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## **ACCESS DISPUTES COMMITTEE**

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### **MINUTES of MEETING No. 16** held in London on 26 March 2008

#### **Present:**

Sir Anthony Holland, Chairman  
John Beer (First Capital Connect)  
Lindsay Durham (Freightliner)  
Nigel Oatway (English Welsh & Scottish Railway)  
Gabrielle Ormandy (Network Rail)  
Mike Price (First ScotRail)

#### **In attendance:**

Tony Skilton (Secretary)  
Martin Shrubsole (Member of Secretariat – "Clerk")

#### **Apologies:**

John Czyrko (London & Birmingham Railway)  
Bill Davidson (Network Rail)  
Tony Deighan (Eurostar (U.K.))

#### **16/1 Approval of Minutes of Meeting no.15**

The Minutes of Meeting no.15, held on 19 December 2007, were approved. The Chairman signed a copy of the Minutes as a true record of the proceedings.

#### **16/2 Matters arising from the Minutes of the previous Meeting**

##### **15/3 The Access Disputes process**

The Chairman had responded to the invitation from the Office of Rail Regulation ("ORR") to set out his views regarding the issues surrounding the current industry process and a copy of the letter had been provided to Committee members. Initiation of the intended review of the Access Dispute process was now awaited.

#### **16/3 Formation of a Company Limited by Guarantee ("CLG")**

The Members received a report setting out progress in the development of a proposition for the formation of a CLG to act as an agent for the Committee in the conduct of its business affairs. Initial drafts of constitution documents for the CLG were now to hand and it was anticipated that final drafts, together with the draft of the agency agreement to be entered into between the Committee and the CLG, would be tabled to the next meeting.

In view of the increasing salary values of Committee Members' time, suggestion was made that provision might be made in the Articles of Association to enable employers of Directors of the CLG to be compensated for their employee's participation in CLG business. It was also considered appropriate that the Access Dispute Resolution Rules be amended to include such provision in respect of Committee Members generally.

The Committee additionally considered it essential to obtain assurance from its solicitors that the agency arrangements being anticipated for the management of contracts through the CLG would not impact adversely with HMRC upon the consultancy arrangements which currently existed.

#### **16/4 Procedural issues arising out of the appeal of reference ADP23**

The Committee noted a paper summarising practical and procedural issues for Panels and the Secretariat which had emerged from ORR's appeal review (without hearing) of the Access Dispute Panel's determination of reference ADP23, noting further that ORR had concluded that the Panel's determination of the disputed issue should be set aside.

The reference concerned the operation of Network Code Conditions J.7 and J.8. ORR had recognised from the parties' pleadings and from concerns expressed by the Panel in its determination that there was some genuine confusion about how the provisions of the Conditions were intended to operate in practice, as well as the extent of the parties' legal entitlements pursuant to them; in view of this, ORR had helpfully provided the industry with an overview of the structure and purposes of these Conditions. The Committee understood that ORR was now providing input towards making Part J clearer.

Changes had already been adopted in response to various of ORR's recommendations regarding administrative practices associated with hearing documentation.

ORR had noted that the "Record" of the hearing had, as was customary, been issued after the Panel's determination. Whilst appreciating that Access Dispute Resolution Rule A1.68 did not impose any obligation upon Panels to make the Record available to anybody, ORR recommended that if the Record is to be released, it should be provided to all the participants to the hearing at the same time and no later than when the determination is published. The Committee recognised that this approach increased the risk of all documentation being delayed, particularly around holiday periods, and regarded potential delay in the issue of determinations as being particularly unsatisfactory for the parties involved. The Committee accordingly concluded that this was a matter for industry consensus during the forthcoming review of the Access Dispute Resolution Rules and decided that in the meantime, Panel's determinations should be issued to the parties at the earliest opportunity and not held back if the Record is not by then agreed.

The Committee noted that following ORR's determination of this appeal, the Chairmen of Panels conducting hearings had instructed the Secretary that the Records should be compiled more strictly in accordance with Access Dispute Resolution Rule A1.68, i.e. to be "a full note of the evidence given to the Panel". The "evidence" now being noted is the parties' written submission(s), the parties' opening statements, the questions and answers, the parties' closing submissions and any material presented during the course of the hearing. The Panels' private deliberations were no longer being recorded in the Record but they were being reflected as appropriate in the determination document to explain how the Panel had

arrived at its conclusions based upon the evidence. The Committee supported this change of practice regarding the content of the Record. Enhancing the accuracy of the Record through audio recording or employment of stenographers routinely at Panel hearings was discounted at the present time because of the additional costs involved and the potential effects on parties' representatives but the Committee recognised that expectations might evolve in this direction.

#### **16/5 Legal interpretation of industry documents**

Following discussion of matters arising from ORR's hearing of the appeal of the Panel's interim determination of reference ADP20 at the previous meeting (Minute 15/5), an approach had been made to the Committee's solicitors for guidance in respect of the terms in which ORR's determination was formulated and as to how future Panels might avoid possible pitfalls.

Reference ADP20 had concerned Network Code Part D. Aspects of a paper which specifically reviewed ORR's determination served to demonstrate how different legal minds can vary in their interpretation of the law and legal documents. Nevertheless, the paper was regarded as likely to be of assistance in the event that a Panel was reconvened to conclude hearing of all the ADP20 issues. The Committee considered that it had no locus to challenge ORR's determination of the appeal, it would be constructive to engage with ORR by sharing the paper in confidence whilst suggesting that sight of it might be of value to members of the Working Party on Part D reform on behalf of the Industry Steering Group.

The solicitors had also prepared a guidance note for Panels regarding the interpretation of contractual terms and it was agreed that this document should be issued to assist Panel members when potentially applicable to the issues surrounding future individual hearings. Reference documents surrounding this topic were also now available at the Committee's office for use by Panel members.

#### **16/6 Update on references**

The Committee noted the current position regarding the references on hand.

#### **16/7 Update on the website**

It was reported that the website was up to date at close of business on 25 March except that some updating of the directory was required to reflect the outcomes of recent Panel hearings and appeals: this updating (which would be subject to approval by the relevant Panel members and Chairmen) was expected to be completed over the coming few weeks.

#### **16/8 Outturn for 2007/08 and budget for 2008/09**

The Committee noted a paper from the Secretary and, indicating that it was content with the forecast outturn position for 2007/08, approved the proposed budget for 2008/09.

#### **16/9 Committee and Pool membership from 1 April 2008**

Members noted forthcoming changes in the elected membership of the Committee, the Access Disputes Pool and the Timetabling Pool.

It was considered appropriate that letters of appreciation to retiring Committee members should be copied for the information of the relevant Managing Director/Chief Executive.

16.07.08