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12 March 2010

Paul McMahon
Deputy Director, Railway Markets
and Economics
Office of Rail Regulation
One Kemble Street
LONDON
WC2B 4AN

Dear Mr McMahon

**APPEAL UNDER REGULATION 29 OF THE RAILWAYS INFRASTRUCTURE
(ACCESS AND MANAGEMENT) REGULATIONS 2005 ("REGULATIONS")
BY DB SCHENKER RAIL (UK) LIMITED ("DBS")**

We refer to our previous correspondence with you in relation to this appeal. The Felixstowe Dock and Railway Company ("FDRC") considers the appeal made by DBS to the ORR regarding the Port of Felixstowe ("PoF") to be premature. However as requested by you in your letter of 2 March 2010 we have set out in this letter our representations on the two issues which we now understand from you to be at the heart of this appeal, namely: (i) an alleged inability to agree terms with FDRC for a new rail service at PoF and (ii) the charging arrangements and level of charges for rail freight operating companies ("FOCs") at PoF. In doing so, please note that FDRC continues to reserve its right to challenge the jurisdiction of the ORR to consider the appeal at this point for the reasons set out in our letters of 18 and 25 February and again requests that the ORR specifically addresses in full the points raised in those letters regarding jurisdiction before it comes to determine this appeal.

1. Proposed new DBS Service at PoF

1.1 Request by DBS for a new service

The first point that FDRC would like to make is that it has not made any final decision(s) on the request submitted by DBS in its letter of 2 September 2009 (appendix 5 to the appeal) to run an additional service at PoF. Indeed because DBS has never provided FDRC with sufficient detail and information about the proposed service FDRC has never been in a position where it could make any decision(s) or enter into any negotiations. FDRC has already made this point in its letter to the ORR of 18 February. However for convenience and because the point is of fundamental importance we repeat below some of what was stated in our earlier letter.

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The correspondence attached by DBS to their appeal application shows that on 2 September 2009 DBS supplied to PoF a copy of its own study of both branch line and port rail terminal capacity. This consisted of a series of power point slides. However, it was not supported with any detailed analysis or explanation. Furthermore no proper business case for this new service was provided by DBS. For example no indication of proposed volumes and utilisation rates was supplied. Another concern for FDRC was that the proposed new service appeared to conflict with the services of another FOC and no information on how this was to be resolved was provided.

Given these facts and its own concerns over the practicality of handling another service FDRC was therefore not in a position to consider DBS's request without further information from and discussion with DBS. FDRC's letter of 29 September 2009 to DBS clearly making this point is attached as appendix 6 to the appeal. Paragraphs two and three of that letter were as follows:

"As a first step in considering your request for access, we have reviewed your study in detail and this has raised a number of areas that we would like to clarify to enable us to come to a definitive view as to the extent to which the requested service can in practice be accommodated. Our own analysis has identified conflicts at the terminal with the proposed new service and we would, therefore, need to understand the basis of your study and the inputs that you have used in support of the study's conclusion.

On that basis, we would like to take up your offer of a meeting which I would be happy to host at the port. In the meeting, in addition to discussing your proposal, we would also like to take the opportunity to brief you on certain studies that we are undertaking that will consider, in more detail, some of the issues raised in your study. These studies include, in particular, our own recently concluded review of capacity in respect of the South Rail Terminal and our planned review of capacity in respect of the North Rail Terminal. These studies seek to specifically identify opportunities to maximise efficient use of our facility on a multi-operator basis both to enhance service provision to our customers and to improve our competitiveness both with other container ports and other transport modes."

Regrettably the meeting of 19 November 2009 lasted a maximum of 25 minutes because DBS decided to leave abruptly. DBS therefore did not provide any of the further detail or explanation that FDRC was hoping to receive at the meeting in order to better understand the proposal. In addition, FDRC was unable to present to DBS the findings of its own recently completed capacity studies and proposals for addressing some of the issues identified.

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The minutes of the meeting attached to the appeal application show that rather than engaging in any meaningful or constructive dialogue as proposed by FDRC, DBS appeared to have had no genuine interest in doing so. Indeed paragraph 10 of the minutes show that DBS had apparently already engaged on a pre-emptive basis with the ORR in advance of the meeting. The balance of what occurred at the meeting suggests that DBS were minded to seek a confrontation with PoF and had no interest in engaging in the type of analysis proposed by FDRC in its letter of 29 September.

Following the abortive meeting with DBS FDRC wrote to Mr Boner, the managing director of DBS Networks, to express its regret and to reiterate its willingness to work with DBS and *"to share our findings in order that you can understand the future capacity opportunities as they emerge from the work that is underway"* (see appendix 7 to the appeal). The letter also confirmed that it was FDRC's understanding that because FDRC had not simply acknowledged from the outset that any additional capacity into the port would inevitably be allocated to DBS as of right, that DBS had withdrawn from any further dialogue. There was never any response from DBS to that letter or further communication. Instead it started an appeal under the Regulations.

In FDRC's view any appeal by DBS at the present time is wholly premature and inappropriate as there is nothing to appeal. FDRC has demonstrated a clear willingness to engage in a constructive dialogue with DBS and was seeking to do so promptly. The dialogue had reached a preliminary stage when DBS decided to break off from further discussion and/or analysis with FDRC and has effectively sought to override any engagement with FDRC by referring matters to the ORR.

Clearly until DBS is prepared to engage constructively with FDRC on this matter it will not be possible to progress further its request for an additional service or any terms and conditions relating to it. On that point we note that DBS has appended to its appeal a draft agreement for the proposed service. As DBS is aware from its participation in the process for the award of terminal capacity for the 27th train at PoF, FDRC has already developed its own template port access agreement for train operators which FDRC believes complies with best practice and all applicable regulations. A copy of this template agreement was also provided to the ORR last year.

We note that DBS had no comments on FDRC's template contract when it participated in the bidding process for the 27th train and therefore would have entered into it had it been successful. We further note that in paragraph 10 of the ORR's decision dated 12 November 2009 relating to access to the Port of Immingham, the ORR noted that the increased use of such template agreements could help to ensure a level playing field for all companies and lead to a reduction in transaction costs. FDRC agrees with the ORR and therefore submits that any terms and conditions for the services operated by DBS (or any other FOC) at PoF should therefore be based on FDRC's template agreement.

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The following sections of this letter are without prejudice to FDRC's primary position that no decision(s) have yet been taken by it which could be considered prejudicial to DBS and hence justify the making of an appeal under the Regulations. There has been no meaningful dialogue with DBS on the issues below and there was therefore no opportunity to hear what its position on these points would have been. What is set out below is therefore simply indicative of the capacity issues FDRC would have liked to have discussed with DBS in further detail as part of the process of considering its proposal for a new service.

1.2 Capacity Issues at PoF

As can be seen from the correspondence between the parties annexed to DBS's appeal, FDRC believes that there are currently significant issues in relation to existing rail capacity at PoF which make it extremely difficult to accommodate any additional services at present. Indeed, in this regard, it should be noted that an application by one of DBS's competitors in June 2009 to run one additional service at PoF was turned down by FDRC for capacity reasons.

FDRC believes that there are essentially two elements to the current capacity issue. Firstly, the ability for the Felixstowe branch line linking PoF at Trimley St. Mary with the main rail network at Ipswich to handle more train services in combination with the marshalling requirements at Ipswich yard and, secondly, the ability of PoF itself to physically service more trains at the two PoF rail terminals. We note in this regard that paragraph 2.14 of the ORR's guidance on appeals under the Regulations considers amongst other things that the "*non-availability of capacity*" and the "*technical limitations of the site or approaches to the site*" are both examples of an objective justification for restricting or denying access to a facility.

Each of the two elements to the capacity issue at PoF are now considered in turn below.

1.2.1 Branch Line Capacity

With respect to the issue of branch line capacity FDRC believes it is generally accepted by the majority of stakeholders that that capacity is now extremely limited. For example the Strategic Rail Authority (the "SRA") gave evidence at the Felixstowe South Reconfiguration public inquiry in 2004 that the maximum capacity of the branch line to and from PoF was limited to 25 trains per day.

Against this backdrop of a capacity ceiling of 25 freight trains per day on the branch line and, the maintenance of the Felixstowe to Ipswich passenger service, FDRC has worked closely with all of its FOC customers and Network Rail to in fact achieve 28 train services per day at PoF at the present time. This indicates a clear willingness by FDRC to be as flexible as possible on such matters and it has a vested commercial interest in being so.

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In achieving this increase, PoF has been wholly dependant on the ability of the FOCs to find and secure rail paths on the railway network and to create the commercial offering for the shipping line customer base. In working with the FOCs and Network Rail, FDRC has relied upon the experience, enterprise and ingenuity of the FOCs to find paths in excess of the 25 that the SRA considered to be the limit of the branch line and the Ipswich yard infrastructure. Clearly then, as part of any process of awarding further rail freight services at PoF, FDRC needs to be satisfied that an applicant can demonstrate that there is sufficient branch line capacity to handle the service. If it can be demonstrated to FDRC that extra capacity can be freed up on a practical basis then FDRC would want to realise it. In this instance, for the reasons set out on section 1.1 of this letter, DBS have so far failed to do this. A sensible dialogue with DBS would have permitted FDRC to start to address these issues.

Currently PoF handles the following trains on behalf of the FOCs on a normal weekday:-

FOC	No. of Services per day
DBS	2
First GBRF	5
Freightliner	21
Total	28

It should be noted that since 2002, when open access arrangements were introduced at PoF, the number of trains has grown from 14 (all of which were operated by Freightliner) to 28 services provided by 3 FOCs. In particular, since 2002 Freightliner has introduced a further 7 services at PoF, whilst the other FOC's have also introduced 7 services in combination (5 by First GBRF and 2 by DBS). Therefore whilst Freightliner was the sole operator in 2002, it has been allocated only 50 per cent of the new services since that time with the other 50 per cent of terminal capacity being awarded to its competitors.

Given these facts, DBS's claim in its appeal that FDRC has acted unfairly and in a discriminatory manner when allocating terminal capacity simply does not stand up. Indeed, given that FDRC is not active in the downstream market for rail freight transport it has no incentive to act in such a manner. FDRC's focus is on maximising the use of the available capacity at the terminals and to ensure that it is utilised in a way which most effectively meets the needs of the shipping line customers of PoF. This in turn maximises the benefit to FDRC's business as a whole.

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1.2.2 PoF Rail Terminal Capacity

The second element to the capacity issue is PoF's ability to physically service further trains. Rail container volumes handled at PoF have grown from 255,067 containers in 2001 to 444, 256 in 2009. That is an increase of almost 190,000 containers moving by rail and equivalent to growth of approximately 74 per cent over the 10 year timeframe. As stated above PoF operates two rail terminals, namely the North Rail Terminal ("NRT") and South Rail Terminal ("SRT"). Despite the rapid growth in volumes, the facilities for handling and servicing rail freight in 2010 are broadly similar to those that were available in 2001. Therefore the challenge for PoF over time has been to become increasingly efficient in the use of port rail terminal capacity that regularly now handles up to 10,000 containers per week on the 28 daily rail services calling at the port.

However, as FDRC's letter to DBS of 19 November 2009 made very clear (see appendix 7 to the appeal) with 18 services daily at the NRT and 10 services at the SRT, FDRC considers that there is now extremely limited rail terminal capacity. Indeed resources for handling the increased rail freight volumes are now so stretched that FDRC is sometimes struggling to meet the service requirements expected of it by its rail customers. Consequently, and as FDRC was hoping to be able to explain to DBS at the 19 November meeting, FDRC has been taking a number of steps to try and address these problems with a view to creating further terminal capacity later in 2010. These steps have included the following measures:

- (i) carrying out detailed studies of the capacity issues at both the SRT and NRT;
- (ii) encouraging both FOCs and shipping lines to focus on utilisation and making better use of the capacity currently available - both in terms of getting better train fill on quieter days of the week and also in terms of making better use of the 'weekend opportunity' and in particular Saturday services;
- (iii) initiating the SMART (System for Managing Additional Rail Traffic) project which involves carrying out a root and branch review of FDRC's rail business process; and
- (iv) investing in new and more efficient container handling equipment.

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Finally we note that in its appeal application DBS has stated that it believes that there is no alternative facility available to it other than the PoF rail terminals. FDRC does not agree that this is necessarily the case. For example there is a rail facility that is being used for intermodal handling within 15 miles of PoF at Associated British Port's Ipswich facility. FDRC believes that this could be considered to be a suitable alternative facility offering additional rail loading capacity. Indeed FDRC understands that DBS already utilises this location for container traffic originating from PoF and that it currently operates two trains per day to this facility at Ipswich.

2. Charging Arrangements at PoF for FOCs

DBS has claimed in its appeal application that it is concerned that *"the charging arrangements and the level of charges currently in place for access and services at the Port of Felixstowe are not being applied in a fair, transparent and consistent manner to the different freight operators using the Port of Felixstowe"*. FDRC rejects this claim and notes for the reasons set out in section 1.1 of this letter that there have been no discussions with DBS about pricing (or any other terms and conditions) for the new service it has proposed. FDRC also notes that DBS has been operating services at PoF since 2002 and that this is the first time that it has ever made such a claim.

Furthermore, apart from providing a copy of the charges currently applicable to it at PoF, DBS has provided no evidence, explanation or reasoning whatsoever as to why it believes the statement quoted above to be the case. DBS has therefore in FDRC's opinion failed to comply with paragraph 4.10 of the ORR's guidance on appeals. For example we note that paragraph 4.10 requires an appeal applicant to provide as a minimum *"the reason why the applicant does not consider that the fee proposed or charged complies with the applicable framework, the rules, or the principles set out in the Regulations"*. Given the failure of DBS to comply with this requirement under the Regulations FDRC is therefore only in a position to respond in very general terms to DBS's claims.

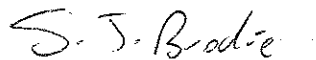
It would seem that the reason why DBS is arguing that it is unable to provide any evidence to support its claims with regard to charging arrangements at PoF is that FDRC has not provided it with details of its competitors' negotiated rates. We note however that DBS has itself requested that as part of the appeal process the charges it has negotiated with FDRC (see appendix 8 to the appeal) remain confidential on the basis that they are commercially sensitive. DBS's position on this point is therefore completely inconsistent as this is precisely the reason given to it by FDRC for not disclosing to it the charges of its competitors. In addition, FDRC understands from the network business segment map available on DBS's UK website that it currently operates at ten inland terminals (a number of which it manages) and 10 UK ports. It is therefore surprising given the extent of its operational footprint and obvious experience that it appears unable to provide any evidence to support the claims in its appeal application.

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We trust our comments above satisfactorily address the issues raised by DBS in its appeal. However, should you require any further information please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. J. Brodie'.

STEPHEN BRODIE
Project Manager – Port Development