

## **Heathrow Rail – May 2022 New Working Timetable**

### **Consideration of proposals for inclusion in the May 2022 New Working Timetable of Train Slots of MTR Corporation (Crossrail) Limited (trading as MTR Elizabeth Line (MTR)) and Heathrow Express Operating Company Limited (HEOC)**

## **1. INTRODUCTION**

### **1.1 Existing Firm Rights**

MTR has Firm Rights to 4tph to Heathrow Terminal 4 (**T4**) via the Central Terminal Area station (**CTA**) and 2tph to Heathrow Terminal 5 (**T5**) via the CTA, in each case, in each direction, seven days a week to/from London Paddington. HEOC has Firm Rights to 4tph to T5 via the CTA, in each case, in each direction, seven days a week to/from London Paddington.

### **1.2 Timetable bids for May 2022 Working Timetable**

1.2.1 Both MTR and HEOC submitted timetable bids to us to operate services to and from T5 that reflect their Firm Rights for the May 2022 Working Timetable. In addition, MTR submitted timetable bids to us to operate only 2tph to and from T4 that reflects their Firm Rights. As per Condition D4.2.2, we have endeavoured to incorporate these bids into the May 2022 New Working Timetable. But, for the reasons described in this document, we cannot accommodate both bids insofar as they relate to T5 as requested. We can accommodate MTR's bid insofar as it relates to T4.

1.2.2 Outside the scope of the points discussed in this document, but for information, we understand MTR has agreed with Network Rail that for the May 2022 Working Timetable, two Paddington-T4 weekday services per hour will be diverted to Hayes & Harlington, which is why MTR's other 2tph Firm Rights to T4 have not been taken up.

### **1.3 Capacity constraints affecting the HAL infrastructure**

1.3.1 Due to the Covid-19 pandemic, T4 remains closed to standard airline passengers, although the terminal is still open for many other uses. One such use is the facility to accommodate test trains and ECS moves to allow the CTA station to operate efficiently and economically.

1.3.2 But the difficulty is around capacity at T5 during weekdays. The Heathrow infrastructure to T5 can, in theory, accommodate 8tph. However, delays to the Crossrail Project have resulted in the delayed opening of the Paddington Elizabeth Line low-level station, which MTR's services are ultimately intended to serve. While these delays subsist (it is understood they will continue throughout the entirety of the May 2022 Working Timetable and likely to late 2022), MTR's services continue to call at London Paddington Station. In addition, restrictions have also been introduced to Platform 6 there during weekdays to facilitate operation of the Western mainline, preventing HEOC's services from occupying the platform between services, where previously this was possible.

1.3.3 We have attempted to seek resolution with relevant industry parties to the restrictions at Platform 6, however, a solution has not been found to this. Discussions remain ongoing.

1.3.4 As per the December 2021 timetable, because of the restrictions at London Paddington Station, for the May 2022 New Working Timetable, HEOC has continued to seek dwell times at the T5 platforms for 52 minutes of every operating hour between the start of service to

20:07 hours on Mondays to Fridays, in order to deliver its preferred 15-minute service pattern. This platform occupation is not possible where MTR is operating 2tph to and from the same station in the present circumstances. There is therefore a timetabling conflict between the two proposals for the May 2022 timetable.

#### 1.4 The October 2021 Determination

The Timetable Participants will be aware of the ADC's determination in October 2021 in relation to a dispute between us and MTR concerning our decision in relation to the December 2021 timetable (reference HAL/TTP003) (the **October 2021 Determination**), and the fact that the determination is the subject of an appeal to the ORR. In the meantime, we have abided by that determination for the December 2021 timetable, although we do not believe that the ADC was correct in concluding that we took our decision incorrectly. Nevertheless, and without prejudice to our position that the October 2021 Determination was wrong, we have considered the observations in that determination, and where appropriate, referred to them in the process and presentation of this document.

#### 1.5 Terms and references in this document

1.5.1 Capitalised terms used but not otherwise defined in this document shall have the meaning given to them in the HAL Network Code (the **Code**). References to conditions in this document are references to Conditions in Part D of the Code. References to the New Working Timetable are references to the May 2022 New Working Timetable, unless referred to in the general sense.

1.5.2 The following Appendices are attached in support of the decision in this document:

- (a) Appendix 1: Decision Criteria for May 2022 Timetable (Excel);
- (b) Appendix 2: Network Rail's letter to the ORR of 5 November 2021 in relation to the appeal of Determination TTP/003 (PDF);
- (c) Appendix 3: MTIN Miles per Technical Incident Data – Period 8 2021-22 (Excel);
- (d) Appendix 4: MTR performance information provided to HAL on 14 December 2021 (PDF);
- (e) Appendix 5: HEOC performance information provided to HAL on 10 December 2021 (PDF); and
- (f) Appendix 6: HAL Performance Projections Analysis for May 2022 Timetable (PDF).

## 2. THE CHANGE STRATEGY

### 2.1 Ongoing use of the Future Timetable Change Strategy – Intervention Windows process

In response to the timetabling challenges brought about by the COVID-19 pandemic, the rail industry agreed, and so Network Rail introduced and has continued to apply, a temporary change to the national timetable planning process: 'Future Timetable Change Strategy – Intervention Windows process' (the **Change Strategy**). The Change Strategy only sought to defer certain and compress other dates comprising the Wider UK Rail Network timetable bid and offer process in order to enable Network Rail to be able to cope with the anticipated volume of potential changes driven by the changing circumstances of the pandemic. In all other respects, that bid and offer process was to remain unaffected by the Change Strategy.

## 2.2 Subcontracting establishment of the Working Timetable

As made clear in Condition D1.1.1(b), we have the right to subcontract the undertaking of all activities relating to the establishment of the Working Timetable to a suitably competent and resourced organisation. We have formally subcontracted those activities to Network Rail since June 2017 because services to and from Heathrow Airport operate on both part of the Wider UK Rail Network and part of the HAL infrastructure. In line with this approach, as per Condition D1.1.1(c)(i), Timetable Participants are entitled to (and as a matter of practice do) incorporate their submissions in relation to the HAL infrastructure in concurrent submissions for the Wider UK Rail Network.

## 2.3 Adopting the Change Strategy

- 2.3.1 We were not involved in the industry agreement of the Change Strategy. However, because, in keeping with Condition D1.1.1(b), our timetable bid process must remain *'fully integrated into Network Rail's activities relating to the establishment of the Working Timetable in respect of the Wider UK Rail Network'*, we did not consider we had any other alternative but to adopt the Change Strategy for the HAL infrastructure also.
- 2.3.2 Consequently, we have worked with Network Rail and Timetable Participants to precisely the same revised timescales set out in the Change Strategy, and all timetabling development for the New Working Timetable has been carried out by Network Rail both for the relevant part of the Wider UK Rail Network and the HAL infrastructure as one operation.
- 2.3.3 We understand that although the Network Rail Network Code was not formally changed to reflect the changes to the timing of the Wider UK Rail Network timetable bid and offer process, both MTR and HEOC agreed in conjunction with the Rail Delivery Group, to follow the Change Strategy in relation to the Wider UK Rail Network, and by extension, the HAL infrastructure.

## 3. TIMETABLE BIDS FOR THE MAY 2022 WORKING TIMETABLE

### 3.1 Summary of bids

The Change Strategy required the submission of bids for the New Working Timetable on 1 October 2021, instead of submission on D-40 (the Priority Date), which occurred on 6 August 2021. However, in relation to the HAL infrastructure, the following happened:

Timing	Submissions for the May 2022 New Working Timetable	Train Slots requested
6 August 2021 (D-40)	MTR submitted a timetable bid	2 tph to T4 and 2 tph to T5, in each case, in each direction, seven days a week to/from London Paddington
	HEOC did not submit a timetable bid	See paragraph 4.2 below
1 October 2021 (D-32 revised Priority Date)	MTR submitted a timetable bid consistent with the Change Strategy	2 tph to T4 and 2 tph to T5, in each case, in each direction, seven days a week to/from London Paddington

Timing	Submissions for the May 2022 New Working Timetable	Train Slots requested
1 October 2021 (D-32 revised Priority Date)	HEOC submitted a timetable bid consistent with the Change Strategy	4tph to T5 in each direction, seven days a week to/from London Paddington

### 3.2 Our consideration of the bids

3.2.1 While we were proceeding on the basis that all parties had agreed to follow the Change Strategy, we have considered all proposals submitted to us in accordance with the Code and not the Change Strategy, because there was no agreement between HAL, MTR and HEOC to invoke Part C for making changes to the Code, or to disapply it for the May 2022 timetable. The same conclusion, based on similar circumstances, was reached in the October 2021 Determination (paragraph 158).

3.2.2 In reaching our conclusion, in accordance with the requirement in paragraph 4.4.1 of the HAL Network Statement, we have ensured that both Timetable Participants have been treated in a fair and non-discriminatory way.

## 4. CONSIDERATION OF PROPOSALS

### 4.1 Consideration of MTR's position at D-40

4.1.1 Conditions D2.4 and 2.5 set out the process for submitting Access Proposals before and after the Priority Date. An Access Proposal containing Firm Rights that is submitted by the Priority Date and meets the requirements of Condition D2.5, means the Firm Rights in that Access Proposal have been Exercised.

4.1.2 MTR's submission at the Priority Date, expressing the desire to exercise some of its Firm Rights to T4 and its Firm Rights to T5, was made in accordance with Conditions D2.4 and D2.5, and therefore amounts to:

- (a) an Access Proposal under Condition D2.4.1; and
- (b) although not expressly given as such, notice under Condition D2.4.2 that it did not intend to use two of its Train Slots to T4 which were included in the Prior Working Timetable, those Train Slots being diverted instead to Hayes & Harlington as described in paragraph 1.2.2 above.

4.1.3 This would mean that MTR's Firm Rights to 2tph to T4 and 2tph to T5 contained in that Access Proposal, were Exercised on that date.

### 4.2 Consideration of HEOC's position at D-40

4.2.1 HEOC did not submit a timetable bid on the Priority Date, meaning that it did not submit an Access Proposal for the New Working Timetable under Condition D2.4.1.

4.2.2 The Exercise of Firm Rights occurs as a consequence either of submitting an Access Proposal by the Priority Date in accordance with Conditions D2.4 and D2.5 or the making of a Rolled Over Access Proposal. A Rolled Over Access Proposal is one where:

*‘an Access Proposal was submitted in a previous revision of the Working Timetable, resulting in Train Slots being included in the Prior Working Timetable which the relevant Timetable Participant does not seek to vary in the New Working Timetable’.*

- 4.2.3 HEOC did submit an Access Proposal in a previous revision of the Working Timetable which resulted in four Train Slots to T5 being included in the Prior Working Timetable (December 2021) with the platform dwell times referred to in paragraph 1.3.4 above. By not making a submission for the New Working Timetable, and failing to issue a notice under either Condition D2.4.1 or D2.4.2, HEOC did not seek to vary those Train Slots in the Prior Working Timetable, including their platform dwell times. Accordingly, as per the definition of Exercised, HEOC Exercised its Firm Rights by way of a Rolled Over Access Proposal as at the Priority Date.

#### **4.3 Consideration of both Timetable Participants’ positions at D-32**

- 4.3.1 At D-32, both MTR and HEOC submitted proposals for the May 2022 timetable. MTR submitted its D-32 proposal at 11:31 on 1 October 2021. HEOC submitted its D-32 proposal at 18:31 on 30 September 2021. Under Condition D2.4.4, proposals submitted after the Priority Date, but by D-26, are treated as Access Proposals. Both D-32 proposals appear to qualify as Access Proposals on that basis. Such Access Proposals do not have the same priority as Access Proposals that are submitted by the Priority Date or Rolled Over Access Proposals, and any Firm Rights in them, are not Exercised.

- 4.3.2 Under Condition D2.4.5, any subsequent or revised Access Proposal amends an earlier one, *‘where it sets out different requirements to the earlier submitted Access Proposal regarding the manner in which a right is to be exercised.’* With the assistance of Network Rail, we have established that MTR’s D-32 Access Proposal revised aspects of its D-40 Access Proposal. Specifically:

- (a) both arrival and departure times for the CTA Station, T4 and T5 were amended throughout the day;
- (b) dwell times at the CTA Station increased from approximately three minutes to approximately seven minutes;
- (c) dwell times at T4 and T5 increased from 16 minutes to 21 minutes; and
- (d) the services that MTR had previously planned in the D-40 proposal to originate/terminate at T4, were swapped with those that MTR had previously planned to originate/terminate at T5, and vice versa.

- 4.3.3 We believe that these changes set out different requirements to MTR’s D-40 Access Proposal *‘regarding the manner in which’* its rights were *‘to be exercised’*, and that therefore, its D-32 Access Proposal is a subsequent or revised Access Proposal that amends its D-40 one for the purpose of Condition D2.4.5. Condition D2.4.5 goes on to provide that a subsequent or revised Access Proposal is treated for the purposes of Condition D4.2.2 as being submitted on the date of notification of the relevant right. We believe therefore, that for the purposes of Condition D4.2.2, MTR’s D-32 Access Proposal is the relevant Access Proposal we should have regard to in making our decision.

- 4.3.4 Again, with Network Rail's assistance, we have established that HEOC's D-32 Access Proposal was identical to its Rolled Over Access Proposal at D-40, and that Rolled Over Access Proposal was identical to a prior Access Proposal submitted by HEOC. It follows that its D-32 Access Proposal did not amend its Rolled Over Access Proposal at D-40 and therefore did not amount to a subsequent or revised Access Proposal for the purpose of Condition D2.4.5. On this basis, HEOC's D-32 Access Proposal would be a restatement of its Rolled Over Access Proposal, and HEOC will have continued to Exercise its Firm Rights to T5.
- 4.3.5 However, the October 2021 Determination has potentially impacted that outcome. The October 2021 Determination ruled that we should:

*'honour the existing MTR Firm Rights (of two trains per hour in each direction to and from Heathrow Terminal 5) on weekdays before 20:00 in the December 2021 timetable as soon as reasonably practicable but in any event from a date not later than 3 January 2022 or alternatively the start of Period B of the December 2021 timetable if that date falls earlier' (paragraph 186)*

The October 2021 Determination has, in the meantime, been complied with, and the services referred to have been included in the December 2021 Working Timetable.

- 4.3.6 Under Condition D2.1.6, we must use the Prior Working Timetable as our starting point to develop the next timetable. We take the December 2021 timetable to be the Prior Working Timetable for the purpose of developing the New Working Timetable. Condition D2.1.6 also provides that if any *'subsequent variations are made to the Prior Working Timetable as a result of the appeal process, then they shall also be incorporated into it.'* On that basis, we believe the outcome of the October 2021 Determination must be incorporated into the Prior Working Timetable. In practical terms, from the date of the October 2021 Determination, the Prior Working Timetable included MTR's Firm Rights to T5, together with the necessary train movements, arrival and departure times at each start, intermediate and end points, and platform dwell times necessary, to give effect to those Firm Rights.
- 4.3.7 A copy of the Prior Working Timetable is to be provided to Timetable Participants no later than D-45 (Condition D2.3.4), with an obligation on us to notify them of changes that are to be made as a result of the appeal process under Condition D2.7, as soon as reasonably practicable thereafter (Condition D2.3.4). Condition D2.1.6 does appear to say that variations to the Prior Working Timetable as a result of the appeal process, must be made whenever they occur. This includes where made after the Prior Working Timetable is first taken up for the purpose of developing the New Working Timetable, and so after a Rolled Over Access Proposal may have been made. The Code is silent about the ongoing status of a Rolled Over Access Proposal in circumstances where an appeal determination creates an inconsistency with the relevant Prior Working Timetable.
- 4.3.8 Once the Prior Working Timetable (the starting point for the New Working Timetable) was changed to comply with Condition D2.1.6, the Prior Working Timetable ceased to be consistent with the Train Slots that HEOC desired in the Rolled Over Access Proposal. Specifically, HEOC's platform dwell times at T5 referred to in paragraph 1.3.4 above, were changed to accommodate MTR's Firm Rights to T5.

- 4.3.9 Once the Prior Working Timetable was changed to reflect the October 2021 Determination, the question became whether HEOC would have to be considered to be effectively varying its Train Slots in the Prior Working Timetable to provide for the platform dwell times at T5 referred to in paragraph 1.3.4 above. If this could be said, it would have the effect of retrospectively rendering it impossible for HEOC to have made a Rolled Over Access Proposal in the first place, meaning that ultimately, it could not have Exercised its Firm Rights.
- 4.3.10 The counter argument it seems to us on this point, is that the December 2021 timetable, which became the Prior Working Timetable, was entirely consistent with HEOC's Rolled Over Access Proposal on the date that proposal was made. On that date, HEOC did not seek to vary the Train Slots that had been included in the Prior Working Timetable. On that basis, the requirements for making a Rolled Over Access Proposal could be said to be satisfied at D-40, and what happens after that, should not diminish the legitimate Exercise of Firm Rights.
- 4.3.11 However, this outcome could give rise to complications when we are required to consider whether we can accommodate all Rolled Over Access Proposals in a New Working Timetable under Condition D4.2.2. Firm Rights in a Rolled Over Access Proposal that continue to be treated as Exercised where a subsequent appeal outcome effectively mandates their exclusion from the related Prior Working Timetable, may prevent us from ensuring that the related New Working Timetable is consistent with those Exercised Firm Rights in accordance with Condition D4.2.2(b). That does not however, appear to be the outcome in this case.
- 4.3.12 On balance, the proper and fair outcome is considered to be that a Timetable Participant's Rolled Over Access Proposal should not be invalidated by a subsequent appeal outcome. To conclude otherwise, would result in Timetable Participants potentially losing legal entitlements they reasonably would have assumed they had via a process that is intended only to reduce the administrative burden on everyone involved in producing the timetable. If Timetable Participants thought that might be the case, they would make Access Proposals by default, even where they simply wanted to roll over the Train Slots they previously wanted. This would undermine the intent behind being able to make a Rolled Over Access Proposal. We would argue that if it was intended that Rolled Over Access Proposals could be potentially invalidated by subsequent appeal outcomes, the HAL Network Code would have expressly provided for this, as it does in Conditions D2.4.4 and D2.4.5 with D-40 Access Proposals being superseded, and so invalidated by revised Access Proposals made later.
- 4.3.13 On that analysis, we are of the view that HEOC has continued to Exercise its Firm Rights to T5 by making a Rolled Over Access Proposal, and as its D-32 Access Proposal does not revise that Rolled Over Access Proposal in the way contemplated by Condition D2.4.5, or at all. That later Access Proposal only restates the Rolled Over Access Proposal. Nevertheless, for completeness, we have considered the outcome both where HEOC's Rolled Over Access Proposal is affected by the October 2021 Determination, and where it is not. See paragraphs 5.3.6 and 5.4.2 below.

## **5. OUR OBLIGATIONS IN RELATION TO THE REQUESTED CONFLICTING TRAIN SLOTS**

### **5.1 Obligation to accommodate proposals**

- 5.1.1 Condition D2.4.4 states that Access Proposals made after the Priority Date, but before D-26, will be incorporated by us into the New Working Timetable *'as far as reasonably practicable, taking into account the complexity of the Access Proposals 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.’* We believe we must have regard to both the principles expressly stated in Condition D2.4.4, and those in Condition D4.2 in finalising the New Working Timetable.

- 5.1.2 Regarding the former, despite receiving Access Proposals eight weeks late, and the subsequent time needed in order that Network Rail could assist us in understanding the differences between those late submissions and the timely ones, we believe that it is reasonably practicable, having regard to the principles in Condition D2.4.4, to incorporate those late Access Proposals into the New Working Timetable.
- 5.1.3 Applying the principles in Condition D4.2, in compiling the New Working Timetable, we must apply the Decision Criteria in accordance with Condition D4.6, and behave in accordance with Condition D4.2.
- 5.1.4 Condition D4.2.2 states that, wherever possible, we must endeavour to comply with Access Proposals submitted in accordance with Condition D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to a number of express principles. We take this to mean that, as a starting principle, we must treat Access Proposals that meet the procedural requirements and Rolled Over Access Proposals equally when it comes to trying to accommodate them in future timetables. We also believe that this duty applies to Access Proposals regardless of whenever they are made, including those made after D-40.
- 5.1.5 Before turning to the remaining aspects of Condition D4.2.2, it is worth reiterating that we cannot accommodate 6tph to T5 as requested by MTR and HEOC because the platform dwell times that each desires, conflict.

## **5.2 Conditions D4.2.2(a) and (b)**

- 5.2.1 We have considered the applicability of Conditions D4.2.2(a) and (b), which our duty to accommodate proposals is subject to. In relation to Condition D4.2.2(a), we believe if we accommodated both proposals to Terminal 5 (including as described in paragraph 5.3 below, and assuming that the platform dwell times conflict is resolved), the New Working Timetable would continue to conform with the Rules. Equally, if we did not accommodate both proposals to T5, but instead accommodated one of them, or a combination of them, the New Working Timetable would also continue to conform with the Rules.
- 5.2.2 In relation to Condition D4.2.2(b), MTR ceased to Exercise its Firm Rights when it submitted its revised Access Proposal at D-32, so the question of the requirement for the New Working Timetable to be consistent with Exercised Firm Rights, only applies to the extent that the Exercise of HEOC’s Firm Rights in its Rolled Over Access Proposal prevails, notwithstanding the impact of the October 2021 Determination. If this was the case, we would be required to ensure that the New Working Timetable remained consistent with the Firm Rights which HEOC will have Exercised. As explained in paragraph 4.3.12 above, on balance, we believe that HEOC has continued to Exercise its Firm Rights despite the October 2021 Determination. We believe then, that the New Working Timetable should remain consistent with those Exercised Firm Rights.

### 5.3 Exercising our Flexing Right

- 5.3.1 Under Condition D4.2.2(c), we are entitled to exercise our Flexing Right to try to accommodate all Access Proposals – in the context of the May 2022 timetable, to reconcile the conflict between the platform requirements of MTR and HEOC at T5. We explained in the proceedings leading up to the October 2021 Determination, that we have previously considered using our Flexing Right and a number of alternative options to try and reconcile that conflict. We set them out here.
- 5.3.2 HEOC runs more trains in circuit than it runs per hour (a circuit of five trains to run 4tph) for contingency reasons. HEOC uses the fifth train to put into service in the event of perturbation. If HEOC ran only four trains in its circuit to deliver 4tph, it would result in a turnaround time at T5 for HEOC of 11 minutes instead of 26 minutes. This option has been described in discussions with MTR and HEOC as being akin to ‘stepping up’ the HEOC service. Stepping up in this way, would allow both HEOC’s and MTR’s requested services to call at T5 during the May 2022 timetable. Stepping up HEOC’s service in this way would remain consistent with the Exercise of HEOC’s Firm Rights to T5, as it preserves its 4tph to T5 via the CTA in each direction, throughout the week.
- 5.3.3 The only way, it appears to us, that the platform dwell time conflict at T5 can be reconciled in the present circumstances, such that all requested services to T5 can be accommodated to T5, is for us to exercise our Flexing Right to require HEOC to operate a four train circuit to deliver its 4tph to T5.
- 5.3.4 We have also discussed with both HEOC and MTR, and considered as part of our decision, a number of operational outcomes for HEOC’s fifth train, if we exercised our Flexing Right to require it to step up its service:
- (a) shunting that fifth train after it terminates at T5, to stand at T4, the CTA or in a tunnel outside T5;
  - (b) stabling that fifth train at T4 while it remains closed;
  - (c) stabling that fifth train off of, but reasonably proximate to, the HAL infrastructure (although nothing that this is an outcome that is outside our control); and
  - (d) removing that fifth train altogether as a comparator (although noting that this outcome is outside our control).
- 5.3.5 We would estimate the first three of these to have a mitigating effect on the number of additional cancellations we expect to arise from removing the contingency from HEOC’s circuit, relative to simply removing the fifth train altogether (see Appendix 6: HAL Performance Projections Analysis for May 2022 Timetable). While the first two of those are not considered practical solutions (see Technical Background tab of Appendix 1 (Decision Criteria for the May 2022 Timetable)), we have nevertheless considered the relative mitigating effect of them, as well as the third. We would estimate the reduction in the anticipated additional cancellations to be somewhere in the order of up to 30 per cent. if the fifth train was stood in a T5 tunnel (shunting to T4 does not work for timing reasons, and standing at the CTA would be logistically untenable). We estimate a 15 per cent. reduction for stabling the fifth train at T4, and a 10 per cent. reduction for stabling off network (although

in respect of the last option, this very much depends on the location the fifth train is stabled in).

- 5.3.6 We have also considered the exercise of our Flexing Right to maximise the number of services to the Airport, where we are unable to accommodate all requested services to T5. This would involve either flexing MTR's two requested tph from T5 to T4, or flexing two of HEOC's requested tph to T4 to accommodate MTR's two requested tph to T5. We have considered both of these options in Appendix 1 (Decision Criteria for May 2022 Timetable), although we are mindful that we would not be able to exercise our Flexing Right to flex HEOC's services to T4 where HEOC has Exercised its Firm Rights to T5 (see paragraph 4.3.12 above).

#### **5.4 Prioritisation if we are unable to include all Train Slots in the New Working Timetable**

- 5.4.1 After the application of the principles in Conditions D4.2.2(a) to (c), if we are unable to include all requested Train Slots in the New Working Timetable, then we must prioritise those Train Slots in accordance with the order set out in Condition D4.2.2(d).

- 5.4.2 If that prioritisation was necessary, we would prioritise as follows:

- (a) if HEOC's Rolled Over Access Proposal was not impacted by the October 2021 Determination such that it continued to Exercise its Firm Rights to T5, in accordance with Condition D4.2.2(d)(i), we would prioritise HEOC's requested Train Slots to T5 over MTR's, as HEOC has Exercised its Firm Rights through its Rolled Over Access Proposal, but MTR has not because it submitted its D32 Access Proposal which revised its D-40 one; and
- (b) if HEOC's Rolled Over Access Proposal was impacted by the October 2021 Determination, such that HEOC's Rolled Over Access Proposal could not have ultimately been made, in accordance with Condition D4.2.2(d)(iv), we would prioritise HEOC's requested Train Slots to T5 over MTR's, as those Train Slots were notified to us on 30 September 2021, whereas MTR's were notified to us on 1 October 2021.

In other words, if we are unable to include all Train Slots in the New Working Timetable, following the prioritisation principles in Condition D4.2.2(d), the outcome would be the same.

## **6. INFORMATION AND DATA ON WHICH OUR DECISION IS BASED**

### **6.1 Professional assistance and judgment**

- 6.1.1 We commissioned SNC-Lavalin to assist us in collating relevant information and data for the purpose of informing our decision, as well as stress testing our thinking in making our decision. We have also used our experience and professional judgment to determine what information is relevant in reaching our decision.

### **6.2 Information and data provided by MTR and HEOC**

- 6.2.1 We wrote to both MTR and HEOC on 3 December 2021 seeking passenger numbers, revenue and performance information for the last 12 months, and the 12 months immediately preceding the COVID-19 pandemic. We also asked them to comment on what they considered the impact to be on achievement of the Objective (applying the Considerations as necessary) of both accommodating and not accommodating their requested services to T5. And we also invited them to provide any other information they considered relevant to support their

proposals for the May 2022 timetable. We have had regard to each of their responses in making our decision.

- 6.2.2 HEOC provided us with the performance and the passenger data information requested on 10 December 2021. HEOC did not disclose to us the financial data we requested, on the basis that it was considered commercially sensitive. MTR provided us on 14 December 2021 with the performance data we requested and some train loading data in relation to the Class 345s it operates, from which we were able to extrapolate some relevant information. Otherwise, MTR did not provide us with the passenger number data we requested, or the financial data we requested. It advised that it would need a minimum of four weeks' notice in future in order to properly comply with a similar request. MTR also cited a '*national failure of the LENNON system*' as contributory to its inability to provide passenger journey and revenue data, although it did not advise how long that failure had been ongoing for. We tried to find out more information about the failure and whether it would resolve itself before we were required to finalise our decision, but we were unsuccessful. MTR did provide some
- 6.2.3 Of the information we received, we have attached, as Appendices 4 (MTR performance information provided to HAL on 14 December 2021) and 5 (HEOC performance information provided to HAL on 10 December 2021), the relevant performance data extracts from MTR and HEOC's submissions respectively.

### **6.3 Impact of the Change Strategy**

The compressed timescales introduced by the Change Strategy, together with the management time required by us to consider the status of multiple, and in the case of MTR, varied, bids for the May 2022 timetable, has had an impact on our ability to seek and obtain relevant information and make our decision.

## **7. OUR DECISION FOR THE MAY 2022 TIMETABLE**

### **7.1 Our application of the Decision Criteria and our decision**

- 7.1.1 Appendix 1 (Decision Criteria for May 2022 Timetable) contains the full analysis of our decision for the May 2022 timetable and our application of the Decision Criteria. However, we have summarised the key findings and our decision here.
- 7.1.2 We endeavoured to comply with both Access Proposals submitted to us for the May 2022 timetable. We could not comply with both Access Proposals as requested, because of the conflicting platform dwell requirements sought at T5. The only way to comply with both Access Proposals insofar as they related to T5, was to exercise our Flexing Right. We found that, in considering whether we should exercise our Flexing Right to include 6tph to T5, we could still achieve this outcome so that the New Working Timetable conformed with the Rules, and would remain consistent with HEOC's Exercised Firm Rights to/from T5 of 4tph each weekday. This would satisfy the requirements of both Conditions D4.2.2(a) and (b).
- 7.1.3 The exercise of our Flexing Right to accommodate all Access Proposals insofar as they relate to T5, would involve requiring HEOC to operate four, instead of five, trains in its circuit to deliver its 4tph to T5.

### **7.2 How would the Objective best be achieved in the circumstances?**

- 7.2.1 Under Condition D4.2.1, we must apply the Decision Criteria in compiling the New Working Timetable. The Decision Criteria comprises the Objective and the Considerations. The

Objective is confirmed in Condition D4.6.1 as being applicable in the context of us deciding any matter in Part D as follows:

*'[...HAL's] 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.'*

- 7.2.2 In deciding whether to include all requested Train Slots to T5 for the May 2022 timetable, including whether to exercise our Flexing Right, we must have the Objective as our goal. The ORR has advised in the appeal decision of TTP determination 1174, that the decision-maker should not include all requested Train Slots in a timetable where this does not achieve the Objective (paragraph 91). The corollary of doing so must be that the decision-maker must include all requested Train Slots where this would achieve the Objective, subject to the other express requirements of Condition D4.2.2. The ORR appears to go on to say in the same decision, that if the Objective is not first achieved by including all Train Slots as requested, then the decision-maker must consider exercising its Flexing Right to vary them if doing so would achieve the Objective, subject again to the other express requirements of Condition D4.2.2.
- 7.2.3 To apply that logic to our decision, we had to consider whether allowing 6tph to operate to T5 in the circumstances (requiring HEOC to operate four, instead of five, trains in its circuit) achieved the Objective. In considering this question, we found every Consideration relevant.
- 7.2.4 In applying all of the Considerations, we found five of them favoured the HEOC proposal, and three of them favoured the MTR proposal. In finding a conflicting result, we decided which of the Considerations to be the most important in the circumstances, attaching appropriate weight to them in accordance with Condition D4.6.3. We came to the conclusion that Consideration D4.6.2(b), that the spread of services reflects demand, and Consideration D4.6.2(c), maintaining and improving train service performance, to be most important in the circumstances. HEOC's proposal better met the Objective in both of those Considerations, in addition to the other three where this was also the case.
- 7.2.5 We could not obtain, including from MTR, credible historical or forecast passenger data that demonstrated that the spread of services it requested, reflected current demand, or future demand during the May 2022 timetable, or that a lack of direct stopping services to T5, would deter its existing or future passengers from travelling by rail to the Airport. According to the passenger data we are in possession of, in November 2021, passenger journeys during weekdays were approximately half the pre-pandemic levels, with total passenger numbers for the past year (December 2020 to November 2021) at only 17 per cent. of the pre-pandemic level. This does not suggest that there is significant unfilled demand that would be met by additional services running to T5. There is then already spare capacity today, and there is no certainty that the impact of the pandemic will be different come the start of the May 2022 timetable, or that offering direct stopping services to T5 in the present circumstances, will induce significant modal shift.
- 7.2.6 Our understanding of passenger demand, such as we have been able to establish it in the circumstances, raises a serious question as to the scale of the benefits that MTR's proposal supposedly brings. It may deliver some shorter journey times. It may enhance the integrated system of transport. It may deliver some modal shift. But we are not convinced as to the

extent. Meanwhile, current passenger numbers, such as they are (taking account of MTR's train loading data which it did supply) still favour HEOC's services by a ratio of approximately 4:1. That suggests that a greater number of passengers will tend to be affected by a decision that impacts HEOC's services than MTR's services, whatever that impact is.

- 7.2.7 As evidenced in Appendices 1 (Decision Criteria for May 2022 Timetable) and 6 (HAL Performance Projections Analysis for May 2022 Timetable), operating 6tph to T5 in the present circumstances brings a clear and substantial performance risk because it requires HEOC to effectively step up its service and run only four trains in its circuit. Doing so greatly diminishes its ability to mitigate the impact of perturbation on both the HAL infrastructure and the wider network. Current performance is mostly attributable to ETCS issues, which are unlikely to materially improve during the term of the May 2022 timetable. If current levels of performance were achieved in the context of an effectively stepped up HEOC service, performance would drop significantly, not just for HEOC, but for MTR, and on the wider network, which Network Rail underscores in its letter to the ORR (see Appendix 2: Network Rail's letter to the ORR of 5 November 2021 in relation to the appeal of Determination TTP/003). On our analysis, it would result in an approximate quadrupling of cancellations. As explained in paragraph 5.3.5 above and Appendix 1, none of the options for the fifth train excluded from HEOC's circuit, provide sufficient mitigation to offset this performance risk – it remains clear and substantial, and indeed those which involve standing that fifth train on the HAL infrastructure actually diminish the capability of that infrastructure in the bargain.
- 7.2.8 We believe that permitting 6tph to T5 with this outcome, would not achieve the Objective of sharing capacity '*in an efficient and economical manner in the overall interests of current and prospective users and providers of railway services*', because:
- (a) those railway services, which serve passengers (including airport staff) to whom timely arrival is critical, would be inherently unreliable with poor contingency solutions; and
  - (b) consequently, a greater number of current users would be more adversely impacted during the May 2022 timetable, than any current users (as well as prospective users if any, of which there is no evidence) would benefit from operating those services to T5.
- 7.2.9 For this reason, we are unable to include all requested Train Slots to T5 in the May 2022 timetable. We believe that Condition D4.2.2(d) is engaged as a result and we must prioritise the requested Train Slots in accordance with that provision. In keeping with our view that HEOC has Exercised its Firm Rights for the May 2022 timetable, we believe we must give priority to its Train Slots to T5 (including its requested platform dwell times at T5) in the New Working Timetable in accordance with Condition D4.2.2(d)(i). If we are wrong on the question of the Exercise of HEOC's Firm Rights, we nevertheless must still give priority to its Train Slots to T5 in the New Working Timetable in accordance with Condition D4.2.2(d)(iv) because it submitted its D-32 Access Proposal to us first.
- 7.2.10 This means that MTR's requested 2tph to T5 cannot be accommodated on weekdays in the New Working Timetable. They can however be accommodated on weekday evenings and at weekends, and we make that offer of availability to MTR for the New Working Timetable.

**Heathrow Airport Limited**

**17 December 2021**