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19<sup>th</sup> October 2020

Dear Sirs

### Project Palamon – NERL's response to the CAA's draft decision CAP1943

1. Thank you for inviting us to make representations on your provisional findings in your investigation under s. 34 of the Transport Act 2000 ("**TA00**") (Project Palamon). This response does not repeat the facts and representations that we have already made to you as part of the investigation, but rather focuses on the preliminary conclusions and recommendations, as set out in the draft decision.
2. We welcome and agree with the CAA's provisional findings that, contrary to the complaints by Ryanair and Stansted Airport Ltd ("**STAL**") (submitted in September 2018 and January 2019, respectively), NERL (a) implemented all of the CAA's recommendations in the Oberon final report<sup>1</sup> and fully implemented the Oberon action plan (chapter 4); (b) correctly coded delays associated with the London Approach Service ("**LAS**") (chapter 5); (c) took all reasonable steps to ensure sufficient capacity was provided within the Essex airspace for the provision of the LAS (chapter 7); and (d) did not unduly discriminate between any person or class of persons in providing the LAS (chapter 8). We note that these findings mean that all allegations put forward by Ryanair and STAL in their original complaints have been dismissed by the CAA.
3. The CAA has, however, provisionally found that between January 2019 and March 2020 (a period not covered by the original complaints, but which the CAA decided to consider as part of the Palamon investigation) NERL was in breach of its duties under ss. 8(1)(c) and 8(1)(d) TA00 and Licence Condition 5.2 in respect of the provision of sufficient staffing resilience in the LAS to users of Stansted and Luton.
4. NERL was not formally notified of the extension of the scope of the Palamon investigation to include the relevant period in respect of which the CAA has provisionally found NERL in breach of its Licence, nor was it requested to comment on the CAA's understanding of any data provided in light of that extended scope. As such, this response is NERL's first opportunity to address the CAA's assumptions and conclusions relating to that period of alleged breach.
5. The draft decision does not adequately explain how on the basis of the evidence available the CAA has reached its provisional finding that NERL has breached its statutory and licence obligations. It would appear from the draft decision that the

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<sup>1</sup> CAP 1578

relevant legal tests (as provided for in TA00 and the Licence) have not been understood or applied correctly to the facts. As such, the draft decision, if upheld on its current terms, would be unlawful.

6. Were these preliminary conclusions to be confirmed following this consultation process, then:
  - (a) NERL would be faced with an apparently arbitrary decision, applied retrospectively and in contradiction of both the licensing framework and the CAA's previous position, including as reflected in the Oberon investigation; and
  - (b) far from being a question of only historical interest, this would have serious implications for NERL's regulatory risk exposure, business model and financeability, which would require significant changes to its approach and the economic settlement for RP3 and beyond.
7. If NERL is now to be expected to have met an outcomes-based standard, which was not previously articulated and is inconsistent with the basis on which its business plan for the relevant period was determined, then NERL will need to recalibrate its business model to prioritise a level of operational resilience that customers previously rejected, but that would now be necessary to guard against future similar retrospective and unpredictable regulatory decisions by the CAA, in such a way that protects NERL's financeability. NERL would need to be assured that the costs of so doing will be recognised as required and efficient in those circumstances, notwithstanding the views of customers as to the balance between cost and resilience that they favour.

#### **NERL's operational challenges in the relevant period**

8. NERL's management of UK airspace requires long-term strategic planning on the basis of reasonable traffic growth forecasts and operational assumptions, coupled with short-term, week-by-week, tactical decisions to manage NERL's finite resources to meet actual demand and address other real-world constraints, such as unpredicted weather movements, personnel issues and delays/disruption arising from the actions of other airspace users and ANSPs, across the whole network. Under the terms of its Licence, NERL must ensure that it has the resources it needs safely to meet on a continuing basis any reasonable level of overall demand, while also ensuring it is recruiting and training staff and updating its systems, processes and technology to ensure it can continue to deliver the licensed service in respect of future reasonable demand.
9. NERL does this according to the financial resources made available to it via its price control, which is determined periodically and which necessarily constrains what is possible during the period in which the price control applies. In practical terms, a large proportion of this comes about through actions taken at the beginning, or even before the start, of a price control.
10. This is because NERL must manage its operational human resources, which are key to its service provision. It is constrained by the geographically-specific validations of the available ATCOs, the long lead-times required to supplement existing validations among the current ATCO population and to recruit and train new ATCOs, and the unique skillset required that creates a constrained resource pool from which such trainees can be

drawn. Those lead times are further extended by the time required to add multiple sector validations to recently qualified ATCOs, before they can provide the operation with the same level of flexibility and resilience as retiring or resigning ATCOs, who hold two and sometimes three such validations.

11. Once NERL's longer term planning has been implemented, it has a finite range of tactical tools available to address short-term spikes in demand or other issues. These include voluntary overtime, where such overtime is possible in accordance with applicable regulations, and combining and splitting the management of sectors in real-time as demand and short-term staffing availability dictates.
12. NERL makes these operational decisions on the basis of a wider view of the activity in the network, including at other airports and the available flight plans from aircraft. These techniques have allowed NERL to avoid needing to overstaff ATCO resources across the entire operation to ensure that there is always sufficient staffing resource available for all the permutations and possibilities that may apply to all sectors. While the latter approach would mean that only airspace capacity (as opposed to staffing capacity) could constrain any particular sector, it would not be conducive to NERL providing a cost-efficient operation.
13. The most extreme example of the techniques for day-to-day operational management is where only one ATCO is available in respect of a sector of airspace (for example due to short-term sickness of a second ATCO on a night shift where little traffic is planned). In these circumstances NERL must place regulations on the relevant airspace to allow for legally mandated rest periods. These regulations can, to an extent, be timed to coincide with periods where no flights are scheduled in the airspace, so as to minimise the impact on traffic during those rest periods<sup>2</sup>. However, there is little flexibility in such circumstances to cater for last-minute, unexpected changes in flight schedules caused by, for example, airlines and/or airport ground handlers. This means that sectors where airlines more frequently miss their scheduled departure and arrival times are more likely to suffer knock-on delays, which could otherwise be avoided, when NERL is constrained due to lack of available staff. We note that this was the cause of the delay to which Ryanair referred in its original complaint (see paragraph 1.8 of the draft decision).
14. Where traffic increases are on a large scale and/or more long-term, the only practical remedy to staffing delays is additional ATCO recruitment, which takes time and careful preparation for the increased on-the-job training requirements in day-to-day rosters, as the CAA acknowledges<sup>3</sup>. In the interim NERL must operate within the operational resource constraints created by its long term business plan, as fixed by reference to its available financial means at the start of a given reference period, and find appropriate and safe work-arounds and mitigation techniques where such operational resources constrain its ability to meet periodic peaks in demand.

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<sup>2</sup> NERL does not 'close' airspace, as alleged by Ryanair (see in paragraph 1.8 of the draft decision). On the night in question there were two separate 'zero rate' regulations on Stansted arrivals and Luton arrivals. Both of these ATFM regulations caused zero delay. During the day of the 3 September 2018 there were three separate ATFM regulations (not closures), two on Stansted arrivals and one on Essex arrivals. All three regulations caused a total of 640 minutes and each regulation was applied for less than an hour.

<sup>3</sup> See paragraph 6.21 of the draft decision.

15. Following the Oberon decision, as the CAA acknowledges, NERL took a number of steps to address the issues identified in terms of NERL's staffing resilience in the Essex airspace. In particular:
  - (a) we implemented the Oberon Recommendations;
  - (b) we fully complied with the action plan to improve delay performance and resilience;
  - (c) we put *"considerable effort into developing the [Resilience Plan], with... policies and processes having been developed and certified in accordance with established best practice"* (the CAA approved the *"form, scope and level of detail of the Plan"* in May 2020) (paragraph 4.17 of the draft decision); and
  - (d) ATCO recruitment and training was increased materially and was at maximum capacity from the last quarter of 2018 until the start of the pandemic, when training was paused.
16. The CAA's provisional decision finds that these steps have not been sufficient to overcome the now long-standing and purportedly foreseeable issues relating to NERL's staffing resilience in the Essex airspace. It has determined that NERL is therefore in breach of certain of its statutory and Licence obligations. In truth, NERL's ability to address these long-standing issues remained as constrained during the relevant period as it was at the time of the Oberon decision. In NERL's view, the draft decision does not reflect these constraining factors in its interpretation and application of NERL's obligations.
17. The first constraint was the RP2 price control settlement. Both Oberon and Palamon relate to NERL's performance during the RP2 reference period. As NERL has previously explained (including in its submissions in the CMA reference on the RP3 price control), the version of the RP2 business plan, which was requested by airlines and imposed by the CAA, was predicated upon NERL reducing overall staff numbers, including the number of ATCOs, through voluntary redundancy to meet its cost-saving targets. This has in turn resulted in long-standing staffing resilience issues during RP2.
18. Once the reduction in its cost-base had been incorporated into the RP2 price control settlement, NERL was obliged to implement the redundancies, but it is clear that this action directly resulted in a 'bottleneck' in the Essex airspace during the RP2 reference period. As the CAA acknowledges, this was due to a smaller cadre of validated ATCOs, as compared to other sectors, which made marginal reductions in resources particularly noticeable, especially when combined with the particularly high traffic growth in these areas. This risk to operational resilience was something NERL had warned about at the time of the RP2 negotiations (as recognised by the CAA in the Oberon final decision, paragraph 4.12): *"although the reduction in the number of controllers would not impact the majority of the day-to-day service, it would lead to a lower level of resilience to certain circumstances such as staff illness, and therefore a greater number of "bad days" in practice"*.
19. As NERL said at the time, by choosing to impose the RP2 settlement – rather than the less restrictive alternative proposed by NERL at the time and in the knowledge of the likely implications for NERL's operational resilience – the airlines and the CAA

demonstrated that they were willing to trade off a lower level of resilience, in spite of the implications for delays, in return for a reduction in prices. That decision set the parameters for what NERL could reasonably be expected to achieve during the period and must therefore be the yardstick against which NERL should be measured in terms of performance during that period. This is because, once implemented, the operational cost-savings NERL was required to make in order to operate within the constraints of the RP2 settlement – which directly led (as NERL warned it would) to the staffing shortfall – were not easily or quickly reversible. That is notwithstanding the fact that recruitment and training of more ATCOs commenced as soon as it became clear that NERL's planning assumptions in the RP2 business plan in respect of retirement age and long term sickness, when combined with the particularly high traffic growth in the Essex sector, were adversely affecting staffing resilience.

20. As a result, despite doing everything asked of it by the CAA and more, NERL was not able to provide a solution to the issues because the underlying cause was the long term RP2 business planning assumptions, on which the associated restrictive RP2 price control had been predicated. In contrast, having identified the associated resilience issue, and customers having recognised it as well, the CAA approved NERL's RP3 business plan that provided for the increases in ATCO numbers that would result from the increased training and recruitment started in RP2.
21. The second constraint was the short-term lack of available ATCOs qualified to manage Essex airspace following the redundancy process, and the fact that insufficient time had passed between putting in place actions to address the problem and the events that led to the CAA's provisional finding of breach in the Palamon investigation.
22. Increasing ATCO numbers is both a time and resource intensive process due to the long lead times, relatively high attrition rate of trainees and the demands placed on present capacity in terms of diversion of resources to train additional ATCOs in circumstances where a shortfall already exists. This was exacerbated in RP2 by the additional need to allocate resources to implement and train for the technology refresh through deploying SESAR capability in our engineering platforms. Therefore, even with further training, the circumstances that led to the Oberon investigation (namely, earlier than expected retirements/resignations and increased long term sickness of ATCOs) continued to affect NERL's operations, including losing more ATCOs from the operation as the Oberon recommendations were being implemented.
23. While these two constraints persisted during RP2, 'bad days' (in terms of isolated instances of delay in particular sectors of airspace) were likely to continue to occur. In fact, the resilience issues discussed above were made more acute in respect of Essex airspace by the significant localised growth at Stansted and Luton airports during RP2, resulting in further staffing delays. The CAA states that this growth was foreseeable as it was predicted by the STATFOR 'high' case<sup>4</sup>. However, irrespective of whether or not growth was in fact "foreseeable", NERL does not agree that foreseeability means that its failure to resolve the resilience issues in respect of Essex airspace necessarily puts NERL in breach of its statutory and Licence obligations.

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<sup>4</sup> In fact, the growth at Luton exceeded even the STATFOR 'high' case, as did Stansted in all years except for 2019, when demand was reduced due in part to the collapse of Thomas Cook.

24. Indeed, the preference expressed by airlines at the beginning of RP2 to prioritise costs over service quality, which was then embedded in the settlement determined by the CAA, is the root cause of the staffing shortfall the CAA believes NERL should have resolved but did not.
25. In light of the ongoing constraints placed on its business plan described above, together with the unexpected material increases in traffic – and their relevance to NERL's obligations, as explained below – that delay does not provide a lawful basis on which the CAA can determine NERL to be in breach of its obligations.

**The provisional finding of breach is inconsistent with the established understanding of NERL's statutory and licence obligations**

26. The CAA's decision appears to be based on the conclusion that – despite all the steps that NERL has taken to address its staffing issues – NERL has failed, in the CAA's view, adequately to address issues that the CAA considers were foreseeable and that, in the CAA's view, NERL should have addressed. In the CAA's own words, NERL failed to "deliver the desired outcomes", "develop effective solutions to properly address these matters" or to present "a recovery plan that credibly demonstrates it can close the gap".
27. We do not agree with the CAA's provisional conclusion. NERL considers that the draft decision is wrong in law.
28. The draft decision is also inconsistent with the established understanding of the legal and regulatory framework within which NERL operates, including as it was applied in the Oberon investigation.
  - (a) As the CAA recognised in Oberon<sup>5</sup>, to determine whether there is, has been or is likely to be a breach of NERL's obligations, the CAA must apply the words of the relevant obligations themselves, including the words that qualify those obligations.
  - (b) Further, when assessing the reasonableness of NERL's actions, the CAA must take into account the constraints on NERL created by the economic reality in which NERL operates and the wider statutory scheme, which, as the CAA recognised in Oberon<sup>6</sup>, aims to balance a number of competing objectives, including promoting NERL's efficiency and its ability to secure finance and investment for its future activities.
  - (c) As the CAA acknowledges in the draft decision, NERL has done everything that has been asked of it since Oberon and in the draft decision the CAA has not criticised any of the steps NERL has taken.
29. Failure by NERL therefore to meet the CAA's desired outcome cannot, of itself, constitute a breach of NERL's statutory and Licence obligations. The draft decision gives no reasons as to why (other than the failure by NERL to meet the CAA's desired outcome) the specific actions NERL took were insufficient to meet the required standard in respect of each of NERL's relevant legal obligations.

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<sup>5</sup> CAP 1578: Oberon final decision, paragraph 5.43

<sup>6</sup> CAP 1578: Oberon final decision, paragraph 5.42

30. Instead, if upheld in the final decision, NERL believes that both the CAA's conclusion and the apparent reasons for that conclusion, as set out in the draft decision, would represent a marked departure from the way in which NERL has been regulated to date. In effect, the CAA's approach would impose on NERL a higher and, as yet, unspecified standard of performance in terms of:
- (a) **the level of demand that the CAA expects NERL to meet** – namely, holding NERL to the STATFOR 'high' case<sup>7</sup> for forecast traffic demand, despite the CAA's approved RP2 Performance Plan and NERL's long-term operational planning having been determined according to the STATFOR 'base' case;
  - (b) **the unconditional nature of demand that the CAA expects NERL to meet** – namely, requiring NERL to meet all "foreseeable" demand, irrespective of whether it is reasonable to expect NERL to be able to meet such demand on the basis of capacity to be made available in accordance with NERL's Service and Investment Plan ("SIP"); and
  - (c) **the granularity of delay that would, in the CAA's view, be acceptable for NERL to incur when carrying out its operations** – rather than holding NERL to its system-wide obligations in accordance with the terms of its Licence (which gives NERL the operational flexibility to manage capacity efficiently across multiple sectors), instead finding NERL in breach when it has incurred an 'unacceptable' level of delay (as yet undefined in the draft decision) in a particular sector (in this case, Essex airspace).
31. In NERL's view, to impose such a heightened standard of performance would run counter to the basis on which NERL was established, the basis on which, until now, its price control has been determined, and the basis on which it finances its operations via the private debt markets. If upheld in the final decision, this change in approach to the way that NERL is regulated would have considerable practical and cost consequences for NERL's business, particularly in terms of how it plans and finances its operations, as explained further below.

#### Implications of the CAA's draft decision, if upheld

32. The CAA notes in its draft decision that the current difficult circumstances resulting from Covid-19 mean that the matters raised in the draft decision are now historical only. We agree with the CAA's decision not to take enforcement action and note the CAA's recommendations set out in the draft decision. However, NERL does not agree that the CAA's provisional findings, if upheld in the final decision, are of historical significance only. In fact, the apparent reasoning in the draft decision – which as explained above, NERL considers to be wrong in law – would represent a significant ongoing risk for NERL, due to the potential mismatch between the levels of operational resilience built into NERL's business plan at the outset of a reference period and the level of operational resilience apparently now expected by the CAA to be achieved by NERL during the reference period. This risk will become more acute when traffic demand returns and,

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<sup>7</sup> We note that, in any event, the level of actual average yearly traffic growth for RP2 overall (2015-2019) at Luton Airport (6.4%) exceeded even the February 2014 STATFOR high case forecast (5.1%). That translates to a difference in the aggregate actual growth over the entire period of 34%, compared to the 28% forecast by the STATFOR 'high' case.

in particular, if NERL is subject to a revised RP3 business plan that, as in the case of RP2, prioritises cost-reductions over operational resilience.

33. The CAA suggests that, by the time demand substantially recovers, NERL will have had time to train sufficient ATCOs and devise a more efficient and resilient service, such that a future breach is unlikely. However, such a suggestion assumes that NERL will be permitted to retain sufficient ATCOs. While the traffic decrease resulting from Covid-19 means that the resilience issues have been mitigated, NERL is about to embark on an RP3 'reset' consultation and early indications are that customers will now be prioritising cost savings, creating circumstances very similar to those prevalent in the lead up to RP2. Indeed, the situation is more acute than in RP2 because it is an accepted fact across the aviation industry that a reliable traffic forecast is inconceivable at present and yet NERL will need to create a business plan in the context of that prevailing uncertainty that will again set the economic constraints for the remainder of the reference period.
34. In this context, when creating that business plan, NERL would – if the draft decision is upheld as lawful – face three additional significant uncertainties as a result of the CAA's approach to the Palamon investigation.
  - (a) First, it is uncertain whether the CAA expects NERL to plan for all foreseeable traffic that might arise, as opposed to the "*level of overall demand reasonably expected to be met at the relevant time on the basis of capacity to be made available in accordance with the Service and Investment Plan*" as required by Condition 2(4)(a) of NERL's Licence. In the event that a vaccine is deployed in the near future, traffic could rapidly return to pre-Covid-19 levels, meaning that this heightened standard of expected performance would make it essential that NERL retained all of the operational staff originally planned for RP3 to be able to meet all foreseeable traffic.
  - (b) Second, since the CAA has not defined the threshold of good performance it requires to avoid breach on a sector by sector basis, NERL must address the risk of being found in Licence breach by planning for staffing resilience levels across all sectors, shifts and seasons that will allow for any levels of unexpected sickness and staff retirements/sickness that the CAA deems foreseeable. The unexpected shortfall in the Essex sector varied between 5-7% of the originally planned manpower across the investigation period, which will imply a more cautious approach to planning numbers of ATCO sector validations across the network than previously.
  - (c) Third, since NERL has been provisionally found in Licence breach because of performance standards not fully specified or articulated, either *ex ante* in the Licence or regulatory policy statement or *ex post* in the analysis of the Palamon provisional findings, then until or unless the CAA clarifies its interpretation of NERL's Licence requirements, NERL will be unable to make decisions about actions it can take to implement further cost efficiencies to the benefit of customers, in case those decisions subsequently result in NERL being over or under resourced against CAA's performance expectations when they are subsequently defined.

35. These uncertainties are exacerbated by the further unknown factor as to what other aspects of NERL's performance might be subject to the retrospective application of heightened standards and this creates challenges to NERL's ability to provide assurances to its lenders and shareholders that the regulatory regime is robust and predictable.
36. If upheld, this change to NERL's regulatory obligations increases the risk to unacceptable levels that further breaches are likely and therefore would require NERL to change how it plans and finances its operations to ensure it does not risk being found in breach again. As explained below, those changes would be more costly for customers and less cost efficient.

#### Addressing the higher level of demand

37. If the CAA will in future expect NERL to be able to meet the STATFOR 'high' case in terms of forecast demand during a given reference period, NERL will need to recalibrate its long term planning accordingly, as it is not possible for NERL to scale up its operations to meet the high case without doing so.
38. Until now, NERL has proceeded on the understanding that the CAA expects NERL to plan its operations on the basis of the STATFOR 'base' case. This is consistent with the CAA's own decision in respect of the RP2 UK-Ireland FAB Performance Plan, which states that the STATFOR base case used by the UK to prepare the plan was considered "*appropriate and reflective of expected traffic during RP2*".
39. Adjusting NERL's long-term operational planning to cater to the STATFOR 'high' case - rather than risking breach of Licence for "foreseeable traffic" - will necessarily require NERL to commit additional resources to its operations and will thus incur further costs for customers. It would also require an adjustment to NERL's operating assumptions in the current and future price control settlements. This approach would, in NERL's view, not be consistent with NERL operating as an economically efficient business for customers, as it would in effect require NERL to overcommit resources so as to be leveraged to respond to statistically unlikely levels of demand over an extended period.
40. As explained below, such an approach would in any event be contrary to the requirements of NERL's Licence.

#### Addressing the unconditional nature of demand

41. The CAA suggests in its provisional conclusions that whether NERL will be expected to meet actual demand will depend on whether that level of demand was "foreseeable".
42. This is not consistent with NERL's Licence, Condition 2.1 of which provides that NERL must make available its Core Services (as defined in the Licence) so as to be capable of meeting on a continuing basis any *reasonable* level of overall demand for such services. Condition 2.4 provides that to determine what is a reasonable level of overall demand for the purposes Condition 2.1(a) the CAA must have regard to the "*level of overall demand reasonably expected to be met at the relevant time on the basis of capacity to be made available in accordance with the Service and Investment Plan*" provided by NERL in accordance with Condition 10 of its Licence.

43. As such, the Licence ties the level of overall demand that it is reasonable for NERL to meet to the capacity it is able to make available according to the SIP and, ultimately, the price control settlement which, as explained above, was determined by reference to the STATFOR 'base' case. This means that, under the terms of NERL's Licence, determining the level of demand that NERL can reasonably be expected to meet must be by reference to the SIP. There is no material consideration of the SIP in the draft decision; instead, the CAA has sought to apply a different standard in respect of what NERL should be expected to achieve in terms of performance, without reference to the SIP.
44. As above, if the CAA can in future lawfully require NERL to meet all levels of 'foreseeable' demand, without reference to what is reasonable on the basis of the capacity that NERL can make available in accordance with the SIP, NERL will need to adopt a precautionary approach. This will require NERL to overcommit resources so that it can always meet any level of foreseeable demand at all times, no matter how unlikely that level of demand is in practice. This will result in inefficiencies and additional costs for customers.

Addressing the granularity of delay

45. NERL's statutory and licence obligations require it to apply its finite resources efficiently to meet the reasonable overall level of demand and ensure the most expeditious flow of traffic across the entire licensed area as a whole.<sup>8</sup>
46. NERL accepts that this does not preclude the CAA from investigating instances of localised delay and, if appropriate on the evidence, concluding that NERL has, is, or is likely to be in breach of its legal obligations under TA00 and/or the Licence. However, the CAA must take account of the fact that NERL's obligations are network-wide and that the appropriate standard is to consider what is reasonable from the perspective of the entire system as a whole in light of those network-wide obligations.
47. The draft decision adopts a different approach, namely to measure performance during the relevant period against the forecast demand in the Essex airspace, without reference to the wider network at the time. As such, it appears from the draft decision that the CAA has not considered whether NERL's actions were reasonable from the perspective of the entire system as a whole. Indeed, during 2019 NERL achieved its performance bonus for delay across the network as a whole and the CAA makes no attempt to factor this into its decision.
48. If NERL were required to comply with the draft decision, NERL would need to ensure that it is capable of meeting an undefined demand in all sectors of its airspace at all times, rather than relying on its ability to be more flexible in how it manages localised spikes in demand across the network. This would be more costly for customers and less efficient than the current approach, which provides NERL a greater degree of operational flexibility.

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<sup>8</sup> See, for example, s. 8(1)(c) TA00, Condition 2.1, 2.5 and 2.7.

Addressing the regulatory uncertainty caused by the retrospective alteration to NERL's statutory and Licence obligations

49. NERL must be permitted to perform (and the CAA is required by the TA00 to secure that NERL can in fact perform) its licensed activities in a manner that is not unduly difficult to finance.<sup>9</sup> This includes the need for regulatory consistency and predictability, which promotes NERL's ability to plan and manage its resources efficiently and allows finance parties to assess the level of regulatory risk to which their capital is exposed.
50. During RP2, NERL took a number of mitigating steps to facilitate its being able to operate in economic conditions that caused it to be operationally constrained. This led to localised instances in delay across the network, particularly in 'bottleneck' sectors, such as Essex airspace, where NERL's smaller pool of validated ATCOs meant that reductions made as part of the RP2 business plan more regularly led to local resilience issues. NERL – in its view – took all reasonable steps to mitigate this lack of service resilience, but ultimately was not able to do enough with the initial resources and subsequent time that it had and given the level of demand that materialised. The CAA's draft decision concludes that NERL's failure to "bridge the gap" in the resulting localised delay meant that NERL was in breach of its Licence, but does not specify the 'tipping point' of objectionable delay nor in what respect NERL's actions were insufficient to meet its statutory and Licence obligations.
51. The draft decision, if confirmed, would thereby purportedly retrospectively raise the standard of performance to which NERL is expected to be held while at the same time making that standard less clear and further removed from the relevant provisions in its Licence.
52. This presents a material risk to NERL's ability effectively to plan and finance its operations and will likely have the effect of raising NERL's regulatory risk profile and its cost of capital, and ultimately the costs for customers. These risks can be mitigated by taking a more cautious approach to planning its ATCO resources. However, NERL would require confirmation that such additional operating costs would be remunerated via the regulatory settlement, particularly in the context of the current circumstances where lack of certainty on the traffic forecast has created an extreme difference between possible future traffic scenarios. Equally, NERL would require certainty as to CAA's expectations for other performance areas such as, for example, implementing airspace changes to address airspace capacity delays.

**The CAA's criticism of NERL in relation to Swanwick Airspace Improvement Project AD6**

53. As stated above, NERL welcomes and agrees with the CAA's provisional conclusion that NERL took all reasonable steps to ensure there was sufficient capacity within Essex airspace for the provision of the LAS. We also welcome the CAA's recognition of NERL's work in this area, particularly in relation to the Airspace Modernisation Strategy.

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<sup>9</sup> Section 2(2)(c) TA00

54. However, NERL does not agree with the CAA's claim that the Swanwick Airspace Improvement Project AD6 ("AD6") "*could have been initiated in a timelier manner*", nor the implication that this was a "*lapse*" on the part of NERL (albeit one that did not constitute a contravention of its statutory or Licence obligations). This claim is not supported by the evidence. The CAA itself acknowledges at paragraph 25 that "*it is not necessarily reasonable to hold NERL solely responsible for delays in making progress with respect to airspace change*", as it is not wholly within NERL's control.
55. There was no undue delay on the part of NERL. The reason for delay was due to a culmination of factors outside NERL's control, including:
- (a) NERL resources between 2010 and 2012 being prioritised to deliver the short term airspace changes to manage 2012 Olympics demands;
  - (b) A decade of considerable and long-standing (and arguably ongoing) political and policy uncertainty between 2010 to 2020 regarding the Government's air transport policy, for example in relation to the Future Airspace Strategy and the Airspace Modernisation Strategy, the question of the new runway in the South-east of England and other aspects of airspace policy and regulation, including multiple Bills before Parliament on the subject; and
  - (c) Gatwick and Stansted experiencing changes of ownership immediately before and during this period and thus the appetite among the relevant London airports for ACPs, which are often controversial with local communities, being subject to change.
56. Such uncertainty, until recently, made ACPs difficult to propose and progress, particularly given that they are time and resource intensive and often at risk of failure and wasting costs. It was not until 2018, following publication of CAA's CAP1616 process, that AD6 was brought forward by NERL, when the conditions described above had stabilised such that an ACP was considered viable. Indeed, it was as a direct result of these well documented issues with changing airspace that the ACOG concept was largely proposed by NERL, and why it was supported directly by its sponsors, the CAA and DfT. In particular, the concept recognised that no one party could realistically progress airspace change and NERL has been recognised by stakeholders as having led the efforts to overcome these issues.

#### **The recommendation to adopt the PRC best practice coding principles**

57. In its recommendations, the CAA has suggested that, notwithstanding the fact that NERL's coding of delay is consistent with current Eurocontrol guidelines and the approach adopted by other ANSPs in Europe, NERL should adopt the PRC best practice coding principles unless NERL can demonstrate to the CAA an important operational reason not to adopt them.
58. NERL would be happy to adopt any new principles or guidelines given to us by Eurocontrol for delay coding. However, it is likely that this would only be beneficial if applied to all ANSPs, so as to facilitate data and performance comparison across FIRs.

59. NERL has always engaged with Eurocontrol, including in relation specifically to coding of any regulations where we follow the Eurocontrol process and will continue to do so. For example, in respect of the CAA's suggestion that NERL provide dynamic sector opening times to the Eurocontrol Network Manager, NERL has been doing so since October 2018. However, this does not include sector opening times for Terminal approach sectors (such as Essex) as the Eurocontrol system does not accept them. This applies to all ANSPs.

We agree that the current situation as a result of Covid-19 provides all parties with an opportunity to reflect on the circumstances that led to the Palamon investigation and to seek to avoid further such investigations in future. However, at the same time, the immediate and unprecedented effect of Covid-19 on the aviation industry calls for prompt and decisive action on the part of NERL, which it will not be in a position to take until the uncertainties created by CAA's draft decision are resolved.

As set out above, the draft decision appears to apply the wrong legal standard in respect of NERL's resilience and, in doing so, retrospectively imposes a higher and more granular outcomes-based requirement that is not provided for in the TA00 or NERL's Licence. If upheld, the CAA's approach in the draft decision presents a material risk to NERL's ability effectively to plan and finance its operations – other than in a manner that is not cost-efficient – and will likely have the effect of raising NERL's regulatory risk profile and its cost of capital.

NERL is open to a discussion about the basis on which it provides its service and ways in which the applicable Licence Conditions could be revised to provide greater clarity. However, NERL's view is that finding NERL in breach of a heightened standard of performance, retrospectively imposed, is not the appropriate means by which to address these issues. If the provisional conclusions are upheld, the CAA should be mindful of the likely practical consequences of doing so for NERL's continued ability to provide a cost-efficient service and for its financeability. NERL invites the CAA to revisit its reasoning and conclude that there was no breach in its final decision, so as to ensure that it is consistent with NERL's statutory and Licence obligations and does not unduly hinder NERL's ability to plan and finance its operations in the future.

Yours faithfully

A handwritten signature in black ink, appearing to read 'R C-c', with a long horizontal flourish extending to the right.

Richard Churchill-Coleman  
Legal Director