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**TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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**Determination in respect of dispute reference HAL/TTP003**  
(following a hearing held on 13 October 2021)

**The Panel:**

Paul Stevenson            Hearing Chair

Members appointed from the Timetabling Pool

Peter Warhurst            elected representative for Franchised Passenger Class, Band 2  
Chris Matthews            elected representative for Non-Passenger Class, Band 2  
Mark Sleet                 appointed representative of Network Rail

**The Dispute Parties:**

MTR Corporation (Crossrail) Ltd. ("MTR")

Jonathan James          Head of Contract Management  
Mike Bagshaw            Performance and Planning Director  
Jonathan Smith          Senior Associate (Dentons)

Heathrow Airport Ltd. ("HAL")

Jason Chamberlain      Bryan Cave Leighton Paisner LLP  
Michael Bradley         Rail Governance Manager  
Emilie Christmas        Heathrow legal team

**Interested parties:**

First Greater Western ("GWR") - unable to attend

Rob Holder                Network Access Manager

Transport for London ("TfL")

Daniel Gierhart          Crossrail Concession Manager

Network Rail ("NR")

Lindsey Nalton          Timetable Production Manager (W&W)

Heathrow Express Operating Company ("HEOC")

Andrew Darbyshire      Cost Transformation / HS2 Lead

**In attendance:**

Tamzin Cloke              Committee Secretary ("Secretary")

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## **A Background and Jurisdiction**

1. Dispute HAL/TTP003 was raised by MTR by service of a Notice of Dispute on 20 August 2021 in respect of HAL's decisions in relation to the New Working Timetable 2022 ("December 2021 timetable"). The dispute was brought on the basis that HAL had not accommodated all the Firm Rights MTR held for access into Terminal 5 at Heathrow Airport. MTR contended that in failing to honour its Firm Access Rights, HAL had not complied with Part D of the HAL Network Code in the development of the New Working Timetable. MTR concurrently requested that the hearing be expedited owing to the proximity of the timetable operation.
2. I was appointed as Hearing Chair on 09 September 2021 and I satisfied myself that the matters in dispute included grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the HAL ADR Rules to hear an appeal under the terms of Network Code Condition D5.
3. In its consideration of the Parties' submissions and its hearing of the Disputes, the Panel was mindful that, as provided for in ADR Rule A5, it should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.
4. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 4 and as otherwise defined in this determination document:
  - "ADR Rules" mean the HAL Access Dispute Resolution Rules and "Rule" is construed accordingly
  - "Decision Criteria" means HAL Network Code Condition D4.6
  - "Consideration" means the matters set out in HAL Network Code Condition D4.6.2
  - "CTA" means Central Terminal Area station at Heathrow Airport
  - "Objective" means the objective set out at HAL Network Code Condition D4.6.1
  - "Chapter H" means Chapter H of the HAL ADR Rules
  - "Part D" means Part D of the HAL Network Code
  - "SRD" means Sole Reference Document
  - "STP" means Short Term Planning
  - "TOC" means Train Operating Company
  - "TTP" means Timetabling Panel
5. Where I refer to a Condition below this is a reference to Part D unless otherwise specified.

## **B History of this dispute process and documents submitted**

6. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide sole reference documents ("SRDs"). The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential interested parties by the Dispute Parties.
7. On 29 September 2021 MTR served its SRD, in accordance with the dispute timetable as issued by the Secretary.
8. On 06 October 2021 HAL served its SRD in accordance with the dispute timetable as issued by the Secretary.

9. Network Rail Infrastructure Ltd., First Greater Western Ltd., Heathrow Express Operating Company Ltd. and Transport for London declared themselves to be interested parties. All bar GWR were represented at the hearing. GWR provided a statement in advance of the hearing, which the Panel noted, and which was shared with the Dispute Parties during the hearing day.
10. On 08 October 2021 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that the principal issue of law which arose was whether HAL was required to follow Part D of the HAL Network Code in the allocation of capacity in the December 2021 Working Timetable. It was also necessary to consider the application of Condition 4.6, which was a mixed question of law and fact. The remaining issues were ones of contractual interpretation.
11. In response to my directions MTR provided notes of the Industry Timetable Assurance PMO Collaboration Sub Group meeting held on 8 October 2021 and a document referred to as an Overview of the TfL and MTREL Position, which I infer was prepared by MTR for that meeting.
12. The hearing took place on 13 October 2021. The Dispute Parties made opening statements, responded to questions from the Panel concerning various points and were given the opportunity to make closing statements. The interested parties were given the opportunity to raise points of concern. At the hearing the Dispute Parties submitted a number of documents as an aid to their submissions. MTR submitted a document which the Panel understands shows passenger numbers in both directions between Hayes and Harlington and the CTA on each Wednesday between 28 July and 6 October 2021 inclusive. HAL provided documents in aid of oral submissions at the hearing relating to (1) platform loading by TOCs at London Paddington and T5; and (2) Thames Valley Area Operations Diagrams dating to April 2019 showing signalling and rail movements controlled from the Thames Valley Signalling Centre and lighting, ventilation, fire, access, emergency response and tunnel radio controlled from Heathrow Express Control Room. The Panel understands that these have in view matters such as route blockage scenarios. In the event, neither party particularly referred the Panel to these additional documents in the course of their submissions.
13. At the outset of the hearing, in accordance with Rule H45(c) the Hearing Chair and other Panel members declared any relevant interests. Mr Sleet declared two potential interests: (1) his employment by NR (which HAL has delegated as its agent for timetabling matters); and (2) he indicated that Mr James was his son's godfather. The question is whether either might give rise to an appearance of bias. I am satisfied that neither does, taking into the account the relevant test whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias, and that it is for me to make the final determination. I invited the Dispute Parties to make any relevant submissions if they wished to do so and neither did.
14. I confirmed that the Panel had read all of the papers submitted by the Dispute Parties and I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such materials are specifically referred to or summarised in the course of this determination.

## **C Outcomes sought by the Dispute Parties**

15. In its SRD, MTR requested the Chair direct HAL to honour its existing MTR Firm Rights, so it could operate two trains per hour in each direction to and from Heathrow Terminal 5 on weekdays before 20:00 in the December 2021 timetable.
16. HAL asked the Chair to determine that:
  - (a) HAL should not accept MTR's request to exercise its firm rights, as there is no capacity for them to be accommodated during the December 2021 timetable;
  - (b) HAL followed the appropriate Network Code processes, either under the Network Code as published, or as amended by the Change Strategy, and in either case, HAL's decision should stand;
  - (c) HAL acted fairly and in a non-discriminatory manner, having correctly applied the Decision Criteria.
17. HAL further requested that the Chair provide guidance as to the status of the Change Strategy, and whether its existence had amended the Network Code, without the formal Network Code Part C process being followed. HAL noted ORR's appeal decision in TTP1331 and TTP1376 in making this request.

## **D Relevant provisions of the Network Code and other documents**

18. The versions of the HAL Network Code Part D and the ADR Rules dated 31 December 2017 were applicable to these dispute proceedings.
19. Conditions D2.4.3, D2.4.4, D2.4.5, D2.6, D3.3.1, D4.2 and D4.6 were particularly relevant and are appended in Annex "A".

## **E Factual Background**

20. To a large extent the factual background was not in dispute between the parties and what I set out below records my findings of fact in connection with background matters so far as required. It is similar to the factual position set out in dispute reference HAL/TTP002 and relates to the practical issues which arise from the impact of the COVID-19 pandemic and its effect on rail travel to and from Heathrow Airport. What I say below draws on the findings in that reference (which is not binding on me but is persuasive) and the parties' submissions and answers to questions. There were attempts across the industry to put in place a process which comprised pragmatic and temporary steps in connection with a revised timetable planning process which is known as the "Change Strategy" but in doing so the parties did not have at the forefront of their minds the detailed provisions of Part D and the implications on their rights and obligations. I accept that HAL was not involved in the development of the process which became known as the Change Strategy but sought to adopt the strategy for the purposes of planning the December 2021 timetable. The focus of the hearing was on Part D because the appeal was made under Part D. The Panel is required to reach a determination 'on the basis of the legal requirements of the parties and no other basis'.
21. A vital and key part of the transport 'offer' at Heathrow Airport is an efficient and effective road and rail connection with central London which, as regards rail, has for a number of years been provided by TfL, HEOC and MTR.

22. As with dispute reference HAL/TTP002 the focus of this appeal is the services offered by HEOC and MTR. These services operate partly on NR infrastructure and partly on HAL infrastructure. Inevitably, for operational reasons, there needs to be a close alignment of the use of those bits of infrastructure. As regards timetabling matters HAL has appointed NR to be its agent, although final decision-making rests with HAL.
23. Prior to the working of the Change Strategy HEOC ran 4 trains per hour (tph) into Terminal 5 (T5) while MTR ran 4tph into Terminal 4 (T4). All trains run by the CTA which acts as an interchange for HEOC passengers requiring T4 and MTR passengers requiring T5. The CTA also serves Terminals 2 and 3, with Terminal 1 having been decommissioned in 2015.
24. Crucially, the HEOC services were, and are, express/non-stopping between London Paddington and Heathrow Airport whereas MTR services stop at intermediate stations, such as Ealing Broadway, which is of particular benefit to travellers and those people working at Heathrow Airport who do not travel from central London.
25. HEOC had the benefit of an agreement with NR providing for the exclusive use of two platforms at London Paddington. At some point, not material to this appeal, HEOC agreed to give up exclusive use of platform 6. This was to free up capacity at London Paddington due to a delay in the Crossrail project. Consequently, HEOC has said that its 4tph needs to dwell at T5 for 52 minutes of every hour. As a result, although T5 has capacity for 8tph this is not its present capacity. This method of operation was included in the December 2020 Working Timetable (“WTT”).
26. So far as material for this appeal the Track Access Contract (“TAC”) between HAL and HEOC provides Firm Rights for the equivalent of 4tph to T5, and no Firm Rights to passenger services to T4. HEOC has contingent rights to operate Ancillary Movements anywhere ‘reasonable’ on HAL infrastructure, including within T4. The HEOC TAC additionally specifies a clock face TT and journey time protection.
27. So far as material for this appeal the TAC as between HAL and MTR provides for Firm Rights for the equivalent of 4tph to T4 and 2tph to T5.
28. The relevant Prior WTT was the May 2021 WTT. I understand that this timetable provided MTR with 4tph to T4 via the CTA and 2tph to T5 after 20:00 on weekday evenings and at weekends.

### **The December 2021 timetable**

29. NR issued an initial timeline for the December 2021 so-called “Intervention Window” as part of the Change Strategy as follows:
  - a. By 30 July 2021 (D18) – operators bid changes
  - b. By 3 September 2021 (D13) – NR offers the changes
  - c. By 10 September 2021 (D12) – operators respond to the offered timetable
  - d. By 17 September 2021 (D11) – NR responds to the offer response and publication of the amended base timetable

30. On 5 March 2021 (the D-40 date within the meaning of Part D) MTR submitted an Access Proposal (referred to as a Principal 2022 Priority Date Notification Statement) which consisted of:
  - a. 2tph in each direction, 7 days a week between London Paddington and T4; and
  - b. 2tph in each direction, 7 days a week between London Paddington and T5
31. HEOC did not submit an Access Proposal at this time. I will turn to the effect of this later.
32. On 9 July 2021 MTR submitted documents referred to as a December 2021 timetable intervention. This requested 2tph to T4 and 2tph to T5, in each case in each direction, seven days to and from London Paddington.
33. On the same date (although the Panel have not seen it) it is common ground that HEOC submitted a timetable bid for 4tph to T5 in each direction seven days a week to and from London Paddington. I refer to the 9 July requests as the July Proposals. The Panel understands that there were some differences in both cases in the Train Slots sought in the July Proposals when compared with MTR's Access Proposal or HEOC's ROAP (see below). These are not material for this appeal.
34. It is common ground that 9 July 2021 was the date for submission of Access Proposals within the meaning of the Change Strategy.
35. I will turn later to the status of the July Proposals.
36. In passing, I note that on 13 April 2021 the Secretary to the Access Disputes Committee sent a reminder to all Resolution Service Parties to remind parties that ADR Rule A5 binds all determination forums and requires them to reach a 'determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'. These legal entitlements are those set out in the Network Code. A copy is at Appendix 5 of HAL's SRD.
37. On 8 August 2021 HAL wrote to HEOC to ask whether HEOC would consider a timetable bid amendment to release capacity at T5 by reducing its service to 2tph to T5 to free up the relevant platform capacity. A copy is at Appendix 6 of HAL's SRD. I note in passing that this letter refers to HAL having '*sought to provide the best passenger proposition that is available to us*'.
38. By a reply dated 12 August 2021 HEOC stated that it did not believe that it was in the best interests of HEOC passengers to reduce to a 2tph service and would not therefore amend its submitted bid. A copy is at Appendix 7 of HAL's SRD.
39. On 8 August 2021 HAL wrote to MTR to ask MTR to consider an amendment to operate only 4tph from London Paddington to CTA, running ECS to T4. A copy is at Appendix 3 of MTR's SRD.
40. On 13 August 2021 MTR responded to confirm that it expected HAL to honour its Firm Rights to and from both T4 and T5 seven days a week. A copy is at Appendix 4 of MTR's SRD.

41. Separately, I understand that in discussions which took place on or about 11 August 2021 (the date is not material for present purposes) MTR and NR agreed to truncate two London Paddington to Heathrow Airport services per hour at Hayes and Harlington.
42. On 13 August 2021 NR published the December 2021 'Intervention Timetable'. A copy is at Appendix 5 of MTR's SRD.
43. I should add that the December 2021 timetable becomes effective from 12 December 2021. There are, accordingly, approximately nine weeks until 'go live'.
44. I will turn to the effect of the Change Strategy below.

## **F Submissions by the Dispute Parties**

### **MTR**

45. In summary, MTR indicated that it was disappointed that it had to make the reference, which it says arose from HAL's decision not to honour its Firm Rights. In doing so, MTR argued that HAL had not made it clear that it followed the requirements of Condition D4.2 in the development of the New WTT. MTR also said that HAL had not correctly applied the Decision Criteria which are set out at Condition D4.6. MTR contended that HAL had not achieved the Objective of sharing capacity to T5 in the overall interests of users and providers in a non-discriminatory, efficient, and economical manner.
46. MTR added that it *"does not believe the impact of the Change Strategy on the Network Code was clearly communicated to operators and neither HAL nor NR appears to be clear between themselves on the issue."*
47. MTR stated that when it submitted its Access Proposal on 5 March 2021 it was *"unclear as to whether the timings in the Network Code had been formally amended by the Change Strategy"*.
48. MTR submitted that applying the original timetable as provided by Part D would be *'inconsistent with the Parties' actions and also produce an illogical outcome'*. It follows, MTR submitted, that Part D should be considered in the light of the Change Strategy timings.
49. MTR referred to the series of principles which are set out in Condition D4.2.2 and accepted HAL's analysis that its and HEOC's submissions rank equally for the purpose of that condition and accordingly, it accepted that the fulcrum of the appeal was the application of Condition D4.6.
50. In relation to the application of Condition D4.6 MTR pointed to HAL's analysis, a copy of which appears at Appendix 10 of MTR's SRD. In summary, MTR submitted that the HAL assessment *'does not...appear to represent the view of an infrastructure manager acting in a non-discriminatory manner'*. MTR argued that the issues highlighted in the HAL assessment focus almost exclusively on arguments that support HEOC being granted priority in the allocation of capacity. MTR contends that *'...the HAL assessment fails to weigh up the Parties' competing positions in a balanced and non-discriminatory manner'*.



The SRD is a very full document which sets out the detail of MTR's complaint with HAL's assessment of each Consideration.

51. The gist of MTR's complaints about HAL's assessment was that:

- a) Capacity to T5 had not been shared and there was no analysis of the potential benefits of sharing capacity;
- b) It is not in the interest of current and prospective users to have limited choice both in terms of intermediate and integrated travel opportunities and price, and to have to change at the CTA, with luggage, for a connecting service with an estimated wait of 11 to 12 minutes;
- c) The proposed MTR services offered real choice, reducing interchange issues for the benefit of passengers travelling from Reading and the west or via Ealing Broadway, airport workers, and also passengers with children or disabilities;
- d) There would be a negative impact on MTR's passengers who would have to change trains to reach T5;
- e) The assessment did not facilitate a modal shift to rail and little regard had been given to the objectives of Heathrow 2.0: Heathrow Plan for Sustainable Growth, one objective of which requires the provision of additional connections to T5 with only one change;
- f) HAL had not considered whether there would be any environmental impact in detail (and this consideration had been given little if any weight) but this is of great importance. There were 'strong' environmental benefits associated with the MTR proposal which would increase connectivity to Heathrow airport; and
- g) There was nothing to suggest that MTR's proposal would be unsafe or impact performance.

## HAL

52. On the application of the Change Strategy/Part D the gist of HAL's submissions is that it contends that it did follow the requirements of Condition D4.2 and correctly applied the Decision Criteria. HAL invited the Panel to consider the precedential value on the question of whether the Change Strategy or the Network Code applied and referred the Panel to the appeal decisions of the ORR in references TTP1331 and TTP1376.

53. HAL submitted that the provisions of the Network Code had, and have, not been amended and that, as a consequence, the timings in the Network Code continued to apply. HAL said that MTR offered no explanation for the 'inherent inconsistency', the fact that MTR chose to act in accordance with the timings in the Network Code, or the fact that the Network Code 'was not formally changed'.

54. In accordance with its view, HAL submitted that HEOC did not need to provide an Access Proposal at D-40, on the basis that the Network Code allows for the Exercise of Firm Rights by way of a Rolled Over Access Proposal ("ROAP"). By way of Condition D1.1.11

this applies where an Access Proposal was submitted in a previous revision of the WTT resulting in Train Slots being included in the Prior WTT, which the relevant Timetable Participant does not seek to vary, in the New WTT in accordance with Part D.

55. HAL was of the view that the July Proposals couldn't be disregarded and had considered what status they might have had within the meaning of Part D. HAL contended that the Dispute Parties' July Proposals should be seen as Train Operator Variation Requests, within the meaning of Condition D3.1.1. HAL recognised that this would create a practical difficulty arising from the possibility of the deemed acceptance of two conflicting TOVRs made at the same time, HAL having not responded to either TOC within the timescales outlined in Condition D3.3.
56. HAL also indicated that it assessed whether the July Proposals should be considered as timetable variations by consent under Condition D3.6.1 but took the view that this was not correct because the written consent of all Timetable Participants would be required.
57. On the substance of MTR's submission regarding the application of the Decision Criteria HAL rejected MTR's characterisation. It submitted that MTR's grievance was that capacity to T5 had not been shared in the way that MTR wished. HAL argued that the requirement of Condition D4.6.1 is to share capacity to the HAL infrastructure as an entity, not with respect to specific locations (such as stations) on the infrastructure.
58. It was HAL's submission that the Framework Capacity Statement (a copy of which appears at Appendix 8 of HAL's SRD) describes the capacity of the HAL infrastructure in ordinary circumstances and does not specify the capacity in the context of the present situation at T5.
59. HAL rejected MTR's submission that it had not met the contractual or regulatory standard required of it and contended that MTR has not specified particular duties or powers beyond those inherent in Conditions D4.2 and 4.6. It submitted that it did endeavour where possible to comply with all Access Proposals submitted and to accommodate all ROAPs. HAL submitted that it had met its obligations under Condition D.4.2.2 (and the MTR TAC) by a combination of: (1) doing everything that it could do accommodate both MTR's and HEOC's proposals in relation to T5, including trying to resolve the platform constraints at London Paddington and T5; by (2) actively considering whether to designate T5 as Congested Infrastructure; and (3) inviting each Timetable Participant to forego their conflicting access requests to T5 for the benefit of the other. In particular HAL argued that MTR had not presented any evidence of unfairness or discrimination. Rather, HAL said that MTR simply didn't like the decision.
60. HAL reminded the Panel of the ORR's decision on appeal from reference TPP1064 that an accusation of 'serious procedural or other irregularity' has a high evidential bar. I will return to this point below. HAL also contended that a sense of proportionality must play a part in the application of the Decision Criteria and referred me to the determination of reference TTP1610. I will turn to this below.
61. HAL said it applied the Decision Criteria to both requests and it set out the conclusions that HAL considered to be determinative. HAL said that it did not fail to consider the benefits associated with either proposal but that 'it did not consider it necessary during the timetable development period for the NWT to make further enquiry of MTR in order to identify those

benefits' because those benefits were '*well understood*'. In conclusion it found that HEOC's proposal better met the Objective or better met the relevant Consideration, or MTR's proposal was '*merely abstractive*', with any benefits which MTR's proposal might bring being offset by the adverse impact to HEOC's proposal or another relevant Consideration. The detail of HAL's approach is set out in Appendix 12 of HAL's SRD (this document shows HAL's original assessment on 9 September 2021, MTR's response on 29 September 2021, and HAL's response on 6 October 2021. The material date is 9 September 2021, which was the date of HAL's assessment). In summary, HAL's approach to the Decision Criteria was as follows (each paragraph refers to the relevant Condition):

- a) The HEOC proposal was the optimum for train service and performance. The capability of the HAL infrastructure would be best met by running that optimum service. MTR's proposal could only be met if HEOC's service is ignored or adjusted downwards. Any performance uplift would be secondary to the potential adverse performance impact from operating a mix of stopping and express services to the CTA;
- b) Continuing with the current arrangements would meet continuing expectations and an express weekday service to T5 with a stopping service to the CTA and an ECS to T4 best reflected demand. MTR's proposal would not only fail to meet existing service demand for express services but even suppress it. This might adversely impact on existing and potential express passenger opinions if those passengers have to wait much longer for an express service;
- c) HEOC's proposal reflected the best option for maintaining train service performance in the current capacity-constrained circumstances. The MTR proposal would require an untried timetable development with inherent potential greater risk to train service performance;
- d) Four HEOC express services to T4 and two stopping services to CTA/T4 provided the shortest journey times across the proposals. MTR's proposal would lead to non-standard departure/arrival times resulting in passengers arriving too early or too late, thereby lengthening journey times;
- e) On balance, continuing the existing timetable, retaining HEOC's 4tph to T5 did more to maintain the existing integrated system of transport to/from the airport for passengers rather than substituting two express services to T5 with two stopping ones;
- f) HAL must balance competing commercial interests to a degree, as well as its own, and continuing with the existing timetable would represent the best balance of those commercial interests. Requiring HEOC to sacrifice two train slots at T5 would result in 'significant' revenue loss for HEOC;
- g) HAL concluded that there was no related impact on the environment in operating services to either T4 or T5 and, as a result this Consideration 'has not formed part of our decision'; and
- h) Accepting the HEOC proposal to T5 results in the continuation of the existing timetable which had been shown to enable both HEOC and MTR to utilise their

assets efficiently. MTR's proposal would come at the expense of HEOC using its assets (rolling stock) less efficiently than before because HEOC would have less need for rolling stock but be unable to avoid its fixed costs.

62. In its SRD HAL clarified a point in connection with Consideration (g) (mitigating the effect on the environment). Although this was an observation after the time at which HAL had taken its decision (which is factor that I need to bear in mind) HAL indicated that it did not dispute that there are environmental benefits associated with the MTR proposal but HAL said it found that there was no clear evidence that the MTR services would mitigate the effect on the environment more than the HEOC services which '*they would replace*' and therefore HAL found that this Consideration was neutral.
63. These conclusions are contentious and not accepted by MTR. As I set out below, the Panel explored these differences at the hearing. In passing, I should say that the Panel was not particularly assisted by the volume of documentation submitted by MTR at Appendices 14 to 19 of its SRD. These are largely generic documents which significantly predated this reference and, accordingly, they were of limited value in the circumstances.

## **G Oral evidence at the hearing**

64. Neither party adduced any written witness statement in accordance with ADR Rules H33 or H34. Both parties relied on the submissions and assertions made in their respective SRDs (and the documents appended) and replies to my directions.
65. During the course of the hearing, several persons present answered questions put to them by members of the Panel and by representatives of the opposite party.
66. At the outset of the hearing I indicated that the Panel had read the documents submitted but asked the Dispute Parties to take us to any specific document or part of a document to which they wished us to pay particular regard.
67. In response to my directions the parties had referred the Panel to a meeting of the Industry Timetable Assurance PMO Collaboration Sub Group, which took place on 8 October 2021 (the Friday prior to the hearing). The Panel understands that this meeting was held on an informal basis and was facilitated by NR. The Panel was shown draft minutes which, the Panel was informed at the hearing, contained some errors and were in the process of being corrected before being made final. The Panel did not consider that the PMO had any right to make specific representations to the Panel. Part D was put into effect before the creation of the PMO and has not subsequently been amended to take it into account. It follows that the PMO does not of itself have any impact on the legal entitlements of the parties as set out in the TAC which they have entered into. Neither NR nor HAL objected to the reference to the minutes during the hearing.
68. The draft minutes referred to consideration of how T5 operations might work with 2tph for HEOC and 2tph for MTR. There was apparently a suggestion that there could be a return to a 7-minute double platform turnaround strategy though the draft minutes indicate that this could give rise to a performance risk that would need to be reviewed by NR Capacity Planning. In its response to my directions, MTR referred to a potential operational scenario which would involve a reduction in turnaround time at T5 from 26 minutes to 11 minutes,

which would thereby free up capacity to enable MTR services to service T5 before 20:00 Monday to Friday.

69. I should add that following the hearing HAL provided what I understand to be final minutes of the PMO meeting. So far as is material the final minutes don't add or subtract much from the draft minutes, in that they refer to the return to a 7-minute double platform turnaround strategy and refer to the potential performance risk. I note that one of the actions given in the minutes is as follows: "*Capacity Planning should look at reducing the turnaround times at Heathrow instead of Paddington. There is a potential knock-on impact for stock and crew diagrams, and this should also be reviewed, but, if a solution can be found implementation at some point during the Dec 21 timetable could happen*". I also note a post-meeting note dated 11 October 2021 which indicates that "*...whilst there is the capacity to reduce turnarounds at T5 for Hex and introduce an additional 2tph at T5, there is a performance risk to this which cannot be fully quantified within the timescales currently available*". The note indicates that the impact with a turnaround of 7 minutes at London Paddington would be to impact the cancellation rate for HEOC or the T-3 punctuality measure.
70. The Panel exercised proper caution in its reference to the minutes having been told that they were in draft. The Panel noted, however, that operational solutions might be available. In verbally referring to this as the "PMO Solution" this was only a convenient shorthand; the Panel was aware of, and reminded itself that, the minutes which it had seen were draft only.
71. During the hearing HAL's decision maker provided most replies. However, HAL's other representatives at the hearing also gave some further information.
72. It was common ground between the parties that the heart of this dispute was the application of the Decision Criteria and we explored the Objective and the relevant Considerations by question and answer.
73. Before that exploration I reminded the parties of their obligations under Condition D1.1.8 to collaborate with each other so that the implementation of Part D is carried out with 'optimal efficiency'. The Panel asked about the approach to the planning of the timetable.
74. In that regard, HAL confirmed that it hoped to encourage collaborative agreement between the Dispute Parties. HAL indicated that '*various discussions*' took place every couple of weeks or so and HAL referred to the correspondence appended to its SRD which HAL said drove the decisions which had been made. HAL appreciated, and apologised, that the document which set out its assessment of the Decision Criteria was '*not ... perhaps what it should have been*'. HAL confirmed that it had used the Decision Criteria analysis which had been produced for the May 2021 timetable on the basis that while there had been some questions about it, it was generally thought to be '*okay*'. HAL's representative confirmed that he had come to the '*end game instead of stepping through the parts*' and had not set out all relevant matters to which he had had regard in HAL's assessment of the Decision Criteria.
75. HAL confirmed that there are forums for discussion between HEOC, MTR and HAL but that timetable planning was not discussed in those forums. The Panel asked why the PMO meeting was not called sooner. HAL's representative accepted that it was only at a

relatively late stage that he thought that the affected parties should be brought together to see if matters could be resolved.

76. On the question of the option considered at the PMO meeting, HAL confirmed that it could physically be done but said that there were a lot of caveats in terms of the service impact.
77. Without giving much detail however, from the start HAL repeatedly emphasized a concern over platform train interface (PTI) which, HAL said, is '*very important to us*'. I set out these points under Consideration (c) below.

Consideration (a): maintaining, developing and improving the capability of the HAL infrastructure

78. Discussion of this Consideration gave rise to matters which are relevant to HAL's approach to a number of Considerations.
79. HAL gave a high-level overview of what options were discussed at the PMO meeting, including accommodating 6tph to T5, or a '2+2' solution if only 4tph to T5 was possible. The Panel's interest being that, if practicable, other options might allow for the accommodation of the Firm Rights of both Dispute Parties without the need to undertake the balancing exercise required in the application of the Decision Criteria, or if that exercise were required, might help to develop and improve the capability of the HAL infrastructure. At the moment HAL confirmed that MTR and HEOC run more trains in circuit than they run ph (for HEOC, five trains in the circuit to run 4tph). HAL indicated that the 6tph scenario canvassed at the PMO could only be done if 4tph were run with four trains. HAL confirmed that the performance risk of doing that was exacerbated perturbation caused by cancelling one train in four in an hourly schedule of four if there was a disruptive event; at present this was mitigated by always having an additional train in circuit. The Panel suggested that not having extra trains in circuit was a fairly standard thing for a TOC to do and was asked how this weighed in the balance against MTR's contractual rights. HAL's response was that it was important to '*get the service*' that the airport needed and such an approach would compromise the service. Asked whether the proposal would involve any physical changes to the timetable HAL indicated that the trains should fit into the same circuit. In other words the issue was not about the timetable itself but the working of stock. It would not be dissimilar to stepping up the service. HAL agreed that this would in theory reduce the turnaround to 11 minutes from 26 minutes though HAL indicated that this '*seemed an onerous task*' when the PMO discussed it.
80. With my consent, NR's representative confirmed that any change would affect both STP and LTP given that bids had already been received for the start of the December timetable. Although NR would need to see the detail of the changes it was more likely that any amendment could be made for a period break, rather than the start of the December timetable. The NR representative confirmed that she was hoping to have more information at the end of the week of the hearing on the question whether it was possible to put in shorter turnarounds at both ends.
81. HAL explained why the dwell time at T5 had to be 52 minutes.
82. HAL was also asked whether it had considered the scenarios which I had canvassed in directions (such as whether HAL had considered reducing the dwell time from 52 minutes

at T5 platforms in order to accommodate MTR's Firm Rights; whether HEOC had the use of any other platforms at London Paddington; whether HAL had given consideration to creating capacity at T5 by vacating a platform temporarily by returning a train to the CTA, if needs be by having a driver in each cab to reduce the turnaround time; or whether HAL had considered vacating T5 platforms and holding trains at the CTA to create platform capacity).

83. HAL indicated that these had been considered but HAL said that they were considered route blockages or alternatively, looking at the option of shunting a HEOC train into T4, HAL said that this would not be possible in 26 minutes and normally takes half an hour. HAL also indicated that those options would not work because of potential safety issues. HAL indicated that the performance impact of running around trains which are effectively blocking the route would not make sense and the timings could not work because in the scenario put forward an Up or Down train would be blocked. In summary, any of those options would have a bigger performance impact than a stepping-up option. HAL did, however, confirm that it would be possible to use T4 as a stabling location for a spare train. HAL confirmed that HEOC uses T4 quite frequently for testing and training and 'to dump' trains. If a spare train was left at T4 HAL confirmed that this arrangement 'would potentially' work but HAL's representative indicated that it was his goal not to have anything operationally unnecessary in stations.
84. Asked about the option of HEOC running 2tph to T4 terminating at CTA, HAL also confirmed that there was no operational reason that a HEOC train could not terminate at the CTA and run down to T4 (it was later confirmed that HEOC does have contingent rights to operate anywhere 'reasonable' on HAL infrastructure, including T4).
85. The Panel canvassed whether the impact on STP might diminish after December 2021 and the festive season. HAL's representative confirmed that he could not speak to that because he did not get involved in such matters. STP was done by MTR or HEOC. HAL also did not know whether HEOC would be able to alter rosters, but thought that MTR could. The Panel asked about the impact on GWR. GWR runs the HEOC trains on behalf of HEOC separately from its own resource and services on the GWML; GWR's submission as an interested party had only reflected its own services.
86. Discussion also considered the requirements of the Objective in relation to safety. HAL accepted that the safety risk is 'very well controlled' with the platform infrastructure but set out a concern that the MTR proposal would increase risk. Asked about the passenger split, HAL said that ordinarily when T4 is open approximately 40-45% of passengers go to the CTA, 40-45% to T5, and 10-15% to T4. The Panel notes that the final minutes of the PMO meeting record a split of 70% of passengers going to the CTA and 30% to T5. The point put was that the risk which HAL raised already exists and is managed. HAL confirmed that it is 'just one of those things we have to manage' and that something which happens twice a day at present 'in simplistic terms' would happen all day everyday (HAL said 37 times a day) under MTR's proposal, potentially ending up with a PTI incident. HAL could not confirm by how much the risk would increase and had not done any qualitative risk assessment (QRA). I asked HAL's representative to confirm whether he considered that MTR's proposal would give rise to a 'significant change' within the meaning of the Common Safety Method for Risk Evaluation and Assessment and he confirmed that he did not.

87. When asked whether HAL submitted that the level of risk was so significant as to be a 'showstopper' HAL confirmed that it was important to eliminate risk. Elimination is '*the best solution*' HAL's representative said.
88. MTR responded to HAL's submissions. It confirmed that currently all MTR services are going to the CTA and passengers have to change, for which reason it was not clear why amending the pattern would cause any material change to the PTI risk. MTR said that it had to manage far more challenging locations than Heathrow Airport, such as Stratford (London). MTR confirmed that it had in view the two options which had been discussed: a split in the HEOC service 2tph to T5 and 2tph to T4 detraining at the CTA, or the step up option. MTR suggested that having a HEOC spare unit at T4 would be good mitigation for the performance concerns that HAL had raised.
89. MTR said that it thought that the timetable operated the step-up pattern already, in times of perturbation, such as during the PMO meeting. HAL said that this had led to two CAPEs which, extrapolated to 152 trains per day, would lead to dozens of CAPEs a day. (It was later confirmed that there had been two cancellations, but the root cause of these was the original disruption, not the stepping-up by itself). The Panel challenged HAL that this was a situation which would be found in most circuits: what was special about HEOC? This returned discussion to the fact that the issue was the 26 minute turnaround, which could be an 11 minute turnaround. There was further discussion about the option of HEOC placing a spare at T4 on the basis that there were two platforms available, and an extra platform remained even if MTR ran 2tph to Hayes and 2tph to T4. HAL's representative appeared to accept that MTR could step back to Hayes if it needed to park failed trains to allow HAL to clear the HAL infrastructure but indicated that this was something that the PMO or NR would need to look at.
90. MTR emphasized that the industry had made significant changes at very short notice all the way through the COVID-19 pandemic. HAL confirmed that industry operators need to be more agile.

Consideration (b): that the spread of services reflects demand

91. HAL's representative confirmed that when he had made the decision he had had regard to data which showed the total number of passengers and the split (4:1 in favour of HEOC) but this was not shared with the Panel. In response to my directions, HAL did not disclose any data about passenger origin or destinations, other than London Paddington. Accordingly HAL could not say what proportion or demographic of passengers came from, for example, Ealing Broadway.
92. HAL confirmed that it didn't have any data regarding staff travel. I indicated – with due caution – that the PMO minutes recorded a 60/40 split in travel to Heathrow Airport via the CTA or T5 respectively. The HEOC representative indicated that this was a 'finger in the air' estimate. Airport staff are entitled to travel for free; other staff attached to airlines will travel with a ticket.
93. To the question about the need to address demand in the aggregate, to include those who might want to transit to or from an origin or destination other than central London, HAL accepted that the balance of demand is not fully served by an express service from London Paddington alone, but HAL said that it had balanced the passenger demographic and their



realistic expectation: an express passenger had an expectation of a fast, frequent non-stop service, whereas a stopping passenger, or commuter-type passenger, has a different idea.

94. HAL's representative indicated that he had focused on the demographic of all rail passengers, and the type of passengers and clientele at the airport, '*similar to having first class passengers in aircraft lounges and standard passengers who don't go to airport lounges*'. But HAL was not able to give the Panel the data or evidence which HAL had gathered about the spread or balance of demand. HAL responded that the decision of an infrastructure manager will not in every case be based on hard data, but some decisions will be based on experience. HAL confirmed that it had not made any request for passenger data from HEOC or MTR. HAL indicated that there was some precedent, with reference to NR that it was incumbent on a TOC to make the best case for its service, rather than NR to find all relevant information (I paraphrase). MTR indicated that had it been asked for data it could have provided pre-COVID passenger data which HAL could have compared with HEOC passengers. MTR provided a limited amount of data based on load on Wednesdays as detailed above.
95. HAL confirmed that it did not have any data which looked at the proportion and make up of service users before and after 20:00 on weekdays. To the question whether HAL had assessed factors, such as ages of current and prospective passengers, those in work and those not in work, and people with restricted mobility, HAL indicated that those questions had been considered '*in a way*'. HAL confirmed that the airport has a rigorous Persons with Restricted Mobility (PRM) facility
96. In its assessment of the Decision Criteria HAL had referred to '*hypothetical, less quantifiable benefits*' of MTR's proposal. HAL clarified that this had in view what HAL believed express passengers wanted rather than stopping passengers. HAL's representative said that '*...I can't give you numbers in Band A, Band C, Band D that go on particular trains, but I do believe that there is a difference between an express type passenger, a stopping passenger and indeed an LU passenger. The bigger proportion of rail users into London Heathrow, by far, travel on LU, maybe for convenience, it might be the locations that they're coming from, it probably in some respects relates I guess to cost...*'.
97. The Panel asked whether HAL would have reached a different conclusion had it considered the option canvassed before the PMO which would have allowed 6tph to T5. HAL again emphasised the risk of perturbation and the risk on performance. The Panel put to HAL the suggestion that with trains in the timetable as currently published having a 26 minute turnaround, a 15 minute service would give an 11 minute turnaround at T5 rather than a bare seven minute turnaround. HAL's representative confirmed that he would hope that they would have 11 minutes as suggested which would give a four minute make up time at best.
98. Given the current seven minute turnaround at London Paddington the Panel asked whether HAL had available any data on the number of late departures whilst that timetable operated. HEOC indicated that there would be data but it wasn't available. HEOC indicated that the operational change at London Paddington had cost £3-4 million p.a. (including the cost of additional traincrew) and thought that there would be a great deal of resistance to any decisions around short timetables at both ends of the track. HEOC confirmed that it had not had any use of any platform at London Paddington which it had given up in the last

year. HAL suggested that it would be best to draw a line under the use of platform 6 at London Paddington.

99. Given that this dispute relates to access to T5, not access to the CTA, the Panel asked whether from a T5 perspective, two MTR services and four HEOC services would not better reflect demand, than two MTR services and two HEOC services, or four HEOC services and no MTR service. HAL accepted that the option canvassed before the PMO would better reflect demand on the self-evident basis that more trains to T5 would be better.

100. HAL added that most HEOC trains were lightly loaded at the moment. It follows that current passenger numbers could be accommodated but HAL emphasized that the issue is frequency from its perspective. HAL also confirmed that it took the needs for social distancing into account as part of one of the factors which influences demand. As HAL's representative put it: '*...when you are talking about demand...we do want to get as many trains in to give us the social distancing that we want...*'

101. In response, MTR indicated that it did not think that HAL's assessment treated all passengers equally, with its passengers travelling to T5 in view. MTR pointed out that under the current arrangements its T5 passengers must wait a minimum of 11 or 12 minutes at CTA for a connecting train. MTR indicated that this is not a very good proposition for a passenger who may be mobility impaired. MTR challenged the submission that local travellers do not mind changing trains. MTR submitted that having a direct train from, say, Hayes and Harlington to T5 is key. The importance of having a direct train to where passengers want to travel is key. The demographic of passengers travelling from Oxford, Swindon or Reading is not particularly different from those travelling from London Paddington. MTR said that at least a certain amount of research was required to understand what the demand is.

102. HAL confirmed that it took those factors into account and its answer was that such travellers may already have made two or three changes and will have got to the point of accessing MTR services by bus, taxi or LU. One further change makes a difference but less of a difference than for a passenger expecting a fast service. HAL made the point that in assessing demand there is always an '*element of faith*' which requires a judgment if you don't have full data.

#### Consideration (c): maintaining and improving train service performance

103. The Panel noted that many previous exchanges had touched on this Consideration. HAL had confirmed that the shuttle to T5 takes a little less than half of the people on HAL's infrastructure and confirmed that the majority of passengers go via the CTA. HAL confirmed that the present way of working is '*not unsafe at all*' but that there is a higher risk with a '*flipflop*' service, as HAL categorised MTR's proposal, though it confirmed that the risk had not been quantified.

104. In terms of rolling stock performance, HAL confirmed both TOCs operate trains maintained by Alstom. HAL confirmed that the performance of both TOCs is '*about equal*'. MTR confirmed that both it and HEOC are running at around 95% PPM.

105. HAL emphasized that it must be remembered that HAL's decision was taken in the context of T4 being closed.
106. The Panel challenged HAL on its emphasis on a consistent service. HAL's representative confirmed that he had mostly considered repeat passengers and a lack of confusion which would be avoided by having the same service every single time, seven days a week. When it was put to HAL that MTR's proposal would be equally consistent and predictable, HAL argued that if a passenger was uncertain that would increase the risk of a PTI. MTR argued that if it is able to run through trains to T5 its passengers would not need to change, yielding a small performance benefit. MTR indicated that it had not seen any negative performance impact or increased or reduced PTI as a result of running through trains to T5 after 20:00 Monday to Friday. MTR added that turnarounds in the order of 11 minutes are quite common on its operation and good performance can be achieved with good contingency planning. MTR noted that 11 minutes works for HEOC on Saturdays and Sundays. MTR noted that its concession agreement with TfL heavily incentivises good performance, which had been borne out since its operation started in 2018.
107. The TfL representative indicated that in May 2018 there had been a huge amount of investment on HEOC and MTR services trying to mitigate confusion for passengers.
108. When the Panel asked the HAL representative whether an 11 minute turnaround is common in the industry he indicated that anything over seven minutes would be okay and reasonable given a short journey time of 20 minutes. MTR noted that 11 minutes is more than the minimum value in the relevant Timetable Planning Rules and added that it considered that it was a luxury to have two platforms at T5 and only run 4tph. MTR considered that there was no evidence either way to suggest that there would be detriment with a seven or eight minute turnaround, even on journeys with a much longer journey time.
109. The Panel pointed out that HAL had sold Firm Rights into T4 and T5 which would not provide for a consistent service when a full T4 service was in place, and which were presumably assessed to be safe and capable of operation when offered. HAL said that the risk of PTI was reduced because such services would always be running into a terminus, with no detraining at the CTA. HAL confirmed that PTI incidents occur almost every day one way or another but are '*very minor*' in most cases. HAL's representative said that he had not noticed any difference before or after 20:00 in terms of the incidence of PTI.
110. The Panel canvassed the options that would maintain or improve service performance. HAL was of the view that 4 HEOC tph or 2tph from each operator would have an equal output in terms of service performance and that 6tph with an 11 minute turnaround rather than a 26 minute turnaround would '*massively*' downgrade performance. The Panel pressed whether this factor had been considered when HAL had taken a decision to sell access rights for 6tph. HAL confirmed that there were no caveats put in place on the exercise of those rights and said that as a consequence, and I summarise, it was HAL's view that attention should shift to the Network Code and the relevant context which must be borne in mind when decisions are made. Those rights had to be applied to the infrastructure as it stood at the time of the decision. HAL indicated that when the rights were sold 'it was a different world' because T4 was open.

Consideration (d): that journey times are as short as reasonably possible

111. HAL's representative said that his assessment had considered all trains on the HAL infrastructure. HAL indicated that the majority of passengers (about 60%) go into the CTA whether from London Paddington, Ealing Broadway, or Hayes and Harlington. HEOC passengers will stop for two minutes and carry on and MTR services will have to detrain. HAL indicated that this was '*not great*' but said that MTR is a stopping service and those passengers would pick up a shuttle passing through to T5. HAL's representative said that this was the minimum journey time you can get '*given the frequency of the services I'm looking for*'. HAL's representative confirmed that you could run 2+2 from wherever the person got on, giving effectively the same journey time to CTA, and then the same journey time to T5 '*which would be better*' but then there would be a less frequent service from the perspective of a passenger wishing to use a HEOC service who would have to adjust their journey time to get the service. The actual time on the train would be the same but the passengers might have to make some compromises. HAL's representative said that in his view the frequency of a service is just as important as journey time because it is part of journey time.
112. The Panel put to HAL the scenario that the same journey time applies if HEOC ran 2tph rather than 4tph which needs to be weighed in the balance against MTR's evidence on the wait times at CTA (11 or 13 minutes being longer than the wait of two minutes of HEOC passengers). HAL's representative accepted that if the connectional allowances could be made smaller then 'we could get a better journey time'.
113. HAL accepted that the Panel did not have available data which gave an indication of how many passengers might be affected by the scenario put forward by HAL but accepted that on the current proposal a passenger going to T5 on an MTR service would take longer. There was some back and forth about the data which was before HAL when it made its decision (HAL indicated that it didn't have passenger numbers but did have data on mode share proportions) but no data was given to the Panel. HAL was not sure that this data would be useful in any event.
114. Challenged on whether HAL's assessment took into account passengers who did not originate at or transit via London Paddington HAL said that it factored in a metric of about four to one, i.e. four HEOC passengers for every MTR passenger travelling to London Heathrow. HAL confirmed that there was no data that it could share showing recent passenger numbers of the split on the various ways in which passengers travel to T5. HAL said that it had tried to obtain the passenger data for which I had asked in my directions but said that it didn't hold it in a form in which it could be provided to the Panel. HAL said that in any event it would need to look at the limitations on the data because it only included people who have put a ticket through the barrier. HAL indicated that it was slightly concerned about sharing mode share data between the Dispute Parties.
115. It was common ground between the parties that there were some challenges on obtaining data because there was a period of time when gates had been left open due to the COVID-19 pandemic.
116. MTR provided some data based on Wednesday load weight data but confirmed that it did not have HEOC data to compare against it. MTR accepted the limitations on this data given that the peak in airline passengers (and by extension the Panel infers the number of train passengers) is on weekends and Mondays.

117. Turning to the question of staff, HAL said that it knows that a higher proportion of staff go to CTA than T5 at the moment, probably in the same proportion as other passengers, i.e. about 60%.
118. HAL indicated that a lot of staff use HEOC services because they are free but confirmed that it didn't have any numbers. The Panel understands that staff with an airside or landside pass get a 75% discount on HEOC services. Pilots and crew are also entitled to a 75% discount on HEOC services.
119. The Panel asked about Heathrow's aim of reducing connections for the largest 100 towns and cities, rather than simply for those transiting central London. HAL's representative indicated that his consideration started with the trains themselves.
120. When challenged about the reduction in changes embodied in the MTR proposal HAL agreed that it would reduce the number of changes by one, but this would be a '*relatively small inconvenience*' if a person had already made, say, six changes.
121. HAL confirmed that when option canvassed at the PMO meeting would make journey times shorter for current and prospective passengers.
122. In response MTR emphasized its view that the choice between options for passengers was not an all or nothing choice. MTR pointed to the Objective to share capacity and said that its proposal would ensure that journey times were as short as possible for all categories of passenger. HAL responded to emphasize that the option discussed at the PMO was '*not what was bid in the process and wasn't the decision for HAL*'.

Consideration (e): maintaining and improving an integrated system of transport for passengers

123. HAL confirmed that its starting point had not been to consider how passengers would reach the HAL infrastructure. HAL started from the perspective that passengers would get to a particular point of origin on an MTR or HEOC service and travel into the airport.
124. Challenged about the importance of connectivity HAL focused its answer on sustainability but then indicated that looking at the overall demographic of passengers they '*generally speaking do not come from west London, so...one way or another they've...got to get to west London, whether they get to London Paddington and get onto MTR or HEOC, or whether they get to Ealing and get onto the MTR service or whether indeed they go by LU*'.
125. Taking into account HAL's assessment at Appendix 12 of its SRD I asked HAL to explain what it had meant by the phrase '*any benefits there may be of MTR services operating to T5*'. HAL's representative could not recall specific detail but suggested that this might have in view the fact that the MTR service would pick up stopping passengers. The Panel pointed out that this means those from outside central London and those served by different parts of the network.
126. Challenged about the assessment of how to improve an integrated system of transport, HAL said that the improvement would be brought about by getting more trains into the

airport. Because 8tph could not be achieved '*...the next best thing is to have a service which works in a very succinct way and runs to T4 as one type of service and into T5 with the other type of service*'.

127. The Panel asked HAL how it would have assessed the solution canvassed at the PMO meeting. HAL repeated its observation that the performance impact would be '*horrendous*', and '*this outweighs everything else*' because performance feeds into everything. Performance is '*key for the entire system*'. HAL's representative indicated that he was happy to be corrected but indicated that no-one had proved him wrong (the Panel understands this to mean in the period between the PMO meeting and the hearing).
128. HAL's representative confirmed that there was no data available to back up this submission but it was an impression or feeling having talked to industry experts.
129. In response, MTR confirmed that it was its view that an integrated system of transport cannot simply look at HAL infrastructure in isolation.

Consideration (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

130. In answer to my directions, HAL confirmed that HEOC is a wholly owned subsidiary of HAL. HAL was unable to say how HEOC accounts for fare revenues but accepted that any dividend from HEOC must be paid up into the group in some way. HAL indicated that HAL and HEOC maintain a functional separation within the group.
131. I challenged HAL on the basis that there is a direct commercial interest in any loss of revenue as between HEOC and HAL, but HAL's representative said that this had not been in his mind when he applied the Decision Criteria because he did not know what HEOC earns.
132. HAL's representative indicated that he did not look at HAL's income overall but focused on track access charges. He accepted that HEOC's fares were higher and accepted the logic that this presumably meant that on a headcount basis it makes more revenue and presumably more profit than MTR.
133. Notwithstanding what HAL's representative had said about his knowledge of the detailed links between HAL and HEOC, the Panel noted that in its assessment HAL had indicated that MTR's proposal would result in '*significant revenue loss*' for HEOC and, it follows, the scale of the commercial losses on one side had certainly been in HAL's mind.
134. HAL's representative indicated that he did not assess any of MTR's costs because he did not have the information and said that he had not discussed revenue with MTR or HEOC. HAL's representative did then say that he didn't consider that HAL would lose anything in his assessment. When I asked whether HAL had considered that in his assessment the arrangement would be relatively neutral, HAL's representative confirmed that he did not know whether the arrangement would be relatively neutral or not because he did not know what MTR's revenues were. HAL's representative confirmed that '*I don't know what the commercial impact would be [on MTR if it ran to T4 or T5] but I have assessed it as it should be equal*'. When asked about what might happen during the

timetable period to May 2022 MTR's representative said that he hoped that MTR would see a proportionate increase in revenue as the COVID situation improved, but this was only a guess.

135. The Panel queried whether the option canvassed at the PMO meeting would have preserved HEOC's commercial interests and also improved MTR's commercial interests. HAL indicated that it did not think so because of the alleged performance impact.

136. MTR indicated that there was a big commercial impact on it because it (or TfL as I mention below) was not serving the passenger volumes to fund the access charges or costs associated with running the service. There was a commercial impact as a result of making MTR's service less attractive. MTR indicated that there is '*plenty of evidence*' to show that increased interchanges act as a deterrent to travel. I noted that HAL's assessment stated that the evidence of the deterrent effect on a rail service that requires a change is '*well understood*'. HAL accepted that changes '*will deter people*' but did not think that it was sufficient to make a tangible difference. HAL submitted that the data supplied by MTR was only generic in nature.

137. HAL picked up on the point that under the concession agreement with TfL all revenue attributed to MTR's service is passed back to TfL. The point in summary being that TfL was not a Timetable Participant and its interests did not need to be considered. MTR submitted that it is required to account to TfL for its revenue under its concession agreement and it is not in MTR's commercial interest to account for less revenue as this might compromise its ability to be paid the concession payments. Whilst MTR is not on revenue risk it had certain express contractual obligations to act as though it is a revenue risk operator. MTR, therefore, argued that it had commercial interests that are prejudiced if it cannot collect the revenue which it expects with its Firm Rights.

138. Pausing there, I note that the relevant Consideration refers to commercial interests, rather than simply revenue. The phrase 'commercial interest' should have its ordinary and general meaning and I accept MTR's submission that the assessment of a party's commercial interest is a question which encompasses more than revenue or profit generated in a particular period.

#### Consideration (g): mitigating the effect on the environment

139. As I have indicated above, HAL's position on how this factor was assessed appeared to have changed slightly between the material assessment, on 9 September 2021, and its further response on 6 October 2021. In the first place HAL said that '*this Consideration has not formed part of our decision*'. Latterly HAL says that it was found to be neutral, a view which it could only reach if it had formed part of its consideration. At the hearing HAL said that '*it was assessed, found to be of no value, so was then disregarded...they were, completely equal so didn't form any part of the equation*'. Put differently, HAL said '*it was relevant to the overall decision, because it had to be analysed, it had to be considered, but it is not a determining factor in the choice that HAL has made*'.

140. With that in view, HAL confirmed that it had considered the importance of whether the access proposals mitigated the effect on the environment, for example looking at rolling stock. HAL's reasons were '*...relating to rolling stock performance in terms of sustainability and so forth*'.

141. I put to HAL the point that HAL had not set out how it had considered the relevance – which it accepted – of delivering a modal shift in transport use taking into account the evidence that fewer changes are likely to lead to more journeys on public transport, better connectivity and lower emissions overall.
142. HAL's representative confirmed that he had looked at rolling stock and concluded that stock performance was '*broadly equal*'. HAL confirmed that he had considered the fact that it was important to get more people onto trains and public transport and said that looking at modal shift and carbon emissions, there was nothing to choose between the proposals because over half of passengers were already going to the CTA, so they would not go to T5. Considering the impact on passengers with family members, lots of luggage and so forth HAL suggested that generally in those circumstances he thought that passengers would not use taxis but there was a pretty fair chance that they would use the MTR service. HAL also made the point that if the HEOC quarter-hourly service were halved people might decide to get a taxi or use a car. It accepted that no data was available on the point but urged the argument that '*if a service is marginally worse, people may make a different choice*'.
143. I put to HAL the fact that at the hearing it had begun to engage with the questions which this Consideration has in view but that none of this was set out as having been considered at the material time. HAL's representative accepted that and reminded me that proportionality should be exercised when assessing the Considerations; it is not necessarily reasonable to expect an Infrastructure Manager to cover every aspect exhaustively.
144. MTR said that there are lots of models in the transport industry which show that additional changes deter people from using rail which it said was particularly relevant for stopping services where more changes would deter passengers with children, luggage etc. particularly given that additional waiting time at CTA would make MTR's service less attractive. MTR also referred the Panel to the HAL plan for sustainable growth (Appendix 18 to HAL's SRD) which refers to an objective to limit connections to Heathrow Airport to one, which HAL characterised as '*aspirational*'.
145. The Panel asked whether the 6tph option – leading to more direct trains to T5 - would have a greater impact on mitigating the effect on the environment. It was HAL's view that any benefit would be '*vastly outweighed*' by running a poor service with performance downgraded, which would force people back onto other modes of transport. HAL's representative said that he already received complaints about performance (trains sat down, trains cancelled, trains part-cancelled) which would continue and inevitably worsen under that scenario.

Consideration (h): enabling operators to utilise their assets efficiently

146. MTR confirmed that, under its current mode of operating, it terminates trains at the CTA, detraining passengers regardless of whether they are finishing their journey at CTA or continuing onwards to T5.
147. HAL did not accept the proposition that running ECS trains was less efficient by default.



148. HAL initially did not accept that the scenario whereby HEOC might leave T5 and run into T4 using one of the spare platforms there (taking into account its contingent rights for ancillary movements) would provide for both TOCs to utilise their assets efficiently from a passenger perspective. MTR indicated that there would be a four minute gap which would allow this to work (taking into account a reduction in turnaround times to 11 minutes as discussed earlier). HAL accepted that if this worked '*perfectly*' this would make more efficient use of assets. HAL repeated its observations about the performance impact.
149. When asked by the Panel about HAL's analysis of its productive running time v. standing time, HAL's representative confirmed that this had not been looked at. The Panel also explored the suggestion of increased HEOC costs arising from shorter turnaround times, looking at traincrew for example. HEOC's representative suggested that in the scenario being discussed a driver would need to be stationed at T4 who would need relieving if there were to be a spare set parked there.
150. HEOC's representative referred to a '*very structured TAC*'. The Panel noted that both HEOC contracts (NR and HAL) and the MTR HAL contract are not publicly available so the Panel has only been able to have regard to the excerpts which have been specifically requested or disclosed. He indicated that it specifies the clock face TT and journey times but it was not suggested that it could not accommodate the options which had been discussed (which would not require a change to the timetable). HEOC appeared to indicate that its TAC specified a 15 minute journey time between London Paddington and Heathrow Airport but it is not clear whether this referred to the NR TAC between London Paddington and Airport Junction, the HAL TAC, or a combination of both. There were some exchanges about the fixed costs of retaining rolling stock which would fall to HEOC if it could not dispose of rolling stock (in the event of a reduced service), but was required to pay for maintenance costs.
151. MTR replied to say that a consistent T5 service all day every day would be more efficient in how it planned rolling stock and traincrew.
152. HAL emphasized its earlier point that MTR's proposal would reduce services overall thereby making use of the HAL infrastructure less efficient. The Panel explored whether this assessment was based on the assumption that HEOC would only be able to run 2tph but it was suggested that if HEOC was to run 4tph between London Paddington and the CTA with two of those continuing to T5 and two continuing ECS to turn around and coming back, such a scenario would result in a more efficient use of HEOC's assets. HAL confirmed that this was correct but, returning to its earlier observations of a '*flip flop*' service, HAL's representative said it would be his '*worst nightmare*' from a PTI perspective.

## **H Analysis/Observations and Guidance**

153. The Panel repeats its gratitude to the Disputes Parties for their full submissions at the hearing.
154. Although, as set out above, it is common ground that this reference hinges on the application of the Decision Criteria, the Panel bears in mind the observations of the ORR in the appeals in references TTP1331 and 1376 that a TPP may reach conclusions on points relating to the interpretation or operation of the Network Code (in this case the HAL

Network Code) which might be relevant in future timetable preparation or disputes (referred to as 'points of principle'). Accordingly, the Panel gives its view on points of principle arising from the application of Part D below.

155. First, the Panel gives a brief observation on a point which was not in the event pressed at the hearing but raised by HAL as an early question of jurisdiction, namely whether MTR's appeal under Condition 2.7.2 was premature. That Condition requires an appeal to be lodged within twenty Working Days of the publication of the New WTT. In my view this is a question of fact which hinges on the date on which the NWT is published. In relation to the matters in view on this appeal it is the Panel's view that the relevant date here was 13 August 2021 when NR wrote under the heading "*Publication of the December 2021 Intervention Timetable*" (and it follows that MTR's appeal was not premature). The Panel reminds parties of the observation of the ORR in its decision on the appeal in TTP1064 that the TTP process is not intended to take on the adversarial characteristics which can be found in commercial litigation.

#### Application of Part D

156. As made clear earlier, the appeal is to be determined on the basis of the legal entitlements of the parties and on no other basis. The legal entitlements (and obligations) of the parties are set out in the TAC they have entered into. The Network Code is a critical component of the contractual relationship between the parties. The Panel members remind themselves of the ORR's decision on the appeals in connection with references TTP1331 and TTP1376 (which relate to the similar NR Network Code). Key extracts are set out in Annex B to this determination.

157. Without deciding the point, I set out my preliminary view for the parties in both my directions and at the hearing, whilst making it clear that I would reserve my view until I had heard submissions.

158. The Panel considers that the starting point is the provisions of Part D. Although it is not binding on it, the Panel considers the reasoning of the Panel in reference HAL/TTP002 persuasive on this point. While the Panel would agree that as a matter of common law it is always open to contracting parties mutually to agree to vary the terms of a contract which they have entered, there is no suggestion here that there was such a mutual agreement to vary, suspend or disapply Part D in whole or in part in connection with the production of the December 2021 timetable. The Panel bears in mind that Part C of the Network Code makes express provision for the process by which the Network Code may be changed. The existence of such a detailed code for amendment supports an argument that it was the parties' intention that these provisions would govern any change requests.

159. Part D of the Network Code is generic and will form part of all TACs entered into by HAL. In other words, Part D does not just concern the rights and obligations of the contracting parties but all Timetable Participants.

160. The Panel has seen and had regard to exchanges from Network Rail which set out the overview of the so-called 'Change Strategy' and provide for what are referred to as 'Timetable Interventions' but there is no suggestion that the Dispute Parties agreed to depart from the provisions of Part D. Indeed, HAL says that it was not consulted on the Change Strategy and says its agreement was not sought, which is not disputed. There

might be circumstances in which the parties could argue that an estoppel by convention has come into effect by reason of their unambiguous, shared understanding of a particular contractual term or state of affairs on which basis they have acted but neither party asserted that here. Indeed, MTR's submission of an Access Proposal in accordance with Part D is inconsistent with any unambiguous, shared understanding.

161. It follows that the provisions of Condition D2.4 apply.
162. It is common ground that MTR submitted an Access Proposal on D-40 "the Priority Date" but that HEOC did not do so. Condition D2.4.4 provides that Access Proposals submitted by that date are given priority in the compilation of the New WTT in the circumstances set out in Condition D4.2. It is, however, also common ground that HEOC had made a ROAP (since it had not sought to vary the allocation of Train Slots enjoyed in the Prior WTT).
163. For present purposes when HAL compiled the New WTT it was required by way of Condition D4.2.2 to endeavour wherever possible to comply with all Access Proposals submitted in accordance with Condition D2.4 and to accommodate all ROAPs.
164. For the purpose of the assessment of priority which is required by Condition D4.2.2(d) the Panel considers that equal priority must be given to both parties on the basis that each had Exercised Firm Rights that would subsist during the whole of the Timetable Period.
165. The Disputes Parties have made a variety of submissions about the status of the July Proposals.
166. Part D provides for:
  - a. A Timetable Participant to submit a subsequent or revised Access Proposal: Condition D2.4.5;
  - b. Timetable Participants to agree variations by consent: Condition D3.6; or
  - c. Timetable Participants to submit a Train Operator Variation Request ("TOVR"): Condition D3.1
167. The Panel is of the view that considered objectively 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.
168. The Panel has heard the submission that the July Proposals were TOVRs but is not persuaded by that submission. A plain reading of Condition D3.1.1 provides that a TOVR may have in view either the variation of the New WTT, or the WTT on an ad hoc basis. The July Proposals clearly had the first of those options in view but at a time when there was no New WTT which was capable of variation under Part D. In coming to this conclusion, the Panel bears in mind that Condition D3.1.1 is expressed to apply "from D-26", i.e. the date on which the New WTT is intended to be published (it is the Panel's view that logically a Timetable Participant must have notice of the NWT before it can seek to vary it).

169. It follows from the above, that the Panel is of the view that the July Proposals have no contractual status. The Panel emphasizes that it has seen no evidence of anything other than good faith and an attempt by the industry to try to manage the effect of COVID-19 on a pragmatic basis, but consistent with the observation of the panel in reference HAL/TTP002 it is the Panel's view that the failure to publish the New WTT at D-26 was a breach of contract which might entitle an aggrieved party to a remedy but the Panel reminds itself that the question of any remedy is outside the remit or jurisdiction of a Timetable Panel hearing an appeal.

#### Decision Criteria

170. The application of the Decision Criteria (cumulatively the Objective and the Considerations) amounts to an exercise of contractual discretion.

171. A contractual discretion must be exercised in good faith and not capriciously. The duty of rationality is now well established and is often referred to as the 'Braganza' duty after the leading case, *Braganza v. BP Shipping Ltd* [2015] UKSC 17 and is implied by law. A discretion must be exercised consistently with its contractual purpose: *British Telecommunications plc v. Telefonica O2 UK Ltd* [2014] UKSC 42.

172. The duty of rationality is intended to act as a safety valve to protect one party from taking advantage of its role as a decision maker.

173. In summary, to comply with the duty of rationality, the decision-maker must:

- a. Ask the right question, taking into account the circumstances and the terms of the contract;
- b. Take account of relevant matters;
- c. Ignore irrelevant matters; and
- d. Avoid a result so outrageous that no reasonable decision maker could have reached it.

174. The process must be consistent with the parameters of Condition D4.6.

175. The Panel reminds itself of the observations of the ORR in its decision on appeal in references TTP1706/8 that the decision maker (in those references NR but here HAL) must be properly informed when exercising the Decision Criteria.

176. In addition, there should be evidence to support the decision and to demonstrate that the relevant opinion was held at the relevant time. The evidence required will vary from case to case and the level of detail required will also vary from case to case, depending on the importance of the decision, and the speed with which the decision must be made. The material time is the time at which the decision is taken.

177. The Panel reminds itself that establishing that a decision is irrational is a 'high hurdle'.

178. In terms then of what is required, the starting point is whether or not HAL could comply with MTR's Access Proposal and HEOC's ROAP whether or not this required the exercise of its Flexing Right (Condition D4.2.2(c)). If HAL concluded that it could not accommodate all requested Train Slots it must then have applied the Decision Criteria. Although the conclusion is not binding on the Panel, I note that it was the view of the Panel in reference TTP1610, which I consider to be persuasive, that Condition D4.2.2(d) is only engaged when the decision maker has exercised its contractual rights to flex and still cannot accommodate all requested Train Slots.
179. 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. The first consideration of what might be possible appears to have been at the PMO meeting. The oral submissions of the parties identified options which would not have required amendment to the physical timetable but would have accommodated MTR's Firm Rights. Accordingly, as a matter of legal entitlement the Panel finds that this is a breach of the TAC.
180. Even if the Panel's view in that regard is wrong, it is the Panel's carefully considered view that HAL did not apply the Decision Criteria correctly in the circumstances with which this appeal is concerned to the extent that its decision is materially flawed and that as a result HAL is as a matter of legal entitlement in breach of the TAC. The Panel has reached this conclusion for the following reasons (which take into account the parties' written submissions and the oral submissions made at the hearing). To the extent that I record matters of fact below they should be regarded as findings of fact:
- a. In its assessment of the Considerations, other than (g) HAL assessed each as relevant. HAL was required to ensure that it was reasonably properly informed in respect of each Consideration when it made its assessment.
  - b. It is the Panel's conclusion that in its assessment of the Considerations, HAL has 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 one TOC (save in respect of Consideration (g) to which I turn below). The Panel concludes that HAL asked the wrong starting question by reaching a concluded view without '*stepping through the parts*'.
  - c. Having heard the submissions of the parties, the consistent theme that runs through HAL's approach is a concern with performance and in seeking to avoid PTI concerns. The Panel accepts that the safe carriage of passengers is a factor in the Objective and that Consideration (c) required HAL to consider maintaining and improving train service performance. This is, however, only one of a number of Considerations but having heard submissions it appears to have been weighed especially heavily. In its written assessment, however, HAL's assessment has not attributed weightings between the different Considerations but has weighed them equally.
  - d. It is the Panel's view 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. As examples HAL did not have sufficient data on passenger numbers or

the spread or balance of passenger demand and no data had been sought from MTR. Had sufficient data been available it is the Panel's assessment that a reasonable decision maker might have assessed some Considerations, particularly (b), (d), (e) and (h), in MTR's favour considering the broader spread of services which would result from the exercise of MTR's Firm Rights to T5, reducing the number of connections for passengers not transiting to or from central London, and avoiding the need to run empty rolling stock on the HAL infrastructure.

- e. In connection with Consideration (f), the Panel considers that HAL did not ask itself the right question when it assessed the parties' commercial interests, focusing on the 'substantial' loss to HEOC. HAL's focus was too narrow, having in view what it considered (on an evidently assumed basis) to be the absence of financial loss in running services to CTA/T4 rather than T5 without considering its broader commercial interest arising from running a more (or less) attractive service. Moreover, there remains a lack of clarity as to the relationship between HAL and HEOC. In other words, the Panel concludes that HAL was not properly informed as to either party's commercial interest. Further, HAL's assessment was based on the demand being highest during the week rather than the weekend, whereas at the hearing the Panel heard that at present at least the peak in airline travel (and therefore we infer demand for rail passenger services) occurs on Saturdays, Sundays, and Mondays. The Panel concludes that on this basis HAL's decision was based on a material error of fact.
- f. Consideration (g) merits particular consideration. At the material time (i.e. its assessment in September) HAL indicated that this factor had not formed part of its decision. In the Panel's view this was a Consideration which a reasonable decision maker would have concluded favours MTR's proposal (taking into account the reduction in the number of interchanges and providing a more efficient service for those transiting from west London). In its updated assessment, in the Panel's view HAL's focus placed too much weight on the environmental assessment of rolling stock, but the focus under Consideration (g) ought to be broader. However, in any event, this does not change the fact that on HAL's own account this factor was not part of its decision in September. There is no evidence that the factors which came out oral submissions at the hearing had formed any part of HAL's decision at the material time.
- g. It is the Panel's view that HAL ought to have concluded that the application of two or more relevant Considerations would lead to a conflict, following which it should have decided which were most important in the circumstances, and then gone on to apply the Considerations with appropriate weight. HAL would have been required to decide whether Consideration (c) and its concerns around safety and performance should have been accorded such substantial weight that they outweighed all other factors. Such an assessment would have required a sufficiently clear evidential base. This was not the approach taken and the Panel understands that in any event the evidence is not available to enable HAL to undertake a properly informed view. The Panel notes, for example, that HAL had not undertaken any Qualitative Risk Assessment. The Panel also notes that there is an inconsistency in HAL seeking to argue that it was able to sell Firm Rights to MTR but then to conclude (in its favour) that MTR should be constrained in the exercise of those Firm Rights as a result of safety/performance issues on its (HAL's) infrastructure.

181. It follows from the above that the Panel does not in fact need to come to a view whether the end result reached by HAL was irrational because the Panel has concluded that in material respects HAL failed to ask itself the correct question or to take a decision which was properly informed.
182. As I have set out above, it is the Panel's conclusion that the paucity of available data is material to its assessment of HAL's compliance with Part D. The absence of data has made my decision on remedy difficult.
183. I remind myself of HAL's submission that it is important to take a common sense and proportionate approach. I remind myself that the evidence and level of detail required will vary from case to case but also remind myself that the Objective which HAL was required to meet is sharing capacity on the HAL infrastructure taking into account contractual rights which already exist. This was not an assessment which required particular urgency and the Panel considers that it should have been taken with the benefit of fuller evidence.
184. The Panel understands that this decision has some practical consequences. While the industry is to be lauded for seeking to manage the impact of COVID-19 in an agile and creative way, the provisions of Part D are intended to provide for a managed approach to the development of a timetable with a proper time for appeal prior to the Timetable Change Date. The consequence of seeking to operate outside those provisions means that time prior to the Timetable Change Date is now very short.

## **I Determination**

185. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination in accordance with ADR Rule H18(d) is as follows.
186. It is my determination that the appeal succeeds and I direct that HAL shall 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. I understand that GWML has no major disruptive engineering access planned for 3 January 2022, which is a Bank Holiday Monday.
187. I am aware that in so doing I am substituting a challenged decision which is a power which may only be exercised in exceptional circumstances. I have had regard to the decision of the ORR on the appeal in reference TTP1520 and its finding that the term 'exceptional circumstances' is not defined in the Network Code and that the assessment of what is exceptional circumstances will turn on the particular facts of each case. I also note that the ORR concluded that the fact that NR was in breach of its TAC was not sufficiently exceptional.
188. I invited the parties to make submissions on the question. HAL indicated that it did not consider that any exceptional circumstances applied. MTR was of the view that there are exceptional circumstances arising from the compressed timescales arising from the

Change Strategy and the exceptional nature of the COVID-19 pandemic. I consider that 'exceptional' should have its ordinary and natural meaning, namely something which is unusual, or not typical.

189. In making this determination I confirm that Network Code Condition D5.3.1(c) does apply for the following reasons:

- a. Ordinarily – on the application of Part D – a TTP determination on appeal which requires to be factored into the NWT would be handed down sufficiently far in advance of the Timetable Change Date. This has not happened on this occasion. This is atypical and results from workarounds relating to the COVID—19 pandemic which is itself an unusual factor;
- b. Ordinarily there would be time for HAL to reconsider its approach but the 12 week window for publicity of the December 2021 timetable has already started and NR has already received bids for the beginning of that timetable. I bear in mind that the overriding objective set out in ADR Rule H16 requires disputes to be administered in a way which is proportionate to the need to ensure that production processes for the railway operational timetable are not disrupted to the potential detriment of third parties; and
- c. Ordinarily, the TOCs would not reasonably expect any exceptional change in demand during the currency of a WTT. Exceptionally, it is likely that passenger demand will increase prior to May 2022 as recovery from the COVID-19 pandemic continues and it remains unclear when T4 will reopen. This justifies putting in place a through service for intermediate stations to T5.

190. No application was made for costs.

191. I confirm that so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Paul Stevenson  
Hearing Chair  
27 October 2021



## Annexes

### Annex A: relevant extracts from the HAL Network Code, Part D

- 2.4.3 Access Proposals may be submitted to HAL during the period up to D-26. However, Timetable Participants shall submit their Access Proposals (and any revised Access Proposals) as early as reasonably practicable prior to D-26 in order to facilitate optimal planning of the New Working Timetable by HAL and to ensure optimal consultation between HAL, Network Rail and all Timetable Participants.
- 2.4.4 Access Proposals submitted by D-40 ("the Priority Date") are given priority in the compilation of the New Working Timetable in certain circumstances set out in Condition D4.2. Access Proposals submitted after the Priority Date but by D-26 will be incorporated by HAL into the New Working Timetable as far as reasonably practicable, taking into account the complexity of the Access Proposal including any reasonable foreseeable consequential impact on the New Working Timetable and the time available before the end of the Timetable Preparation Period, and in accordance with the principles set out in Condition D4.2.
- 2.4.5 Any subsequent or revised Access Proposal submitted by a Timetable Participant shall amend an Access Proposal submitted earlier where it sets out different requirements to the earlier submitted Access Proposal regarding the manner in which a right is to be exercised. In such case the date on which the subsequent or revised Access Proposal is submitted will be treated, for the purposes of Condition D4.2.2, as the date of notification of the relevant right.
- 2.6 Timetable Preparation – D-40 to D-26**
- 2.6.1 During the Timetable Preparation Period (D-40 to D-26) ("Timetable Preparation Period"), HAL shall compile the proposed New Working Timetable.
- 2.6.2 Between D-40 and D-26:
- (a) all Timetable Participants shall have access to the evolving draft of the New Working Timetable either:
    - (i) by way of "read-only" remote computer access or such other electronic means reasonably requested by a Timetable Participant; or
    - (ii) to the extent that a Timetable Participant does not have the required systems to facilitate remote computer access, by read-only computer access upon attendance at a location where such access is available as specified by HAL;
  - (b) HAL shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable, and shall continue to answer enquiries and facilitate and co-ordinate dialogue as stated in Condition D2.3.3.
- 2.6.3 In compiling the New Working Timetable, HAL shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.
- 3.3 Train Operator Variations after D-26**
- 3.3.1 Where a Timetable Participant seeks a Train Operator Variation, it shall submit to HAL a written request, referred to as a "Train Operator Variation Request".

## 4.2 Decisions arising in the preparation of a New Working Timetable

4.2.1 In compiling a New Working Timetable in accordance with Condition D2.6, HAL shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2.

4.2.2 HAL shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:

- (a) a New Working Timetable shall conform with the Rules applicable to the corresponding Timetable Period;
- (b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;
- (c) in compiling a New Working Timetable, HAL is entitled to exercise its Flexing Right;
- (d) where the principles in paragraphs (a), (b) and (c) above have been applied but HAL is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:
  - (i) first to:
    - (A) the Firm Rights of any Timetable Participant that will subsist during the whole of the Timetable Period and which have been Exercised; and
    - (B) any rights HAL has for Network Services included in the Rules;
  - (ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that HAL considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;
  - (iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided HAL considers (acting reasonably) they will be Firm or Contingent Rights in force during the Timetable Period;
  - (iv) fourth to any rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5. Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to HAL.

#### 4.6 The Decision Criteria

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 B: relevant extracts from ORR appeal of TTP1331 and TTP1376

95. In essence, ORR considers that Condition D2.7.2 provides the TTP with jurisdiction to consider any issue which it is necessary for it to consider to properly determine a Timetable Participant's appeal against the New Working Timetable. We deal with the particular issues further below:

### ***Matters of contract and breaches of the Network Code***

- (a) We consider that it is beyond any doubt that under Condition D2.7.2 the TTP is permitted, and required, to consider matters of contract. It is required to determine whether an appeal should succeed on the basis of the legal entitlements of the parties set out in the Network Code. This necessarily entails concluding as part of the appeal whether Network Rail (or, as the case may be, a Timetable Participant) has complied with its contractual obligations.
- (b) The contractual impact of the TTP's decision is given effect by any order of the TTP under Condition D5.3.1 and by the impact of that determination as persuasive authority in any future appeal to the TTP<sup>76</sup>. In addition, Condition D5.7.1 provides that where a decision of Network Rail is overturned on appeal, Network Rail may be liable in respect of that decision, but only where it was made in bad faith or was unreasonable.
- (c) Frequently an appeal will involve the TTP considering whether Network Rail has made timetabling decisions in accordance with Condition D4 of the Network Code (such as whether Network Rail has correctly applied the Decision Criteria<sup>77</sup>). However, appeals may require the TTP to consider other provisions.

### ***Points of principle***

- (d) In determining a particular appeal against the New Working Timetable, it may be necessary for the TTP to reach a conclusion on points relating to the interpretation or operation of the Network Code which might be relevant in future timetable preparation or disputes and which might be described as '*points of principle*'.
- (e) If it is necessary for the TTP to form conclusions on such points to determine the appeal, it must do so. Such determinations then form persuasive authority in any future appeal.
- (f) For completeness, we note that the ADRR does provide for the TTP to refer specified regulatory issues to ORR for determination prior to the TTP making its

own determination in an appeal<sup>78</sup>. In some cases, the TTP may consider that it would be appropriate to make such a reference.

### ***The production of the New Working Timetable***

- (g) Condition D2.7.2 sets out a right for Timetable Participants to appeal against “*the New Working Timetable... within twenty Working Days of its publication*” (emphasis added). The provision envisages that there is a particular timetable which is subject to the appeal process.
- (h) We therefore agree with Network Rail that, in order to consider an appeal, the TTP must necessarily conclude what is the New Working Timetable published under Condition D2.7.1 which should be treated as the timetable which is capable of appeal<sup>79</sup>. The TTP cannot make a determination without having formed a view on the timetable which is the relevant starting point for the purpose of the appeal process.
- (i) This is not inconsistent with the reference in Condition D2.7.2 to being able to appeal against ‘*any part...*’ of the New Working Timetable. Those words simply acknowledge that parts of the relevant timetable may be challenged. The TTP must still come to a conclusion on which timetable is relevant. Indeed, the TTP cannot determine an appeal against any part of a timetable without first identifying the relevant timetable.
- (j) Generally, the issue will not be contentious. But if there is a dispute between the parties on this point, the TTP must consider that dispute as part of the appeal. It must conclude which is the relevant timetable on the basis of the legal entitlements of the parties set out in the Network Code. The conclusion would then influence what the TTP was permitted to consider in the appeal.
- (k) In addition, we note that consideration of the production of the New Working Timetable may in some cases assist the TTP in determining whether Network Rail erred in the particular decisions it made in relation to that timetable which are under appeal.

137. However, it is important to note that in reaching our conclusion we have considered the provisions of Part D of the Network Code and concluded that it sets out a mandatory process for the development of the New Working Timetable, which provides stability and certainty for the industry. In coming to our conclusion in this appeal, we were necessarily required to consider whether Network Rail had followed that process to determine which timetable was the relevant timetable which is subject to appeal. Under the provisions of the Network Code, Network Rail is not entitled to replace the New Working Timetable at any time it wishes (but only in accordance with those provisions).