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3 July 2015

Dear John

### **Access to the East Coast Main Line (ECML): Industry hearing follow up**

On 22 June 2015 you forwarded a letter outlining the next steps you intend to take prior to making a decision on the competing applications for ECML capacity. As part of this you distributed the draft transcript, in which we have addressed minor issues and then returned.

However, fundamental to any next step is the matter concerning the VTEC Timetable which was given to First Group on 24 February 2015, (which we now know VTEC was compelled to provide by the ORR), and the delay to the laid out process established by the ORR on how it would deal with applications and the statutory process for s17 applications<sup>1</sup>.

I would be interested to understand under what circumstances the ORR considered it appropriate to require and then provide this information to First Group and not to other applicants at the time.

I am not sure that the ORR has grasped the seriousness of this issue, nor indeed the depth of Alliance's concern, but there can be no 'next steps' until this matter is satisfactorily resolved. This is not just a simple process error, but a manifest injustice that has seen First Group given an unfair competitive advantage by the ORR:

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<sup>1</sup> The statutory timescales are contained in para 29 (7) of the Railways Infrastructure (Access and Management) Regulations 2005

- By being able to enter a process with output timescales that were clearly defined in the ORR letter of 6 February 2015<sup>2</sup> and, as a result, delay it
- By being given a commercial advantage in being provided with a confidential timetable that was not made available to Alliance for a further ten days, despite it being requested as early as 12 February<sup>3</sup>

In its June 2014 letter the ORR stated that “*a decision from us may not be possible until early in 2015 – we recognise however that an earlier decision will reduce uncertainty and help all current and prospective operators plan their businesses with reasonable assurance*”.

On 6 February 2015 the ORR stated what relevant current applications or expected applications it was aware of and this did **not** include First Group. The timescales were known, and the ORR stated its “assessment and decision” would be made in April/May 2015. By 6 February, assessment of GNER’s application was almost complete.

In 2010, following similar problems on the ECML, the ORR published its East Coast Lessons Learned Report. In it the ORR noted:

*“Notwithstanding the right under the Act for anyone to make an application at any time, we believe that there is a strong case for priority to be given to more significant applications where we have set out clear timescales, particularly on congested parts of the railway..... However, it was made clear that, whilst this did not preclude anyone from submitting an application, which would still be considered in line with our usual processes, it would not be given the same level of priority unless there was strong justification... This is particularly true where a train operator might seek to ‘block’ another company’s access application by making a rival application”.*

How, then, is it remotely possible for the ORR to accept a late application from First Group into this process? Rob Plaskitt’s defence of the position at the hearing is untenable: “*We could see no good reason to leave them out of the process, provided it didn’t have an impact on the overall timescales*” he stated. It was obvious it would have an impact on timescales – and it has.

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<sup>2</sup> Original timescales were also set out in the ORR letter of 18 June 2014

<sup>3</sup> This has allowed First Group to ‘play’ with timetables to reduce abstraction and is anti-competitive

The timescales were laid out clearly by the ORR on 6 February 2015. The CH2MHILL report was to be published mid to late March 2015, with a decision in April/May 2015. First Group did not apply until 9 March 2015<sup>4</sup>, so consultation alone took us beyond the scheduled report publication date. I consider that to accept a late application into the process was negligent and entirely inconsistent with your stated plan, and for those of us who have correctly followed your process - and the statutory process<sup>5</sup> - it has once again imported significant delay, added further cost and not allowed us to plan our business with certainty.

I would be interested to understand under what circumstances the ORR considered it appropriate to further extend a process where you had already set out clear timescales.

The situation was then compounded by the ORR giving First Group the VTEC timetable on 24 February 2015 which enabled it to model its own submission. This ensured First Group could not only argue that they used up spare capacity (by allowing VTEC to introduce its total service), but that they could also flex their timings to reduce the abstractive effect of any submission.

As a result, the application First Group has submitted (and modelled by CH2MHILL) is designed to maximise its unfair competitive advantage – a position the ORR should clearly have understood. As an example, on all up services, the xx35 (Edinburgh), First Group trains are timed to leave Edinburgh (and Newcastle) in front of a VTEC train at xx42 – and despite being non-stop from Newcastle and having equivalent traction, they are overtaken and arrive behind the xx42. Of course not only is this poor use of capacity, but more importantly it has allowed First Group to almost halve the revenue abstraction based on MOIRA than would otherwise be the case.

It is this flawed and very tactical First Group timetable that CH2MHILL has undertaken its work on, giving totally biased and unreliable outputs – irrespective of any ‘unique proposition’ as claimed by First Group<sup>6</sup>. This being the case, the value of

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<sup>4</sup> The VTEC application of 8 March is not relevant in this matter as their work had already been shared with CH2MHILL.

<sup>5</sup> The statutory timescales are contained in para 29 (7) of the Railways Infrastructure (Access and Management) Regulations 2005

<sup>6</sup> First Group’s ‘unique proposition’ is based on sophisticated yield management, which most long-distance TOCs are already using.

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the CH2MHILL work on the First Group application must be fundamentally questioned and discounted appropriately.

The ORR is aware of the Alliance history with its ECML applications. It is also aware that at every ECML Programme Board Alliance has pursued the capacity position, which eventually resulted in a Network Rail Capacity Report that supports our position on the number of paths available. First Group has not only taken advantage of that, despite earlier 'ORR lessons learned', but has been handed a further – and significant - advantage by the ORR.

It is extremely unusual, and possibly unique, that a competition regulator finds itself in this position. The Access Management Regulations has the ORR as appeal body if a company feels it has been unfairly treated or discriminated against. If the ORR is itself that discriminatory body where might that leave the industry?

What we have now is an unacceptable position, and I am asking for the ORR to suspend any further work on its consideration of the current ECML applications until the situation surrounding its own involvement with the unfair competitive advantage given to First Group is satisfactorily resolved.

Given our concerns around the anti-competitive behaviour exhibited I formally request that this should be subject to an urgent and independent investigation and the findings shared with Alliance to help provide more confidence of a level playing field in your assessment of the various applications.

There will then be the issue of the validity and acceptability of the CH2MHILL work to consider, and I will be writing to the ORR separately on that matter.

Yours sincerely



Ian Yeowart

Copy:

Chris Burchell, Chairman, UK Trains

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