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Dear Tony

**SERVICE LEVELS**

As you requested yesterday, I attach a preliminary draft letter to Keith Baines. I have discussed the basis of the letter in detail with Iain Monaghan and our joint view is that it should be as short as possible at this stage, doing little more than "formally" recording the disagreement. There is no need, for dispute escalation purposes, for a contractual "notice" as such, so we think it best the letter come from you.

There are a number of reasons for keeping the letter short which I would like to discuss with you, not least that I am concerned that proceeding, or threatening to proceed, with a legal claim based on mistake is not the best way, or indeed, the only way forward. I can see that the arguments based on mistake operate at two levels: commercial and legal. If we can satisfy Keith there has been a mistake, he might agree at the commercial level, in the interests of the working relationship to rectify the position, or perhaps make concessions in other areas. However, proceeding with a legal claim would be much more difficult. On the evidence I have seen (and heard) so far, a claim based on mistake at law justifying amendment to the Codified Agreement is unlikely to succeed, not least because we would probably have to show that POCL was aware of the mistake, yet kept silent and allowed the Codified Agreement to be signed incorporating that mistake.

If we need to go further back, and rely on matters dating back to the time of "drop down", as you suggested yesterday, then the claim, depending upon how it is formulated, may founder due to the full and final settlement provision contained in the Letter Agreement, which settled everything before that.

It may be that once we have put together the history of the relevant provisions, and other documents, as discussed yesterday that a solid basis for a claim will emerge, but it would be premature to formally threaten such a claim before that. It may unnecessarily sour the relationship with POCL.

Holding back for a time would also give us a chance to investigate what appear to be inconsistencies in Pathway's arguments. For example, how to reconcile Pathway's intention to put forward a synthesised average fall back time for EPOSS of 21.6 seconds (which is less than the average of the EPOSS benchmark times of 22.9 seconds), with the argument that fall back transaction times were intended to be taken into account in the weighted average of benchmark times for EPOSS, APS etc separately, to assess whether the MAT/TRT had been achieved/avoided for each service separately. What the 21.6 second time would mean for EPOSS, taken on its own, is that fall back would make it easier for Pathway to succeed against the MAT/TRT for that service. It makes sense if you aggregate the values of "c" for EPOSS and APS under Schedule B10, because there the figures would cancel each other out to some extent (APS being on the plus side), but it doesn't seem to work at the level of the individual service. I should also point out that the fall back transaction time intended to be put forward for EPOSS would fall foul of the EPOSS service level schedule which requires the synthesised fall back transaction time to be greater than the contracted transaction time.

The service review books for May and October 1999 set out various different transaction types for APS and OBCS, unlike EPOSS for which there is only one entry. I understand that the weighted average approach was intended to apply to APS, OBCS and EPOSS (except for some of the OBCS transactions which are based on actual measurements) so you would expect there to be one entry for each of them, with perhaps a few additional entries for OBCS. Incidentally, the 30 second weighted average figure for EPOSS which you referred to appears in the October review book, but I have as yet been unable to find it anywhere else. That too we need to look into.

We also need to clarify whether Pathway asserts that for the purpose of the weighted average approach (as opposed to the very similar calculation for "C" which we discussed with Keith yesterday) the common intention of the parties' was to use actual volumes for each transaction type for weighting purposes, or the annual PIVOT/MIS volumes. This seems to me to be another facet of the argument, which has yet to be fully explored.

Finally, an alternative strategy you might wish to consider is putting forward a document which highlights (diagrammatically if possible) the ambiguities within the various service level schedules, at the same time proposing an alternative, streamlined approach to service levels, incorporating advantages for both parties. We might be able to combine this with the proposal put forward yesterday.

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Myles Blewett → Tony Oppenheim

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Just so as you know, and depending on how you would like to proceed, if we enter a "dispute" scenario, I would like to discuss the issues with Rob McCallough.

Yours sincerely

**MYLES BLEWETT**