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OFFICE OF **RAIL REGULATION**

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Dear Stephen and Stewart

APPEAL UNDER REGULATION 29 OF THE RAILWAYS INFRASTRUCTURE (ACCESS AND MANAGEMENT) REGULATIONS 2005 – ACCESS TO THE PORT OF FELIXSTOWE WHERE FELIXSTOWE DOCK AND RAILWAY COMPANY IS THE SERVICE PROVIDER

1. This is the decision of the Office of Rail Regulation ("ORR") regarding our jurisdiction to hear an appeal made by DB Schenker ("DBS") on 22 January 2010 under regulation 29 of the Railways Infrastructure (Access and Management) Regulations 2005[1] (the "Regulations").

2. DBS has appealed to ORR because it is aggrieved in relation to various matters relating to its access to Felixstowe port and terminal. Briefly, those matters are that the facility owner and service provider, Felixstowe Dock and Railway Company ("FDRC"), has not been consistent in the capacity allocation schemes it has applied, and has refused to allocate the next path (which DBS claims to have identified) directly to DBS. DBS also contends that FDRC's charging schemes appear to be discriminatory between the rival freight operators using the port, and are not transparent.

3. FDRC has challenged our jurisdiction to hear this appeal. A brief summary of the grounds of FDRC's challenge is set out below. This challenge has been raised in correspondence, and we have considered it appropriate to meet with the parties to give them both an opportunity to make oral representations on the matter. FDRC

[1] http://www.rail-reg.gov.uk/upload/pdf/SI3049_A-MReg05.pdf

has also raised concerns about our processes for dealing with information (particularly charging information) that FDRC considers is confidential and commercially sensitive, and should not be made available to DBS (and certainly not published more widely by ORR). The meeting took place on 13 May 2010 at our offices. This decision letter sets out our decision in relation to our jurisdiction, and describes the procedures we intend to adopt in relation to material either party considers confidential.

4. Both parties delivered representations which we found helpful and useful in understanding their respective positions. Both parties provided us with written copies of those representations after the meeting, and for that reason we do not consider it necessary to reproduce them in detail in this decision letter.

Our guidance

5. ORR has published guidance on the approach we intend to adopt when considering appeals made under the Regulations – Guidance on appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005, published March 2006[2] (the "Guidance").

The Regulations

6. The relevant regulations are:

7. Regulation 6(1) provides that an applicant is "entitled to track access to and the supply of services in terminals and ports". Further, regulation 6(3) obliges the service provider to "ensure that the entitlements conferred by this regulation are honoured and that access to, and the supply of, services is granted in a transparent and non-discriminatory manner". Regulation 6(4) provides that "without prejudice to the generality of regulation 29, if [an applicant] is denied the entitlements conferred on it by this regulation ... that [applicant] has a right of appeal to the Office of Rail Regulation in accordance with regulation 29".

8. Regulation 29(1) provides that an applicant has a right of appeal to ORR "if it believes it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager, an allocation body, a charging body, a service provider or, as the case may be, a railway undertaking, concerning any of the matters described in [regulation 29(2)]". The parties appear to agree that the relevant part of regulation 29(2) is sub-paragraph (f), "the arrangements in connection with the entitlements to access granted under Part 2 and Schedule 2". Regulation 6 falls within Part 2.

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[2] http://www.rail-reg.gov.uk/upload/pdf/275.pdf

9. Given that our jurisdiction to hear this appeal has been challenged, and therefore evidence to be submitted by both parties has not been completed, we have not yet examined the substance or merits of DBS's claims, except to the limited extent they informed the parties' respective submissions on the preliminary issue.

Jurisdiction

FDRC

10. In relation to DBS's appeal against FDRC's refusal to allocate the path DBS claims to have identified directly to DBS, FDRC considers that the route to enable an appellant to commence a regulation 29 appeal lies through regulation 6. In particular it states that regulation 6(4), and its reference to an applicant being "denied" entitlements, requires there to have been a denial by FDRC of the relevant capacity sought by DBS before DBS can make an appeal under regulation 29.

11. FDRC's position is that it has not made any such decision, in part because DBS has refused to engage in negotiations on this issue after a short meeting held in November 2009 at which FDRC requested further detail of the capacity DBS claimed to have identified.

12. At the meeting we asked FDRC to explain its understanding of the wording in regulation 6(4), that it is "without prejudice to the generality of regulation 29". FDRC says that if regulation 29(2)(f) is the only ground of appeal against a service provider, but an appeal can be brought without establishing that a decision to deny entitlements has been made (or that there has been sufficient prevarication on the part of the service provider to infer the same), then regulation 6(4) would be redundant.

13. FDRC's previous correspondence of 18 February 2010 raised a further argument that none of the criteria set out in our guidance at paragraphs 2.11 to 2.16 have not been raised by DBS. These criteria list the circumstances which we consider would justify a refusal to award capacity. In FDRC's view, the fact that DBS has not raised these is further evidence that FDRC has not made a decision to refuse access.

14. In relation to DBS's appeal against discrimination and lack of transparency in FDRC's charging scheme, FDRC considers that an applicant may only challenge specific proposed access charges. It says that DBS cannot simply claim that generally FDRC's charging mechanism is discriminatory or unfair. Rather, any appeal must be grounded in a proposed set of charges for a specific path being sought. FDRC says that given that no pricing for the proposed 29th path was discussed, no decision on pricing could have been reached, and so no appeal against its charging and pricing regime is possible.

15. A further argument raised by FDRC in its letter dated 12 March 2010, and touched upon briefly at the meeting, was that our Guidance at paragraph 4.10 sets out what FDRC considers are minimum requirements for an appellant to set out in its appeal claim; FDRC says that DBS has not met these requirements. In particular, FDRC points out that DBS cannot fulfil the second bullet point of that paragraph, being

unable to identify the amount of fees proposed (due to DBS's leaving the negotiations before any pricing had been discussed).

DBS

16. In relation to DBS's appeal against FDRC's refusal to allocate it the 29th path, DBS says that regulation 29 gives an applicant a broad right of appeal where it considers it has been unfairly treated and discriminated against, so long as it identifies a limb of regulation 29(2) that applies. DBS identifies the relevant limb as regulation 29(2)(f), which therefore allows it to appeal for unfair treatment and discrimination in respect of the access and services it is entitled to under regulation 6. (DBS also identifies regulations 7(3) and 7(7) for similar provisions in relation to access to services, but on this point, our Guidance at paragraph 2.10 is clear that we do not consider regulation 7 applicable to ports and services.)

17. Furthermore, DBS claims that FDRC has in any event made decisions which are capable of being appealed, or that FDRC has prevaricated to the same effect. DBS considers that FDRC's decision in May 2009 to suspend its established allocation procedure after the award of the 27th path, followed by FDRC's decision to award the 28th path to Freightliner without consultation or inviting other bids are decisions which were discriminatory and were not made in a transparent manner.

Our decision

18. The Regulations implement directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (the "Directive"). Given that the Regulations implement the provisions of the Directive, the Regulations must be interpreted so far as possible to give effect to the Directive.

19. The Directive is aimed at ensuring transparent and non-discriminatory access to rail infrastructure for all railway undertakings. In particular the Directive is aimed at opening up the market for international freight services. For example, recital 13 states that "Railway undertakings should receive clear and consistent signals from capacity allocation schemes which lead them to make rational decisions", and recital 16 provides that "Charging and capacity allocation schemes should allow for fair competition in the provision of railway services".

20. Recital 46 of the Directive states that "The efficient management and fair and non-discriminatory use of rail infrastructure require the establishment of a regulatory body that oversees the application of these Community rules and acts as an appeal body, notwithstanding the possibility of judicial review".

21. We have considered our role as an appeal body under the Regulations in light of the purposes of this Directive.

22. In relation to DBS's appeal against FDRC's alleged refusal to allocate it the 29th path, we find that there is no absolute requirement that the service provider must

have made a decision before the applicant can commence an appeal under regulation 29.

23. We do not agree that regulation 6(4) has the meaning set out by FDRC. Regulation 29(1) is intended to give an applicant a general right of appeal "if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved". Regulation 6(4) provides a specific instance in which a freight operator may wish to appeal against a service provider denying it access, but FDRC's interpretation that such is the only instance in which an operator can appeal in such circumstances would cut across the deliberate generality of regulation 29(1) and the purpose of the Regulations. We consider that "without prejudice" in this context means that although regulation 6(4) has specific detail about an instance that may enable an applicant to appeal, it does not deny the applicant any wider rights covered by the generality of regulation 29.

24. Our Guidance makes it clear that applicants can appeal "at any stage" (paragraph 1.21) and does not distinguish between types of appeal. FDRC claimed that DBS had conceded (in its letter of 31 March 2010 at paragraph 2.7) that there must be a decision made before an appeal could be made. We do not agree that it has – rather DBS sought in that letter to argue that the facts do not support FDRC's case, if it was assumed that FDRC's contentions on the need for a decision to have been made are correct. During the meeting on 13 May 2010, DBS was clear that it had not conceded this.

25. FDRC's contentions would require us to allow appeals only when the service provider has made a decision which the applicant disagrees with (or where there has been prevarication to avoid making a decision). While most appeals might follow such decisions, we are clear that this is not a prerequisite, including if an applicant feels aggrieved or that it has been discriminated against at an earlier stage in its negotiations with the service provider. FDRC was concerned that this raised a risk of a "hair trigger", but we do not consider this is the case and note that this has not happened in practice. Whether the applicant is right of course constitutes the substance of the appeal, which we reiterate we have not yet considered in the current appeal.

26. We consider that where an applicant feels in any way aggrieved, including in the context of charging, the protection built into the Regulations is an applicant's ability to appeal to ORR. We do not consider that, once an applicant has received what it considers to be a refusal (or discrimination), our role as the appellate body is limited to directing the parties to continue negotiations. To restrict our role in this manner would be contrary to the purpose of the Regulations.

27. The reference by FDRC to paragraphs 2.11 to 2.16 of our Guidance does not support its case. These paragraphs provide examples of arguments a service provider might make, and which we might expect to see if a decision to refuse access is to be justifiable. Their absence cannot be taken as evidence that no decision has been taken (especially as FDRC acknowledged that in some instances

a decision to refuse access may have to be inferred, in which case such detail will not have been given).

28. In relation to DBS's appeal against FDRC's charges, we do not agree that an applicant may only bring an appeal in relation to a specific charging decision that a service provider has made. We consider that if an applicant identifies that a service provider is operating a discriminatory and/or non-transparent charging system, this should be open to appeal at any time. We consider that this is entirely in keeping with the overall purpose of the Directive, and the terms of the Regulations, being to encourage transparency and non-discrimination in access terms and charges setting.

29. Our Guidance is clear that we will consider appeals against specific charges that applicants consider too high (paragraph 3.8, as identified by FDRC). This does not mean we can only consider allegations of this type when they are linked to a complaint made by an applicant who is at that time seeking specific charge proposals for a path. It seems to us to be in-keeping with the purposes of the Directive and the Regulations that an operator who wishes to challenge the service provider on grounds of transparency and/or discrimination if it becomes aware of the terms granted to a rival should be permitted to do so, even if no new path is actively being negotiated at that time.

30. FDRC also refers to the fact that paragraph 4.12 of our Guidance states our role is to be that of arbiter rather than investigator, and suggests this as a further reason why we would not have jurisdiction in the event that no decision to refuse access has been made. That is, if no details of access sought can be provided because limited negotiations have taken place, FDRC is concerned that too much emphasis is placed on us directing terms instead of the parties acting commercially to agree them. We do not consider that it is a reason to refuse jurisdiction to hear the present appeal. We will only proceed to base any decision on information received from the parties (or if we are aware of information which may be relevant, the parties will be given an opportunity to comment on it).

Confidentiality

31. We understand that FDRC's concerns on this point relate particularly to the charging aspect of DBS's appeal, rather than to the alleged refusal to award the next path to DBS.

32. We have powers under the Regulations themselves to require parties to appeals to provide specific information necessary to facilitate our performance of our appeal body functions.

33. Regulation 31 provides that any request we make for information under section 80(1) of the Railways Act 1993 (the "Act") shall be applicable to, inter alia, service providers. This means that service providers such as FDRC are under a duty to furnish us with information as we request, such information being what we consider necessary for the purposes of facilitating our functions. These functions include

acting as an appeal body for the purposes of the Regulations. Section 80(5) provides that a service provider is not obliged to produce any documents which it could not be compelled to produce in civil proceedings in court. FDRC has not indicated that it considers any of the documents we have previously requested fall into the category of privileged material which is what section 80(5) covers.

34. Regulation 39 provides that section 145 of the Act shall take effect in relation to information we obtain under the Regulations. Section 145(1) provides that information in respect of a particular business (i.e. from FDRC in the current case) obtained under the Act shall not be disclosed without its consent. However, section 145(2)(a) provides that this restriction does not apply to any disclosure which we may make for the purposes of facilitating the carrying out of our functions under the Act, and in particular for the purposes of facilitating the carrying out of our functions under regulations implementing directive 2001/14/EC (section 145(2)(b)).

35. We therefore have the power to require FDRC to provide the information we have already identified as relevant and necessary for the purposes of hearing this appeal brought by DBS. Neither the Act nor the Regulations grant FDRC any right to refuse to provide such information on grounds of confidentiality or commercial sensitivity.

36. At the meeting with the parties on 13 May 2010 FDRC indicated that it accepted that we have these statutory rights and that it is prepared to provide the information to ORR, but that its concerns went to how we propose to treat such information. We confirmed that we do consider how information which is identified as confidential or commercially sensitive may be treated, both during the appeal and in any final decision letter.

37. We indicated during the meeting that we do not generally find it necessary to use confidentiality-rings. This is especially the case where the party seeking the information is not using external advisers. However, if once we have reviewed the information requested of FDRC we consider such a ring may be appropriate, we shall discuss this with the parties.

38. We are of course limited to discussing this on a hypothetical basis because FDRC has yet to provide even its general charging guidance. Once we have seen the information, we may have to reconsider this approach. However, we will not take any steps to disclose material to DBS (or publishing it more widely) which FDRC specifically identifies as confidential without prior discussion and communication with the parties to enable them to make any representations they wish, and to explore alternative methods of resolving this concern.

Procedure going forward

39. FDRC was also keen that we be clearer in explaining the process we intend to follow for inviting further submissions and representations from the parties. In particular, FDRC seeks assurance that it will always have an opportunity to comment on any representations made by DBS. We gave such an assurance during the meeting, and of course it applies equally to DBS having the right to

comment on representations made by FDRC. We will send a separate letter by Friday 28 May 2010 clarifying the procedure for future conduct of this appeal. This will include revisiting the outstanding requests we have made to FDRC for specific information. We will also consider FDRC's request that DBS's appeal be further particularised, given FDRC's contention that the issues in dispute are not clear.

40. We are conscious of the time that has already elapsed since DBS submitted its appeal documents, so we shall seek to move this matter on as quickly as is appropriate.

Yours sincerely

Paul McMahon