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Our Ref : L-MG-RR-00001-10-HSO
Your Ref :

17th June 2008

Neil Leedham
Executive, Track Access
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

Dear Mr Leedham

Appeal under Regulation 29 of the Railways Infrastructure (Access and Management Regulations) 2005 - Rail Freight Charging System and the Level of Access Charges for the High Speed 1 Railway

We refer to your letter of 13 May 2008, attaching a copy of the appeal made by English Welsh & Scottish Railway Limited ("EWS") on 25 March 2008 under Regulation 29 of the Railways Infrastructure (Access and Management) Regulations 2005 ("the Regulations"). We also note the correspondence (Neil Leedham's e-mail to Brian Blackwell of 28 May 2008, and his subsequent letter of 28 May 2008) confirming the extension of the deadline for responding to the ORR's letter from 3 June 2008 to 17 June 2008.

This letter sets out the written representations of CTRL (UK) Ltd and Union Railways (North) Ltd in respect of EWS's appeal. For ease of reference, we have referred throughout this response to both companies collectively as HS1, except where otherwise indicated. (As you know, HS1 is now the operating name for the Channel Tunnel Rail Link, and CTRL (UK) Ltd and Union Railways (North) Ltd are therefore also now largely functioning under that single "banner". As you will also be aware, Network Rail (CTRL) Ltd ("NR CTRL") in performing its functions as infrastructure manager of HS1 and as the charging and allocation body does so wholly on behalf of HS1. Therefore we believe that it is appropriate that we, rather than NR CTRL, respond to the EWS appeal in detail.)

1. Summary - HS1's overall position concerning the EWS appeal

EWS has explained in its correspondence and discussions with the ORR that its appeal is essentially a "statement of frustration" that HS1 has not yet settled charging rules for freight services seeking to use HS1. HS1 accepts that EWS may be frustrated, but we do not believe that it would be an appropriate response to those frustrations for the ORR to agree to intervene in the process which is in train for setting those rules.

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This is not what is envisaged by the Regulations in relation to HS1. The Regulations clearly envisage that any supervisory function in that process is to be performed by the Secretary of State, not the ORR, and this is what is currently happening. The ORR's function in relation to the rules is intended to be an *ex post facto* appeal function only - i.e. once those rules have actually been set.

As we hope will be clear from the further detail below, the process for setting charging rules for freight services on HS1 is in any case well advanced and moving effectively towards what we believe will be a timely resolution. Therefore we believe that the best course for all concerned would be for HS1 to be allowed to continue to work with the Department for Transport ("DfT") and to continue consultations with the freight industry including EWS (which we have in fact been undertaking regularly to date) to that end. Our view is that intervention by the ORR at this stage would not only be inappropriate having regard to the scheme envisaged in relation to HS1 under the Regulations, but also may be counterproductive to achieving that end.

Whilst we believe that this is the correct approach for the ORR to take in relation to the appeal, and even though we do not believe that it would be unreasonable for EWS now to await the outcome of the process to set the charging rules, because we recognise the frustrations which EWS is expressing, we are willing to explore possible interim solutions with EWS.

If EWS genuinely wishes to take up access to HS1 at this point we are willing to engage in discussions with EWS openly with a view to achieving that. HS1 has no intention or desire that any party who genuinely wishes to take up access to HS1 be impeded from doing so. HS1 is fully supportive of Government's policy interest in encouraging use of HS1 by freight services where possible, consistent with the overall priorities and objectives for HS1 as a high-speed line

On that basis that we are willing to explore such interim measures, we believe that there should be even less basis for the ORR to feel that it would be appropriate to seek to intervene in the process for setting the charging rules for HS1 at this stage.

2. Detailed comments on the appeal

We have addressed essentially two points in detail below:

- First, we have set out some views on the issue of whether legally the ORR could at this point properly do any of the things which EWS has sought. Although we do not wish to be seen to be unduly dismissive of EWS's position, our view is that as a matter of law it simply would not be appropriate for the ORR to make any of the directions which EWS has sought. Therefore on that basis alone our view is that the ORR should dismiss the appeal.

We have tried to keep these views as brief as possible, but inevitably as they concern some issues of legal construction, we have had to include some level of detail.

- Second, we have tried to explain more fully the process for setting charging rules for freight services which HS1 must work through; the factors which HS1 must take into account in doing so; and where HS1 stands in that process. We would hope that once the ORR has had an opportunity to consider those matters fully the ORR will agree, regardless of the legal arguments, that the appropriate course for all concerned, including EWS, would be to let that process now run its course.

3. The legal position

We do not believe that EWS can properly appeal at all at this point

Having regard to the language of Regulation 29 as a whole, and the overall scheme of the Regulations as they apply to HS1, we do not believe that EWS can properly appeal at this point on any of the matters which it has raised. Our view is that the appeals mechanism in Regulation 29 is intended to provide applicants with a right to seek review of actions to be taken by HS1 under Regulation 12 - establishment of charging rules, determination of actual fees etc. - *only once those actions have actually been taken*. The Regulations do not contemplate that the ORR will intervene in those processes *whilst those processes are taking place*.¹

We accept that the right of appeal in Regulation 29(1) is *prima facie* cast in wide terms. However, *our* view is that that right must be construed in light of the remaining language of Regulation 29 itself, and also the Regulations as a whole.

Regulation 29 contains a list of matters on which an applicant can expressly appeal. Whilst we accept that that list is not exhaustive, all of the matters in that list are *ex post facto* matters - i.e. they relate to decisions which have *already been taken* - for example, network statements *that have already been produced*, or charging schemes and rules *that have already been established* etc.. With this in mind, and having regard also to the broader scheme of the Regulations as regards the setting of charging rules for HS1, our view is that Regulation 29 must be read as being an *ex post facto* appeals mechanism only.

The ORR's own published guidance on appeals under Regulation 29 (Guidance on appeals to ORR under the Railways (Access and Management) Regulations 2005) very much reflects this view.² It

¹ We note also in this respect that sections 17 and 18 of the Railways Act are disapplied by the CTRL Act and therefore any involvement of the ORR in relation to access charging matters relating to HS1, other than the appellate function under Regulation 29, is not contemplated at all under the overall legislative framework which applies in relation to HS1. This role rests with the Secretary of State.

² Paragraph 3.1 (Appeals on Charging Matters) states:

"Under the Regulations, appeals can now be brought against an infrastructure manager's charging system, or charging matters associated with access ..."

Paragraph 3.2 then goes on to state:

"The Regulations oblige us to establish the charging framework and specific charging rules for Network Rail. In relation to the CTRL, the Secretary of State is responsible for establishing the charging framework through the development agreement. The specific rules are established by the infrastructure manager for CTRL consistent with the framework. We are the appeals body under regulation 29 for appeals in relation to the charging scheme and the charging system [for HS1] established in accordance with regulation 12 [emphasis added]."

This is followed by Paragraph 3.3, which states (apparently by reference back to the description at the start of Paragraph 3.2 of ORR's *ex ante* role in setting the charging framework and charging rules for Network Rail):

"We do not have a role under the regulations in respect of establishing the charging framework or rules for other network operators' facilities [i.e. other than in relation to Network's Rail's facilities]."

acknowledges that the model for determining access charges in relation to HS1 under the Regulations is plainly a different one from that which applies in relation to the UK domestic network - i.e. that any *ex ante* function in relation to setting of charges for HS1 is for the Secretary of State, not the ORR as is the case in relation to the domestic network. In other words, the Guidance indicates that the ORR itself accepts that it does not have any role under the Regulations by way of intervention in the actual setting of the charging framework or charging rules for HS1: the ORR accepts that it has an *ex post facto* appellate function only on these matters.

HS1 considers that there are sound reasons in principle why this should be so and hence why it would be inappropriate for the ORR to consider any departure from this approach. HS1 submits that it would be undesirable in principle for the ORR to determine that Regulation 29 provides a basis for it to intervene in those processes on an *ex ante* basis and then also to have an *ex post* appeal function in relation to the resulting framework and rules.

In our view this analysis points inevitably to one of two results in this case: we believe that either the ORR should take the view that EWS cannot properly appeal *at all* at this stage, or the ORR could accept that strictly speaking EWS can appeal, but should then decide that at this stage - i.e. pending adoption of actual charging rules by HS1 - that appeal is wholly premature and therefore should be dismissed in any case.

Why the ORR should dismiss the first limb of the EWS appeal

If we take the first part of the EWS appeal - its request that the ORR investigate with a view to directing HS1 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*" - our interpretation of this is that EWS is seeking that the ORR direct that HS1 comply with Regulation 12 within a specified time-frame.

As the ORR will be aware, the ability of HS1 to discharge its obligations under Regulation 12 to establish charging rules (and, subsequently, actual infrastructure usage fees) is effectively contingent on the Secretary of State first establishing a charging framework pursuant to Regulation 12(3).³

Although we understand that the DfT may take the view that there is already a rudimentary framework to this effect in the terms of the HS1 development agreement,⁴ both DfT and HS1 agree that it is

Finally, Paragraph 3.6 provides further confirmation that the ORR does not consider that it has any role in relation to access charges for HS1 until the charging framework and rules have actually been established. Paragraph 3.6 states:

"Should an appeal be received in relation to CTRL charging, we would examine the charging framework established for access to the CTRL network, which would include the relevant contracts in place under the development agreement."

³ Although Regulation 12(4)(a) does not *expressly* require that HS1 establish charging rules in accordance with the charging framework to be determined by the Secretary, this seems very clear looking at Regulation 12 as a whole. Regulation 12(4)(b) for example does expressly require that any actual fees determined by HS1 must be determined in accordance with: (i) the principles set out in Schedule 3 of the regulations; and (ii) the charging framework determined by the Secretary of State; and (iii) the specific charging rules established by HS1. Again, the ORR's own Guidance also confirms this. As noted above, Paragraph 3.2 of the Guidance states:

"The specific charging rules are established by the infrastructure manager for CTRL consistent with the framework [emphasis added]."

necessary for the Secretary of State now to develop a fully detailed charging framework and that HS1 can only sensibly adopt charging rules once that full framework is in place.

Therefore it would not be possible at present for the ORR to direct that HS1 establish charging rules within a particular time-frame, as that time-frame would have to be contingent on actions by the Secretary of State over which HS1 has no control.

Again though, even if the ORR were minded to come to a different view on this point, we feel very strongly that it would not be appropriate in the circumstances for the ORR to consider setting any timetable in any case.

HS1 is working closely with the DfT to take forward consultation on the DfT's proposed detailed framework and the charging rules in tandem, to ensure that HS1 is in a position to establish its charging rules in conformity with charging framework as soon as possible after it is finalised. We have described the current state of that work more fully in the final part of this letter below. As explained in the Executive Summary above, we are confident that once the ORR has had an opportunity to consider that position, the ORR will appreciate why it would not be appropriate for the ORR to seek to impose any binding timetable at this stage which may cut across that process.

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If the first limb of EWS's appeal is intended to go further than asking for a direction on timing, and is also seeking some form of direction from the ORR concerning the substance of the charging rules or actual fees which HS1 is required to set under Regulation 12 (which perhaps is what EWS is envisaging in its request that the ORR direct HS1 to establish a "proper charging scheme" and "robust" fees?), HS1 submits firstly that that request is simply too imprecise to provide any proper basis for any direction from the ORR.

More importantly though, as explained above, it would be wholly premature for the ORR to make any direction concerning the substance of any charging rules or fees to be determined under Regulation 12 until they have actually *been* determined. This would in effect pre-empt the role of the Secretary of State and to confuse the supervisory and appellate roles accorded to the Secretary of State of the ORR respectively.

We also wish to be clear that contrary to what EWS appears to believe, the indications which HS1 has attempted to give (and is continuing to try to give) in the course of its consultations with the freight industry about the anticipated *direction* of our approach on freight charges are not in any way indicative of HS1 having reached any final position on any particular point. HS1 has not done that yet.

Therefore the ORR should not accept any suggestion from EWS that it can intervene at this stage on the basis that one can reasonably anticipate what HS1's charging rules will or will not say on any of the points of substance raised by EWS. Factually that is simply not the position.

Why the ORR should dismiss the second limb of the EWS appeal

The second limb of the EWS appeal seeks two further directions, namely:

- that the ORR determine *"that it is inappropriate for High Speed 1 to levy 'mark-ups' or 'investment recovery charges' on freight services using HS1"*; and

⁴ The development agreement for HS1, which pre-dates the Regulations, contains no framework in relation to freight services as such, other than to require that HS1 comply with the terms of the Railways Regulations 1998. The interpretation provisions of the development agreement operate so as to make that reference now a reference to the 2005 Regulations.

- that the ORR determine "*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 [our emphasis]*",

HS1's reply on these matters is essentially the same as noted above: it would be entirely premature for the ORR to seek to make any direction under Regulation 29 concerning the substance of any charging rules or fees required to be set by HS1 pursuant to Regulation 12 until those rules and fees have actually been established or determined. (Indeed the second of these points actually *pre-supposes* that usage charges for freight services using HS1 have in fact already been set by HS1. Therefore HS1 submits that this element of the EWS appeal simply must be dismissed by the ORR without any further consideration at all.)

EWS has itself acknowledged that its appeal on these matters is essentially a matter of speculation at this stage. The note of the meeting between EWS and the ORR held on 16 April 2008 records (at Paragraph 8) that during that meeting Graham Smith of EWS:

"[C]onfirmed that EWS could provide evidence regarding the length of time taken to negotiate and liaise with NR(CTRL) and HS1 in terms of establishing a charging system, however, it would be difficult for EWS to provide any evidence to support its appeal on the level of proposed usage charges being too high, as this is generally accepted as being EWS' opinion and EWS does not have the relevant cost model."

In other words, EWS itself accepts unless and until HS1 actually establishes its freight charging rules in light of the charging framework once that is established by the Secretary of State EWS can do nothing more than *opine* that such rules may be inappropriate.⁵

This concession by EWS simply confirms why Regulation 29 must be understood to create only an *ex post facto* review function for the ORR in relation to HS1 charging issues. Regulation 12 accords the function of determining the charging framework and charging rules to the Secretary of State and HS1. Until those functions are discharged, there is simply nothing against which the ORR can properly judge questions such as those posed by EWS in the second part its appeal.

For example, it is only *if and when* HS1 has determined under its charging rules, having regard to Schedule 3 of the Regulations and the charging framework, that it would be appropriate to levy 'mark-ups' or 'investment recovery charges' on freight services using HS1, and the rationale for that view is known and therefore can be tested by the ORR, that any appeal could properly be brought in relation to such matters under Regulation 29.⁶

⁵ The question of whether it would be appropriate to levy mark-ups, for example, is one which must be determined by reference to two issues under Paragraph 2 of Schedule 3 of the Regulations which require a very detailed level of factual assessment - i.e. whether they would still "guarantee optimal competitiveness, in particular for international freight services", and whether they would, "exclude use of HS1 by market segments which can pay at least the cost that is directly incurred as a result of operating the railway service, plus a rate of return that the market can bear".

Whilst EWS may wish to form its own opinions on these matters now, HS1 considers that it is clear that that cannot form the basis for any appeal which the ORR can properly consider. That appeal would have to take full and due account of any conclusions which HS1 reaches on these matters, and the basis for HS1 reaching those conclusions. Only then might any opinion or assessment by EWS to the contrary be properly capable of being assessed by the ORR under Regulation 29.

⁶ If and when HS1 does adopt its charging rules, and if EWS is then *still* aggrieved, it would be incumbent on EWS then to make detailed submissions to the ORR setting out why it believes that such elements cannot properly be included in any charges for freight services using HS1, by reference to the principles of Schedule 3, the charging framework (if relevant to

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We trust that all of the points we have noted above (and also the further details set out below as regards progress towards a charging framework and charging rules for HS1) **will allow the ORR to dismiss the EWS appeal in full.** However, if the ORR were to require any further information from HS1 in order to determine its response to the appeal - for example in the unlikely event that the ORR did wish at this stage to examine the substance of EWS's claim that it is inappropriate for HS1 to levy 'mark-ups' or 'investment recovery charges' on freight services using HS1 - **HS1 requests that the ORR give HS1 the opportunity to make further detailed submissions on any such issue.**

HS1 would strongly reject any such assertion. Again, this does not mean that HS1 has positively determined that it does in fact intend to levy any such mark-ups or charges: HS1 at this point fully reserves its position on that question. **HS1 simply rejects any assertion that at this point it could already positively be determined, as a matter of fact, that no such mark-ups or investment recovery charges could properly be levied by HS1, without knowing fully the basis on which HS1 may propose to do so.**

4. Details of HS1's progress towards adoption of charging rules in relation to freight

Although, as we have indicated above, we do not believe that it would be proper, as a matter of law, for the ORR to seek to intervene to impose any timetable on HS1 at this stage, we would also like the ORR to appreciate why we do not believe that this would be necessary, or indeed appropriate, in the circumstances *in any case*.

Progress to date

EWS's perception, which appears in large part to have provided the impetus for its appeal, seems to be that HS1 and DfT have previously indicated that the work on setting the charging framework and charging rules for HS1 would be completed in a shorter time frame than is actually occurring. That is not the case.

The consultation letter published by DfT in October 2007 clearly indicated that Government was then still only in the early stages of its policy development process. (The DfT nonetheless sought views on certain key questions at that stage in order to facilitate progress in relation to development of the charging framework, and even before publication of this letter by the DfT, HS1 had also issued a "first stage" consultation concerning access charging principles, in an effort to facilitate the "in tandem with Government" approach to development of the charging framework and charging rules described above.)⁷

the case which EWS may then seek to make) and by reference to any relevant financial or other data. Again, the fact that EWS is plainly not in a position to do this at this juncture indicates why the nature of EWS's appeal as it stands is not one which can properly be brought under Regulation 29.

⁷ It will have been clear to EWS from those documents that, as at October 2007, development of the details of the charging framework, let alone any charging rules, was still very much at an early stage and therefore that any representations from NR (CTRL) Ltd earlier in 2007 regarding the possible level of charges for freight using HS1 were of a wholly preliminary nature. Therefore it is clear at this point, given those subsequent consultations, and the further work undertaken, and still being undertaken, by the DfT and HS1 since (as outlined more fully below), that those preliminary indications could not provide any basis now for the ORR to draw any conclusions as to the possible substance of that framework and those rules once they are settled, as EWS has effectively invited the ORR to do.



In January this year HS1 again indicated clearly to EWS that substantial further work would be required before HS1 would be able to arrive even at more detailed views for consultation about *possible* levels of charging for freight services. HS1 indicated then that that work would not be completed until some time after March. At this point that work is still ongoing. However, that is not as a result of any undue delay on HS1's part.

This work must form part of, and reflect, a careful holistic approach to setting the charging framework and charging rules for HS1

There are two very important points for the ORR to appreciate as regards the current progress of that work, and how it can now be expected to be completed.

The first is that what is required in relation to HS1 under Regulation 12 is highly complex, and not at all comparable with the situation which EWS may be familiar with in relation to the UK domestic rail network. It is a process which is being undertaken on a "ground upwards" basis, in relation to a new and specialised piece of rail infrastructure which is unique in the UK rail context.

Second, and even more importantly, the process of determining the charging framework and charging rules for HS1, if not carried out correctly, potentially has significant implications for the long term financial viability of HS1 as a critical piece of the UK's (and indeed the EU's) transport infrastructure. (We will be happy to explain those issues to the ORR in more detail if necessary.)

It is therefore crucial that all elements of that process - i.e. approaches on passenger charging *and freight charging*; various elements of charging such as core usage charges, mark-ups and investment recovery charges, etc. - all be determined carefully in conjunction with each other, to yield a unified approach which ensures correct treatment of all existing and potential users of HS1 relative to each other, and which in doing so also addresses the overall financial viability of HS1 going forward.

This has clearly been signalled to EWS previously (see for example the e-mail from Brian Blackwell of HS1 to Graham Smith of EWS dated 18 March 2008, which is included as Attachment 24 to EWS's letter to the ORR of 25 April 2008). The manner in which EWS has framed its appeal, on the other hand, suggests that issues concerning freight can be dealt with in isolation from this broader context and therefore implies that they should already have been dealt with. This is simply not the case.

How the work will now be completed, and the potential adverse impact of any interference at this stage

The process on freight charging is moving forward as quickly as could reasonably be expected. We are working to be able to consult with the freight industry on the work referred to above in the late summer. (As you will be aware, we updated the industry again on progress in this respect only last week.) We also anticipate substantial progress from the DfT in relation to the charging framework in that period. Therefore we are confident that we will then be able to move to a full second stage consultation on the proposed charging rules for HS1 by September. In the circumstances, we do not believe that it would be realistic for EWS to demand any of these actions any sooner.

Our view is that there would in fact potentially be serious adverse consequences for the ability of the DfT and HS1 to ensure that the charging framework and charging rules as a whole can meet the critical broader objectives for HS1 if the ORR were to interfere with those next steps now by attempting to set a faster timetable. Again, DfT and HS1 are working as quickly and efficiently as possible to discharge their obligations under Regulation 12 - including in relation to freight - having regard to the particular



complexities in doing so which arise in relation to HS1: our view is that we must be allowed to continue with that process unhindered for the time being.

On this basis we do not think we need engage in any further debate about the chronology of events which EWS has presented, or what representations EWS considers have been made by or on behalf of HS1 or the DfT to date about likely freight charges. If the ORR did wish to examine that chronology more fully though, again we reserve our right to say more on these issues.

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In light of the foregoing, we would formally request that the ORR, subject to such consultation as may be required pursuant to Regulation 29(8) of the Regulations, dismiss EWS's appeal pursuant to Regulation 29(7) in full. We would like to emphasise though that we are of course available for further dialogue with the ORR on this matter should the ORR feel that that would be the most productive way forward at this stage.

A copy of this letter has been sent to Graham Dalton at the DfT and Anthony Barnes at NR (CTRL) Ltd.

If you have any questions regarding the above please do not hesitate to contact Brian Blackwell on 07525 702 804 or Naina Mistry on 07525 702 839.

Yours sincerely

A handwritten signature in black ink, appearing to read "P. Chapman", written over a horizontal line.

PAUL CHAPMAN
Managing Director

cc Graham Dalton – DfT
Anthony Barnes – NR (CTRL) Ltd
Chris Hamill – LCR
John Robertson – Herbert Smith

