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JM/rc

17 May 2006

Michael Conn
Network Rail
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Dear Michael,

ECML Rewiring Project (the "Project")

Thank you for your team's recent presentation to us on the scale and significance of the Project.

We recognise and appreciate the importance of replacing assets many of which are now at the limits of their 30 year life and the professionalism of your engineering team in the way in which they are performing so big a task.

The purpose of this letter is to address what is also a very important aspect for First Capital Connect, ensuring that we are appropriately compensated for the extensive impact of the rewiring project on our operations. Making the railway available for the long-running sequence of weekend and bank holiday weekend possessions required by the project imposes very significant additional costs on our operations. These include special arrangements for handling the exceptional passenger loadings generated at other stations when Kings Cross is closed and extensive bus substitution costs. Although it is too early in our franchise to provide you with full details, we are also expecting this pattern of weekend disruption to be impacting significantly on our weekend revenues. As you will appreciate the regular Schedule 4 compensation which you are paying is not designed to cover these types of situations and leaves us with a significant shortfall.

Our analysis is that the rewiring project comprises a Major Project and that FCC is therefore entitled to recover its costs associated with possessions for the Project. This is briefly explained as follows.

A "Major Project" is defined in the Network Code as:

"any engineering, maintenance or renewal project which requires a possession or series of possessions of one or more sections of track extending over:

- (a) a period of more than one year; or
- (b) a period which contains two or more Passenger Change Dates".

The Project clearly falls within the scope of "Major Project". It is a renewal project, requiring a series of possessions of one or more sections of track spanning more than one year. Your presentations on the Project have made clear that this is not part of routine maintenance and renewal: this in itself is also self-evident from the scale of works being undertaken and the distinctly non-routine, additional possessions which are being required.

We have seen minutes of a meeting held on 14th September 2004 which record that "Alan Beattie said that he had been in discussions with Stephen Marsh the project manager and a MPN would be issued".

We are dismayed therefore to find that no MPN has been issued and currently we are regarding this as a contravention of your obligations under the Network Code. The previous versions of the Code provided that "Network Rail **shall**, if it wishes to implement a Major Project, give notice of its intention to each Bidder...." (emphasis added). Note 5 of the current Network Code keeps ongoing the obligation to issue MPNs.

The Network Code is incorporated into the track access contract and each party indemnifies the other for Relevant Losses consequent upon its breach of the track access contract.

The significance of the failure to issue an MPN is, of course, that FCC has been unable to establish Significant Restriction of Use treatment under Schedule 4 in respect of the possessions related to the Project. This treatment would have enabled FCC to recover the costs covered by the Significant Restriction of Use provisions which it is now incurring as a result of the Project. Recovery of those costs now therefore form part of the "Relevant Losses" which FCC are suffering as a result of Network Rail's breach of the Network Code in failing to issue an MPN.

Our preference is to reach a speedy settlement with you regarding compensation for the impacts of the Project from 1st April 2006 to the Project's conclusion. I would hope that we can meet very rapidly to progress such a settlement and conclude this matter before the next bank holiday weekend. However if we are unable to do so, we will have little choice but to progress the enforcement of our rights and I must confirm that at this point all our rights are reserved.

Yours sincerely



Jim Morgan
Director, First Capital Connect



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Jim Morgan, Director, Passenger Development, Rail
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16 June 2006

Dear Jim,

RE: ECML Rewiring Works

Thank you for your letter of 17 May and I must apologise for the delay in my reply to you; although as discussed during our telephone conversation of 25 May, it was not possible to respond by your deadline, given the implications of your letter.

Network Rail fully appreciates the significance to your business of the continuing Overhead Line works on the Great Northern Route and, therefore, is keen to ensure that you are fairly compensated, in line with our obligations under the Network Code and Schedule 4 of the track access agreement.

The Overhead line renewal works being undertaken on the GN route form a discrete series of possessions with the ultimate aim of replacing the life expired sections of the infrastructure. These possessions have been programmed to fit around public holidays and Sundays and it is this time extension which has pushed what would normally have been considered to be simply a series of possessions into the area where the "Major Project" definition might apply.

As stated, it is our intention to ensure that compensation is fair and expert legal advice continues to be sought as to the applicability of the "Major Project" definition in this instance. It is our intention to respond to you again further on 30 June with a definitive answer and I would please ask for your patience in the meantime, although please do not hesitate to contact should you have any immediate questions in the interim.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Michael Conn".

Michael Conn
Business Manager, First Capital Connect (on behalf of Network Rail)



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29 June 2006

Dear Jim,

RE: ECML Rewiring Works

As outlined in my letter of 16 June, I am writing again to share with you Network Rail's conclusive response to your letter of 17 May. I would like to thank you for your patience in allowing us the time to complete our investigations into whether we share your view that the definition of 'Major Project' is applicable in the case of the ongoing overhead line ("OHL") renewal works on the East Coast Main Line.

By its very nature, a 'Major Project' must be something which is distinguishable from the regular renewal and maintenance activity carried out across the network all the time. One tribunal decision which comes to mind as being particularly relevant here is Network and Vehicle Change Committee, NV 53 (Forth Bridge, 2003). There the Committee was at pains to make it clear that it was *'not in any way moving in a direction whereby other more usual types of maintenance could be categorised as a "Major Project" (Paragraph 11)*, similarly this would apply to renewals, and *'a project is something not "run of the mill", but is non-repetitive...and extends over a sustained period of time' (Paragraph 9.3)*.

As presented to you when we met, these works include the replacement of contact wire and 'droppers' of various wire runs associated with Mark IIIa OHL equipment. The opportunity was also taken to renew selected components via means of 'campaign changes', where the existing infrastructure is now not replaceable on a 'like-for-like' basis. This work is being undertaken to sustain the integrity of the existing systems and equipment and not to offer substantive operational improvements. The chosen possession regime has also been planned in conjunction with existing permanent way renewals works at Woolmer Green and Digswell (not in themselves Major Projects), so as not to increase the disruption to services. Indeed, the planning timescales involved were often later than the usual processes, given concerns regarding OHL reliability at the locations noted.

The term 'Project' is not defined in the Network Code, but perhaps we can look elsewhere for guidelines as to the meaning of the term. The Association of Project Management ("AoPM") (<http://www.apm.org.uk/PtoQ.asp>) suggests:

- (a) Unique set of coordinated activities, with definite starting and finishing points, undertaken by an individual or organisation to meet specific objectives within defined time, cost and performance parameters; or*
- (b) An endeavour in which human, material and financial resources are organised in a novel way to deliver a unique scope of work of given specification, often within constraints of cost and time, to achieve beneficial change defined by quantitative and qualitative objectives.*

In the present case although the works are substantial Network Rail does not believe they contain the element of novelty that the AoPM definitions allude to and indeed the term 'Project' in its normal sense, contains. This approach to us seems entirely consistent with the determination of NV53.

Therefore, to conclude, it is Network Rail's belief that the current payment mechanism via the Schedule 4 Part 3 regular 'restriction of use' regime is applicable and fair as we do not believe the works constitute a 'Major Project'.

Please do not hesitate to contact should you wish to discuss this issue further, however, please note that I am on annual leave between 03 and 07 July (inclusive).

Yours sincerely,



Michael Conn
Business Manager, First Capital Connect (on behalf of Network Rail)

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JM/rc

22 August 2006

Mr M Conn
Business Manager
Network Rail
Room 207 West Side Offices
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N1 9AP

Dear Michael,

ECML Rewiring Project (the "Project")

Following your letter of the end of June maintaining that the ECML rewiring scheme could not be regarded as a Major Project, I was interested to read the recent article, in which NR has clearly been closely involved, on the project in RMOL. I enclose a copy for your information.

The article describes all the features of the scheme in terms which align precisely with the Major Project definition. You will see it is described as a project, of a defined duration extending more than two timetable periods, with a defined type of work being carried out, which is clearly not day-to-day.

Can I therefore assume that Network Rail has altered its position and is ready to negotiate with us the SROU treatment of the scheme as a Major Project?

I have also checked through NV53 which you referred to in your letter. The Forth Bridge repainting works at issue in the case have many similarities to the present rewiring scheme. The works were determined to be a Major Project and compensated as SROUs. This strongly supports our case.

We are very hopeful that we may now settle this without resort to formal dispute. However we are now in the closing stages of finalising our submission to the ADP and will shortly be contacting your legal team.

I look forward to hearing from you.

Yours sincerely


Jim Morgan

Director Passenger Development, Rail