

**RESPONSE TO NOTICE OF APPEAL
TO THE OFFICE OF RAIL REGULATION
FROM THE ACCESS DISPUTES PANEL
REF:ADP20**

Network Rail Infrastructure Limited

v

First Greater Western Limited

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FGW'S RESPONSE TO NETWORK RAIL'S NOTICE OF APPEAL TO THE OFFICE OF RAIL REGULATION FROM THE ACCESS DISPUTES PANEL, REF ADP20

1 Network Rail Infrastructure Limited ("Network Rail") issued a Notice of Appeal in relation to parts of the interim determination of the Access Disputes Panel ("ADP") on 18th April 2007.

2 The Office of Rail Regulation by its letter to First Greater Western Limited ("FGW") of 1 May 2007 set Wednesday 30th May 2007 as the date for FGW's response to the Notice of Appeal and by its letter of 18th May 2007 addressed to the parties confirmed its intention to hear the appeal.

3 Accordingly this is FGW's response to the Notice of Appeal.

4 Procedural Basis of the Appeal

4.1 The appeal by Network Rail addresses elements of the interim Determination which relate separately to the application of Part D of the Network Code and to the interpretation of Schedule 4.

4.2 FGW accepts that there is merit in addressing the particular issues of Schedule 4 raised in the Notice of Appeal together with the Part D issues and is prepared to consent to this in relation to this aspect of the appeal to the interim Determination only. This consent does not affect the relevant appeal route for any appeals which may arise in relation to any other aspects or stages of the dispute or in relation to Schedule 4 more generally. This consent is also on the basis that it is without prejudice to the requirements of Schedule 4 paragraph 8 regarding the timescales within which objections to disputes are required to be raised.

5 The Nature of the Claim

5.1 The claim by FGW which is appealed by Network Rail is about the correct application of the template Schedule 4 as established by the ORR to possessions taken in Periods 1-6 2006/07.

5.2 FGW maintains that in each of Periods 1-6 2006/07 the late Notification Factor under Schedule 4 should apply, because:

(a) Network Rail failed to update the timetable by T-12, while FGW met the requirements for Revised Bidding; and

(b) if there were any discrepancies in FGW Revised Bidding, the failure to achieve upload of the revised timetables by T-12 was not because of FGW Revised Bids. (FGW does not accept that there have been discrepancies based on quality or on timing, save in a few instances regarding timing where either there have been late material changes by Network Rail or submissions by FGW were made after the T-18 deadline but generally no later than the next working day.)

5.3 The defence raised by Network Rail in the closing stages of the preparation of the dispute for referral to the Panel raised fresh issues regarding the Part D process and led to those issues being considered before the Panel. It remains very significant both in terms (i) of the interpretation and application of Part D and Schedule 4, (ii) the assessment of the factual evidence and (iii) Network Rail's claims regarding the implications for the timetabling process of the Determination, that Network Rail

generally did not object to the Revised Bids made by FGW during the bidding process or raise any failure of the Revised Bids made by FGW within the timescales required by Schedule 4 for Network Rail's response to the disputes raised by FGW. Indeed Revised Bids made by FGW in substantially the same form as those made by FGW during the period in dispute are now routinely uploaded as bid by FGW directly into the TSDB by Network Rail.

- 5.4 The process for addressing the claim established by the Panel is such that a stage has not yet been reached when the evidence as to the actual conduct of the timetabling process has been assessed. The consideration of the appeal needs therefore to consider the proper interpretation and application of Part D and Schedule 4 in the context of the range of likely evidential findings, and be sure that any findings have application in the practical context such as gives rise to the current dispute. It is also important that ORR considers the application of Part D in the context of the wider industry timetabling process.
- 5.5 While it is possible to formulate an extreme "bad case" and use that to test the Network Code provisions, the real risk is that this will also make "bad law". Network Rail in its Notice of Appeal seeks in effect to postulate potential "bad cases" in terms of TOC behaviour which it claims the Determination would leave it unable to manage. FGW maintains that this approach has no foundation in the case in dispute, first because the claim in question is founded on a series of fully-timed Revised Bids made in the industry standard format and accepted by Network Rail in the timetabling process and second because Network Rail takes no account of the background of its own resource problems during the period and the occasions where it late notified material changes to its requirements for Revised Bids. Furthermore, the interpretations for which Network Rail argues are not sustainable under the rules for interpretation and implication of terms and the consequences of its proposals would in FGW's view significantly harm the current operation of the timetabling process.
- 5.6 FGW further maintains that the Determination offers an accurate interpretation of Part D, with clear pointers to a number of practical ways in which Network Rail can in fact effectively manage and discharge its responsibilities for the production of timetables on a basis consistent with this interpretation, using the Network Code as interpreted by the Committee. These measures include a practical test for significant failures of Revised Bids, which in line with Network Rail's own guidance in the Rules of the Plan lack sufficient content to enable a Bidder's intent to be sufficiently discerned; use of the Rules of the Plan and the Condition D4.8.2 process to communicate requirements for particular information; a proper approach to the duties of consultation with Bidders under Condition D4.8.4; and a robust approach to the use of its powers under Condition D4.8.6 where there is a failure of a Revised Bid.

6 Network Rail's reasons for the claim

- 6.1 Network Rail maintains at paragraph 2.6 of its Notice of Appeal that the Panel's Determination amounts to a substantial departure from the current practice of Network Rail and most Train Operators.
- 6.2 FGW fundamentally disagrees with this statement and in doing so draws on its wider group experience as operators of First Capital Connect, First ScotRail, Hull Trains, Transpennine Express and GB Railfreight as well as prior experience with Great Western Trains Company Limited, First Thames Trains, First North Western and First Great Eastern.
- 6.3 The alleged fundamental departures have not been particularised by Network Rail.

- 6.4 The provisions of Condition D3.3 of the Network Code regarding the contents of bids are long-standing. FGW has been preparing and submitting bids and Revised Bids on a consistent basis since at least 1 April 2004, throughout the period covered by the dispute and subsequently, with no indication that these standard practices are not in accordance with the requirements of the Network Code. The only exception was during a short period prior to the period in dispute, when FGW adopted a specification bidding process, under which reduced information was bid and accepted by NR. The format and content of the Revised Bids made by FGW during the period in dispute was in accordance with the established Voyager Plan industry format for fully timed bids. An example of a typical bid made by FGW during this period is at Appendix 4.13(c) of the Bundle in File 2 of the Appeal Documents. Revised Bids in this format and with this degree of content since the period in dispute have been routinely bid by FGW and uploaded by Network Rail directly into the TSDB. It is a very serious matter that bids presented in accordance with the standard format and long established practices may be called into doubt and for it to be suggested that a standard accepted for uploading data direct into TSDB might not be adequate for a bid.
- 6.5 FGW regards the Determination as highly consistent both with a proper interpretation of the Network Code and with current timetabling practice, reflecting the manner in which the processes interlink, but require to be operated with communication and inter-change between the parties. The Determination recognises that there may however be a challenge to the processes when a party is in difficulty over compliance with its obligations and consequently fails to meet timescales established in the Part D process.
- 6.6 In the period leading up to this dispute, ORR investigated Network Rail's compliance with its Informed Traveller licence obligations. Neither ORR nor Network Rail identified FGW's Revised Bidding practices as the cause of Network Rail's non-compliance with its licence obligations. Appendix 4.13(f) of the Bundle in File 2 of the Appeal Documents includes a copy of the ORR's press notice of 2nd September 2004 included findings that Network Rail was failing to meet its licence requirements and securing a recovery plan from Network Rail covering its operational and long term planning and greater control over late changes. The background to the dispute is therefore one of Network Rail's failure to meet licence requirements, rather than of inadequate Revised Bids causing Network Rail to miss T-12 deadlines.
- 6.7 The correspondence included at Appendix 4.13(j) of the Bundle in File 2 of the Appeal Documents (for example David Beadle's e-mail in Neil Sutton's email of 24th February 2006 and Simon Whitehorn's e-mail of 4th April 2006) demonstrates that during the period of dispute Network Rail was wrestling with major issues concerning internal train-planning resourcing levels and the knowledge and expertise of its staff. These challenges had a critical part to play in Network Rail's ability to process Revised Bids and achieve T-12 uploads during the period of dispute. Network Rail train-planning backlogs were seriously delaying Network Rail's ability sometimes even to start consideration of bids to the timescales required to achieve T-14 offer and T-12 upload: FGW suspects that Revised Bids it made were often not being reviewed until significantly after the T-18 deadline, resulting in the Network Rail offers being well after T-14. The Revised Bid quality (and even timing) becomes irrelevant as a cause of T-12 non-compliance where Network Rail's review and validation processes, which should happen between T-18 and T-14, are significantly delayed beyond those dates for Network Rail backlog or resourcing reasons.
- 6.8 FGW contends that the circumstances of Network Rail's arrangements for compliance with its T-12 obligations created the substantial departure from what should have been the proper operation of Part D to ensure uploading of timetables to T-12, rather than the

interpretation of Part D by the Panel and that the Panel's interim Determination is consistent with the proper functioning of Part D going forwards.

- 6.9 This background to the claim is further relevant to the matters raised by Network Rail in its appeal as it:
- (a) illustrates the context within which Part D terms have to be interpreted;
 - (b) informs considerations of business efficacy and intent; and
 - (c) demonstrates the need to place individual steps in the timetable process in a larger context.

7 Basis of Interpretation of Contractual Findings

7.1 At section 3 of its Notice of Appeal Network Rail makes a range of comments on the basis of interpretation of contractual provisions.

7.2 In section 3.1 of its Notice of Appeal Network Rail refers to clause 4.1 of the track access contract between the parties which follows the ORR model clauses and sets out general standards to be applied by both parties. Network Rail infers in its Notice of Appeal that these standards should be applied to make more extensive the requirements on Bidders under the Network Code, for example in relation to the requirements for the contents of Revised Bids. However clause 4.1 relates to standards of dealings in the course of performance of obligations under the relevant contract, rather than amending what are the obligations under the contract. Furthermore, FGW has identified in its claim a range of aspects in which Network Rail had failed in its obligations under the Part D process, for example in relation to changes to its engineering requirements after the CPPP stage, resulting in late notification of its requirements for possessions, and the absence of any communication regarding any inadequacy in Revised Bids. These failures are not referred to in the Notice of Appeal, but a proper consideration of the matters appealed requires the implications of such failures to be taken into account.

7.3 In section 3.3 of its Notice of Appeal, Network Rail refers to the need for the sequential steps specified in Part D to be taken into account, as well as the requirement for a high level of cooperation and competence. FGW supports these general remarks, regards them as supporting its approach towards construction of Part D, and notes in particular (i) the comments in Simon Whitehorn's e-mail of 4th April 2006 included at Appendix 4.13(j) of the Bundle in File 2 of the Appeal Documents demonstrating that during the period of dispute Network Rail was wrestling with major issues concerning internal train-planning resourcing levels and the knowledge and expertise of its staff and (ii) the failure of Network Rail to communicate to FGW its concerns regarding FGW's Revised Bids, at a time when Network Rail was reporting compliance in bidding by FGW in its national reports and accepting the Revised Bids without adverse comment.

7.4 In section 3.4 of its Notice of Appeal Network Rail refers to well established rules of interpretation. These are generally accepted by FGW, but subject to the following comments:

- (a) FGW will argue that the ordinary and natural meaning of the terms strongly supports the Panel's Determination;
- (b) The tests set out for the implication of terms proposed by Network Rail are not in fact met;

- (c) The principle of not permitting a party to take advantage of its own faults must be considered in the wider context of the larger process, so that it is in fact relevant for example if a Revised Bid is delayed that the request for that Revised Bid had been materially amended by Network Rail out of time;
- (d) In judging any requirement for cooperation required for the performance of a contract it must be borne in mind that the Network Code is itself setting out very detailed rules for such cooperation, so the express and detailed rules should not lightly be construed in a manner contrary to their ordinary and natural meaning. This is particularly so in the case where the timetabling function is a responsibility of Network Rail which it is funded to perform and, while acknowledging the responsibilities of Bidders, and for which there are legitimate expectations regarding the funding and resourcing it will apply to fulfil its Network Code responsibilities to develop and produce timetables.

8 Panel's finding at paragraph 56.2 of the Determination

- 8.1 FGW supports the finding of the Panel that a Revised Bid must specify the Bidder's requirements (if any), failing which Network Rail is entitled to assume that it has none.
- 8.2 It is essential for Network Rail's larger argument to proceed that this finding be overturned, such that failure to provide any element of information in a Revised Bid will entitle Network Rail to proceed as if the Train Operator has failed to submit a Revised Bid at all. Network Rail's argument needs to succeed on both these two main grounds, first that the Condition D3.3 prescribes that bids contain all relevant timetabling information and second that Condition D4.8.6 means that any bid not including all relevant timetabling information should be treated as a "no bid".
- 8.3 FGW rejects Network Rail's approach firstly because it is contrary to the ordinary and natural meanings of Conditions D3.3 and D4.8.6. Condition D3.3 cannot be interpreted so as to alter "A Bidder shall, in making a Bid, indicate.....the extent of its requirements (if any)" into a commitment to a requirement for "a Bidder to provide all relevant timetabling information". Given the ordinary and natural meaning of Condition D3.3, Condition D4.8.6 cannot be interpreted so as to alter its reference to the situation "where no Revised Bid has been submitted" to include situations where Revised Bids are submitted which are sufficient to convey a Bidder's intentions but may omit some details or contain some errors.
- 8.4 In addition FGW rejects Network Rail's view as:
 - (a) it is contrary to the proper interpretation of Condition D3.3;
 - (b) it is contrary to the context of bidding, and the exercise by Network Rail of its obligations under Part D to construct timetables, resolving and flexing Bids in accordance with Bidders' rights and the Decision Criteria;
 - (c) it is contrary to the widespread practice in bidding and the general principles of a joint and collaborative planning process;
 - (d) such a finding would introduce considerable uncertainty into the timetabling process and risk discriminatory treatment between bidders;
 - (e) no change in practice is in fact required to support the operation of Condition D4.8;

- (f) there are adequate measures and sanctions to address shortfalls where they do arise, including the commercial risks run by train operators that they will not have requirements met which they do not bid;
- (g) given the proper interpretation of Condition D3.3, the invitation to find in effect that any omission of Train Slot details from a Revised Bid entitles Network Rail to find there is no Revised Bid is not in accordance with the express terms of Condition D4.8.6, does not meet any of the requirements for implication of such a term and would be inconsistent with the balance of Part D and wholly disproportionate. Given the very severe consequences of Network Rail's interpretation (ie any omission from a Revised Bid means that the Revised Bid is treated as entirely failing), it might be expected that the Network Code would have adopted very express wording on this point, clearly identifying in Condition D4.8.6 that "no Revised Bid" includes bids rendered "no bids" due to any omissions and providing expressly for some warning of the failure to be provided: this is not done and this points to Network Rail's interpretation being wrong;
- (h) while Network Rail refers to the potential for Train Operators to appeal its rejection of a Revised Bid, it is material here that Network Rail accepted the Revised Bids and did not notify any objection or reasons for objection to FGW, even when the dispute under Schedule 4 was notified, following operation of the Train Slots. It cannot be open to Network Rail to accept and/or fail to object to a Revised Bid, and then subsequently at a later stage in the process (for example after it has been accepted into the timetable or after the Train Slot has been operated) to claim that it was not a Revised Bid, after the opportunity for the Train Operator to object or react to that claim has been lost.

Network Rail's invitation to the ORR to revise the construction of Part D go significantly beyond what could ever be achieved by contractual interpretation or the implication of terms. If Network Rail believes that Part D should operate as it argues, then it should propose amendments to revise Part D for consideration through the process for change to the Network Code and application only to future timetable processes.

8.5 Condition D3.3 states:

"A Bidder shall....indicate.....the extent of its requirements (if any) as to...." and then a number of categories of information are set out.

Network Rail maintains that the reference to "if any" relates to the listed categories of information. By relating "if any" to the list of items rather than the Bidder's requirements, Network Rail wish to construe Condition D3.3 as imposing a positive obligation to detail what it terms as all relevant timetabling information, in effect obliging Bidders to fully detail all aspects of a Train Slot as referred to in the list of items in Condition D3.3 in its bid.

This construction is rejected by FGW as contrary to the ordinary and natural meaning of the sentence and not capable of being implied into the Network Code:

- (a) "(if any)" is placed immediately after "its requirements" and is separated from the list of categories by the further words "as to": this shows that it relates to "its requirements" rather than the list of categories of information;

- (b) "(if any)" compliments the phrase "the extent of its requirements": it emphasises the invitation to set out the extent of requirements, by making clear that there may in fact be no requirements;
- (c) the phrase "the extent of its requirements (if any)" is a not uncommon phrase, indicating both that there may be differing extent of requirements and that it is acceptable that there may be none at all;
- (d) this approach is supported by the use of the phrase "its requirements", which carries with it the sense (i) through the use of "its", indicating what is the Bidder's (rather than what might be the eventual objective total description of the Train Slot) and (ii) "requirements", carrying the sense of what may be desired or important to the Bidder.
- (e) the phrase relating to the Bidder's requirements appears in a sentence where the relevant verb is "shall...indicate": "indicate" carries with it the sense of "pointing out". This is consistent for example with Network Rail's description of the requirement in the Rules of the Plan, as being such as to make the Bidder's intentions clear. It may be contrasted with alternative verbs, such as "shall detail" or "shall set out in full" which may have been chosen (but were not), if the intent had been to oblige Bidders to set out full details of bids.
- (f) the wording would require considerable amendment to make "(if any)" apply to the subsequent list.
- (g) even then the construction would not fit with the subsequent list of items to meet Network Rail's argued position that Bidders are obliged to specify all relevant listed features in their bids. For example sub-paragraph (g) of Condition G3.3 relates to "the route to be followed". Where more than one route is equally possible (for example for an intermediate section of a freight flow or where there is no calling point over the relevant section), there must always necessarily be one route finally selected in the timetabled Train Slot. Network Rail's argued interpretation would require a Bidder necessarily to specify which route is followed in its bid or accept that its bid must be rejected, but this does not fit with the fact that the "extent of its requirement" may in fact be to have no requirement regarding the equivalent alternatives, while still requiring the end to end points of the Train Slot.
- (h) Network Rail's argued outcome would require an amendment to Condition D3.3 to mandate that all the details of a Train Slot are provided, rather than just the extent of the Bidder's requirements (if any) in respect of the Train Slot. This fails the requirements for the implication of such a term, in particular as there is no business efficacy requirement for such a provision given the balance of the process provided for in Part D and because Train Operators are not in a position necessarily to meet that requirement. If the amendment were modified as alternatively expressed by Network Rail to cover what information is relevant to the timetabling process, then it fails in particular the requirements of being reasonable and equitable, capable of clear expression and being necessary for business efficacy: train operators are not in a position to judge at the point of bidding what will prove relevant for the eventual timetabling process or necessarily to know what the details of the relevant information will be. The Network Code provides the process for Network Rail to develop the consequent timetable in collaboration with Bidders (see Condition D4.8.4) and through this stage in the process to resolve omissions or inadequacies in bids and so develop the timetable.

- (i) Network Rail further indicates in its Notice of Appeal that the Rules of the Plan provide a full guide on what should be submitted as part of the Revised Bid. The guidance in fact provided in the Rules of the Plan relevant to FGW at the relevant time is referenced in more detail at paragraph 10.4 of this response and includes the advice that:

"3.3 Bids must include sufficient detail to make the Train Operator's intentions clear to Network Rail."

This is both consistent with FGW's and the Panel's interpretation of Condition D3.3 (the reference to Train Operator's intentions is consistent with FGW's interpretation of Train Operator's requirements, rather than Network Rail's argument for full details of the Train Slot) and serves to demonstrate that Network Rail did not in fact place on or indicate to Train Operators any more extensive requirement for bid content to go beyond clearly indicating intentions of service requirements to providing more fully worked-up Train Slots.

- (j) Network Rail's argument for all relevant timetabling information to be included in a bid suggests either that (i) all details of a Train Slot should be provided with the bid, as all this information is relevant and the Train Slot will not be complete without it; or (ii) some lesser (but nevertheless implicitly quite full) standard of what is relevant applies, which is not determined by the Bidder's view but has somehow to be determined in a way which offers certainty to the process. The first alternative would require all bids to be fully timed and more. As the argument is developed in its claim before the Panel, Network Rail would wish to consider any subsequent variation or development of the Train Operator's requirements during the remainder of the timetabling process as evidence that the Revised Bid was not fully complete and so not to the required standard when bid. This is inconsistent with actual process, sensible efficiency and a process which envisages a stage of development and consultation post Revised Bid. The second alternative raises a very uncertain middle ground, raising real questions as to just what should be judged relevant: what may be relevant may be judged very differently from the perspective of either the Bidder or Network Rail or between the time of the bid and when all the bids received are taken into account. The third alternative which fits the natural meaning of the phraseology and the timetabling process of subsequent consultation and development is that which is in accordance with the Determination.

The natural construction of Condition D3.3 therefore places the emphasis on the Bidder indicating its view of the extent of its requirements, if any, in respect of the items listed in Condition D3.3. It does not establish an obligation on the Bidder to describe, in terms of the items listed in Condition D3.3, all the details of the Train Slots for which it is bidding or to supply all information relevant to the timetabling. There is no basis to support such a revised construction or the implication of such an additional term.

- 8.6 This natural construction is consistent with the larger structure of Part D. In constructing timetables, Network Rail will often be required to resolve conflicting bids and exercise flexing rights, applying the Decision Criteria. An indication of requirements which distinguishes between or omits details which are not part of the Bidder's requirement may be helpful by giving Network Rail room to exercise flexing rights and the Decision Criteria to construct the timetable. It would also be contrary to efficiency to require Bidders to Bid Train Slots which were fully developed in the knowledge that this exercise would necessarily be imperfect because the Bidder does not have visibility of other bidders' requirements and the detail would need to be re-

worked once Network Rail came to perform its obligations of reconciling the Bids into a timetable. This is frequently the case for example in relation to the final fine tuning of Train Operator responses to emerging offers from Network Rail in reply to Revised Bids, for example to optimise train crew and rolling stock diagrams in the light of the details of the emerging offers.

- 8.7 This natural construction is also consistent with the practice adopted by many Bidders which (unlike FGW) do not submit fully-timed bids but "specification bids" which omit many details listed in Condition D3.3 which are not essential to the basic output requirements, indicating just the higher level intent of the Bidders concerned. It would be very serious for the timetabling process for the legitimacy of specification bids to be called into doubt by the adoption of Network Rail's proposed interpretation.
- 8.8 The construction for which Network Rail argues would introduce considerable uncertainty into the timetabling process. If the reference in Condition D3.3 to "its requirements (if any)" were to be interpreted as requiring Bidders to set out all the features of a Train Slot or all relevant timetabling information (neither of which is accepted by FGW as a possible construction), then specification bids must necessarily all be rejected. Fully timed bids would also be subject to individual scrutiny for any omission (or possibly any error), for example of a platform number, intermediate timing or possible connection, with the consequence (as Network Rail argue) that no bid would be treated as made if there was any omission (or possibly any error). Network Rail would have to apply the same standards to all Bidders, it may be argued with no leeway in such a multi-operator process to make exceptions without securing agreement to the variation by all concerned.
- 8.9 This approach for which Network Rail argues would also be contrary to processes established under the Network Code, for example at Condition D4.8.4, which, rather than envisaging a process of scrutiny and disqualification of bids, requires Network Rail in consultation with Bidders to compile a timetable, taking account of what can be operated and the Revised Bids which have been submitted. The Revised Bid is properly just a stage in a process of arriving at a revised timetable, and not a finished article: the Revised Bid is expected to be worked on in consultation to arrive at an eventual outcome.
- 8.10 The Panel determined that where no requirement for a feature of a Train Slot is specified in a Bid, then it may be assumed by Network Rail that the Bidder has no requirement for that feature. As explained at paragraph 8.5(g), this does not mean that where there is no requirement specified (for example as to which of a choice of routes is to be used) that no corresponding element will be in the eventual Train Slot, rather Network Rail has increased freedom in constructing the timetable as to how the requirement for the Train Slot is fulfilled. In an unlikely and extreme situation a Bid may be so lacking in any information as to the Bidder's intent that no requirement can be discerned for even the highest level specification of Train Slot (for example where a technical glitch resulted in a blank bid being submitted): where this is not resolved through consultation (for example of the type required under Condition D4.8.4) then no requirement may be assumed and where there is then an absence of any meaningful requirement for the bid at all the Bid will fail. However this would not be the case where there is sufficient information provided to identify a Bidder's specification requirements and it is submitted that the case in dispute does not involve any such "empty" Revised Bid.
- 8.11 Network Rail argues that this approach provides an inadequate sanction and at section 4.10 of its Notice of Appeal invites ORR to find that any failure to submit details under

Condition D3.3 categories entitles Network Rail to assume that no Revised Bid has been made at all. This analysis is dangerously misplaced.

- (a) First, there is no obligation which has been broken to which a sanction should apply. The correct interpretation of Condition D3.3 is in accordance with the Determination, so Revised Bids do not cease to be such because the requirements stated by the Bidder do not include all the Condition D3.3 details which may finally apply to the Train Slot.
- (b) It is contrary to the plain meaning of Condition D4.8.6 and the phrase "in relation to which no Revised Bid has been submitted" for what may clearly have been understood to purport to be a Revised Bid when it was submitted to be totally rejected because of an error or omission, facing the extreme consequences of Condition D4.8.6, rather than the collaborative process of Conditions D4.8.4 and D4.8.5.
- (c) Even if Network Rail's interpretation of Condition D3.3 were right, Condition D3.3 merely refers to a stage in a process and it does not give rise to an obligation which has been broken for which it is appropriate to apply sanctions. Condition D3.3 merely refers to a stage in a process: a Bidder "shall" submit a Bid setting out its requirements, if it wants to progress through the process. Condition D3.3 requires a statement of requirements if any, it does not require a fully detailed Train Slot.
- (d) The context is one of a process under which Bidders secure Train Slots in a timetable, in the case of franchised train operators, for which entitlement they pay very substantial fixed charges to Network Rail: the sanction of not having their requirements to run trains fulfilled as they wish is very strong indeed, often striking directly to their business cases and performance of their franchise or other contracted commitments. It is sanction enough in itself if requirements are not met by Network Rail because of failures to express requirements clearly enough. The expectation that bids submitted will be considered and developed through the collaborative processes established in Condition D4.8.4 and D4.8.5 is legitimate.
- (e) The duties on passenger train operators to cooperate with Network Rail in fulfilling its licence condition obligations regarding provision of timetable information by T-12 are incorporated in their licences and open to enforcement by the ORR.
- (f) This all applies in a context in which Network Rail is charged with establishing and managing the systems necessary to implement the procedures described in Part D (see Condition D1.1) and Network Rail has the responsibility for compiling the amended timetables for each timetable week (see Condition D4.8.4) which are required consequent on Network Rail's own proposals for revising the allocation of capacity already made to take account of Network Rail's engineering requirements (see Condition D4.8.2). Train Operator's do have reasonable requirements of Network Rail regarding the performance of its duties with regard to these processes, including the collaborative approach they can reasonably expect in developing bids into timetables.

8.12 Network Rail argues that a strong sanction of invalidating bids with any information missing is required to ensure it receives the information required to establish services under Condition D4.8. However this:

- (a) was not identified as a feature in the ORR investigation into compliance with Informed Traveller Licence Obligations;
- (b) fails to take account of the provisions of Condition D4.8.4 which require Network Rail to develop timetables in cooperation with Bidders. In the case in dispute there was generally no response by Network Rail to bids submitted which raised any issue over bid content or requirement for further information prior to the acceptance of the bid and the objections to bid content were only raised nine months after the Revised Bids were first made and six months after FGW notified the dispute under Schedule 4;
- (c) fails to take account of the licence commitments regarding timetabling on train operators, as well as the licence commitment on Network Rail to report failing operators to the ORR;
- (d) fails to take account of the process proposed by Network Rail and incorporated into Condition D4.8.6 which gives Network Rail extensive powers to deal with situations where "no Revised Bid has been submitted";
- (e) fails to take account of the dangerous business consequences of expressing the absolute standard for bid content which if not met would result in a bid being a "no bid" and the difficulty of describing any lesser standard. New concepts would need to be introduced to gradate the consequences of omissions (for example if one of two alternative routes was not specified, should the bid be rejected as relevant timetabling information was missing and how is relevance to be judged?) and the impact on specification bids determined (should these all now be disallowed as no bids, or would specification bids be regarded as meeting the test and if so what is the relative treatment of a fully timed bid?);
- (f) would surely greatly worsen the situation by increasing substantially through its changed approach to Condition D3.3 (which is rejected by FGW) the number of Bids which would be rendered void and so increase the number of services having to be dealt with via the Condition D4.8.6 default without the benefit of the process of cooperation and taking account of requirements which would otherwise apply under Condition D4.8.4. This would increase the challenge to Network Rail of ensuring realistic timetables are produced.

Network Rail's position display a policy argument which FGW regards as seriously misplaced. It does not satisfy the grounds for incorporating further terms into the Network Code or amending the Network Code by implication to provide new terms on bid content or the consequences of shortfalls in bid content.

8.13 Consequently there is no basis under the contract or on grounds of interpretation or construction or implication that ORR can accede to Network Rail's invitation at paragraph 4.10 of its Notice of Appeal.

8.14 Network Rail notes in support of its invitation that if the ORR were to accede to its invitation, then Train Operators could challenge any assessment by it to reject a bid. FGW notes that:

- (a) this would require the implication of a further term regarding notification of the rejection of bids which Network Rail determined were not properly submitted because of its requirement on completeness of details; and
- (b) in relation to the matters in dispute, Network Rail failed to notify FGW of any such rejection (and indeed went on to accept the bids in the timetabling process

and reported the bids as made on time), so denying any opportunity for FGW to challenge the decision.

If ORR were to accede to Network Rail's invitation, it must provide for Network Rail not to be able to claim a no bid status for a claimed Revised Bid where Network Rail has failed promptly to notify any defect in the claimed Revised Bid or has processed the Revised Bid as if it were a Revised Bid at a later stage in the timetable development process (including for example by amending or accepting the Revised Bid).

- 8.15 In contrast the current arrangements in Condition D4.8.5 support the construction for which FGW argues. Condition D4.8.5 deals with the treatment of Revised Bids which have been properly submitted and requires Network Rail to notify modification or rejection to Bidders, together with concise explanations. This is consistent with the consultation with Bidders required under Condition D4.8.4 and with Revised Bids being regarded as properly submitted where they are to time, without an additional test on completeness of details. Condition D4.8.6 then applies to enable Network Rail to take action where "no Revised Bid has been submitted", which means what it says, ie that no Revised Bid has been submitted rather than where a Revised Bid has been submitted but without details in excess of what is properly required by the natural construction of Condition D3.3.
- 8.16 If the ORR were minded to accept the position argued by Network Rail in relation to the content of Revised Bids, then FGW requests that it relates this position to the level of detail in fact provided by FGW in its Revised Bids as set out in the example of a typical bid made by FGW during this period set out at Appendix 4.13(c) of the Bundle in File 2 of the Appeal Documents. FGW maintains that Revised Bids to such levels of detail are at least sufficient to meet Network Rail's requirements and fulfil Bidder's obligations in the process.

9 Panel's finding at paragraph 56.3 of the Determination

- 9.1 FGW supports the finding of the Panel at paragraph 56.3 of the Determination that the use of "shall" in Condition D4.8.3 does not imply a breach of the Network Code where there is a failure to do so.
- 9.2 FGW supports the view that Condition D4.8.3 is adopting the term "shall" because this is the appropriate terminology to describe the stages in a process for which the process itself sets out consequences, in this case in Condition D4.8.6.
- 9.3 Other mechanisms apply to ensure train operators abide with the requirements of the process, including (i) the commercial incentive regarding the running of trains in accordance with their requirements and (ii) the licence commitment on Network Rail to notify failures of cooperation to the ORR and the licence commitment on train operators to cooperate with Network Rail in the timetabling process. The arrangements in Schedule 4 further align the economic incentives with the supplemental timetable revision process, so that train operators who fail to submit Revised Bids where required may only qualify for reduced rates of compensation.
- 9.4 FGW further notes that this provision must in any event be considered in context. In particular only on a few occasions in the period in dispute is it alleged that FGW missed the deadline for submission of a Revised Bid. These occasions fall into three categories:
- (a) Where the delay was due to Network Rail having made material variations to the structure for the amended train plan and capacity allocation after the T-22 deadline established under Condition D4.8.2(c). It is not correct that a delay in

a Revised Bid should be regarded as a breach of the Network Code by a Bidder where the delay has been caused by a late and material variation by Network Rail of its requirements after the time permitted in the Network Code. If Network Rail's interpretation is to be followed, then its delay should be regarded as a prior breach of the Network Code and the source of the subsequent breach, such that Network Rail should not be permitted to take advantage of the consequent delay in submission of the Revised Bid. FGW believes this point is accepted by Network Rail.

- (b) Where FGW submitted a Revised Bid after 5pm on T-18, but in any event before or during the next working day. These instances should be regarded as non-material, having regard to Network Rail's acceptance and processing of the bids as Revised Bids and it would be disproportionate to categorise them as constituting a breach. It is further submitted on the facts that these minor delays were not the cause of the eventual very much more serious delays in achieving T-12, so that for the purposes of Schedule 4 paragraph 4 the Late Notification Factor still applies.
- (c) Where FGW submitted a Revised Bid on time, but later in the timetabling process there was a further FGW Spot Bid amending or adding to some of the requirements included in the Revised Bid. FGW submits that this does not alter the original character, timing or compliance of the Revised Bid, although the implications of the later Spot Bid will need to be judged in the context of the stage in the timetabling process in which it is made. (The Spot Bid may not be subject to compensation under Schedule 4 and the Spot Bid if accepted will modify the eventual working timetable.)

10 Panel's findings at Paragraph 56.7 of the Determination

10.1 The Panel at paragraph 56.7 found:

- (a) in the consultation process leading up to the requirement for a Revised Bid Network Rail could establish what should be the content of a Revised Bid; and
- (b) Network Rail should act reasonably and fairly in deciding whether a Revised Bid is properly submitted for the purposes of Condition D4.8.5.

10.2 FGW notes that the context in which this was considered by the Panel was answering Network Rail's concern that information it required to construct a timetable might not be provided, particularly if Condition D3.3 on the content of bids is not construed to require all the details of the train slots to be submitted. The Panel's Determination identified the consultation under Condition D4.8.2 as a mechanism by which Network Rail can specify particular details which it requires to be included. So, for example, if Network Rail wanted Bidders to include in their Revised Bids a detailed platforming exercise for major stations rather than to carry out this timetabling exercise itself or once there was greater certainty over the details of the train slots which would need to be accommodated, it could use this mechanism together with the Rules of the Plan to communicate the requirement. This demonstrates the efficacy of the current process and helps establish that there is no need to depart from the interpretation of Condition D3.3 on bid content as determined by the Panel.

10.3 FGW considers that Network Rail did not in fact specify any such requirements in the course of the Condition D4.8.2 consultation processes relevant to the periods in dispute.

10.4 Network Rail further indicates in its Notice of Appeal that the Rules of the Plan provide a full guide on what should be submitted as part of the Revised Bid. The guidance

provided in the Rules of the Plan relevant to FGW at the relevant time includes various statements including (emphasis in bold is added):

*"3.1 Where Network Rail has identified a need for Revised Bids in accordance with para 2.6 above, and where a Train Operator wishes to specify any new or altered service requirements during the Timetable Week, **detailed Bids will be prepared by each Train Operator (or agreed agent) to specify the Operator's service requirements.** Except by prior arrangement with Network Rail, e.g. where major engineering works are planned, a positive Bid should be made for all services to run on Bank Holidays, including where appropriate confirmation in the Bid Commentary that the normal SX, SO or Sun service should apply, either in its entirety or with specified alterations.*

3.2 Bids should be compliant with Rules of the Route/Plan (including any agreed amendments) and the relevant Track Access Agreement. Compliance with Rules of the Plan implies that there are no conflicts between individual paths bid by a single Train Operator ('internally conflict free'). So far as reasonably practicable, Bids should also avoid conflicting with other Train Operators' Permanent Timetable paths not notified by Network Rail as requiring amendment unless the other Train Operator(s) submit a compatible short term Bid. Network Rail recognises that this requirement could be difficult to observe completely in some circumstances and where such conflicts are identified by Network Rail, they will be resolved by discussion with the Train Operators concerned.

3.3 Bids must include sufficient detail to make the Train Operator's intentions clear to Network Rail. Unless otherwise specified in Rules of the Plan, short term Bids should contain the same level of detail as Bids for paths in the permanent timetable. If a Train Operator requires additional section running time information to enable a compliant Bid to be prepared, that information should be requested from Network Rail using the Timing Links Request Form shown in Appendix F to Section 1 of the National Rules of the Plan."

This is both consistent with FGW's and the Panel's interpretation of Condition D3.3 (the reference to service requirements and to the Train Operator's intentions is consistent with FGW's interpretation of Train Operator's requirements, rather than Network Rail's argument for full details of the Train Slot) and serves to demonstrate that Network Rail did not in fact place additional requirements on FGW regarding bid content.

11 Panel's finding at paragraph 56.8 of the Determination

11.1 The Panel determined that Network Rail could conclude that a Revised Bid was not properly submitted if a Bidder which failed to state its requirements under one or more of the paragraphs of Condition D3.3 imposed unreasonable burdens or delays on Network Rail in formulating the timetable.

11.2 FGW agrees in substance with the Panel's Determination. It considers that the Panel is attempting to formulate a test for the point at which a shortfall in the requirements communicated in a purported bid are so substantial, or that the bid is so lacking in content, that it should be treated as not properly a bid. So a blank sheet of paper or a statement of requirements so incomplete that no meaningful Bidder intention could reasonably be ascertained would not be sufficient to constitute a bid. This is consistent with the interpretation of Condition D3.3 under the Determination and as supported by FGW. The background to the Panel's finding makes clear, and FGW supports the finding, that this is not a requirement for all the Condition D3.3 list of items to be addressed and that it is open to Network Rail to use the Network Code processes to communicate any particular requirements for information which it has.

- 11.3 FGW further agrees with paragraph 47 of the Determination, subject to paragraph 11.4, that compliance with the time limits specified in Condition D4.8 are also a valid criteria for the proper submission of a Revised Bid.
- 11.4 Where Network Rail has failed to comply with its obligation under Condition D4.8.2 to notify all its requirement for a Revised Bid by T-22 and so notifies material amendments after T-22, then its delay must mean that it must allow a reasonable corresponding extension of time for the submission of the Revised Bid in response before the Revised Bid can be regarded as not properly given, either because this is in accordance with the construction of "properly given" or because Network Rail should not be allowed to benefit from the consequences of its failure to comply with Condition D4.8.2.
- 11.5 FGW repeats its claim that where Network Rail (i) does not in fact promptly notify a Bidder submitting what it claims to be a Revised Bid that it is not properly submitted and/or (ii) does in fact process that bid as a Revised Bid, then it is not open to Network Rail subsequently to claim that it was not properly submitted.

12 Panel's findings at Paragraph 56.9 of the Determination

- 12.1 FGW generally agrees with the Panel's finding at paragraph 59 that a Revised Bid which has not been properly submitted will in practice mean that the Train Operator has failed to submit a Revised Bid in accordance with Condition D4.8.3.
- 12.2 However in accordance with FGW's response at paragraph 11 this is on the basis of tests of such a substantial shortfall in content that what was submitted failed to meet the requirements for a bid established by the natural construction of Condition D3.3 or, subject to the situation described in paragraph 11.4, failure to submit the Revised Bid to the required timescales.

13 Panel's findings at Paragraph 56.10 of the Determination

- 13.1 FGW supports the finding of the Panel at paragraph 56.10, restating the requirements for the facts of the case to fit the requirements of paragraph 4.1 of Schedule 4 if the Column C Notification Factor is to apply.
- 13.2 FGW believes that Network Rail is misreading the second sentence of the Panel's finding: if FGW failed to submit a Revised Bid and this was the cause of the timetable upload not being met, then this situation is addressed by the wording of paragraph 4.1 of Schedule 4 and the Column C Notification Factor will not apply.
- 13.3 FGW strongly objects to Network Rail's statement at paragraph 9.3 of its Notice of Appeal that "paragraph 4.1(b)(iii) clearly sets out that the default of the Train Operator to give a Revised Bid in accordance with Condition D4.8.3 entitles Network Rail to adopt Column C levels of compensation". This mis-describes paragraph 4.1(b)(iii), which in fact provides (*italics added*):

"(iii) where paragraph 4.1(b)(ii) does not apply [*ie where the T-12 upload is missed*] because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3....."

Paragraph 4.1(b)(ii) does not say that where a Revised Bid is not given then automatically Column C levels of compensation apply. It clearly states that the Column C rate applies where the T-12 upload is missed "because" of the failure to give a Revised Bid, requiring there to be a causal link, indicated by use of the word "because", between the failure of the Revised Bid and the delayed upload.

14 Panel's Findings at Paragraph 56.11 of the Determination

- 14.1 FGW strongly supports the findings of the Panel at Paragraph 56.11 of the Determination that the use of the word "because" in paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Schedule 4 imply the requirement for a causal link between the failure of a Revised Bid and the failure to achieve T-12 upload.
- 14.2 FGW supports this interpretation because the plain and natural meaning of the word "because" is to establish a causal link.
- 14.3 Network Rail's suggestions in paragraph 10.3 of the Notice of Appeal for the drafting required to establish a causal link are entirely fanciful, in contrast to the plain clarity of the actual drafting of these provisions and the natural meaning of "because". If it had been intended (which it was not) to apply the Column C level of compensation wherever there was a failure of a Revised Bid all that would have been required was the substitution of "because" with "if": this was not done, nor was it the intention of the draughtsman of this provision.
- 14.4 This approach was discussed at the time of drafting of the Schedule 4 provisions between representatives of Network Rail and ATOC. The provisions regarding failure of Revised Bids were included at the request of Network Rail in the light of experience at that time with one train operator which Network Rail considered had disrupted the timetable process by a total failure to submit Revised Bids and it was accepted in the industry discussions that a train operator in such a situation should not then be entitled to benefit from the higher compensation rates. However it was also discussed that a failure of a Revised Bid should not result in the loss of the higher compensation rates when Network Rail would have failed in any event to achieve T-12. This resulted in the drafting using the term "because", to establish the requirement for the causal link.
- 14.5 The construction of these provisions as requiring a causal link is consistent with the policy expressed by ORR as the reason for the structure of this part of Schedule 4, namely the application of a strong incentive to achieve upload by T-12. This objective would not be achieved where there was some failure of a Revised Bid but the real reason for the delayed upload lay elsewhere.
- 14.6 The circumstances of the case in dispute demonstrate the legitimacy of this approach. For example where Network Rail's train planning resource was not in a position even to consider Revised Bids until after T-12 because of shortages of resources or where requirements for Revised Bids were materially amended by Network Rail after the deadline for their notification under Condition D4.8.2, then minor delays in submitting Revised Bids which could not be said to have affected the timescales for upload should not result in Network Rail avoiding the higher compensation rates. To do so would seriously weaken the incentives designed to be applied by Schedule 4 and encourage a nit-picking approach by Network Rail designed to avoid responsibility for delayed uploads based on alleged technical details, notwithstanding that Network Rail failure has been the underlying cause of T-12 being missed.
- 14.7 Network Rail claim in paragraph 10.2 of the Notice of Appeal that the lack of a similar structure in Part D is relevant to the construction of Schedule 4. This is not the case: there is much in Schedule 4 which is not mirrored in Part D, which is because Schedule 4 is constructed to deal with issues of compensation, while Part D is concerned with the timetabling process.
- 14.8 Network Rail claims at paragraph 10.6 that the Panel's preferred construction will lead to uncertainty. First there is no ambiguity possible in the construction which makes this consideration relevant. Secondly the facts claimed in this case demonstrate a series of

what FGW maintains are clear failures where Network Rail circumstances are evidently resulting in significantly delayed uploads; it is consistent with the policy on incentives underpinning Schedule 4 to permit these circumstances to be considered; and Network Rail's suggestion is fraught with uncertainties as it raises the prospect of technical challenges and attempts to bar Revised Bids after the event to avoid increases in compensation costs for delays in achieving T-12 which would have occurred in any event.

- 14.9 While the Panel's interpretation does mean that higher levels of compensation might still be achieved despite a failure in a Revised Bid (for example a deadline missed by a day), this would only be the case where the failure did not cause the delay in upload. It would be a high risk strategy for train operators without good reason to delay Revised Bids and expect still to achieve both their requirements and higher compensation. FGW further notes that it would be open to Network Rail to manage the risks it perceives in the Panel's interpretation by communicating with Bidders where it has any concern that issues with Revised Bids may be impacting on the achievement of T-12 uploads, for example in a manner consistent with Condition D4.8.4. FGW notes that Network Rail did not generally raise any issue over the timing or quality of its Revised Bids until significantly after the bids had been accepted and the dispute had been in progress for around six months.
- 14.10 FGW rejects Network Rail's claim in paragraph 10.7 of the Notice of Appeal that delays or failures of Revised Bids should be categorised as breaches of contract and as a result only the column C level of compensation applied. First it is not in accordance with the proper construction of Part D that delays or omissions should be categorised as a breach. Second, there is no ambiguity in paragraph 4 of Schedule 4, which expressly provides that the column C level of compensation only applies where delay in T-12 is because of the failure of a Revised Bid: that is, Schedule 4 expressly contemplates the requirement for causation through the use of the term "because" even where there is a circumstance (a failure of a Revised Bid) which on Network Rail's argument is a breach. The clear terms of paragraph 4 should therefore be applied notwithstanding any categorisation of the failure as a breach: there must both be a failure of the Revised Bid and that failure must be the cause of the delayed upload if the Late Notification Factor is to be disappplied.
- 14.11 Network Rail's arguments concerning the onus of proof in paragraph 10.8 are misplaced. Network Rail is responsible for preparing the Day 42 statement under Schedule 4 which sets out its calculation of the compensation payable under Schedule 4. As the party responsible for carrying out this calculation, it carries the initial burden of proof for the calculation which it makes. This is entirely appropriate, or the Day 42 statement process would be thrown into disarray. It is reflected in the terms of Schedule 4, for example in paragraph 3.1 requiring Network Rail to calculate compensation and in paragraph 6 requiring it to accurately record the information required to make the calculations, including the determinations of the Notification Factors. It is also consistent with the obligations in Network Rail under Condition D1.1 to establish and manage the systems necessary to implement the procedures described in Part D.

15 Panel Findings at Paragraph 56.12 and at Paragraph 56.13 of the Determination

- 15.1 FGW strongly supports the findings of the Panel under paragraph 56.12 that circumstances of failure to upload at T-12 because of a Train Operator's failure are likely to be specialised and infrequent and under paragraph 56.13 that Network Rail has the onus of proof to demonstrate the steps justifying any particular Notification Factor.

- 15.2 Regarding the Determination at paragraph 56.12, FGW notes that Condition D4.8 caters expressly for both situations, where a Revised Bid is given and when it is not given. Network Rail is custodian of the timetabling process and has wider obligations under its Network Licence for timetabling and the achievement of T-12. Under Condition D1.1 Network Rail is obliged to establish and manage the systems necessary to implement the procedures described in Part D. This creates an expectation that Network Rail would be resourced and manage the timetable generally to safeguard the delivery of T-12 in either situation. However FGW acknowledges that this does not exclude the potential that failures by a Bidder could in the right circumstances cause delay and result in the lower compensation rates applying.
- 15.3 FGW finds the references to cooperation and standards of skill and diligence in paragraphs 11.4 and 11.5 of the Notice of Appeal do not support any particular conclusion, other than that the circumstances of each case need to be taken into account. For example in the case in dispute it is material that Network Rail on occasions notified material changes to its requirements late, did not commence consideration of Revised Bids to the relevant timescales, admitted issues regarding inadequacies in its timetabling resources, did not consult with FGW in the development of the timetable, did not notify concerns regarding the content or timing of the Revised Bids and accepted and sometimes uploaded Revised Bids without indicating any of the concerns it raised until very much significantly later in the dispute, after the slots had operated and the Schedule 4 dispute was notified.

16 Points of Clarification

- 16.1 Network Rail seeks confirmation of the Panel's findings at paragraphs 56.1, 56.4, 56.5 and 56.6 of the Determination, wishing to ensure that the whole process is maintained workable.
- 16.2 In paragraph 56.1 the Panel determined that a Revised Bid must be made by T-18. FGW accepts this is generally correct but notes that in some of the very few cases in the period in dispute in which its Revised Bids were slightly delayed (by a matter of days) this occurred in circumstances of late, material variation of the requirement for a Revised Bid by Network Rail after T-22 and in circumstances when the eventual upload was weeks after T-12, so that the test of causation between failure of the Revised Bid and delayed upload under Schedule 4 paragraph 4 would not be satisfied. However Network Rail's request requires the correct application of Part D is taken into account in all circumstances, including where Network Rail has failed to comply with Condition 4.8.2,. The response to Network Rail's request therefore needs to resolve that the Train Operator is not required to offer a Revised Bid if the request is not in accordance with Condition D4.8.2(c)(ii) (which it will not be where it is materially amended late) and Condition D4.8.9 bars entitlement for Network Rail to amend Train Slots except in accordance with Condition D4.8. In any event, as presented by Network Rail at section 3.4.4 of its Notice of Appeal, the terms should be construed so far as possible to prevent Network Rail taking advantage of its own defaults, where it has made such material late amendments and in practice this should enable bids submitted in a timely way in response to the amendments to be considered through the Condition D4.8.4 and D4.8.5 process, rather than requiring that they be disqualified under Condition D4.8.6 – which would defeat the very purpose of Network Rail having issued the late amendment.
- 16.3 In paragraph 56.4 of the Determination it is stated that a material alteration or addition to a Revised Bid will constitute a new Bid replacing the Bid previously made and that this will not be a Revised Bid where it is made after T-18. In paragraph 56.5 of the Determination it is stated that if a Revised Bid is superseded by a subsequent bid made after T-18 there will be no Revised Bid in respect of the relevant Train Slots. These

determinations are accepted by FGW but in the context of the sequential stages of the timetabling process established in Part D. So, having submitted a Revised Bid by T-18, any later bids will be Spot Bids but the fact of the Revised Bid submission should not be affected or expunged from the record for example by (i) amendments made in consultation with Network Rail under the Condition D4.8.4 process, (ii) revised bids made in response to modifications to the Revised Bid proposed by Network Rail under Condition D4.8.5, or (iii) Spot Bids made after T-18 which get considered after the Supplemental Timetable Revision Process, albeit that in each case such later processes will affect the eventual details of the Train Slots and for Schedule 4 purposes Spot Bids and Spot Bid revisions not due to further engineering requirements or the working out of the Condition D4.8.4 and D4.8.5 process will not be compensated.

- 16.4 FGW agrees with paragraph 56.6 of the Determination that minor clarification or alterations of bids not requiring material alteration or addition would not normally constitute a new bid, unless it required material revision or re-editing. FGW believes that this will include the working out of the processes at Conditions D4.8.5 and Condition D4.8.6, where Revised Bids are amended or rejected and revised or replaced. Indeed not infrequently Network Rail may request Bidders to re-bid Revised Bids after T-18, for example in circumstances where clashes between operators are identified and Network Rail judges that the situation is better resolved by a revised bid rather than by Network Rail re-working bids or Bidders may submit further bids in response to Network Rail's responses under Condition D4.8.5 to further optimise the timetable solution proposed by Network Rail. In these cases of the subsequent working out of the Condition D4.8 process in relation to circumstances first responded to in an initial Revised Bid, even material changes should not result in the earlier Revised Bid being disregarded, such that it should then be treated as not having been properly submitted, with the consequent dis-application of Condition D4.8.4 and D4.8.5 and potential reduction in the compensation applicable under Schedule 4. Any such approach would be incorrect as it would serve to defeat the very collaborative timetable development process which is then under way and there is no sound reason why the functioning of this collaborative process should affect the level of compensation payable.

17 Response to Network Rail's Points of Appeal

- 17.1 In this paragraph FGW sets out and responds to the individual points of appeal set out in section 12 of Network Rail's notice.

17.2 Panel's Findings at Paragraph 56.2 of the Determination

- (a) Network Rail's point of appeal is as follows:

"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."

- (b) FGW opposes any such additional finding, with its reasons set out in paragraph 8 above. In particular this is contrary to the proper construction of Condition D3.3 and Conditions D4.8.6.
- (c) If ORR were to accept Network Rail's invitation, then FGW requests that such acceptance be made in terms which:
- (i) provides clarity on what is meant by "failure" and how this may be applied in the context of (aa) fully-timed bids of the nature of those made by FGW in this case; (bb) fully-timed bids which may omit

certain details such as substitute bus service details or final platforming exercises (where these have not been requested and have not customarily been supplied at Revised Bid stage) and (cc) specification bids of the type commonly made by freight and many passenger train operators; and

- (ii) confirm the requirement for Network Rail to apply a consistent standard of requirements for bid "completeness" across all bidders on a particular route or more generally.
- (d) If ORR were to accept Network Rail's invitation, then FGW further requests that ORR find that Network Rail should not be able to claim that any such "failure" has occurred where, when a purported bid has been submitted by a Bidder which Network Rail wishes to designate as a "failure", it fails to notify the Bidder (and potentially other bidders) promptly of any such failure and proceeds to process the bid in accordance with Condition D4.8.4 and D4.8.5 as if it were properly submitted. In this case Network Rail's delay in raising issues of failure until nine months after the Revised Bids in question were first made and accepted and six months after the dispute was raised (following the revised timetable having actually been operated) are a complete bar to arguments that the Revised Bids were failures.
- (e) If ORR were to accept Network Rail's invitation, then FGW further request that ORR find in accordance with FGW's claim that if it is established that Network Rail's raising of the failure of the Revised Bids was outside of the timescale for the raising of such issues established at paragraph 8.3(b) of Schedule 4 then such failure should not now be permitted to be raised.

17.3 Panel's Findings at Paragraph 56.3 of the Determination

- (a) Network Rail's point of appeal is as follows:

"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."
- (b) FGW opposes this point of appeal and supports the Panel's determination, with its reasons set out in particular at paragraph 9 of this Response. This part of the Network Code is describing a stage in the timetabling process. Further it would be incorrect to categorise a failure to specify a particular train slot requirement or minor delay as a breach, notwithstanding that it will have consequences in terms of the timetabling process.
- (c) If ORR were to accept Network Rail's interpretation, then its finding should address that:
 - (i) there would be no such breach where the delay was a consequence of Network Rail's late and material amendment to its requirements for a Revised Bid; and
 - (ii) the categorisation of "breach" would not affect the interpretation of Schedule 4 paragraph 4(b)(iii) or paragraph 4(c)(ii) as requiring in accordance with its express terms and plain and literal meaning that there would still need to be a causal link established between the failure

of the Revised Bid constituting the breach and the delayed upload of the timetable; and

- (iii) Network Rail should not be able to claim that any such breach has occurred where, when a purported bid has been submitted by a Bidder which Network Rail wishes to designate as a "failure" and therefore as a breach, it fails to notify the Bidder promptly of any such failure and proceeds to process the bid in accordance with Condition D4.8.4 and D4.8.5 as if it were properly submitted. In this case Network Rail's delay in raising issues of failure until nine months after the Revised Bids in question were first made and accepted and six months after the dispute was raised (following the revised timetable having actually been operated) are a complete bar to arguments that the Revised Bids were breaches.
- (iv) if it is established that Network Rail's claim that the failure of the Revised Bids constituted a breach was outside of the timescale for the raising of such issues established at paragraph 8.3(b) of Schedule 4 then such breach should not now be permitted to be raised.

17.4 Panel's Findings at Paragraph 56.7 of the Determination

- (a) Network Rail's point of appeal is as follows:

"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."

- (b) FGW rejects this point of appeal. This point of appeal mis-construes Condition D3.3 and the wider point being made by the Committee. When Condition D3.3 is properly construed in accordance with the Panel's Determination, the requirement is seen as being for the Train Operator to specify the extent of its requirements (if any), not to provide a particular set of train slot timetabling information. However this is subject to Network Rail's ability, if it chooses, to use the Part D processes to establish particular information which it would like to see provided.

17.5 Panel's Findings at Paragraph 56.8 of the Determination

- (a) Network Rail's point of appeal is as follows:

"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."

- (b) FGW rejects this point of appeal in particular for the reasons set out at paragraph 11 of this Response. In relation to sub-paragraph (i), the Network Rail statement is generally correct but subject to qualifications. In relation to sub-paragraph (ii) of the Network Rail statement, this mis-construes the requirements for a Revised Bid under Condition D3.3 as addressed in more detail at paragraph 8 of the Response and it is not therefore a valid requirement that all information relevant to the timetabling exercise is provided.
- (c) If the ORR were to accept Network Rail's invitation on this point, then its finding should address that:
 - (i) there would be no such rendering of a late Revised Bid improper where the delay in submission was a consequence of Network Rail's late and material amendment to its requirements for that Revised Bid; and
 - (ii) the rendering of a Revised Bid as improper would not affect the interpretation of Schedule 4 paragraph 4(b)(iii) or paragraph 4(c)(ii) as requiring in accordance with its express terms and plain and literal meaning that there would still need to be a causal link established between the impropriety of the purported Revised Bid and the delayed upload of the timetable; and
 - (iii) Network Rail should not be able to claim that any such impropriety has occurred where, when a purported bid has been submitted by a Bidder which Network Rail wishes to designate as a "improper", it fails to notify the Bidder promptly of any such failure and proceeds to process the bid in accordance with Condition D4.8.4 and D4.8.5 as if it were properly submitted. In this case Network Rail's delay in raising issues of failure until nine months after the Revised Bids in question were first made and accepted and six months after the dispute was raised (following the revised timetable having actually been operated) are a complete bar to arguments that the Revised Bids were improper.
 - (iv) if it is established that Network Rail's claim that the Revised Bids were improper was made outside of the timescale for the raising of such issues established at paragraph 8.3(b) of Schedule 4, then such breach should not now be permitted to be raised.

17.6 Panel's Findings at Paragraph 56.9 of the Determination

- (a) Network Rail's point of appeal is as follows:

"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."

The test referred to at paragraph 12.4 are those referred to in paragraph 17.5.

- (b) FGW rejects this point of appeal for the reasons outlined in its rejection of the point of appeal at paragraph 17.5 regarding the tests referred to in paragraph 12.4 of the Notice of Appeal.

17.7 Panel's Findings at Paragraph 56.10 of the Determination

- (a) Network Rail's point of appeal is as follows:

"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."
- (b) FGW accepts this point but with the clarification that, in accordance with the heading of this point of appeal, this point of appeal relates only to the finding at Paragraph 56.10 of the Determination and does not affect the Panel's findings at paragraph 56.11 of the Determination.

17.8 Panel's Findings at Paragraph 56.11 of the Determination

- (a) Network Rail's point of appeal is as follows:

"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."
- (b) FGW rejects the point of appeal made at paragraph 12.7.1 of the Notice of Appeal, for the reasons set out in particular at paragraph 14 of the Response. The Panel Determination on this point is sound and the meaning of the Schedule 4 provisions proposed by Network Rail is not in accordance with its proper construction: use of the term "because" does indeed indicate a requirement for a causal link between the alleged failure and the delayed upload of the timetable. The extent of Network Rail powers and responsibilities in relation to the timetabling process should generally enable it to manage this process adequately.
- (c) If the ORR were to accept Network Rail's invitation on this point, then its finding should address that:
 - (i) the rendering of a Revised Bid as improper would not affect the interpretation of Schedule 4 paragraph 4(b)(iii) or paragraph 4(c)(ii) as requiring in accordance with its express terms and plain and literal meaning that there would still need to be a causal link established between the impropriety of the purported Revised Bid and the delayed upload of the timetable;
 - (ii) Network Rail should not be able to claim that any such impropriety has occurred where, when a purported bid has been submitted by a Bidder which Network Rail wishes to designate as a "improper", it fails to notify the Bidder promptly of any such failure and proceeds to process

the bid in accordance with Condition D4.8.4 and D4.8.5 as if it were properly submitted. In this case Network Rail's delay in raising issues of failure until nine months after the Revised Bids in question were first made and accepted and six months after the dispute was raised (following the revised timetable having actually been operated) are a complete bar to arguments that the Revised Bids were improper; and

(iii) if it is established that Network Rail's claim that the Revised Bids were improper was made outside of the timescale for the raising of such issues established at paragraph 8.3(b) of Schedule 4, then such breach should not now be permitted to be raised.

(d) FGW rejects the point of appeal made at paragraph 12.7.3 of the Notice of Appeal, for the reasons set out in particular at paragraph 15 of the Response. Network Rail carries the initial onus of proof as it is responsible under Schedule 4 for calculating the payments due under Schedule 4 and notifying its calculations to FGW and is obliged by Condition D1.1 to establish and manage the systems necessary to implement the procedures described in Part D.

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

(a) Network Rail's point of appeal is as follows:

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

(b) FGW rejects this point of appeal for the reasons as set out in paragraph 17.8

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

(a) Network Rail seeks confirmation in relation to these paragraphs as follows:

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

(b) FGW has set out its position with regards to each of these paragraphs of the Determination at paragraph 16 of this response and requests that any confirmation of these paragraphs should address the points raised there.

17.11 FGW notes that this appeal is in respect of an interim determination of the Panel only. It seeks the urgent resumption of the process outlined in paragraphs 57.2 to 57.4 of the Determination so that this matter can be progressed to a conclusion as soon as possible and the compensation which is now long overdue to FGW paid, as well as later periods now also in dispute resolved. In this regard it would seek confirmation that if there were to be a referral back to the Panel in the event of a failure to agree on the application of the outcome of this appeal to the facts, then an appeal from the Panel would lie to the ORR.

SIGNED:

By Burges Salmon LLP for and on behalf of First Greater Western Limited

DATED: 30 May 2007