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20 September 2016

Abellio Greater Anglia Ltd  
MTR Corporation (Crossrail) Ltd

By Email and Post

Dear Sirs

## **APPEAL UNDER PART M OF THE NETWORK CODE (TTP985)**

Thank you for the ORR's email dated 16 September 2016. We write to answer, as requested, the questions raised in that email.

We also comment briefly on Abellio Greater Anglia Ltd's (**AGA**) Respondent's Notice.

### **1 Questions Raised in the ORR's email dated 16 September 2016**

1.1. The questions the ORR has referred to Network Rail are:

*"1. In paragraph 4.14, you state that NR's "intention when drafting paragraph 5.1 of its statement of case was to request that the Panel did not base its decision on the Appellant's application of the Decision Criteria" and that "the Appellant wanted the Panel instead to focus on whether or not AGA had adequately demonstrated why it should have been awarded the capacity". Please can you explain what is meant by this paragraph and how the latter request differs from the former?"*

*2. Further, how does the above explanation of Network Rail's intention relate to the underlined section in paragraph 4.12?"*

1.2. The underlined section in paragraph 4.12 of Network Rail's Notice of Appeal is an extract from paragraph 5.1 of its statement of case and it states:

"In this instance Network Rail do not feel it is appropriate for the panel to find error with Network Rail's processes, but not rule on who should be allocated the capacity."

### **Response to ORR Question 1**

1.3. This is a more detailed explanation of what is meant by paragraph 4.14. Paragraph 4.14 clarifies Network Rail's intentions when drafting paragraph 5.1 of its statement of case (which is repeated in the underlined section in paragraph 4.12 of Network Rail's Notice of Appeal), which Network Rail acknowledges was ambiguously drafted in its statement of case.

1.4. Network Rail was concerned that the Panel might base its decision solely on whether or not Network Rail had applied the Decision Criteria correctly and/or other process issues. By making the statement at paragraph 5.1 of its statement of case, Network Rail was attempting to ensure that, even if the Panel found fault with Network Rail's application of the Decision Criteria, this would not automatically result in the Panel finding that the outcome of Network Rail's application of the Decision Criteria (awarding the capacity to MTR Corporation (Crossrail) Ltd (**MTR**)) was wrong. Network Rail wanted to ensure that the Panel also considered the cases of both operators (AGA and MTR) and in particular whether AGA had adequately demonstrated that it should have been awarded the capacity.

1.5. In so doing, Network Rail was asking the Panel to apply a two-fold test:

1. Did Network Rail apply the Decision Criteria correctly?; and
2. If not, would all reasonable applications of the Decision Criteria still lead to MTR being awarded the capacity, because AGA had failed adequately to demonstrate why it should have been awarded the capacity?

- 1.6. If the answer to 1 was yes, then Network Rail's decision should have been left to stand. If the answer to 1 is no, then question 2 should then have been considered.
- 1.7. If the answer to 2 was yes, again, Network Rail's decision should have been left to stand. If the answer to 2 was also no, then the Panel should have found against Network Rail and given directions to order Network Rail to reconsider the award of the capacity at platform 18 at Liverpool Street and, in doing so, to re-apply the Decision Criteria in a way which took into account any flaws found by the Panel in Network Rail's original application of the Decision Criteria.

## **Response to ORR Question 2**

- 1.8. The explanation set out in paragraph 4.14 of the Notice of Appeal and explained in more detail above, shows how Network Rail's intention relates to the underlined section in paragraph 4.12 of the Notice of Appeal, in turn derived from paragraph 5.1 of Network Rail's statement of case. That sentence should not be read in isolation, but should be considered within the paragraph in which it sits, and in particular should be read in the light of the sentence immediately following it, which says, "*...Network Rail is asking the panel that unless AGA have adequately demonstrated that they should have been awarded the capacity to stable in Platform 18, then Network Rail's decision should remain*".
- 1.9. In summary, Network Rail was seeking that in addition to consideration of the Decision Criteria, the Panel should also look at the case being put forward by AGA.
- 1.10. Network Rail accepts that the language was not clear, and (for the reasons set out in the Notice of Appeal) this point should have been clarified by the Panel.

## **2 Additional information for the ORR to consider**

- 2.1. We do not propose to repeat the contents of the Notice of Appeal, but we would like to make some brief points which respond to the points raised by

AGA in its Letter of Response. We respectfully ask the ORR to take these points into account in considering the appeal.

- 2.2. At 2.3(b) AGA suggests that Network Rail does not challenge the substantive findings of the Panel. Whilst Network Rail does not expressly criticise the findings of the Panel in its Notice of Appeal as regards the application of the Decision Criteria, this point by AGA is misconceived because, as set out in Network Rail's Notice of Appeal, Network Rail challenges the Panel's ability to make the finding it did, because the Panel did not have the power to substitute an alternative decision. There were no "*exceptional circumstances*". Network Rail therefore challenges the very basis of the Determination itself. This is clearly a challenge to the substantive finding of the Panel, and for that reason Network Rail requests at paragraph 5.4 of the Notice of Appeal that the decision be remitted back to Network Rail for reconsideration with appropriate directions.
- 2.3. Throughout AGA's Letter of Response AGA refers to Network Rail requesting / specifically asking the Panel to rule on which party should be granted capacity (see 1.3(b), 1.4(b), 4.3(a), 4.3(b), 4.4(a), 4.4(c), 7.8, 7.10 and 7.12 – 7.13). Network Rail made it clear in its Notice of Appeal that this was not a request and that the Panel simply misinterpreted a sentence in Network Rail's statement of case. We also refer to the explanation provided in section 1 of this letter.
- 2.4. Further to this point, AGA seem to suggest that if Network Rail had made such a request, that such a request would be sufficient to give the Panel the right to substitute its decision for that of Network Rail. This is not the case.
- 2.5. Firstly, the Panel's powers are clearly set out at Condition D 5.3.1 of the Code and requests by Network Rail should not alter or extend these powers. It is of upmost importance that the industry has certainty as to the terms of Code. To allow such terms to be altered on an ad hoc basis at the request of a party would be contrary to the express provisions of Part D.
- 2.6. Secondly, a request such as this one should not constitute an "exceptional circumstance" for the purposes of Condition D 5.3.1 (c) of the Code. Please

see paragraph 4.6 of Network Rail's Notice of Appeal which deals with this point. Exceptional circumstances should be exceptional.

2.7. At 4.4(b) AGA suggests that substituting the Panel's decision for that of Network Rail "*reflects the step Network Rail would be obliged to undertake under Condition D5.6.1*". If this were the case then the Panel would in effect be granted the power to substitute its decision for that of Network Rail in every case. This is contrary to the express provisions of the Code, because the Panel's power under Condition D 5.3.1 (c) of the Code is only exercisable in "exceptional circumstances". If AGA's point were accepted, this would create a precedent which is likely to have a significant detrimental impact on the operation of Part D of the Code, in that Panels would no longer be restricted to exercise their powers under Condition D 5.3.1 (c) of the Code only in "exceptional circumstances".

2.8. Finally, Network Rail disputes AGA's claim that the Panel's application of the Decision Criteria is the only correct application. AGA submits that the substantive issue has been found in favour of AGA (4.4(b)), that the Panel's determination is binding on Network Rail (4.3(d)) and that there is a "single conclusion" in respect of who should be granted the capacity (4.3(e)). This position overlooks the fact that there may be many "correct" ways in which the Decision Criteria could be considered and applied, and, as a result, there are other correct outcomes which may be reached. The key point here is that it is Network Rail's decision to make. Network Rail requests, as in paragraph 5.4 of the Notice of Appeal, that the appeal should be upheld and the decision remitted to Network Rail for reconsideration with appropriate directions.

2.9. All other arguments put forward by AGA are already dealt with in our Notice of Appeal.

Please let us know if any further comment or explanation is required.

Yours faithfully

A handwritten signature in black ink, appearing to be 'S.P.' followed by a stylized flourish and a long horizontal line extending to the right.

**Sian Williams**

**Legal Counsel, Routes**