

Heathrow Airport Limited: response to ORR request for further representations, in the timetable dispute: HAL/TTP003

Date: 26 November 2021

Prepared by: Heathrow Airport Limited

Status: FINAL

To: the Office of Rail and Road (the **ORR**)
To the Respondents: MTR Corporation (Crossrail) Limited (**MTR**)
To the other Appellant: Heathrow Express Operating Company Limited (**HEOC**)

1 THE ORR'S LETTER OF 19 NOVEMBER 2021

1.1 Following the determination of the Timetabling Panel of the Access Disputes Committee dated 27 October 2021 (the **Determination**) in respect of dispute TTP003, and the appeals of Heathrow Airport Limited (**HAL**) and HEOC, each of 5 November 2021, the ORR wrote to each of the parties named above and HAL on 19 November 2021 (the **ORR Letter**), inviting them to respond to the following questions:

- (i) ORR's legal power to act as an appeal body in this dispute and under which statutory provision(s); and
- (ii) which party/parties have a right to appeal to ORR and under which statutory and/or contractual provisions, including:
 - a. the inter-relationship between a party's right to appeal under the contractual provisions of the HAL Network Code and any statutory right to appeal; and
 - b. the inter-relationship between Parts D and M of the HAL Network Code with respect to a party's right to appeal.

1.2 Unless otherwise defined, the terms used in this Response, have the meaning given to them in the Determination. References to a **Regulation** are to a regulation in the The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (SI 2016/645) as amended (the **Regulations**). References to a **Condition** are references to a Condition in the HAL Network Code.

1.3 This Response only attaches further documents that the ORR and the parties have not already sent/received within the context of this dispute.

2 QUESTION (i): ORR'S LEGAL POWER TO ACT AS AN APPEAL BODY IN THIS DISPUTE

The 2018 Determination

2.1 The ORR Letter notes that the parties' submissions to date have not directly addressed the question of whether the ORR has vires to hear the TTP003 dispute. The ORR's Letter refers to its previous decision in relation to an appeal by Transport for London (**TfL**) regarding the terms of access to HAL infrastructure, published in 2018 (the **2018 Determination**). In paragraph 91 of the 2018 Determination, the ORR noted that '*neither TfL nor HAL [had] directly addressed the question [it] had raised in [its] letter of 31 October 2017 regarding the scope of [its] vires under relevant legislation and whether it would be sufficient to allow [the ORR] to act as the appeal body and/or decide a reference under these provisions.*'

2.2 Nevertheless, in paragraphs 92, 94 and 97 of the 2018 Determination, the ORR goes on to say that:

- '92. *However, the parties' submissions raise significant points in relation to the interaction between the Heathrow Rail infrastructure and the wider Network Rail network, and the risk of conflicting decisions being taken by, on the one hand, ORR in respect of disputes arising between parties using the latter and, on the other hand, some other decision maker in respect of disputes arising in relation to the former.*
94. *[The] ORR does have various powers under legislation applicable to the Heathrow Rail Infrastructure. Those include but are not limited to the powers and duties under regulations 32 and 34 of the Regulations [...].*
97. *In summary, we are open to considering a reference or appeal in relation to the Heathrow Rail Infrastructure where it has implications for the Network Rail mainline and/or wider industry relevance, but we would need to confirm whether we could and should consider such a matter in due course in light of the submissions made to us and all the relevant circumstances.'*

2.3 HAL welcomes the opportunity to set out its responses to the questions in the ORR Letter. Given the position the ORR reached in the 2018 Determination, HAL contends, based on the explanations set out in this Response, that reaching a determination in respect of this dispute is within the legislative powers the ORR has in relation to the HAL infrastructure. However, consistent with the 2018 Determination, HAL expects that the ORR will form its own view as to whether it has vires under relevant legislation to act as the appeal body, regardless of HAL's or any other party's responses.

The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016

- 2.4 Paragraph 23 of the ORR's Statutory and Contractual Framework Module dated 28 July 2021¹, notes that appeals under the Regulations may be made in relation to facilities that are otherwise exempt from the Act, such as the HAL infrastructure.
- 2.5 Paragraph 27 of the ORR's guidance to the Regulations² refers to the procedures and criteria which apply to the allocation of rail infrastructure capacity under framework agreements (as defined in the Regulations) – the Commission Implementing Regulation (EU) 2016/545. Paragraph 28 of that guidance, confirms that matters relating to the allocation process and its results can be the subject of an appeal to the ORR under Regulation 32.
- 2.6 Regulation 32(1) sets out an appeal right to the ORR as follows:

'32.—(1) Subject to paragraph (3), an applicant has a right to appeal to the Office of Rail and Road if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager, an allocation body, a charging body, a service provider or, as the case may be, a railway undertaking, concerning any of the matters described in paragraph (2).'

¹ The statutory and contractual framework, 28 July 2021 - <https://www.orr.gov.uk/sites/default/files/2021-07/guidance-on-the-statutory-and-contractual-framework.pdf>.

² The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, as amended: Access to the rail network and service facilities, infrastructure management and appeals - <https://www.orr.gov.uk/sites/default/files/2021-07/guidance-on-the-access-2016-regulations.pdf>.

2.7 What may be appealed to the ORR under Regulation 32(1), is not limited to the decisions taken by the illustrative entities listed in it, or even by decisions necessarily. The applicant simply has to form a belief that it has been unfairly treated or discriminated against in relation to, or feel aggrieved about, any of the matters listed in Regulation 32(2). Most obviously, HEOC and MTR would appear to qualify as applicants given its definition in Regulation 3.

2.8 Regulation 34 provides that:

'34.—(1) The Office of Rail and Road must monitor the competitive situation in the rail services markets.

(2) In particular it must—

(a) control the matters referred to in regulation 32(2) on its own initiative and with a view to preventing discrimination against applicants; and

(b) check whether the network statement contains discriminatory clauses or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants.'

2.9 The term '*rail services markets*' is not defined in the Regulations, however, it is clear that the issues in question relate to, and/or the parties involved are operating in, a rail services market for the purposes of the Regulations.

2.10 The ORR's duty to control the matters referred to in Regulation 32(2) includes, at paragraph (a), '*the network statement produced in accordance with regulation 13, in its provisional and final versions*'. The HAL Network Statement (the consultation version of which is set out in Appendix 20 of the Sole Reference) is acknowledged by the ORR on its website, as is the ORR's duty to '*control the detail*' of it, going on to say that:

*'If we consider that the information in any network statement does not meet the requirements of the Directive, ORR has the power to direct the IM to address any deficiency.'*³

2.11 Paragraph 1.5.3 of the HAL Network Statement provides:

'1.5.3 Appeals Procedure

Any dispute for matters covered by the HAL Access Disputes Resolution Rules ("ADRR") is dealt with in accordance with the procedure prescribed in such rules, annexed to the HAL Network Code. The procedure addresses disputes arising out of TACs and SACs. The Access Disputes Committee for the Wider UK Rail Network provides services under the ADRR. The charges for the provision of such services are passed on to railway undertakings in TACs and SACs.

Any disputes in relation to other matters covered by the ADRR shall be dealt with in accordance with the procedure prescribed in that agreement. The ADRR provide for the referral of any dispute to a technical, operational or financial panel, as appropriate, then an attempt at amicable settlement and finally to arbitration under the rules of the London Court of International Arbitration.

³ <https://www.orr.gov.uk/guidance-compliance/rail/network-statements>.

The ORR is the regulatory body to which an appeal may be made in accordance with the Regulations should any applicant for capacity believe it has been discriminated against or treated unfairly.'

- 2.12 The HAL Network Statement clearly indicates that the dispute resolution system for the purposes of Regulation 23(7) (see paragraph 3.2 below), is the system under the ADRR, which is '*annexed to the HAL Network Code*', with a right of appeal to the ORR. It is clear therefore to any applicant for access who reads the HAL Network Statement, that its appeal rights set out in the HAL Network Code, will form part of the terms of its Access Agreement with HAL.
- 2.13 The ORR's duty to control the matters referred to in Regulation 32(2) also includes at paragraph (c), '*the allocation process and its results as prescribed in Part 5 and Schedule 4*'. In other words, how capacity has been allocated on the HAL infrastructure, which is precisely the subject matter of the dispute between the parties and the resulting Determination.
- 2.14 As the ORR has under Regulation 34, an overarching monitoring duty and power to '*control*' HAL's Network Statement, '*on its own initiative*', the ORR has the ability to involve itself in, and make decisions about, issues covered by the HAL Network Statement that arise, among other things, under the HAL Network Code, including disputes relating to allocation and timetabling, and whether the HAL Network Statement is correct to advise applicants for access about recourse to the ORR as an appeal body following determinations under the ADRR.
- 2.15 HAL is confident that it has taken a decision in relation to the December 2021 New Working Timetable, that is defensible and in keeping with the Regulations, which is in part why HAL would like the ORR to take the appeal up so that it may establish this once and for all. In being asked to identify what duties the ORR may have to resolve this dispute, HAL would argue that the ORR has such a duty under Regulation 34, because it requires the ORR to act on its own initiative (regardless of whether an effective appeal has been made to it under the Regulations) in relation to access allocation processes and outcomes. This interpretation is supported by the Explanatory Note to the Regulation, which describes the purpose of Regulation 34, among other things, and which states that the purpose of Regulation 34, is to place a requirement on the ORR to monitor competition in rail services markets and to take appropriate action to deal with undesirable developments in the markets, either arising out of its own investigations, or from appeals which have been submitted.

The ORR's public interest duties

Railways Act 1993

- 2.16 While the effect of the Railways (Heathrow Express) (Exemptions) Order 1994, is to exempt the HAL infrastructure from the access regime which the ORR oversees (among other things) in the Railways Act 1993 (the **Act**), HAL is not entirely excluded from the ORR's regulatory function under the Act. The ORR must discharge its public interest duties under section 4 of the Act when exercising its functions, which extend, broadly speaking, to the entire railway network in Great Britain. The ORR acknowledges in paragraph 13 of the 2018 Determination, that it is required to have regard to those section 4 duties when considering an appeal under the Regulations in relation to the HAL infrastructure.
- 2.17 The ORR's section 4 public interest duties under the Act, are relevant in this appeal, and empower the ORR to hear HAL's appeal. To assist the ORR, the following table, while a summation and illustrative only,

attempts to map certain of the ORR's duties to certain of the issues that constitute part of the dispute, and so in turn, the Determination and the appeal.

Relevant ORR duty	Dispute issue
Section 4(1)(zb) of the Act: <i>to promote improvements in railway service performance</i>	Train service performance on the HAL infrastructure and the wider network as a result of permitting MTR to operate 2tph to Terminal 5 in the present capacity constrained circumstances
Sections 4(1)(a), 4(2)(a) and 4(6) of the Act: [...] <i>to protect the interests of users of railway services, including disabled passengers, including in relation to prices charged and quality of service</i>	Interests of users of HEOC express and MTR stopping services
Section 4(1)(b) of the Act: <i>to promote the use of the railway network in Great Britain for the carriage of passengers [...], and the development of that railway network, to the greatest extent that it considers economically practicable</i>	The best use of the HAL infrastructure in the present capacity constrained circumstances
Section 4(1)(ba) of the Act: <i>to contribute to the development of an integrated system of transport of passengers and goods</i>	The integrated system of transport comprising the HAL infrastructure in the present capacity constrained circumstances, the wider network (insofar as proximate) and other transport modes that serve Heathrow airport
Section 4(1)(bb) of the Act: <i>to contribute to the achievement of sustainable development</i>	Whether there was a meaningful difference between the HEOC services or MTR services operating to Terminal 5, in mitigating the effect on the environment
Section 4(1)(c) of the Act: <i>to promote efficiency and economy on the part of persons providing railway services</i>	The extent to which the efficiency and economy of HEOC and MTR would be impacted by HAL's decision
Section 4(1)(d) of the Act: <i>to promote competition in the provision of railway services for the benefit of users of railway services</i>	Whether HAL's decision was discriminatory or was made with ' <i>a fixed goal in mind</i> ' (in each case, as alleged)
Section 4(1)(g) and 4(2)(b) of the Act: <i>to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance, including in relation to prices charged and quality of service</i>	Whether HAL's decision diminished MTR's business assurance, or the Determination, through the performance risk it imports, diminishes HEOC's business assurance

Relevant ORR duty	Dispute issue
Section 4(3)(a) of the Act: <i>to take into account the need to protect all persons from dangers arising from the operation of railways</i>	Whether the Determination does or does not import increased safety risk at the PTI at the CTA Station
Section 4(3)(b) of the Act: <i>to have regard to the effect on the environment of activities connected with the provision of railway services</i>	Whether there was a meaningful difference between the HEOC services or MTR services operating to Terminal 5, in mitigating the effect on the environment
Section 4(5) of the Act: <i>to have regard to the ability of the Mayor of London and Transport for London to carry out the functions conferred or imposed on them by or under any enactment</i>	Whether HAL’s decision had any bearing on the Mayor of London and Transport for London’s ability to carry out any of its statutory functions

2.18 The ORR goes on in paragraph 13 of the 2018 Determination, to state that it is required to balance relevant section 4 duties, which are not prioritised and so are for the ORR to appropriately weight. In respect of the current appeals, whatever weighting is applied, the ORR would not be fulfilling its public interest duties if it declined to hear them, given the direct relevance to those duties of the matters constituting the dispute, Determination and those appeals. Specifically, as discussed in paragraph 5.6 below, one of the consequences of the ORR’s failure to take up the appeals, will be the need to implement changes to the HAL Network Code and HAL Network Statement that reflect an alternative appeals process. This may ultimately result in the risk of conflicting decisions being taken by the ORR and some other decision maker, as the ORR was mindful of in the 2018 Determination (see paragraph 2.2 above). This outcome does not appear to HAL to be conducive to, for example, the duty to promote improvements in railway service performance, the best interests of users, the development of an integrated system of transport, the promotion of efficiency and economy, or to allow service providers to plan the future of their businesses assuredly.

2.19 The ORR must exercise its functions to best achieve its section 4 duties. Those functions include the functions that are assigned to it under or by virtue of the Regulations (Regulation 31(1)), which include taking up appeals, investigation and issuing directions.

Railways Act 2005

2.20 In addition to the duty referred to in paragraph 2.17 above, to take into account the need to protect all persons from dangers arising from the operation of the railways (section 4(3)(a) of the Act), the ORR has a general duty under the Railways Act 2005 to take appropriate steps in furtherance of railway safety, including protecting the public from personal injury and other risks arising from the operation of railways. This duty therefore also relates to the whether or not the Determination imports increased safety risk for passengers at the PTI at the CTA Station, and for the same reasons given in paragraph 2.18 above, it has, in HAL’s view, a bearing on whether the ORR should take the appeal up.

Crossrail Act 2008

- 2.21 Section 22 of the Crossrail Act 2008 provides that the section 4(1) public interest duties under the Act, include the objective of facilitating the construction of the Crossrail project. The dispute has indirectly arisen because of the arrangements at London Paddington, which have been effected to permit works to continue in relation to the delayed Crossrail project, but the dispute itself, and so the Determination and resulting appeals, do not facilitate the construction of the Crossrail project. HAL does not therefore consider this ORR duty as relevant to the question of taking up the appeal.

3 QUESTION (ii): WHICH PARTY/PARTIES HAVE A RIGHT OF APPEAL TO ORR AND UNDER WHICH AUTHORITY

The Regulations

- 3.1 As referred to in paragraph 2.6 above, an applicant, as defined in the Regulations, has a right of appeal under Regulation 32(1), where it believes that it has been unfairly treated, discriminated against or is any other way aggrieved concerning any of the matters described in Regulation 32(2). Regulation 32(2) lists the matters to which that sense of unfair treatment, discrimination or dissatisfaction must relate. Of those matters, of particular relevance to the facts of the dispute, are:
- (a) the network statement produced in accordance with regulation 13, in its provisional and final version (Regulation 32(2)(a));
 - (b) the allocation process and its results as prescribed in Part 5 and Schedule 4 (Regulation 32(2)(c)); and
 - (c) the arrangement for access provided under Part 2 and Schedule 2 (Regulation 32(2)(f)).
- 3.2 Separately, Regulation 23(7) requires infrastructure managers to facilitate the establishment and operation of a dispute resolution system:
- 'which must set out in the network statement, to resolve disputes about the allocation of infrastructure capacity promptly and, where that system is applied, a decision on the matters in dispute must be reached no later than ten working days after the final submission of all relevant information in accordance with that system.'*
- 3.3 Regulation 23(8) provides that the dispute resolution system required under Regulation 32(7) is without prejudice to the appeal right under Regulation 32.
- 3.4 Regulation 23(7) does not expressly contemplate a separate appeal right to the ORR in the dispute resolution system that must be established thereunder, but neither does it preclude it. As mentioned in paragraph 2.11 above, the HAL Network Statement, includes reference (paragraph 1.5.3) to the dispute resolution system that meets the requirements of Regulation 23(7). And that system, consistent in all material respects with the equivalent network statement of Network Rail, provides that the dispute resolution system for the purposes of Regulation 23(7), is the system set out in the HAL Network Code, which, in keeping with the Network Rail equivalent network code, comprises the handling of disputes at first instance under the HAL Access Dispute Resolution Rules (**ADRR**), with an appeal right to the ORR.
- 3.5 The HAL Network Code and the annexed ADRR, therefore prescribe who may appeal to the ORR for the purposes of Regulation 23(7) and the HAL Network Statement.

The HAL Network Code

- 3.6 The HAL Network Code, incorporated by reference into each Access Agreement between HAL and an Access Beneficiary, creates contractual rights and obligations between HAL and each Access Beneficiary, but not between each of the Access Beneficiaries which are party to Access Agreements with HAL.
- 3.7 Under Condition D5.2.1, HAL or a 'Timetable Participant' may refer a decision of a Timetabling Panel to the ORR for determination as follows:

'5.2.1 Where either HAL or a Timetable Participant is dissatisfied with the decision of a Timetabling Panel under Condition D5.1, it may refer the matter to the ORR for determination under Part M. [...]

A **Timetable Participant** is defined in Condition D1 as (a) an Access Beneficiary or (b) a Potential Access Party. The definition of Potential Access Beneficiary is not relevant on the facts. Access Beneficiary is defined in Part A at Condition A1.2 as:

' "Access Beneficiary" means, in respect of an Access Agreement, the Train Operator or Access Option Holder who is party to that Access Agreement.'

- 3.8 On the basis of Condition D5.2.1, the relevant definitions, and the facts, HAL contends that any of HAL, MTR or HEOC would have a right of appeal of the Determination to the ORR under Part M.
- 3.9 Condition M1.1.1 appears to reference a broader class of potential appellant to the ORR, than Condition D5.2.1. Condition M1.1.1 refers to such an appellant as being one that is merely '*a party dissatisfied with [such] a decision*'.
- 3.10 However, the remainder of Part M and the ADRR contemplate a narrower class of potential appellant to the ORR than Condition D5.2.1. Specifically, Condition M1.1.2 sets out, among other things, a definition of **Appellant** and then uses that term where appropriate in the remainder of Part M. An Appellant is defined as follows:

' "Appellant" any Dispute Party seeking to challenge a determination made in accordance with the ADRR by appeal to the ORR;'

The ADRR also sets out, among other things, the definition of Dispute Party as follows:

' "Dispute Party" an Involved Party which is likely to be materially affected by the outcome of the dispute and is putting its position to the Forum and/or requesting a determination from a Forum;'

Under Chapter H (*Determinative Process Rules – Timetabling Panel*) of the ADRR, Rule H58 also refers to any Dispute Party being entitled to appeal (including in accordance with Part M to the ORR) a determination of a Timetabling Panel.

The ADRR sets out the definitions of Forum and Involved Party as follows:

' "Forum" Each Hearing Chair of an ADA or Timetabling Panel, evaluator, mediator, arbitrator and determining expert appointed under these Rules;'

' "Involved Party" In relation to a dispute, dispute procedure or dispute resolution process means a party directly involved in the dispute including the Secretary, all Dispute Parties, and the Forum;'

- 3.11 An Involved Party then, is merely one that is directly involved in a dispute, a dispute procedure or dispute resolution process, and can include, but is not limited to, the Secretary, Dispute Parties and the relevant Forum.
- 3.12 But on that basis of the above, under the remainder of Part M and the relevant chapter of the ADRR, a person who is entitled to appeal to the ORR, is one that:
- (a) is seeking to challenge an ADDR determination by appeal and who has put its position to the relevant Forum and/or sought a determination from it; and
 - (b) is directly involved in the dispute and who is likely to be materially affected by the outcome of the dispute in question.
- 3.13 HAL is clearly an entity that has sought to challenge an ADDR determination by appeal. It put its position to a Forum and sought a determination from it. It was and is directly involved in the dispute. It has been materially affected by the outcome of the dispute in expending considerable management time reversing its original decision, and facilitating the necessary timetable, rostering, and contingency changes (including ensuring that Terminal 4 remains clear with the new service pattern), in each case in order to effect the Determination. It will also be materially affected by the outcome of the dispute if the airport's railway passenger proposition is, as expected, degraded because of the significantly increased performance risk that will be introduced to the HAL infrastructure following the Determination (see paragraphs 5.39 to 5.45 of the HAL Appeal Notice). In HAL's view therefore, it is clearly a Dispute Party entitled to lodge an appeal of the Determination under the HAL Network Code.
- 3.14 MTR argues in its submission to the ORR of 12 November 2021 that, as the ORR does not constitute a Forum, HEOC cannot qualify as a Dispute Party on this basis, among other things, since in appealing to the ORR, it is not putting its position to a relevant Forum or asking a relevant Forum to make a determination. While this is not a direct matter for HAL, the ORR has nevertheless asked HAL to speak to the broader question of who has a right of appeal to the ORR, and this assertion by MTR has a bearing on the answer to that question. HAL has therefore addressed this point directly.
- 3.15 HAL considers MTR's conclusion to be a misunderstanding of the above provisions, and generally takes issue with a number of assertions set out in that letter that are not relevant for the purposes of this Response. In order for Rule H58 to function appropriately to allow, as it contemplates, a Dispute Party to appeal a determination of a Timetabling Panel to the ORR under Part M, the position put to or determination sought of the relevant Forum (as per the definition of Dispute Party), must have already been made to that Timetabling Panel. In other words, the Forum in the definition of Dispute Party when applied in Rule H58, must be a Timetabling Panel or some other permissible Forum and not the ORR as suggested by MTR.
- 3.16 As to the question of whether or not HEOC put its position to the Timetabling Panel as a Forum, which was also raised by MTR in its submission to the ORR of 12 November 2021, HAL would note that HEOC did make representations at the TTP hearing and there is no qualitative element in the definition of Dispute Party as to the extent of the position that it puts to a relevant Forum.
- 3.17 HAL previously considered the performance risk to HEOC's services of implementing the kind of outcome mandated in the Determination as part of its original decision (see paragraphs 5.39 to 5.45 of the HAL Appeal Notice). For this reason, it is clear to HAL, that HEOC will '*likely [...] be materially affected by the outcome of the dispute*' in question and so qualifies as a Dispute Party entitling it to lodge an appeal of

the Determination under the HAL Network Code, separate from any rights it may also have to appeal under the Regulations.

- 3.18 While there is inconsistency between the relevant definitions in Parts D, M and the ADRR as to who may be entitled to appeal under the HAL Network Code to the ORR, HAL's position is that the broadest scope should be applied in the interests of fairness.
- 3.19 This conclusion is aligned with, and supported by, a prior decision taken by the ORR in 2019 in connection with the appeals made by GB Railfreight Limited and DB Cargo (UK) Limited (**DBC**) in respect of decisions TTP1331 and TTP1376⁴. Although this decision related to Network Rail's network code the applicable provisions under Part D and Part M are the same as those in the HAL Network Code in all material respects. In that matter, as HAL understands it, Network Rail disputed that a third party had standing to bring an appeal because it was not a Dispute Party, however the ORR determined that the third party was entitled to bring the appeal. In paragraph 7 of its decision, the ORR stated that it was persuaded by DBC's arguments because:

'7. Condition D5.2.1 could have been drafted so as to clearly limit the right to refer a matter to the ORR so as to exclude persons other than Network Rail and the Timetable Participant who brought the original dispute. In addition, we note that Condition M1.1.1 refers only to the process 'by which a party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D or a decision reached by Access Disputes Adjudication in relation to a dispute arising under Part J, can appeal the matter to the Office of Rail and Road for determination', meaning that there isn't consistency of expression even within Part M, the rest of which refers to an 'appellant'. The uncertainty in the drafting, ought, in our view, to be interpreted in a non-restrictive, rather than restrictive, sense. The application of Condition M4.1 will continue to prevent unmeritorious or unjustified appeals from proceeding.'

4 THE ORR'S DISCRETION UNDER CONDITION M4.1.1

For the reasons given in paragraph 2 above and the wider mainline and industry arguments made in paragraph 3 of HAL's Appeal Notice, HAL is of the view, having satisfied itself that it has the requisite powers to do so, that the ORR should exercise its discretion under Condition M4.1.1 of the HAL Network Code to take up the appeal.

5 CONCLUSION

- 5.1 For all of the reasons given above, HAL believes that the ORR has the legal powers under the relevant legislation to act as an appeal body in this dispute and/or make a determination on the issues and direct the parties accordingly.
- 5.2 The ADRR and ORR appeal mechanics in network codes, were conceived as a single dispute resolution system. Indeed, those mechanics only properly function as a single system, offering access parties, a low-cost, efficient and fast, informed, but narrowly-focused, first instance forum, the decisions of which can

⁴ <https://www.orr.gov.uk/sites/default/files/om/ttp-1331-and-1376-determination-7-orr-letter-2019-12-19.pdf>.

be reasonably appealed to a higher body that also operates within the rail industry, but which has a broader remit, allowing it to take decisions in the overall interests of the industry, passengers and users.

- 5.3 If the ORR determines that it does not have the legal power to hear the appeal, this will have serious consequences for all of the parties interested in the HAL infrastructure. Such an outcome leaves those parties without recourse to the same opportunities that are available to others, for industry-informed appeals of ADRR determinations. MTR lodged its appeal of HAL's decision in relation to the December 2021 New Working Timetable under Parts D and M of the HAL Network Code and not Regulation 32. Consequently, that appeal was heard by an ADRR-appointed Timetabling Panel and not the ORR at first instance. If the Determination had instead affirmed HAL's decision, MTR would similarly be denied a right of appeal of the Determination in circumstances where the ORR had decided that it does not have regulatory oversight in these sorts of situations.
- 5.4 More particularly in the immediate term, HAL may be required to seek alternative appeal or declaratory relief that the dispute resolution rights in Parts D and M of the HAL Network Code are void and unenforceable on the basis that each of HAL, MTR and HEOC, had agreed these rights on the common mistake that the ORR had the requisite authority to take up appeals in each case, and/or that they are unjust or inequitable because they do not in practice afford all parties an equal opportunity to appeal. MTR entered into its Access Agreement with HAL in 2018, aspects of which established between them, that the ORR had such authority to hear appeals that either of them made of ADRR decisions.
- 5.5 TfL has been supportive of the proposal that the ORR assumes the appeal function under the ADRR and the HAL Network Code. It confirmed this in its letter to the ORR of 21 February 2018 (see the Appendix), as reported in paragraph 63 of the 2018 Determination:

'If the ORR was minded to accept the roles under the ADRR and Part M of the HAL Network Code (as proposed by HAL), we [TfL] would have no issue with this.'

HAL is surprised therefore that both MTR and TfL now question the vires of the ORR to hear the appeal (see (i) MTR's submission to the ORR of 12 November 2021, (ii) MTR's letter and its response to the Appeal Notice, in each case to the ORR of 19 November 2021 – each received by HAL on 23 November 2021 – and (iii) TfL's letter to the ORR of 24 November 2021).

- 5.6 Ultimately, HAL will be forced to pursue amendments to the HAL Network Code to change the dispute resolution processes therein and amend the HAL Network Statement to describe that changed process. HAL notes that there is significant latitude in Regulation 23(7) to establish a dispute resolution system that meets the requirements of the Regulations. Consideration will need to be given as to the merits of continuing to rely on an ADRR process which, in circumstances where the ORR declines to take appeals up, would not offer a ready path to appeal for all parties, and whether a simpler alternative, such as arbitration under the Arbitration Act 1996, offers a better solution for all parties.
- 5.7 HAL wishes to avoid this, because it believes the ORR is best placed to exercise an appeal function and so determine whether matters are of sufficient importance to the industry. As HAL argued in submissions in respect of the 2018 Determination, as relayed by the ORR in paragraph 63 of that determination:

'HAL notes, in particular, the risk of conflicting decisions taken by ORR (as regulator in relation to the wider UK rail network) and by the proposed independent arbiter (as the decision-maker appointed in relation to the Heathrow Rail Infrastructure). HAL also notes the scope for uncertainty as to which was the correct decision-maker/appeal route in certain cases, and argued

that the ORR should retain jurisdiction over issues of wider industry concern and/or of a regulatory nature. HAL further notes that introducing an independent arbiter could lead to a 'dual-tier' system of determination.'

These were arguments that the ORR ultimately accepted – see paragraph 2.2 above.

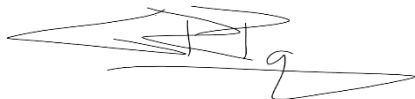
- 5.8 Specifically, any simpler dispute resolution mechanism will inevitably be less industry-aligned and likely to give rise to higher costs, and increased time spent resolving disputes, in the longer run, as more management and advisory time is spent avoiding the risk of less-informed, arbitrary, and/or potentially conflicting decisions. There is no certainty, for example, that an alternative arbiter would apply in the same way as the ORR, the discretion in Condition M4.1 to limit appeals to matters of sufficient importance to the industry and prevent unmeritorious and unjustified appeals. In addition, inconsistent appeal outcomes from those on the wider network, also seem likely, which would be undesirable for all, given the universal acceptance of the need for the wider network and the HAL infrastructure to continue to be operated as a single system. It would give rise to inequality and inconsistency between the rights available to Train Operators on the HAL infrastructure and those available on the wider UK rail network. And it is not clear how any such inconsistency would be resolved other than by a further appeal, putting further disproportionate financial and time burdens on all parties involved.
- 5.9 HAL cannot see how a change from the ORR as the appeal body would be in the best interests of the users, or efficient management of the HAL infrastructure or the wider network, and it therefore urges the ORR to exercise the considerable powers at its disposal to take the appeal up.

6 SIGNATURE

For and on behalf of

Heathrow Airport Limited

Signed:

A handwritten signature in black ink, appearing to read 'GAVIN PAYNE', written over a horizontal line.

Print Name: *GAVIN PAYNE*

Position: *DIRECTOR OF ENGINEERING & BAGGAGE*

APPENDICES

Appendix

Letter from Transport for London to ORR, dated 21 February 2018