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Dear John

Capacity Charge for franchise and open access passenger for CP5

I am writing further to your letter of 24 September, in my capacity as Chair of the RDG working group on contractual and regulatory reform.

As I indicated last week, we held an industry 'mini-workshop' to discuss ORR's letter to which all owning groups, freight and current and aspirant open access operators were invited. I am now writing to reflect some of the views that were expressed at that workshop and also reiterate some of the points we made in RDG's August proposal to ORR.

We welcome the opportunity to comment on ORR's emerging position on the Capacity Charge for passenger operators in CP5. We also recognise ORR's difficulty in seeking to conclude on this complex policy issue in such tight timescales given that the Final Determination is just a few weeks away from being published.

Clearly only allowing four business days to respond to ORR's latest proposal provided an extraordinarily compressed timescale to consider such complex and significant issues. I have to report that RDG members are frustrated by this, especially as we set out the industry's position nearly a month ago. Indeed, the timing afforded us to respond has made it impossible for RDG to agree to (or indeed properly consider) radical changes to its August position.

Industry Leadership

The process that RDG adopted, over the summer, in considering ORR's draft proposals for Schedule 8, the Capacity Charge and the Volume incentive was a really good example of the industry behaving in the sort of collegiate way that stakeholders had hoped for in creating RDG. Our response was a pragmatic and workable way forward which recognises some of the legacy issues, whilst moving the situation forward. I believe that it is vital that RDG continues to provide

an industry voice on important policy matters such as the Capacity Charge. RDG members are keen that ORR recognises the benefits that can be achieved from this sort of approach and that it does all it can to encourage this further. The structure of charges review that is slated to start in early 2014 will be a significant opportunity for more 'RDG led' policy development.

Reflecting its desire for a greater role in policy development, this letter sets out RDG's joint view. It consciously responds at a 'principles' level primarily as we have already set out RDG members' collective views in our previous communications. I am sure, however, that some RDG colleagues will write separately to you on some of the minutiae of ORR's latest proposals.

Legal Opinion

We are grateful to ORR for sharing its external legal review of the RDG Capacity Charge proposal for open access operators. We consider that there are likely to be legal risks with all of the various Capacity Charge proposals that have been considered in PR13 including ORR's. We, therefore, consider that it would have been helpful if ORR had undertaken a legal review of its own proposals as well as the RDG one. ORR has sole responsibility for ultimately setting the charging framework. It is, therefore, important that it is satisfied that its approach is consistent with all relevant legislation – including EC Directives and competition law. We would have thought that ORR would be keen to understand any legal risks that it may be entering into in making changes to the way that the Capacity Charge operates.

RDG's August Letter

We note that ORR is uneasy with the legal risks that it considers are inherent in RDG's open access proposals and is not minded to adopt the industry's proposal for open access operators' capacity charge. There is clearly insufficient time to 'tweak' the RDG open access proposal within ORR's timescales to respond to its letter. Therefore, I restate, below, the conclusions from the RDG proposal that helped inform its open access 'special arrangements' for CP5. We consider that ORR should use these to test its own recent proposals. One could conclude that any alternative proposal for the Capacity Charge for Open Access operators that 'scores well' against RDG's conclusions would be likely to find favour amongst our members. We encourage ORR to carry out such an exercise before it concludes on this issue in its Final Determination.

The RDG conclusions were:

- 1) There should be, as far as possible, a predictable and stable charging regime for all operators. This was considered particularly important for OA operators.
- 2) Trains of a similar nature operating on the same parts of the network should have their various access charges set on a consistent basis.
- 3) OA operators entered the market and based their business cases / models on a reasonable expectation of predictable charges.
- 4) The Arup CP5 proposed capacity charge rate increases for OA are very significant and a sustainable pace of transition is needed if they are not to become unaffordable for existing OA operators.
- 5) There would be merit in 'special arrangements' for OA Capacity Charges in CP5.
- 6) That any OA Capacity Charge 'special arrangements' should be restricted to CP5 and clearly signalled as such in anticipation of an immediate review of charges for CP6.

Market Certainty

For some observers this summer's discussions on the Capacity Charge may seem arcane. However, I would like to emphasise that for current and aspirant Open Access operators this is a very significant issue. As we observed in the RDG proposal, *"the way that OA operators gain*

access to the GB rail network is very different to the way that franchised operators do". This statement alludes to the fact that Open Access operators will have found these discussions potentially very unsettling for their business models. I would like to reiterate a further statement from the RDG note i.e. *"ORR should promote greater regulatory stability"*, which is particularly true for Open Access (and freight operators) operators who do not enjoy some of the contractual protections that franchise operators do.

Beyond PR13

A further point that several members have asked me to reiterate is that the issues that have emerged in discussing some of the current charges is the need for a different approach for the next periodic review, with much more input from RDG on policy issues. Indeed, there is a real appetite to start the RDG led review of the future structure of charges, in early 2014.

Conclusion

Part of the RDG proposal offered an interim solution to help deal with Open Access operators' genuine concerns about the potentially steep increases in their Capacity Charge rates for CP5. RDG recognised these concerns and devised what I still consider to be a pragmatic and workable way forward which would recognise their legacy position, whilst moving the situation forward.

If ORR concludes, in its Final Determination, that it is unable to implement RDG's open access approach in CP5, it would be helpful if you could acknowledge the significant input from RDG over the summer. It would also be useful to frame ORR's decision more closely around RDG's open access 'conclusions' (from our letter).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Plummer', with a horizontal line underneath the name.

Paul Plummer