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Dear Bill

**DB Schenker appeal under Regulation 29 of the *Railways Infrastructure (Access Management) Regulations 2005* ("Regulation 29") for access and services at Freightliner's Maritime Terminal at Southampton, 14 January 2015**

Thank you for your letter of 1 May 2015 relating to the redaction of commercially sensitive information contained in Freightliner's response of 4 February 2015.

Under Section 145 of the Railways Act 1993 (the "Act"), which relates to disclosure of information by the ORR, the ORR is able to disclose information where such disclosure is made for the purposes of carrying out its functions under the Act. However, the ORR itself has recognised (see paragraph 6 of its letter to Freightliner of 1 May) that there may be circumstances where information provided in the context of an appeal under Regulation 29 may be confidential or otherwise of a commercially sensitive nature. In particular, the ORR recognises that the need to protect such information may increase where the party to whom the information is being disclosed is a competitor.

In these circumstances, the ORR has taken the pragmatic view that the redaction of certain information may be appropriate prior to the disclosure of Freightliner's response to DBS.

In assessing whether to allow information to be redacted prior to disclosure, the ORR considers it appropriate to apply the test set out in Section 71 of the Act (which contains factors to which the ORR should have regard prior to allowing the *publication* of information). In applying this test, the ORR's letter of 1 May sets out a number of factors that it will take into account in considering the "*balance to be struck between complete transparency, ensuring a fair and open appeals process and protecting a party's commercially sensitive information.*"

Freightliner has considered the application of these factors (as well as the balance the ORR is seeking to achieve) carefully. As a result (and in an effort to expedite the appeals process as far as possible), Freightliner has decided to allow the disclosure of certain information which had initially been redacted in the non-confidential version of its response to DBS' appeal. However, Freightliner continues to request that certain information be withheld from disclosure to DBS given its highly confidential nature and the commercial damage likely to result from the provision of this information to a competitor.

In this regard, Freightliner has appended to this letter a table which contains the following:

- a) a reference to the page number and the text of the confidential information, as redacted from Freightliner's response;
- b) an explanation of the context of the information; and
- c) an explanation as to why Freightliner considers that disclosure of the information to DBS would '*seriously and prejudicially*' affect its commercial interests.

Following receipt of Freightliner's representations on confidentiality, Freightliner notes that the ORR is proposing to provide a copy of these to DBS and invite DBS to comment. Whilst the ORR is required, under Schedule 4, Section (3)(2) of the Act, to provide DBS with the opportunity to make representations in relation to Freightliner's substantive response to its access appeal, it does not appear that the ORR is obliged to allow DBS the chance to comment on Freightliner's confidentiality requests. Freightliner makes three points in this regard:

- a) that reverting to the appellant for comment in relation to confidentiality requests is likely to be of limited value given the commercial incentive for the appellant (which is also a competitor of Freightliner) to request that it be provided with access to all such information and, in particular, that which is of the greatest commercial sensitivity;
- b) that, in our experience of the redactions process as overseen by competition authorities, it is not normal practice for third parties to be consulted; and
- c) that, should the ORR consider it necessary to provide the appended table to DBS, the table itself would need to be redacted given the inclusion of the original confidential information.

As regards the broader appeals process under Regulation 29, the ORR is required to provide to DBS with Freightliner's response to its appeal, as well as the opportunity to make further written representations pursuant to Freightliner's response (as set out in Schedule 4, Section (3)(2) of the Act). Freightliner notes that, pursuant to Schedule 4, Section (3)(3) of the Act, the ORR has the discretion to "*request or invite further information, clarification or representations from the applicant or the facility owner.*"

Given that the ORR is providing the appellant with the opportunity to comment on Freightliner's response to its appeal, i.e., is providing DBS with two opportunities to make representations and provide evidence in support of its appeal, it is only 'fair' for the ORR to provide Freightliner with the opportunity to do the same. Given that it is Freightliner which is being required to 'defend' its decision not to grant DBS access to its terminal, it is appropriate to allow Freightliner a right of reply to DBS's secondary representations. This would be consistent with other administrative, arbitral and judicial procedures which give the last word to the "defendant."

This is particularly relevant in this instance where, as set out in the ORR's '*Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005,*' the ORR considers its role in such regulatory disputes as one of an arbiter, not an investigator. As such, the ORR intends "*to rely on the information provided by the parties themselves*" in making its determination and requests that the parties "*provide as much realistic information as possible.*" By denying Freightliner the opportunity to respond to DBS's second submission, the ORR would not only be depriving Freightliner of a fair and open appeals process, but depriving itself of information and evidence necessary to allow it to reach an informed decision.

On this basis Freightliner requests that the ORR uses its powers under the Act to provide Freightliner with the opportunity to make representations in response to the appellant's comments on Freightliner's initial response of 4 February 2015.

Yours sincerely



Lindsay Durham  
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Freightliner Limited