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25 March 2008



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Dear Bill

**APPEAL UNDER REGULATION 29 OF THE RAILWAYS
INFRASTRUCTURE (ACCESS AND MANAGEMENT) REGULATIONS 2005
- RAIL FREIGHT CHARGING SYSTEM AND LEVEL OF ACCESS
CHARGES FOR THE HIGH SPEED 1 RAILWAY**

This letter constitutes a letter of appeal by English Welsh & Scottish Railway Limited ('EWS') to the Office of Rail Regulation ('ORR') pursuant to regulation 29 of the Railways Infrastructure (Access & Management) Regulations 2005 ('the Regulations'). EWS believes that the matter of this appeal is not one in relation to which directions can be sought from the ORR under sections 17 or 22A of the Act as it relates to the circumstances specified in paragraph (4) of regulation 29.

EWS considers an appeal has become necessary because it is aggrieved with the continuing lack of a proper charging scheme and robust level of infrastructure fees pertaining to the High Speed 1 Railway ('HS1') without which, EWS is unable to continue to plan its business with a reasonable degree of assurance.

Background

EWS is rapidly developing its plans to facilitate a substantial increase in the operation of Trans-European rail freight services to and from the UK through the Channel Tunnel. The announcement made by EWS on 22 November 2007 regarding the launch of an integrated network of intermodal services between Belgium, Germany, Italy and the UK was the first step towards this goal. HS1 provides a European high-gauge route into the United Kingdom, which will encourage modal shift from road to rail in line with UK Government and European Union policy and in furtherance of a sustainable freight transport system.

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Before EWS could operate rail freight services on HS1, however, it will need to undertake and complete essential modification work to its relevant locomotive and wagon fleets to make them compatible with the operating systems used on HS1. These modifications represent a substantial investment and given the time it will take to complete the project design, development and fitment programme, the decision by EWS on whether or not to proceed should have been made long before now. However, this decision is being delayed because EWS currently has no confidence that the access charges for rail freight services on HS1 will be affordable due to the lack of a proper charging system with a robust level of infrastructure fees.

Subject matter for the appeal

EWS understands from the consultation undertaken thus far by High Speed 1 that HS1 track access charges for freight services are proposed to consist of:

- Usage Charge;
- Usage Charge Mark Up; and
- Investment Recovery Charge

Usage Charge

EWS understands that the freight usage charges for HS1 have been proposed to be at a level that is 80-90% higher than the average levied on the UK domestic network. Rail freight will not be able to afford usage charges that are almost twice those levied by Network Rail on its domestic network, which are already amongst the highest in Western Europe. EWS fails to understand why rail freight usage charges for HS1 are proposed at such a high level.

Usage Charge - Mark Up

EWS understands that, as currently proposed, a 'mark-up' of 10% is to be applied to HS1 rail freight usage charges. EWS also understands that this 10% 'mark-up' is a notional figure and that High Speed 1 is undertaking a market analysis to assess whether or not a 'mark up' can be justified and, if so, at what level it should be set. Whatever the outcome of this further analysis, if rail freight cannot afford to pay for the basic level of usage charges which is almost twice that it pays for use of the domestic network, it would not be able to afford a further 'mark-up' in addition.

Furthermore, EWS notes that both Eurotunnel and Network Rail (i.e. the adjacent infrastructure managers to High Speed 1) do not levy a 'mark-up' and whilst the principle of a 'mark up' is permitted by the Regulations (sub-paragraph 2(1) of Schedule 3 refers), its effect should not be to exclude market segments that can pay at least the cost that is directly incurred as a result of operating the service (sub-paragraph 2(2) of Schedule 3 refers).

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EWS also understands that ORR took account of this when forming its view in its document entitled '*Periodic Review 2008, Consultation on Caps for Freight Track Access Charges*' that international rail freight could not afford to pay a 'mark-up'. This view, of course, was expressed in the context of Network Rail's usage charges which, as EWS has highlighted above, are already at a level which is almost half of those proposed for HS1.

Investment Recovery Charge

Given the comments made above in respect of the unaffordability of both the usage charges and the usage charge mark-up, EWS is further concerned that it is proposed rail freight should also be subject to a further charge designed to recover investment. EWS considers that this further charge should not be levied if its effect would be to exclude the use of infrastructure by market segments which can pay at least the cost that is directly incurred as a result of operating the service. EWS considers that the proposed investment recovery charge will have such an effect on rail freight and, therefore, should not be levied on freight services.

EWS does, however, note that the Regulations provide a mechanism for the recovery of investment in new railway infrastructure by which higher access charges may be set on the long-term costs of the project. However, it is important to recognise that this mechanism is an exception to the basic charging principle established by the Directive (i.e. charges set at the cost that is directly incurred as a result in operating the train services). Paragraph 3(2) of Schedule 3 of the Regulations provides that an infrastructure manager may only set higher charges on the basis of the long-term costs of a specific investment project where:

- (a) the effect of the higher charges must be to increase the efficiency and cost effectiveness of the project; and
- (b) the project could not otherwise have been undertaken without the prospect of such higher charges.

EWS believes that an investment recovery charge levied on freight would not satisfy either of these pre-conditions. In respect of sub-paragraph 3(2)(a), EWS considers that this does not apply to freight on HS1 and in respect of sub-paragraph 3(2)(b), EWS considers that there would need to be evidence to indicate that the project could not have been undertaken without the prospect of the higher charges for freight. EWS, therefore, submits that the relevant legislation reinforces EWS's view that the investment recovery charge should not be levied on freight services.

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Conclusion

Over the past year, EWS has had many meetings with High Speed 1 and its contractors regarding its concerns over access charging for HS1 and has also entered into much correspondence on the subject. This includes expressing its concerns and aggravation in response to High Speed 1's consultation process on access charging principles. This dialogue and correspondence culminated in a joint meeting between senior members of High Speed 1, EWS and the Department for Transport ('DfT') on 14 January 2008 where it was agreed that High Speed 1 undertook to send to EWS and DfT a programme outlining the work it is doing to assess what the level (or levels) of the freight access charges should be.

More than two months after that meeting, EWS is no further forward in obtaining confidence that HS1 access charges for rail freight will be affordable. High Speed 1 has recently informed EWS of the terms upon which it has engaged consultants to undertake a freight study to determine the strategy and appropriate charging for rail freight on HS1. This work is not expected to be submitted to DfT until the end of April 2008 and then some time after that a consultation document will be issued to interested parties on the conclusions.

Whilst EWS remains committed to developing a rail freight option for HS1, it cannot proceed with its planning and investment decisions, which includes securing EU funding, until it is confident that track access charges will be affordable. Currently, for the reasons stated above, this confidence is severely lacking and it appears clear that the uncertainty caused by the lack of a proper charging system and robust level of charges will continue for some considerable amount of time yet.

This is unacceptable and is severely affecting EWS's ability to plan its future business with a reasonable degree of certainty. This is why EWS has decided that it has no other option but to lodge an appeal to ORR pursuant to regulation 29 of the Regulations.

EWS appeals to the ORR to investigate the above matters with a view to:

- directing High Speed 1 to establish and publish a proper charging scheme and charging system for rail freight services using HS1 in accordance with regulation 12 of the Regulations along with a robust level of infrastructure fees;
- determining that it is inappropriate for High Speed 1 to levy 'mark ups' or 'investment recovery charges' on freight services using HS1; and

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- determining whether the usage charges for rail freight using HS1 have been set at the cost that is directly incurred as a result of operating such services.

If you require any further information please let me know.

Yours sincerely

A handwritten signature in black ink, appearing to be "Graham Smith", written over a series of horizontal lines.

Graham Smith
Planning Director

cc.	Graham Dalton	DfT
	Tim Wellburn	DfT
	Paul Chapman	HS1
	Brian Blackwell	HS1