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Dear John,

**Transport for London (“TfL”) applications under regulations 29 and 30 of the Railways Infrastructure (Access and Management) Regulations 2005 (the “Regulations”) in respect of access to the Heathrow Spur and associated stations (the “Applications”)**

*Introduction*

1. Thank you for your email of 30 June 2016, attaching the letter (and associated documents) from Heathrow Airport Limited (“HAL”) in connection with the Applications and inviting further representations from TfL.

*Comments on HAL’s response*

2. TfL is disappointed by the insubstantial response by HAL to the Applications. In particular, HAL fails to consider practically all of the material contained in the Applications despite ORR’s explicit directions to make written representations thereon. Although this could be taken as acceptance by HAL of these points, the overall tone of HAL’s letter suggests not. HAL provides no relevant material to assist ORR in making its decision and the general tenor of the response is unconstructive.
3. HAL fails to make written representations on the:
  - a. R29 application forms;
  - b. proposals by TfL for charging in relation to the Heathrow Spur and associated stations (attached as an appendix to TfL’s covering letter to the Applications);

- c. draft documentation submitted by TfL as part of the Applications (appended to the Applications); and
  - d. table of TfL responses to HAL's consultation (HAL has merely submitted its original tabular response dated November 2015 following on from the original consultation process).
4. HAL has instead provided generic comments on the process of engagement to date, making inaccurate and unsubstantiated comments about TfL's approach, whilst failing to provide any substantive response to detailed aspects of the Applications.
5. Not only has HAL failed to engage with the detail of the Applications, it has instead confused matters by providing a different set of documents (which appear to be substantially the same as those considered by TfL when preparing the Applications). TfL is disappointed that HAL is unwilling even to consider and respond to TfL's informed comments on HAL's contractual documentation. It also illustrates the lack of engagement by HAL on the details of the access documentation.

### *Charging*

6. For any service to operate on the Heathrow Spur / to the associated stations, it is essential that a clear charging structure, established in compliance with the Regulations, is available. Despite the ORR having handed down its final decision in relation to the charging framework for the Heathrow Spur on 27 May 2016, HAL appears not to have undertaken any further work to establish a charging framework in accordance with the ORR's decision.
7. TfL has provided its estimates, with supporting evidence of the level of charges payable for the access sought in the Applications (please see the Appendix to TfL's covering letter, which has not been commented on by HAL). Having undertaken significant work, TfL can see no relationship between the level of charging proposed by HAL and the directly incurred costs estimated by TfL. TfL notes that HAL has set out in outline the methodology for determining its proposed charges, without providing any of the detail as to the amounts falling within each of the headline costs or the calculations. TfL is therefore unable to comment further on this aspect of HAL's representations, except to reiterate that HAL has failed to provide written representations on the charges proposed in TfL's Applications. If HAL has no comment on these, then we presume the ORR would direct the access sought by TfL to be on the charging terms proposed in the Applications.

### *ORR guidance*

8. TfL has taken the opportunity to remind itself of the ORR's published guidance on appeals under regulation 29 of the Regulations. TfL notes that the guidance required TfL (as it has done) to provide "*the commercial terms proposed*" (paragraph 4.6, second bullet point of the ORR guidance). TfL acknowledges HAL's comment that it has "spent a significant amount of time working on their ideal terms". This was to meet the requirements of the ORR's guidance and also in response to HAL having made clear that it intended to impose its own terms of access on TfL without serious consideration of TfL's comments.
9. Following an application, the guidance requires the facility owner (in this case HAL) to respond to the "*specific arguments stated by the applicant in its application form*" (paragraph 4.9 of the ORR guidance) which HAL has clearly not done<sup>1</sup>. The ORR also states that it intends to "*base [its] determination only upon the information presented by the parties...*" (paragraph 4.5 of the ORR guidance). Given that HAL has failed to provide written representations on the vast majority of the material (and in particular the commercial terms proposed), TfL's view is that the ORR should determine the Applications in the manner requested by TfL.
10. TfL proposed commercial terms for access as part of the Applications. It was for HAL to consider and respond to those terms of access. HAL has failed to do so. The provision of other documents by HAL (which ignore most of TfL's comments) does not constitute making representations on the Applications. The documents provided by TfL as part of the Applications must be the starting point for the ORR. TfL therefore does not intend to provide a commentary on the draft contractual documentation submitted by HAL<sup>2</sup>.

### *Proportionality*

11. TfL notes HAL's suggestion that a 9km stretch of railway requires a proportionate approach to be adopted in relation to the access

<sup>1</sup> For example, in the third paragraph of its letter, HAL refers to DfT's letter of 27 April 2016 and states that DfT "did not suggest any unfair treatment or discrimination". We do not understand why HAL is making reference to that letter rather than addressing the issues raised in the Applications. Indeed, if HAL had considered the R29 application forms, it would have seen in an Appendix a table setting out examples of various areas where TfL considers it has been unfairly treated and discriminated against, in addition to its more general grievances. TfL raised similar concerns both with HAL and with the ORR as part of HAL's consultation on its access documentation.

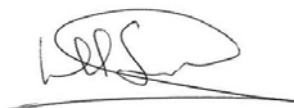
<sup>2</sup> Upon an initial review, it would appear that very few amendments have in fact been made by HAL to the set of documents most recently seen by TfL and which led it to making the Applications. The ORR will note that in various places in the Applications, TfL refers to revised documents prepared by HAL. Nothing substantial appears to have changed in the revised documents; therefore the grounds of appeal set out in the Applications still remain.

documentation. TfL agrees with this point – indeed, in discussions with HAL to date, it has accepted that certain elements which appear in the equivalent Network Rail documents would not be required<sup>3</sup>. However, HAL itself used the Network Rail documentation as the starting point and has made selective excisions to suit its narrow interests, rather than seek to achieve commercially balanced terms appropriate to operating railway infrastructure.<sup>4</sup>

### *Conclusion*

12. HAL's letter demonstrates why TfL was forced to make the Applications. HAL has again failed to engage with the detail – something which it must do if commercial terms are to be agreed. Instead, HAL has sought to act as a dominant infrastructure manager, seeking to impose terms without discussion and negotiation with its prospective customer.
13. Most importantly, HAL has failed to provide written representations on the Applications, meaning that on the evidence available to it, HAL has not complied with the ORR's own guidance. ORR should therefore determine the Applications in the manner requested by TfL.
14. TfL wishes to emphasize the urgency of securing access to the Heathrow Spur and associated stations on commercially acceptable (including the level of access charges payable) and operationally workable terms.
15. Finally, TfL confirms that no aspect of this response is confidential and is content for it to be published on the ORR's website. In the meantime, if you have any questions, please let me know.

Yours sincerely,



Howard Smith  
**Crossrail Operations Director**

for and on behalf of  
**Transport for London**

<sup>3</sup> For example, TfL agreed that an equivalent to Part L of the Network Rail Network Code was not required in the context of the Heathrow Spur.

<sup>4</sup> For example, simply because the Heathrow Spur is 9km long does not mean that HAL can have no regard for the environment in the operation of the railway. Being proportionate might suggest a simpler approach, but not a wholesale disregard for an environmental condition.