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OFFICE OF **RAIL REGULATION**

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Dear Paul, Rob and Jack

## **PROTOCOL FOR NETWORK RAIL WORK ON THE CROSSRAIL ENHANCEMENT PROJECT**

We have reviewed the protocol version 5.0 dated 27 November 2009. The terms used in this letter have the meaning set out in the protocol. The structure of the protocol and its drafting is detailed and complex. Since it is important that everyone who has dealings with the protocol understands what it does, we have tried to keep our response short and clear.

Most Network Rail enhancement works are subject to our normal regulatory processes, although our investment framework allows us to supplement these arrangements with bespoke arrangements. The protocol sets out your bespoke arrangements.

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Specifically the protocol:

- sets out what Network Rail, CRL and DfT consider to be reasonable requirements for the purposes of licence condition 1;
- sets out processes such that Network Rail, CRL and DfT will define the target prices, instead of ORR, and determine the efficient cost to be added to the RAB;
- alters our standard project monitoring process to give CRL a specific role in monitoring the project;
- provides for an incentive framework with delivery and price incentives which differ from those used in PR08; and
- sets out a dispute escalation process and provides for ORR to resolve any disputes.

We note that the protocol is not a legally binding contract between the parties.

The protocol does not affect our role in enforcement as set out in our enforcement policy. However, you have asked for a statement about how we would interpret licence condition 1. In considering whether there is evidence of a contravention of licence condition 1 in the Network Rail programme (the infrastructure works and services the company is providing), we will take into account, where relevant, the impact on the Network Rail client requirements (CRL's requirements for the Network Rail programme) of a failure to deliver elements of the on network works baseline plan or the development phase baseline plan. But a failure by Network Rail to comply with an individual obligation under the protocol and /or any element of the Network Rail client requirements may not in itself necessarily constitute a contravention of licence condition 1.

The protocol is based on the Thameslink protocol and has been in negotiation for some time. At the time of the discussions on the Thameslink protocol and, indeed, since then, we have seen protocols as an exception to the normal regulatory processes which have to be justified by specific circumstances. We recognise that this is one of those circumstances.

We are currently reviewing our approach to protocols as part of our work on how cross industry projects can be taken forward more efficiently. As part of this review we will be looking at lessons learnt on the Thameslink project. This review may lead to changes in our stance on protocols if one was to be proposed in the future. This will not affect this protocol. Work on this protocol started long before our review commenced. You based it on the Thameslink protocol which we had previously approved.

The next part of this letter covers each major area of the protocol in turn.

### **Reasonable requirements**

We recognise and accept that CRL's and DfT's requirements stated in Paragraph 5.2 of the protocol are reasonable requirements for the purposes of licence condition 1.

### **Efficient cost to be added to the RAB**

We recognise that you intend to carry out a significant amount of work to establish target prices. We are therefore content that where Network Rail, CRL and DfT have agreed the overall target price and each delivery phase target price in line with the protocol, the process in the protocol will determine the actual amount to be added to the RAB and that this can be treated as an efficient price. If we were to carry out our own analysis this would simply duplicate the work you have done, hence we will rely on your analysis to determine the price and the RAB addition.

Where either the overall target prices or any of the delivery phase target prices cannot be agreed by the parties (after invoking the escalation procedure in Paragraph 11.8), we will, at the request of any party, determine the relevant target price. We are content to add the development phase costs to the RAB.

### **Monitoring**

The protocol describes how CRL will monitor Network Rail. We will be a member of the Network Rail Programme Delivery Board, to help discharge our role in monitoring Network Rail. We need to form our own view on whether Network Rail is meeting its obligations. But we do not want to duplicate CRL's monitoring and increase the burden on Network Rail. Hence, as far as possible, we will draw on the information created as part of CRL's monitoring. But we want to highlight that we would expect to receive copies of all material correspondence between Network Rail and the parties, relevant to our role, such that we are fully informed.

### **Incentive framework**

We recognise that you want to enter into a bespoke delivery and price pain/gain share mechanism. We will need to approve the proposed arrangements involved when you have finalised your work on this in line with Schedule 2.

### **Escalation of disputes**

We recognise your process for escalating disputes. Where you fail to reach agreement we are content to have disputes on any aspect of the protocol to be referred to us on the basis that our decision will be final and where relevant will be enforceable in accordance with our economic enforcement policy. We are content for the protocol to be established at the date of this letter. We are publishing this letter on our website.

Yours sincerely



**John Larkinson**