breach of the Network Code. However, if a Train Operator fails to submit a Revised Bid, it must accept the consequences of not doing so.”*

The background to this finding is set out at paragraphs 34-36 of the Determination.

5.2 It is Network Rail's position that a Train Operator is required to submit a Revised Bid once notification has been received from Network Rail under Condition D.4.8.2 (c) (ii).

5.3 Condition D.4.8.3 uses clear and unambiguous words to require the Train Operator to submit a Revised Bid.

5.4 Unless there are equally clear and unambiguous words elsewhere in the Code contradicting those clear words, the clear and obvious meaning of Condition D.4.8.3 should be adopted.

5.5 At paragraph 34 of the Determination the Panel sets out its view that because Condition D.4.8.6 contemplates the possibility of a Revised Bid not being made, this is sufficient to overcome the clear requirement at Condition D.4.8.3. Network Rail disagrees with this view.

5.6 The principal objective of Condition D.4.8 is to allow for the running of alternative services. Condition D.4.8.3 requires the Train Operator to participate in that process.

5.7 Condition D.4.8.6 gives Network Rail the ability to make any necessary amendments to its proposals in the event that no Revised Bid is submitted and prevents a Train Operator from appealing such amended proposals. This is simply a contingency provision to allow the system to operate in the event of there being no Revised Bid. It is not a justification for a Train Operator failing to participate in the system for providing alternative services.

5.8 Network Rail would have great difficulty in formulating any worthwhile proposals for the running of alternative services without the active participation of the Train Operator. It could theoretically however upload to TSDB at T-12 with its own proposals and thereby be entitled to adopt Column C level compensation but this would be a significant change to current practices and (in the short term at least) would not necessarily result in the achievement of the most effective timetable.

6. **Panel's findings at Paragraph 56.7 of the Determination**

6.1 *"When carrying out the consultation required in Condition D.4.8.2 (b), including the setting of "agreed criteria", Network Rail is entitled to consider and stipulate what, for the purposes of Condition D.4.8.5, should be the content of a Revised Bid (properly submitted), and in deciding whether a Revised Bid has actually been "properly submitted" for the purposes of that Condition D.4.8.5, Network Rail must act reasonably and fairly. Fairness requires that it should treat all Industry Parties affected by the same ROUs, and with rights to operate over a specified route, equally."*

The background to this finding is at paragraphs 45-48 of the Determination.

6.2 Network Rail agrees with this finding but refers to its response below to the Panel's findings set out at paragraph 56.8 of the Determination. As there set out the requirement to act reasonably and fairly is in relation to Network Rail's objective assessment of the Train Operator's compliance with the terms of Condition D.4.8.3.

6.3 Further, Network Rail would not wish this finding, and more particularly the discussion leading to the finding at paragraphs 45-48 to be seen as detracting in any way from the obligation on Train Operators to comply, independently of any input from Network Rail, with the terms of Condition D.3.3, in submitting Revised Bids.

6.4 As set out at paragraph 3.2 above, a Train Operator's permission to use the Routes is subject in all respects to the Rules of the Plan. The Rules of the Plan together with Condition D.3.3 provide a full guide to the Train Operator on what information should be submitted as part of a Revised Bid.

6.5 Network Rail note that the Panel's Determination makes little reference to the effect of the Rules of the Plan, despite this being raised in the joint referral. There is no reference in the Determination to the Panel having taken these submissions into account in arriving at its findings.

7. Panel's findings at Paragraph 56.8 of the Determination

7.1 *"It would be reasonable for Network Rail to conclude that a Revised Bid had not been properly submitted if the effect of the Bidder who failed to state its requirements under one or more of the paragraphs of Condition D.3.3 imposed on Network Rail unreasonable burdens or delays in formulating an amended Timetable."*

The background to this finding is set out at paragraphs 45-47 of the Determination.

7.2 Network Rail considers that the Panel was wrong in this finding.

7.3 Under the terms of Condition D.4.8.5 Network Rail is entitled to consider whether a Revised Bid has been properly submitted in accordance with Condition D.4.8.3.

7.4 Condition D.4.8.3 sets a clear time limit for submission of a Revised Bid. By reference of the definition of "Revised Bid" Condition D.4.8.3 also requires that the contents of the Revised Bid comply with the provisions of Condition D.3.3.

7.5 There is no express provision in Condition D.4.8.5 or D.4.8.3 that the criteria for assessing a "properly submitted" Revised Bid should be by reference to whether or not it imposes "unreasonable burdens or delays (*on Network Rail*) in formulating an amended Timetable."

7.6 There is no justification under the principles set out at paragraph 3.4.2 above, or on any other basis, for implying such a term into the contract. The contract contains clear requirements for the time of submission and content of a Revised Bid. It is against these criteria that proper submission should be judged.

7.7 In Network Rail's view therefore if a Revised Bid is late or if it fails to comply with the requirements of Condition D.3.3 Network Rail is entitled to decide that it has not been "properly submitted" for the purposes of Condition D.4.8.5.

8. **Panel's findings at Paragraph 56.9 of the Determination**

8.1 *"Where Network Rail, acting reasonably, concludes that a Revised Bid has not been properly submitted", this will mean in practice that "the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D.4.8.3".*

The background to this finding is set out at paragraphs 45-47 of the Determination.

8.2 Network Rail agrees with this finding subject to clarification that the exercise in deciding whether a Revised Bid has been "properly submitted" is that described in Network Rail's appeal against the finding at paragraph 56.8 of the Determination above.

9. **Panel's findings at Paragraph 56.10 of the Determination**

- 9.1 *"The Column C Notification Factor applies only where the facts of the case fit the wording of paragraph 4.1 of Schedule 4. If they do not (for example, because the ROU was not reflected in the First working Timetable, and this was not because of a request by FGW that it should not be) Network Rail cannot claim the benefit of Column C whatever FGW's shortcomings may have been."*
- 9.2 Network Rail agrees with the Panel's finding that "the Column C Notification Factor applies only where the facts of the case fit the wording of paragraph 4.1 of Schedule 4".
- 9.3 The qualification in the second sentence of the finding of "whatever FGW's shortcomings may have been" is not understood since paragraph 4.1 (b) (iii) clearly sets out that the default of the Train Operator to give a Revised Bid in accordance with Condition D.4.8.3 entitles Network Rail to adopt Column C levels of compensation.

10. **Panel's findings at Paragraph 56.11 of the Determination**

10.1 *"The use of the word "because" in paragraph 4.1 (b) (iii) and 4.2 (b) (ii) of Schedule 4 to the Track Access Contract means that the Column C (or, as the case may be, D) NF applies only where Network Rail's failure to upload to TSDB by T-12 has been caused by FGW's failure to submit a Revised Bid by T-18 (taking account of all that is said in this Determination). A "but for" test should be applied. This test would not be satisfied if it appeared that the true cause was a complete failure of Network Rail's system. It would be unlikely to be satisfied if what FGW had prepared and intended as a Revised Bid failed to qualify as such only because it was submitted a day late."*

The background to this finding is set out at paragraphs 23-25 and 49-51 of the Determination.

10.2 Network Rail considers that the Panel has misinterpreted the effects of the word "because" in paragraphs 4.1 (b) (iii) and 4.2 (b) (ii) of Schedule 4. In Network Rail's view the true meaning of the words used is that if a Revised Bid is not given in accordance with Condition D.4.8.3 the provisions of paragraph 4.1 (b) (iii) are satisfied. There is no requirement in that clause that the failure to provide a Revised Bid in accordance with D.4.8.3 should cause a delay in entering the Working Timetable in the train services database beyond T-12. Neither is there any basis for implying such a term, under the principles set out at paragraph 3.4.2 above, or any other basis.

10.3 To have the effect as found by the Panel paragraph 4.1 (b) (iii) would need to provide express words along the lines set out below:-

"Where the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D.4.8.3 and this failure has resulted in Network Rail being unable to enter the Working Timetable into the train service database by..."

The words actually used in Clause 4.1 (b) do not come close to such a provision.

- 10.4 It is Network Rail's case that on the ordinary meaning of the words used the Panel's interpretation is wrong. However, to the extent that there is any ambiguity it is appropriate to consider the contract as a whole and in particular the principal objective of Condition D.4.8.
- 10.5 The Supplemental Timetable Revision Process set out at Condition D.4.8 was intended to be and is a detailed, comprehensive and certain set of rules for achieving alternative services.
- 10.6 The Panel's interpretation would lead to great uncertainty in almost every case as to whether paragraph 4.1 (b) (iii) applies. Such uncertainty cannot have been intended by those drafting the contract.
- 10.7 On the Panel's interpretation it would be open to Train Operators to serve Revised Bids later than required by Condition D.4.8.3 and to fail to provide detail under relevant requirements of Condition D.3.3. Despite such breaches of contract Network Rail would be required to demonstrate that these breaches also caused delay in entering the Working Timetable. Such an interpretation is likely to lead to uncertainty and argument in many cases. This is to be contrasted with a much greater certainty of there being a breach of Condition D.4.8.3 if the Revised Bid is late and/or insufficient in content, with such breaches clearly triggering the operation of paragraph 4.1 (b) (iii).
- 10.8 As to the onus of proof it would be highly unusual for a party to a contract that requires a series of sequential steps to be in breach of its obligations and the onus to be on the innocent party to demonstrate that such breach caused its inability to perform a subsequent obligation of its own. Contrary to the principle referred to at paragraph 3.4.4 above such an interpretation will permit the defaulting Train Operator to take advantage of its own defaults. A much more common and equitable position is that once a breach of contract is demonstrated the onus of proof rests with the defaulting party to demonstrate that their default did not cause the innocent party to fail to comply with its obligations.

11. **Panel findings at Paragraph 56.12 and at Paragraph 56.13 of the Determination**

11.1 56.12 - *“Given the discretions and authorities at Network Rail’s disposal in the operation of Condition D.4.8.2, instances when a failure to “upload to TSDB at T-12” is “because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D.4.8.3”, and the “but for” test is therefore satisfied, are likely to be specialised and infrequent.”*

11.2 56.13 - *“Schedule 4, and in particular paragraphs 5 and 4, are drafted on the basis that a) all ROUs require Network Rail to pay compensation to the Train Operator; b) the extent to which the compensation factor is reduced by one A Notification Factor rather than another depends largely on steps to be taken by Network Rail; accordingly c) the onus of proof is on Network Rail to demonstrate that those steps were taken to justify application of a particular Notification Factor.”*

The background to these findings is at paragraphs 26-27 and 49-53 of the Determination.

11.3 These findings are dealt with together since they both concern the issue of onus of proof. Network Rail does not accept either of the Panel's findings.

11.4 Condition D.4.8 sets out a detailed regime for both Network Rail and the Train Operator to perform obligations with a view to achieving alternative services. Without the full participation of the Train Operator the most effective alternative services will not be achieved. To the extent that there is any doubt about the operation of the express terms of Condition D.4.8 the principles set out at paragraph 3.4.5 above would apply. Those principles would imply co-operation where, as here, a contract cannot effectively be performed without such co-operation.

11.5 Paragraph 4.1 of the Track Access Agreement concerning standards imposes obligations of skill and diligence of an equal nature on both Network Rail and the Train Operator.

11.6 In Network Rail's view achieving a Supplementary Timetable revision under the provisions of Condition D.4.8 is the product of joint working between Network Rail and the Train Operator. There is no special responsibility on Network Rail that could be interpreted as putting the onus of proof to demonstrate entitlement to a particular Notification Factor being placed on Network Rail. There is no express provision in relation to such onus and there is no justification for implying such a term.

12. Appeal

For the reasons set out above Network Rail requests the ORR to make the following findings:-

12.1 Panel's Findings at Paragraph 56.2 of the Determination

In addition to the Panel's findings the ORR is invited to find that:-

failure by a Train Operator to submit details under the categories set out at Condition D.3.3, when such information is relevant to the timetabling exercise, entitles Network Rail to proceed as if no Revised Bid has been made at all.

12.2 Panel's Findings at Paragraph 56.3 of the Determination

The ORR is invited to reject the Panel's finding and instead find that:-

A Train Operator is required to submit a Revised Bid once notification has been received from Network Rail under Condition D.4.8.2 (c) (ii) so that if it did not do so it would be a breach of the Network Code.

12.3 Panel's Findings at Paragraph 56.7 of the Determination

In addition to the Panel's findings, and with reference to the Panel's discussion of the issues at paragraphs 45-48 of the Determination, the ORR is invited to find that:-

A Train Operator's obligation to comply with Condition D.4.8.3 (and as part of that compliance with Condition D.3.3) is not dependent on Network Rail defining what information is required from the Train Operator as part of the "agreed criteria" under Condition D.4.8.2 (b) or through the process in Condition D.2.2 to establish the Rules of the Plan.

12.4 Panel's Findings at Paragraph 56.8 of the Determination

The ORR is invited to reject the Panel's finding and instead find that:-

It will be reasonable for Network Rail to conclude that a Revised Bid had not

been properly submitted if:-

(i) the Revised Bid is submitted late; or

(ii) the Revised Bid does not contain details under the categories set out at Condition D.3.3 when such information is relevant to the timetabling exercise.

12.5 Panel's Findings at Paragraph 56.9 of the Determination

In addition to the Panel's finding the ORR is invited to find that:-

The exercise in deciding whether a Revised Bid has been "properly submitted" in accordance with Condition D.4.8.3 should be by reference to the tests referred to at paragraph 12.4 above.

12.6 Panel's Findings at Paragraph 56.10 of the Determination

The ORR is invited to confirm that nothing in the Panel's findings adversely affects the operation of paragraph 4.1 (b) (iii) of Schedule 4 of the Track Access Agreement.

12.7 Panel's Findings at Paragraph 56.11 of the Determination

12.7.1 The ORR is invited to reject the Panel's findings.

12.7.2 If the ORR finds as requested by Network Rail at paragraphs 12.4 and 12.5 above no further findings are required.

12.7.3 Alternatively, if the ORR does not find as requested at paragraphs 12.4 and 12.5 above the ORR is invited to find that:-

(i) if a Revised Bid is submitted late or a Revised Bid does not contain details under the categories set out at Condition D.3.3, when such information is relevant to the timetabling exercise; and

(ii) Network Rail fails to upload to TSDB by T-12;

then the onus is on the Train Operator to demonstrate that its failings have

not caused the delay in uploading.

12.8 Panel's Findings at Paragraphs 56.12 and 56.13 of the Determination

The ORR is invited to make the same findings as set out at paragraph 12.7 above.

12.9 Panel's Findings at Paragraphs 56.1, 4, 5 and 6 of the Determination

The ORR is invited to confirm its agreement with the Panel's findings under these paragraphs of the Determination.

SIGNED:

By Beachcroft LLP for and on behalf of Network Rail Infrastructure Limited

DATED: 18 April 2007

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