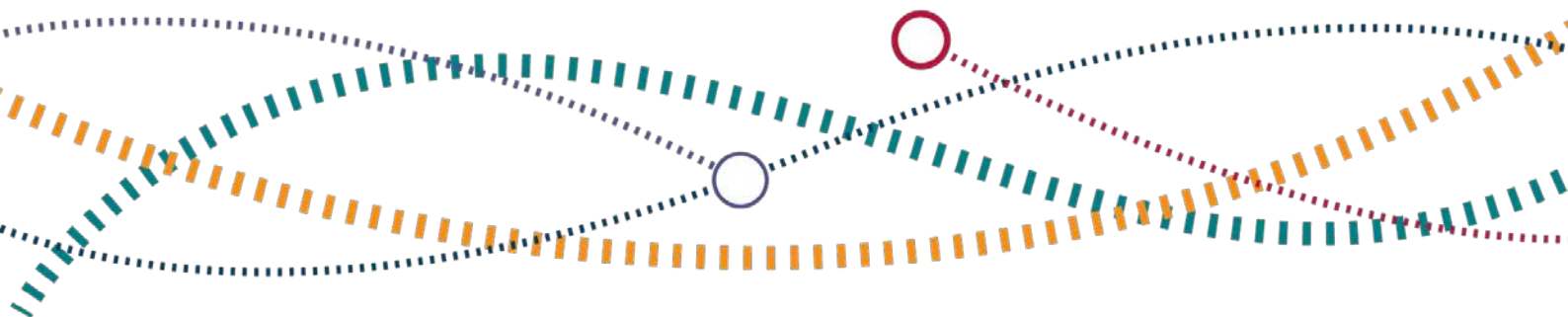




Appeal to ORR on Access Disputes Committee Timetabling Panel Determination HAL/TTP003

ORR determination

20 January 2022



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Executive Summary

1. This determination by the Office of Rail and Road (“ORR”) concerns an appeal (received 5 November 2021) pursuant to Part M of the Heathrow Airport Limited (“HAL”) Network Code against the determination of the Timetabling Panel of the Access Disputes Committee (“the Panel”), dated 27 October 2021 (“the Determination”). The Determination considered dispute HAL/TTP003, raised by MTR Corporation (Crossrail) Limited (“MTR”).
2. ORR has determined this appeal pursuant to its powers under Regulation 32 of the Railways (Access, Management and Licensing of Railways Undertakings) Regulations (2016) (the “Regulations”), and in accordance with the provisions set out in Parts D and M of the HAL Network Code.
3. Condition M7.1.1 of the HAL Network Code provides that every appeal will be limited to a review of the decision of the lower tribunal unless ORR considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. Based on the circumstances of this case, ORR has not considered it would be in the interests of justice to conduct a re-hearing and therefore this determination is limited to a review of the decision of the Panel.
4. On balance, ORR considers that the Panel’s conclusion that HAL had insufficient information to make the decision that it did was reasonable. HAL dismissed potential alternatives too readily and did not do enough to endeavour to find an acceptable solution that was consistent with all Exercised Firm Rights¹. ORR therefore upholds the Panel’s decision that HAL’s decision should be set aside on this basis. However, ORR considers that in substituting its own decision, the Panel produced a determination which suffers from the same weakness as that of HAL, i.e., that it was made in the face of a “paucity of available data” (Paragraph 182 of the Determination). In short, the Panel was not in a position to make a substituted decision. Therefore, ORR determines that this part of the Panel’s decision should be set aside. Instead, ORR remits the decision to HAL to be re-taken in accordance with the findings in this determination, in particular the need to obtain further information.

¹ This term is defined in Part D of the HAL Network Code.

Background

5. Dispute HAL/TTP003 was raised by MTR in relation to HAL's decision not to accommodate all the Firm Rights MTR held for access to Heathrow Airport Terminal 5 in relation to the New Working Timetable 2022 ("December 2021 timetable").
6. Following a hearing held on 13 October 2021, the Panel determined that HAL should honour the existing MTR Firm Rights (of two trains per hour ("tph") in each direction to and from Heathrow Terminal 5) on weekdays before 20:00 in the December 2021 timetable as soon as reasonably practicable, but in any event from a date not later than 3 January 2022 or alternatively the start of Period B of the December 2021 timetable if that date falls earlier.
7. On 5 November 2021, Heathrow Express Operating Company Limited ("HEOC") appealed to ORR against the Determination. HAL also submitted a document which it referred to as an Appeal Notice, but which ORR has treated as being the representations that HAL is entitled to make on an appeal which concerns it.
8. On 19 November 2021, MTR served its Respondent's Notices on ORR, and subsequently on HAL and HEOC on 23 November 2021.
9. ORR also received representations in this case from the following interested parties: Network Rail Infrastructure Limited, First Greater Western Limited and Transport for London.²
10. A full chronology is set out at Annex 2 to this determination.

Relevant Provisions of the HAL Network Code and The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016

11. The HAL Network Code is a set of rules incorporated into, and forming part of, each track access agreement between HAL and holders of rights of access to the track it owns and operates.
12. It is the responsibility of HAL to establish a timetable for the HAL network, referred to as the "Working Timetable". Part D of the HAL Network Code sets out the rules for the revision of the Working Timetable, a process that normally takes place twice per

² ORR also notes representations from British Airways dated 12 November 2021, although British Airways was not an interested party before the Panel.

year. Part D creates a right of appeal to the Panel against decisions of HAL about, amongst other things, the Working Timetable. Part M provides the process by which a party, if dissatisfied with a decision of a Timetabling Panel in relation to a dispute arising under Part D, can appeal the matter to ORR for determination.

13. Condition D2 of the HAL Network Code sets out the bi-annual timetable revision process. Condition D2.4 provides the framework for Timetable Participants³ and HAL relating to access proposals submitted before and after the Priority Date, which is 40 weeks before the timetable comes into effect (known as “D-40”). Condition D2.6 sets the requirements of HAL in preparing the New Working Timetable (“NWT”) and Condition D2.7 sets the requirement of HAL to publish the NWT at D-26. Condition D.3 deals with variations made to the working timetable.
14. In addition to the relevant conditions of the HAL Network Code, the Regulations are also relevant in this case with respect to ORR’s legal power to hear the appeal and are discussed in more detail below.

³ “Timetable Participant” is defined in Part D of the HAL Network Code.

ORR's Legal Power to Hear the Appeal

15. As set out in *ORR's Decision on an appeal by Transport for London regarding the terms of access to the track and stations comprised in the Heathrow rail infrastructure* in 2018, before hearing this appeal, ORR had to determine its vires to act as an appeal body in this case.⁴
16. On 19 November 2021, ORR wrote to HAL, HEOC and MTR stating that it considered that the parties' submissions had not (up to that date) directly addressed the question of whether ORR had the legal power to act as an appeal body for the dispute. Rather, the representations related primarily to whether ORR should exercise its discretion to consider the appeal on the assumption that it had the legal power do so.
17. In the same letter, ORR invited representations on: (i) ORR's legal power to act as an appeal body in this dispute and under which statutory provision(s); and (ii) which party/parties had a right to appeal to ORR and under which statutory and/or contractual provisions, including:
 - (a) The inter-relationship between a party's right to appeal under the contractual provisions of the HAL Network Code and any statutory right to appeal
 - (b) The inter-relationship between Parts D and M of the HAL Network Code with respect to a party's right to appeal
18. On 3 December 2021, ORR wrote to HAL, HEOC and MTR confirming that, following consideration of the representations received by the parties, it had decided to hear this appeal pursuant to its powers under Regulation 32 of the Regulations.
19. Regulation 32 of the Regulations provides a broad right of appeal for an applicant to ORR where it "*believes that it has been unfairly treated, discriminated against or is in*

⁴ ORR noted at Paragraph 95 of that Decision: "...if a matter were in due course to arise in relation to the Heathrow Rail Infrastructure on which it was considered appropriate to see ORR's view or decision...we would consider that matter on its merits at the time and in the context it was referred to us. Naturally, that consideration would include whether we had a power or duty to consider the matter in question (taking into account any submissions with respect to our vires made the party or parties seeking our view)", as well as whether we should exercise our discretion to exercise any such power in all the circumstances pertaining at that time."

any other way aggrieved, and in particular against decisions adopted by the infrastructure manager.... The provisions go on to set out the range of matters which may be the subject of an appeal including, but not limited to, the allocation process and arrangements for access, which are matters which relate to this appeal.

20. ORR confirmed that HEOC, as a train operating company, has a prima facie right of appeal to ORR as an “applicant” under Regulation 32 of the Regulations. Although HAL does not have a similar right of appeal as an “applicant”, ORR considers it is nevertheless directly involved in this dispute. ORR confirmed that HAL should be treated as a “relevant party” which has a right to be “consulted” in any appeal under Regulation 32(5)(a) of the Regulations.
21. ORR has therefore treated HAL’s Appeal Notice as the representations HAL is entitled to make in response to such consultation.
22. ORR also notified the parties that it intended to use its discretion under Regulation 32 of the Regulations to conduct its determination of this appeal in accordance with the provisions the parties had agreed between themselves, as set out under Parts D and M of the HAL Network Code. ORR considered this to be in line with what the parties themselves had contractually agreed as being acceptable and would ensure consistency in ORR’s process when hearing timetable disputes involving other infrastructure managers and networks. Furthermore, ORR considered this to be an expedient approach to determining the appeal, not least because the parties had already submitted the relevant documents to ORR.

HEOC's Notice of Appeal

23. HEOC's Notice of Appeal, dated 5 November 2021, states at paragraphs 5.3.1 – 5.3.5 (replicated below) the following reasons why the Determination was unjust including, but not limited to:

“The solution would result in a substantial reduction in HEOC services and operations;

The solution would have a highly adverse effect on passengers who rely on the HEOC service for a consistent, time sensitive, frequent, (4 trains per hour) service;

The solution, despite reducing HEOC operations and service frequency, adversely affects HEOC financially, as it does not allow cost savings in meeting the costs of delivering services and operational costs.

The ADC fails to take into account the much greater proportionate impact on HEOC, which is distinct from the impact on TFL/MTR, which far smaller in comparison given the relative size of operations and service patterns;

The solution effectively required by the ADC could result in thousands of HEOC passengers missing time sensitive commitments, namely flights, with substantial associated costs for passengers and knock-on negative consequences at Heathrow Airport.”

24. In paragraphs 7.1.1-7.1.6 of its Notice of Appeal (replicated below), HEOC also identified the following specific issues from paragraphs in the Determination.

*“Paragraphs 25 – 27, and 95 (“Paddington Platform Concession”);
Paragraphs 78 - 122 (“Operational and Performance Impact”);
Paragraphs 79 – 90 (“Passenger Impact”);
Paragraphs 133, and 149 (“Financial Impact”);
Paragraph 138 (“Brand and Reputational Impact”); and
Paragraph 92 (“Colleague Impact”).”*

25. HEOC explained what it considered the impact was on it of each of these issues in paragraphs 7.60-7.68 of its Notice of Appeal.
26. HEOC also stated that, in respect of network capacity, if the Determination was to be implemented, it “*may need to consider all alternative options to maintain 4 trains per*

hour to T5 including reverting to the network arrangements prior to the introduction of single platform at Paddington” (paragraph 7.69 of HEOC’s Notice of Appeal).

27. In paragraphs 8.2.1-8.2.5 (replicated below) pursuant to its Notice of Appeal, HEOC requested the following declarations from ORR:

“HAL should not be required to accept MTR’s request to exercise its Firm Rights, on the basis there was no capacity for these to be accommodated during the December 2021 timetable;

HAL followed the appropriate HAL Code processes either under the HAL Code as published, or as amended by the Change Strategy, and in either case, HAL’s decision made pursuant to the Decision Criteria⁵ within the HAL Code should stand; and

HAL acted fairly and in a non-discriminatory manner, having correctly applied the Decision Criteria.

The ADC incorrectly interpreted Condition D4.6; and

The ADC incorrectly deemed that exceptional circumstances applied such as to warrant it derogating from HAL’s decision on the Decision Criteria.”

MTR’s Response to the HEOC Appeal

28. On 19 November 2021, MTR served its Respondent’s Notice in respect of HEOC’s appeal on ORR and, subsequently on HAL and HEOC on 23 November 2021. In its Notice, MTR requested that ORR uphold the decision of the Panel in the Determination and direct all parties to continue with the implementation of that decision.
29. In its Respondent’s Notice, MTR provided its response to HEOC’s reasons for appeal. MTR summarised its response at paragraph 4 (a) to (e) as follows, stating that it:

“believes that, regardless of the Single Platform Arrangement (as referred to in the Appeal), a timetable solution is available that accommodates MTR and HEOC services at Terminal 5 (6tph in total utilising two platforms), with no requirement to reduce the HEOC service frequency. MTR also believes that there is spare capacity for

⁵ This is the criteria described in Condition 4.6 of the HAL Network Code.

HEOC to divert to Terminal 4 (ECS⁶ to and from Heathrow CTA⁷) if it decides to do so;

believes the Determination is good for passengers overall as it will enable both HEOC and MTR to provide direct services to Terminal 5, seven days a week and offer a wider range of fares and passenger choice;

believes that the Determination allows for both HEOC's and MTR's commercial interests to be balanced in a way which seeks to achieve the Objective⁸ by sharing capacity in an efficient and economic manner and which honours the parties' contractual rights. MTR also understands that one potential timetable solution is to remove an 8-car HEOC set from the cycle (four trainsets instead of five trainsets) which may reduce wear and tear to the rolling stock fleet;

believes that HEOC has failed to explain why the Determination decision has a greater proportionate impact on HEOC compared to MTR and that timetable solutions exist which prevent any such impact; and

believes that there are timetable solutions which allow HEOC to operate a four trains per hour service to Terminal 5, with no impact on HEOC journey times. All timetable solutions which result in MTR's Firm Rights being honoured provide additional options for passengers wishing to travel to Heathrow airport, with no reduction in services per hour.”

30. MTR also stated in its Respondent's Notice that:

- (a) In respect of the Paddington Platform Concession, MTR noted that “HEOC declined to discuss or acknowledge any commercial agreement with the Department for Transport (“DfT”) which MTR understands underpins the Single Platform Arrangement, when asked about this during the TTP Hearing” (paragraph 5.2.2). MTR stated that HEOC's argument was that, had HEOC not given up the platform, there would not have been capacity at Paddington for MTR to continue to operate at the high level.

⁶ “ECS” refers to Empty Coaching Stock.

⁷ “CTA” refers to the Central Terminal Area station at Heathrow Airport.

⁸ The “Objective” is defined in Condition D4.6.1 of the HAL Network Code, as set out in Annex 1 of this determination.

- (b) MTR noted that HEOC included several graphs in its appeal to try and demonstrate the performance impact of the timetabling solution discussed at the meeting of the Industry Timetable Assurance Programme Management Office (“PMO”) on 8 October 2021⁹ (the “PMO Solution”) and subsequent impact on passengers. However, MTR state that neither HEOC nor HAL presented any data to the Panel related to this issue.
- (c) Regarding the safety impact, MTR stated that *“HEOC also argues that the PMO Solution increases the requirement for passengers to have to change at Heathrow CTA (due to poor service performance) which will increase customer confusion and so Platform Train Interface risk increases”* (paragraph 5.4.1) is not correct. MTR stated that it *“understands that a 4tph HEOC service can easily be maintained by either reducing the HEOC turnaround times at Terminal 5 or diverting 2tph per hour to Terminal 4 (ECS between Heathrow CTA and Terminal 4)”* and that *“the PMO Solution also removes the need for MTR passengers to change at Heathrow CTA before 20.00 SX, and so in actual fact reduces the PTI¹⁰ risk”* (paragraph 5.4.1).
- (d) In respect of network capacity impact, MTR noted HEOC's observation that if the Determination is upheld, it may need to consider all alternative options to maintain four trains per hour to Terminal 5, including reverting to the network arrangements prior to the introduction of HEOC having a single platform at Paddington. MTR did not consider this issue to be within the scope of this appeal.

⁹ This is the meeting of the Industry Timetable Assurance PMO Collaboration Sub-Group described at Paragraph 11 of the Determination.

¹⁰ Platform Train Interface.

HAL's Representations

31. HAL made representations to ORR in the form of a "Notice of Appeal", dated 5 November 2021, setting out certain "grounds of appeal". As HAL is not the "applicant" in this case, ORR has treated these as the representations that HAL is entitled to make under Regulation 32 of the Regulations. In reviewing the Panel's decision, ORR has duly taken them into account. HAL set out its "grounds of appeal" at paragraph 4 (a) to (f) of its "Notice of Appeal" as follows:

"the TTP has based the Determination on the wrong timetable bids, which has misdirected the TTP's conclusions about HAL's responsibilities under the Network Code;

the TTP has come to the wrong conclusion as to the extent and quality of information HAL possessed or was required to obtain in order to make its decision, which has materially influenced its assessment;

the TTP has failed to appreciate that HAL is required to apply the Decision Criteria to every decision made under Part D of the Network Code, and so wrongly concluded that HAL failed to ask itself the correct question when making its decision;

the TTP has wrongly concluded that HAL did not give consideration to alternative timetabling solutions that may have allowed both MTR's and HEOC's requested services to operate to Terminal 5 in the December 2021 Timetable;

the TTP has wrongly concluded that HAL did not apply the Decision Criteria and that its application was materially flawed; and

the TTP has failed to provide any reasons for its own substituted decision and has failed to apply the Decision Criteria."

32. In paragraph 8.3 (a) (i)-(iv) and (b) (replicated below), HAL submitted that ORR should make declarations that:

"the TTP erred in its interpretation of Condition D3: the July Proposals were TOVRs¹¹ and HAL was correct in treating them as such;

¹¹ Train Operator Variation Requests

the TTP erred in its determination that HAL did not take a properly informed decision: HAL was required to consider the July Proposals in compressed timescales and therefore the requirement to properly inform itself in making its decision is limited by those timing constraints;

the TTP erred in its determination that HAL did not apply the Decision Criteria correctly in the circumstances; and

the TTP erred in substituting its own decision without sufficient justification, including failing to provide any reasons for, or apply the Decision Criteria in reaching, its decision; and

a direction that, in accordance with Condition D5.3.1(b) of the Network Code, HAL's decision in relation to the New Working Timetable stands and should accordingly be reinstated."

MTR's Response to HAL's Representations

33. On 19 November 2021, MTR served its Respondent's Notice in respect of HAL's appeal on ORR and, subsequently on HAL and HEOC on 23 November 2021. MTR requested that the ORR upholds the decision of the Panel in the Determination and directs all parties to continue with the implementation of that decision.
34. In its Respondent's Notice, MTR responded to each of HAL's representations, summarised at paragraph 4 (a) to (f) which stated that MTR:

"disagrees with HAL's view that the July Proposals are Train Operator Variation Requests (TOVRs) and agrees with the TTP's assessment on this issue;

believes that HAL failed to procure sufficient data to enable it to make a reasonably informed decision despite having sufficient opportunity to do so;

believes HAL has misinterpreted the TTP's views as to whether HAL asked itself the correct question and, in any event and by its own admission, failed to properly apply the Decision Criteria to every decision made under Part D of the Network Code;

agrees with the TTP's view that there is no evidence that HAL obtained or evaluated any information as to what alternative options might be available whether with the exercise of its Flexing Rights or otherwise in order to try to accommodate both parties' exercised Firm Rights;

agrees with the TTP's assessment of whether HAL correctly applied the Decision Criteria; and

disagrees with HAL's view that the TTP failed to provide reasoning for its own substituted decision.”

ORR's Consideration of the Appeal

35. ORR has considered the grounds of appeal raised by HEOC in its Notice of Appeal; HAL's representations; and the arguments put forward by MTR in its Respondent's Notice. ORR has also duly noted all representations received from interested parties. However, since ORR's determination is limited to a review of the decision of the Panel, these representations have been considered only to the extent that the matters raised in them were put before the Panel at the time it made its Determination.
36. ORR notes that HEOC's representations are essentially submissions as to the merits of HAL's representations, and in turn the Panel's, decision. HEOC seeks to reargue why it should be able to maintain 4tph to Terminal 5 without significantly increased risk to its performance. However, as observed above, ORR's determination of this appeal is limited to a review of the decision of the Panel rather than a re-hearing; ORR has not reconsidered the merits of either HAL's or the Panel's decision. Therefore, although ORR has given due consideration to the matters raised by HEOC, ORR considers that many of the arguments raised by HEOC are not directly relevant to ORR's determination of this appeal.
37. HAL's representations are formulated as grounds of appeal and do largely seek to identify errors in the reasoning of the Panel rather than re-argue the merits of the case. As observed above, however, whilst HAL has a right to be consulted and its representations have been taken into account by ORR, HAL does not have a right to pursue an appeal under Regulation 32 of the Regulations.
38. ORR has therefore conducted its own review of the Panel's Determination. Some of the issues ORR has identified align in particular with those identified by HAL and are addressed below. However, whilst ORR has taken all of HAL's representations into account in making its decision, ORR has not considered it necessary to expressly address each and every one of the matters raised by HAL.

Network Code Timings, the Change Strategy and Status of Access Proposals

39. The HAL Network Code sets out the contractual requirements for "Timetable Participants" - HEOC and MTR and HAL itself - in the production of a Working

Timetable¹². It permits HAL to sub-contract the production of the timetable to a suitably competent organisation and where that is Network Rail, the activities will be integrated into the establishment of the Working Timetable for the wider rail network.

40. In response to the problems caused by the COVID-19 pandemic for the rail network, Network Rail introduced a “Change Strategy” which amongst other things, set out alternative dates to those contained within Part D of the HAL Network Code and compressed the timeframe for producing an NWT. ORR recognises the unprecedented difficulties that the industry has faced because of COVID-19 and its impact upon rail travel. The Change Strategy is an understandable attempt by industry to respond to those difficulties in the manner it considers most appropriate.
41. ORR wishes to emphasise, however, that where industry seeks to depart from the existing provisions of Network Codes, it should do so by following the process for modification contained within the Code itself in order to avoid unnecessary confusion and uncertainty among industry participants. The dates and processes in the HAL Network Code, which is based on the Network Rail Network Code used across the wider rail network, have been very carefully worked out over a number of years to provide for an effective and transparent process for all industry participants. The HAL Network Code provides a formal process in Part C for modification which, if followed, would have allowed for greater clarity on the position of the Change Strategy and the corresponding contractual requirements for all parties.
42. This appeal is a good example of the confusion which can ensue when industry fails to adhere (or does not properly formalise changes) to the clear processes set out in Network Codes. For example, in this case MTR sought to protect its position by making an Access Proposal in March 2021 and another in July 2021, although the latter was slightly different, which has led to some confusion about which proposal should be considered. HAL initially followed the later timelines in the Change Strategy, but then submitted that the Change Strategy had not formally varied the HAL Network Code. HAL’s representation in this appeal that its publication of the NWT was effectively late, has led to confusion about what the knock-on consequences should be for the remaining dates in the HAL Network Code when an NWT is not published on time.
43. In this case, the parties submitted July Proposals in line with the Change Strategy. Whatever the effect of the Change Strategy on the HAL Network Code, all parties considered that the July Proposals were the relevant proposals for HAL to consider. It was also common ground that, as far as Exercised Firm Rights and thus Condition

¹² As defined in Part D of the HAL Network Code.

D4.2 of the HAL Network Code were concerned, the July Proposals would have equal priority.

44. However, because the Panel concluded that the Change Strategy did not amend the HAL Network Code, it could not treat the July Proposals as the relevant Access Proposals as the parties intended, and had to decide what else they were instead.
45. First, it considered that the July Proposals had the “characteristics of” varied Access Proposals within the meaning of Condition D2.4.5 but were “made outside the scope of what is permitted by Condition D4.2” (paragraph 167 of the Determination) and so were not Access Proposals¹³. ORR does not follow the Panel’s reasoning on this point since Condition D4.2 does not make any provision about varied Access Proposals.
46. Next, the Panel considered HAL’s submission that the July Proposals were TOVRs pursuant to Condition D3.3. The significance of this submission was twofold:
 - (a) First, if they were TOVRs, then Condition D4.2 would not apply to them and HAL would not be obliged to “*endeavour wherever possible*” to accommodate them;
 - (b) Second, HAL submits that July was the effective start-date for it having to consider the two bids. This, it submits, put pressure on the Part D timetable process and is relevant to the question of the steps that it was reasonable for HAL to take in order to inform itself about the decision it was required to make.
47. The Panel rejected this possibility too, on the basis that on a plain reading of the HAL Network Code TOVRs could only be made in relation to published NWTs. Having rejected the possibilities that the July Proposals were Access Proposals or TOVRs¹⁴, the Panel concluded that the July Proposals “have no contractual status” (paragraph 169 of the Determination).
48. ORR considers that the Panel erred in deciding that the July Proposals were of no contractual status. As stated above, all parties considered that the July Proposals were the relevant proposals for HAL to consider and therefore considered them to have some meaning.

¹³ As defined in Part D of the HAL Network Code.

¹⁴ It is unclear to ORR why the Panel did not consider whether the July Proposals were Revised Access Proposals.

49. Against this background, ORR considers that the most fair and reasonable outcome on the particular facts of this case would have been for the Panel to treat the July Proposals as if they were the relevant Access Proposals, for the following reasons:
- (a) Both Timetable Participants submitted proposals on 9 July, which was the revised Priority Date under the Change Strategy. Therefore, it is reasonable to assume that the parties intended their July Proposals to be treated as Access Proposals.
 - (b) Revised Access Proposals and TOVRs have a lower priority in the decision-making process than Access Proposals submitted by the Priority Date or Rolled Over Access Proposals (“ROAPs”). To treat the July Proposals as TOVRs or Revised Access Proposals would be to treat both Timetable Participants as having acted unwittingly in a manner which prejudiced themselves.
 - (c) If HAL was correct, then its failure to publish an NWT by D-26 was a breach of contract by it. ORR considers it would be unjust for Timetable Participants to be prejudiced – by what would otherwise be Access Proposals, or at least Revised Access Proposals, being treated as lower priority TOVRs – as a result of HAL’s unilateral breach of contract. This seems particularly unfair where both parties did everything they could to make timely Access Proposals.
 - (d) Both Timetable Participants made relevant proposals on the same date in March, and again on 9 July. Given that they were acting in lockstep in this way, it is fair and reasonable to give them equal priority.
50. In light of these conclusions, ORR does not consider it necessary to deal further with HAL’s detailed representations about whether the July Proposals were TOVRs.
51. The effect of ORR’s conclusion that the Panel should have treated the July Proposals as Access Proposals is as follows: (i) Condition D4.2 of the HAL Network Code, (discussed in more detail below) applies to the July Proposals; (ii) the Firm Rights of both MTR and HAL had equal priority (indeed, however the July Proposals are viewed, the Firm Rights of both MTR and HAL would always have had equal priority); and (iii) since the Firm Rights of both MTR and HAL had equal priority, and to the extent that HAL was “unable” to accommodate both within the meaning of Condition D4.2, the Decision Criteria in Condition D4.6 come to the fore of this appeal, as discussed further below.

HAL's Application of the Decision Criteria and the Panel's Assessment

52. Condition D4.2.1 of the HAL Network Code provides that, in compiling a New Working Timetable, HAL shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in Condition D4.2. Conditions D4.6 and D4.2 are thus to be applied simultaneously and there is therefore an inter-relationship between them.
53. Condition D4.2.2 provides that HAL "*shall endeavour wherever possible*" to comply with all Access Proposals submitted to it in accordance with Conditions D4.2.4 and D4.6 and accommodate all ROAPs, subject to a number of principles which then follow. Principle (b) is that each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant. Principle (c) is that, in compiling a New Working Timetable, HAL is entitled to exercise its Flexing Right. Where those principles have been applied but HAL is "unable" to include all requested Train Slots in the New Working Timetable, principle (d) sets out an order of priority for allocating slots. For the reasons set out above, ORR considers that if HAL were to reach principle (d), MTR and HAL would and should be treated as having equal priority.
54. Condition D4.6.1 provides that, where HAL is required to decide any matter in Part D, its objective shall be to share capacity on the HAL infrastructure for the safe carriage of passengers in a non-discriminatory, efficient, and economical manner in the overall interest of current and prospective users and providers of railway services. This is referred to as the "Objective".
55. Regarding the Objective, HAL submitted at Paragraph 4.20 of its Sole Reference Document to the Panel that the Objective referred to sharing the HAL infrastructure as a whole, not sharing specific platforms. Whilst this may be true, ORR considers this gives insufficient regard to the fact that MTR's Exercised Firm Rights *are* Firm Rights to access particular platforms.
56. In achieving the Objective, HAL is required to apply the Decision Criteria set out in Conditions D4.6.2 and D4.6.3.
57. In applying the Condition D4.6.2 criteria, ORR considers it is important to remember that they must be applied in a manner which: (a) "*endeavours wherever possible*" to comply with the Access Proposals of both HEOC and MTR; (b) "*shall*" be consistent with Exercised Firm Rights unless HAL is "*unable*" to do so; and (c) is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participant and HAL. As such, even where conflicting Firm Rights are evenly matched pursuant to Condition D4.2.2, they remain relevant when considering how to apply Condition D4.6.

58. In Paragraphs 78 to 152 of the Determination, the Panel considered each of the Decision Criteria (a) to (h) to assess whether and how HAL had applied them. In Paragraphs 170-184 of the Determination the Panel sets out its assessment of HAL's application of the Decision Criteria. Although the Panel was considering the March rather than the July Proposals, ORR considers that the key point in both March and July was that both HEOC and MTR were Exercising Firm Rights to Terminal 5. Therefore, ORR does not consider that that fact, alone, is sufficient to undermine the Panel's conclusions about each of these Decision Criteria.
59. ORR considers that the Panel carried out a full analysis of each of the Decision Criteria, taking account of the written and oral representations of all the relevant parties following a contested hearing.
60. ORR considers each of the Panel's conclusions in turn.

Paragraph 180(a)

61. ORR agrees with the Panel that all of the considerations at Condition D4.6.2 were relevant. ORR also agrees that HAL was required to ensure that it was reasonably properly informed in respect of each Consideration¹⁵ when it made its assessment, as explained below.
62. At Paragraph 5.14 of its representations, HAL contended that, because the relevant proposals were the July Proposals, it had less time to investigate alternatives and to gather additional evidence, and that this is relevant to the scope of its duty to take reasonable steps to inform itself about the decision it was required to make. However
- (a) HAL was on notice from March 2021 that MTR was or would be seeking to Exercise its Firm Rights of 2tph at Terminal 5. Indeed, the logic of HAL's submission that the July Proposals should be treated as TOVRs is that the Change Strategy was not effective, and that the March Proposals were therefore valid Access Proposals. If so, then ORR considers HAL should have been giving them due consideration at that date. To the extent that HAL believed that the relevant date would be July, or was in doubt about that, it knew that it might have to work to a compressed timetable. ORR considers it was open to HAL to start conversations with Timetable Participants in March about whether they were planning to make the same requests in July, and to commence its deliberations accordingly. It was not necessary for HAL to wait until July 2021 to begin the process.

¹⁵ "Consideration" is defined in Condition D4.6.2 of the HAL Network Code.

(b) It contradicts what HAL says elsewhere, about having already adequately considered the alternative proposals several times. If it had already done so, then it would not have needed any additional time.

63. Further, and irrespective of timing issues, in determining what information it was reasonable for HAL to obtain, ORR considers that the following circumstances were also of particular relevance: (a) MTR had Firm Rights; (b) MTR chose to Exercise those Firm Rights and did so in timely fashion; (c) HAL is under a contractual obligation under Condition D4.2.2 of the HAL Network Code to “*endeavour wherever possible*” to accommodate Access Proposals; (d) HAL is under a contractual obligation under Condition D4.2.2 of the HAL Network Code to formulate an NWT which is consistent with Exercised Firm Rights unless it is “unable to” do so; and (e) HAL has a duty under Condition D4.6.3 of the HAL Network Code to make a decision which is “*fair and is not unduly discriminatory*”.
64. ORR considers that this combination of factors led to a heightened duty on HAL to properly inform itself of relevant information.

Paragraph 180(b)

65. At paragraph 180(b) of the Determination, the Panel concluded that HAL approached each Consideration with the fixed goal in mind of wanting to prioritise a regular, express service from London Paddington, which is why its assessment universally favours HEOC. It referred to HAL asking itself the wrong starting question by reaching a concluded view without “*stepping through the parts*”.
66. ORR considers that this part of the Panel’s decision amounts in effect to concluding that HAL’s decision was predetermined. ORR does not consider the Panel had sufficient evidence before it to reach this conclusion and therefore its conclusion in this regard was not reasonable.

Paragraph 180(c)

67. ORR considers the Panel reasonably analysed HAL’s decision as being focussed principally upon concerns about performance and avoiding incidents at the Platform Train Interface (PTI).
68. Where a decision-maker is required to take account of a range of considerations then, in the absence of any guidance to the contrary, it is a matter for the decision-maker to decide how much weight should be attached to each of those considerations, provided that the amount of weight attached is reasonable. ORR does not consider that, on the facts of this case, it was inherently unreasonable for HAL to attach significant weight to questions of performance or passenger safety.

However, in ORR's view, it was reasonable for the Panel to conclude that there were gaps in the information that HAL gathered, which meant that the issues of performance and passenger safety were unable to bear the weight that HAL sought to attach to them. Indeed, the significance that was attached to these issues made it all the more important that HAL gathered the necessary information in relation to them.

Paragraph 180(d)

69. The Panel concluded that "HAL was not properly informed with sufficiently complete and/or useful data when it reached its view in connection with a number of material matters". The Panel assessed that had data been available, some of the Decision Criteria such as (b), (d), (e) and (h) might have been assessed in MTR's favour.
70. The Panel identified three main areas in which information was missing. First, a key aspect of the Objective is "the overall interest of current and prospective users and providers of railway services". However, the Panel noted that HAL had no passenger data from either HEOC or MTR (see Paragraph 94 of the Determination); no data on the relative proportion and makeup of service users before and after 20.00 on weekdays (Paragraph 95 of the Determination); or on the number of people affected by the longer journey times of the MTR service caused by the HAL decision (Paragraph 103 of the Determination).
71. The Panel also referred to a lack of data on the spread or balance of demand. In response, HAL has indicated that it may have this information but did not wish to disclose potentially commercially sensitive information without a direction by the Panel, which the Panel did not make. However, it is not clear what data HAL holds in this regard: the Panel recorded that HAL said it did not store data in this way and that HAL had not requested this information from HEOC or MTR; and HAL also refers extensively in this context to its right to exercise professional judgement, which seems to be a substitute for objective data.
72. Whatever the position, ORR considers it was reasonable for the Panel to determine that HAL needs to have a proper evidential foundation for its conclusion about the demand that exists for various types of service, for both current and prospective users of the two services. If HAL already has this evidence, then it should be able to demonstrate that it has used it. If not, then it should obtain it.
73. Second, as already observed above, HAL relied upon the possibility of increased safety incidents at the PTI. The Panel referred at Paragraph 77 of the Determination to the fact that HAL repeatedly emphasised this concern, but without giving much detail. ORR has also been unable to obtain a clear sense of what these concerns are

either from HAL's submissions below or from its representations on appeal. On the contrary, there is reference in the Determination to the safety risk on HAL infrastructure as being very well controlled, and to the vast majority of PTI incidents being at the most minor end of the scale. HAL also stated that it was not aware of the relative proportion of PTIs before and after 20.00 (Paragraph 109 of the Determination). Importantly, the Panel noted that HAL had not undertaken any qualitative risk assessment in its application of the Decision Criteria (Paragraph 180(g) of the Determination). ORR agrees with the Panel that HAL ought to have provided a clearer evidential basis for its concerns about the increased risk of incidents at the PTI.

74. Third, and critically, given the emphasis placed on this factor by HAL, HAL had no concrete evidence of the impact of the solution canvassed at the PMO meeting of 8 October 2021 on performance (Paragraphs 127-128 of the Determination). Nor did it have any data on the effect of a short turnaround time at London Paddington (Paragraph 98 of the Determination). At the PMO Meeting on 8 October 2021, Network Rail observed that shortening the turnaround time at Terminal 5 would require specialist attention by Network Rail Capacity Planning. It is not clear to ORR whether that assessment has since taken place, although those at the PMO meeting observed that there was insufficient time to carry out the assessment for the December 2021 Timetable period.
75. In its representations, HAL contends (at Paragraph 3.4) that HAL should have been able to rely upon its own professional judgement in these matters. ORR agrees that there is room for infrastructure managers to exercise professional judgement in their decision-making. However, ORR considers that this professional judgement should always be exercised in light of whatever objectively ascertainable data the infrastructure manager ought reasonably to obtain. ORR does not consider that it is open to a decision-maker to make assumptions about questions of objectively ascertainable facts that it reasonably ought to have gathered by way of evidence.
76. Appendix 10 of HAL's representations provides some performance analysis of a "four train" option for HEOC. However, this is dated after the Panel's Determination.
77. Further, the Panel is a specialist body which is well-placed to identify the information that is necessary to make properly informed decisions. ORR considers that the Panel conducted a full and probing analysis of the evidential basis upon which HAL reached its decisions. It was open to the Panel to conclude that the information identified above is what would be expected in order for HAL to be able to make a properly informed decision, and ORR has not identified any error in the Panel's approach.

78. At Paragraph 5.39 onwards of its representations, HAL also contends that the alternative options had previously been considered and dismissed, and that there had been no material change since then. It contends that it should not have to repeat the same reasoning that it has already provided in earlier decisions, in the absence of a material change. ORR agrees with this in principle. On the facts of this case, however, there is nothing in HAL's decision to suggest that it was building upon earlier decisions. There is no mention in its 9 September 2021 decision¹⁶ that this is what it was doing. On the contrary, the tenor of HAL's reasoning is that it is making a fresh decision. Additionally, at Paragraph 1.3.6 of HAL's decision dated 9 September 2021, HAL observed that there was no way of accommodating all Exercised Firm Rights of both MTR and HAL, which seems to indicate to ORR that it had not considered the options involving shorter turnaround times at Terminal 5 and/or the stabling of a fifth train at Terminal 4.

Paragraph 180(e)

79. The Panel concluded that, in considering MTR's commercial interests, HAL focused unduly narrowly upon the absence on financial losses in running services to Central Terminal Area/Terminal 4 as opposed to Terminal 5, without considering its broader commercial interest arising from running a more (or less) attractive service. ORR considers it reasonable for the Panel to conclude that that broader matter is a materially relevant consideration to which HAL ought to have had regard, but did not.

Paragraph 180(f)

80. The Panel held that environmental considerations had not formed part of HAL's decision-making. In ORR's view, however, it appears environmental considerations did form part of HAL's decision-making, but were assessed as weighing equally on both sides and thus as being a neutral factor.

81. Having found that environmental considerations were not a part of HAL's decision-making, the Panel went on to find that a reasonable decision-maker would have concluded that environmental considerations favoured MTR's proposal because of the reduction in the number of interchanges and the provision of a more efficient service for those transiting from West London. However, the Panel only made this assessment in light of its finding that HAL had not considered the issue at all. ORR does not know what the Panel would have decided had it been conducting a review of the decision that HAL made, rather than providing a fresh view of its own. As such,

¹⁶ This document was submitted by MTR to the Panel and is titled: "Heathrow Rail - December 2021 New Working Timetable - Consideration of proposals for inclusion in the December 2021 New Working Timetable of Train Slots of MTR Corporation (Crossrail) Limited (trading as MTR Elizabeth Line (MTREL)) and Heathrow Express Operating Company Limited (HEOC)".

ORR does not consider the Panel's view about this Decision Criterion to be binding. However, the fact that the Panel – which is also an expert body and which heard full and competing submissions from all sides – assessed MTR's proposal as being more environmentally favourable, is a relevant consideration to which HAL should have regard when it re-takes its decision.

Paragraph 180(g)

82. The Panel observed that HAL ought to have concluded that two or more relevant considerations would lead to a conflict, and then decided whether one set of factors outweighed any countervailing factors. ORR agrees that, in the event that HAL is faced with two or more considerations, it must follow the contractual provisions established in the HAL Network Code, including the proper application of the Decision Criteria.

Undue discrimination

83. ORR considers that, as a matter of objective fact, HAL's decision discriminates as between HEOC and MTR. It treats the former more favourably than the latter notwithstanding the fact that their Exercised Firm Rights gave them equal priority. The key question, however, is whether there was "undue" discrimination, which ORR considers is essentially a question of whether the discrimination could be justified having regard both to the degree of discrimination and to the reasons for it.

84. As observed above, ORR considers that the facts that: (a) MTR has Firm Rights which it has Exercised; (b) as far as Firm Rights are concerned, MTR has equal priority with HEOC; (c) HAL is under an obligation to endeavour wherever possible to comply with Access Proposals, and to prepare an NWT that is consistent with Exercised Firm Rights unless it is "unable" to do so; and (d) compliance with both Access Proposals is operationally possible, mean that significant justification will be required before the discrimination against MTR can be justified.

85. In ORR's view, in the absence of information in the areas identified above, HAL is unable to justify the discrimination against MTR.

Conclusion

86. On balance, ORR considers that the Panel's conclusion that HAL had insufficient information to make the decision that it did was reasonable. HAL dismissed potential alternatives too readily and did not do enough to endeavor to find an acceptable solution that was consistent with all Exercised Firm Rights. ORR therefore upholds the Panel's decision that HAL's decision should be set aside on this basis.

The Panel's Decision

87. The Panel determined that the appeal by MTR succeeded and directed HAL to honour MTR's Firm Rights. In doing so it exercised the power to substitute a challenged decision with its own decision, which is a power that the Panel may only exercise in "exceptional circumstances". In its determination, the Panel set out reasons why it considered that Condition D5.3.1(c) of the HAL Network Code applied.
88. In its Notice of Appeal, HEOC requested a declaration from ORR that *"the ADC incorrectly deemed that exceptional circumstances applied such as to warrant it derogating from HAL's decision on the Decision Criteria"* (paragraph 8.2.5). It also requested a declaration from ORR that *"HAL should not be required to accept MTR's request to exercise its Firm Rights on the basis there was no capacity for these to be accommodated during the December 2021 timetable"* (paragraph 8.2.1).
89. In its representations, HAL stated that the Panel failed to provide any reasons for its own substituted decision and had failed to apply the Decision Criteria.
90. ORR considers that in substituting its own decision, the Panel produced a determination which suffers from the same weakness as that of HAL, i.e., that it was made in the face of a "paucity of available data" (Paragraph 182 of the Determination). Therefore, the Panel's application of the Decision Criteria was necessarily subject to the same flaws as those in HAL's decision. In short, the Panel was not in a position to exercise its power make a substituted decision. Therefore, ORR considers that this part of the Panel's decision should be set aside.
91. Instead, the decision should be remitted back to HAL who should make a fresh decision in light of the ORR's findings above.
92. In light of these findings, ORR considers it unnecessary to determine whether there were exceptional circumstances empowering the Panel to make the decision for itself. Given the potentially wide-reaching nature of any ORR determination on what amounts to "exceptional circumstances", ORR would only wish to make findings about the types of situation which might meet that threshold in a case where the point properly arises for determination.

ORR's Conclusions and Determination

93. Having considered this appeal, ORR makes the following determinations:
- (a) ORR agrees with the Panel's overall conclusion to overturn HAL's decision on the basis that HAL failed to obtain certain information that it ought reasonably to have obtained in the areas identified above.
 - (b) ORR does not, however, uphold the Panel's decision to mandate HAL to grant MTR's Exercised Firm Rights. As noted above, ORR considers that the Panel's decision suffers from the same lack of relevant information as HAL's.
 - (c) ORR therefore remits the decision back to HAL to be re-taken in accordance with the findings in this determination. In re-taking its decision, ORR determines that HAL should consider the parties' July Proposals and treat them as if they were Access Proposals submitted by the Priority Date. The criteria in both Conditions D4.2.2 and D4.6 of the HAL Network Code are to be applied to the July Proposals.
 - (d) ORR directs HAL to re-take its decision as soon as reasonably practicable and in line with ORR's own duties under Section 4 of the Railways Act 1993, ORR considers that implementation of that decision should occur no later than the introduction of the May 2022 timetable.
94. ORR notes that its determination on this timetabling appeal has been issued just after the commencement of HAL's December 2021 timetable. It is a matter for HAL, as infrastructure manager of the HAL network, to decide what action, if any, to take pending a new timetabling decision by it. However, given ORR's duty to protect the interests of users of railway services, ORR would not expect HAL to introduce immediate changes to the December timetable before it has properly re-considered its decision.
95. ORR has considered the evidence provided and has concluded that "*endeavours wherever possible*" in Condition D4.2.2 of the HAL Network Code means that an infrastructure manager should be able to demonstrate with evidence that it has considered an option(s) to accommodate all Exercised Firm Rights. ORR does not consider this was evident in the submissions to the Panel or to ORR. HAL's own submissions have focused on only accommodating one operator. In remitting the decision to HAL, HAL needs to provide evidence to all parties of its consideration of

other options to demonstrate its “endeavours”. It can then apply the Decision Criteria to those options (in this particular case, at least one of which should accommodate all Firm Rights).

96. In other words, in re-taking its decision, ORR expects HAL to obtain and consider appropriate data in respect of all solutions that it considers and to have sufficient evidence to support its consideration of each of the Decision Criteria. This may include, for example, completion of the network rail capacity planning analysis (referenced at the PMO meeting of 8 October 2021), qualitative risk assessment of PTI events and data on passenger use/spread from all operators.
97. ORR is aware of industry discussions regarding the potential for HEOC to use an additional platform for the May 2022 timetable onwards, at Paddington. This development (which potentially accommodates all Firm Rights), is likely to be a relevant consideration for HAL in the re-taking of its decision.
98. Finally, ORR observes that across industry each Network Code has a formal modification process to provide legal certainty for industry participants. Changing the timescales and processes, from those within a Network Code, without following the proper modification procedures puts all parties at risk in the case of a dispute, as highlighted in this appeal. ORR therefore encourages the industry to ensure there is clarity over these Network Code processes to mitigate this risk.



Martin Jones
Deputy Director, Access and International
Duly Authorised by the Office of Rail and Road
20 January 2022

Annex 1 – Condition D4.6 HAL Network Code

4.6.1 Where HAL is required to decide any matter in this Part D its objective shall be to share capacity on the HAL infrastructure for the safe carriage of passengers in a non-discriminatory, efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).

4.6.2. In achieving the Objective, HAL shall apply any or all of the considerations in paragraphs (a)-(h) below (“the Considerations”) in accordance with Condition D4.6.3 below:

- (a) maintaining, developing and improving the capability of the HAL infrastructure;
- (b) that the spread of services reflects demand;
- (c) maintaining and improving train service performance;
- (d) that journey times are as short as reasonably possible;
- (e) maintaining and improving an integrated system of transport for passengers;
- (f) the commercial interests of HAL (apart from the terms of any maintenance contract entered into or proposed by HAL) or any Timetable Participant of which HAL is aware;
- (g) mitigating the effect on the environment; and
- (h) enabling operators of trains to utilise their assets efficiently.

4.6.3 When applying the Considerations, HAL must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and HAL. Where, in light of the particular circumstances, HAL considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

4.6.4 The Objective and the Considerations together form the Decision Criteria.

Annex 2 - Chronology

1. On 5 November 2021, HAL and HEOC served Notices of Appeal¹⁷ on ORR under Part M of the HAL Network Code to appeal the Determination that HAL should honour the existing MTR Firm Rights (of two trains per hour in each direction to and from Heathrow Terminal 5) on weekdays before 20:00 in the December 2021 timetable as soon as reasonably practicable, but in any event from a date not later than 3 January 2022 or alternatively the start of Period B of the December 2021 timetable if that date falls earlier.
2. On 9 November 2021, ORR wrote to HAL and HEOC to acknowledge their requests for an expedited process and proposed timetables for their respective appeals. Also on 9 November 2021, ORR wrote to MTR and asked for representations on whether the appeal should proceed or not, and on HAL and HEOC's request to expedite their appeals.
3. On 12 November 2021, MTR wrote to ORR inviting us not to exercise our jurisdiction, on grounds that in its view the matters contained within the HAL appeal are not of sufficient importance to the industry. In the same letter MTR also stated that the HEOC appeal should not be considered by ORR because in its view HEOC does not qualify as a Dispute Party under Part M of the HAL Network Code.
4. On 5 November 2021, one of the interested parties, Network Rail Infrastructure Limited, wrote to ORR summarising its position regarding this matter, which has been noted. ORR shared these representations with HAL, HEOC, MTR and the other interested parties on 16 November 2021.
5. On 17 November 2021, ORR also received representations from another interested party, First Greater Western Limited. ORR shared these representations with HAL, HEOC, MTR and the other interested parties on 18 November 2021.
6. On 24 November 2021, ORR received representations from another of the interested parties, Transport for London. ORR shared these representations with HAL, HEOC, MTR and the other interested parties on 25 November 2021.
7. On 19 November 2021, MTR served its Respondent's Notices on ORR, and subsequently on HAL and HEOC on 23 November 2021. Also on 19 November 2021, ORR wrote to HAL, HEOC and MTR asking for their representations on ORR's

¹⁷ As stated in Paragraph 21 of its determination, ORR has treated HAL's Appeal Notice as the representations it is entitled to make under Regulation 32 of the Regulations.

legal power to hear this appeal and which parties were entitled to appeal to ORR. Responses were received on 26 November 2021.

8. On 3 December 2021, ORR wrote to HAL, HEOC and MTR confirming its decision to hear HEOC's appeal pursuant to ORR's powers under Regulation 32 of the Regulations, and in accordance with the procedure set out in Part M of the HAL Network Code. In the same letter, ORR stated that it considered that although HAL does not have a right of appeal as an "applicant" under Regulation 32, HAL is directly involved in this dispute. ORR considers that HAL is a "relevant party" which has a right to be "consulted" in any appeal under Regulation 32(5)(a). ORR therefore decided to treat HAL's Appeal Notice as the representations HAL was entitled to make in response to such consultation.
9. In the same letter, ORR noted the requests in the Notices of Appeal received from HAL and HEOC for the appeal to be heard under an expedited process and the representations from MTR on this matter. ORR confirmed it would endeavour to reach a final determination of the appeal as soon as reasonably practicable.



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