ACCESS DISPUTE ADJUDICATION

Determination in respect of Dispute ADA16

Held at 1 Eversholt Street, London NW1
on Friday 27 September 2013

Present:

The appointed Adjudication Panel (the "Panel")

Hearing Chair: Stephen Murfitt

Industry Advisors: Christopher Geldard
Mark Leving

Disputes Parties:

Network Rail Infrastructure Limited ("Network Rail" or "NR")

Dan Kayne	Senior Legal Counsel
James Waight	Senior Sponsor – Plans, Crossrail Project
Giles Clark	Assistant Sponsor, Crossrail Project
Clare Dwyer	Addleshaw Goddard LLP, solicitors
Stephen Dapre	Signalling Engineering Design Manager
Louise Gurney	Stakeholder Manager, Crossrail Project (observing)
Karen Stapleton	Legal Counsel (observing)

First Greater Western Ltd ("FGW")

John Czyrko	Head of Network Strategy
Robert Holder	Network Access Manager
Chris Jackson	Burges Salmon LLP, solicitors
Rupert Hyde	Burges Salmon LLP, solicitors
Ian Brightmore	Project Operations Strategy Manager
Sarah Caswell	Work experience student (observing)

Freightliner Ltd and Freightliner Heavy Haul Ltd (together, "Freightliner")

Jason Bird Track Access Manager, Freightliner Ltd

Interested party

DB Schenker Rail (UK) Ltd

Pavel Nowak Rail Network Manager

In attendance: Tony Skilton (Committee Secretary)
John Beer (Committee Chair) (observing)

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1 INTRODUCTION, SUBSTANCE OF DISPUTE AND JURISDICTION

1.1 This dispute concerns the entitlement of Network Rail Infrastructure Limited ("NR") to implement a Network Change contained in the proposal of 26 February 2013 which involves the removal of the Windsor Bay Line from the Windsor Branch Line at Slough West, and the removal of Slough East Facing Bay Platform.

1.2 The change sought was part of other projects which included the renewal of signalling interlockings and control equipment, and migration of the existing signalling control from Slough Power Signal Box to the Thames Valley Signalling Centre at Didcot. The Project driver is the renewal of an ageing signalling system, but also the delivery of future Crossrail enhancements, although this project is not part of Crossrail. NR sought to commence the project by Christmas 2013.

1.3 On 25 March 2013 First Greater Western ("FGW") sent a Formal Notice of Rejection to NR.

1.4 NR referred the dispute to an Access Dispute Adjudication ("ADA") for determination in accordance with Condition G11.1 of the Network Code (1 August 2012 Edition).

1.5 A Procedure Agreement was entered into between NR and FGW on 6 August 2013 with regard to this dispute stating that the determination procedure would be an ADA in the first instance.

1.6 Within the terms of the Access Dispute Resolution Rules (the "Rules"), Freightliner Limited and Freightliner Heavy Haul Limited (together, "Freightliner"), were added as dispute parties. DB Schenker Rail (UK) Limited ("DB Schenker") declared itself to be an interested party.

1.7 In accordance with Rule G1, NR, FGW and Freightliner all filed Statements of Case setting out their respective positions and submissions. A Hearing took place on 27 September 2013 when all the dispute parties and interested parties were present and represented.

1.8 I initiated a number of case management procedures prior to the hearing including a request for answers to a number of questions to clarify and narrow the issues between the parties. I am grateful to the parties for their co-operation and assistance in that process, both in relation to the answers provided, but also the production of an agreed Hearing Bundle which was of assistance to both myself and the Industry Advisors.

1.9 Prior to the Hearing FGW "for the reasons of proportionality and practicability" decided not to pursue its objections as to the Slough East Bay Platform. As a consequence, and as agreed with all of the representatives at the hearing, that objection was removed from ADA16 and forms no part of this Determination.

1.10 In consideration of the Parties' submissions, and at the hearing of the Dispute, I was mindful that as provided for in Rule A5, I should reach my "determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis." I indicated at the commencement of the hearing that on my reading of the papers there were no issues of law other than to possibly consider Canons of Construction in relation to the interpretation of particular words relied upon by the Dispute Parties.

2 BACKGROUND HISTORY OF THIS DISPUTE PROCESS AND DOCUMENTS SUBMITTED

2.1 The summary of the background of this dispute requires a brief mention of Part G of the Network Code. A full copy of Part G is appended at Appendix B, but it will be helpful to include in this Determination some sections of Part G that are particularly relevant for this Determination.

2.2 The general principle is that before any Network Change can be implemented:

2.2.1 It must be formally proposed under Part G; and

2.2.2 It must be accepted by those Access Beneficiaries whom it will affect (and where the change is proposed by an Access Beneficiary, by NR); or

2.2.3 To the extent that there is any dispute as to whether the change should be implemented, or the terms on which it should be implemented, such dispute must

be resolved (whether by agreement, or in accordance with the Rules) in favour of the change being implemented.[1]

2.3 Conditions G1.1(a) and (b) provide that if NR wishes to make a Network Change it shall give notice in the following ways:

2.3.1 To each Access Beneficiary that may be affected by the implementation of the proposed Network Change, the Secretary of State, the Office of Rail Regulation and each Passenger Transport Executive.

2.3.2 **"Without delay"** (my emphasis) publish on its website a summary of its proposal for Network Change.

2.4 Condition G1.2 (e) provides that the content of the notice of proposed Network Change shall contain:

(i) The reasons why it is proposed to make the change, including the effects it is intended or may reasonably be expected to have on the operation of the network or on trains operated on the network;

(ii) A specification of the works to be done (including a plan showing where the work is to be done and the parts of the network and associated railway assets likely to be affected);

(iii) The proposed times within which the works are to be done and when they are intended or may reasonably be expected to be begun and completed;

(iv) NR's proposals (if any) for the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change;

(v) (Short Term Network Change);

[1] Explanatory note of Network Code Part G – Network Change.

(vi) Any additional terms and conditions which NR proposes should apply to the change, including any proposed variation procedure;

(vii) The results of any consultation undertaken in accordance with Condition G5;

(viii) The results of any preparatory works undertaking in accordance with Condition G6; and

2.4.1 Condition G1.2(f) provides:

(f) Be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the person specified in Condition G1.1(a), to enable any such person to assess the likely effect of the proposed change on its business and its performance of any obligations or the exercise of any discretions which it has in relation to railway services.

2.5 NR has an obligation to consult with each operator of railway assets likely to be materially affected by the proposed change.

2.6 Condition G2.1.1 provides that the Access Beneficiaries shall give notice to NR if it considers that:

(a) One or more of the following conditions has been satisfied:

(i) The implementation of the proposed change would necessarily result in Network Rail breaching an Access Contract to which that Access Beneficiary is a party.

(ii) Network Rail has failed, in respect of the proposed change, to provide sufficient particulars to that Access Beneficiary under Condition G1.2;

(iii) The implementation of the proposed change would result in a material deterioration in the performance of that Access Beneficiary's trains which cannot adequately be compensated under this Condition G2 or (where

that Access Beneficiary is a Train Operator) in respect of a Restriction of Use in connection with the implementation of the proposed change under that Train Operator's Access Agreement, or

(iv) The proposed change does not adequately take account of the reasonable expectation of the Access Beneficiary as to the future use of the relevant part of the Network.

2.7 Condition G1.2(f) was an amendment made on 10 January 2005 to the Network Code and Condition G2.1.1(a)(iv) was an amendment made on 12 January 2007. Prior to both amendments the Network and Vehicle Change Committee determined dispute NV58 (referred to below) and following the first amendment to the Network Code on 10 January 2005, but prior to the revision on 12 January 2007, ORR determined an appeal in relation to NV58. That was dated 28 January 2005. These dates are of significance in considering the persuasive authority of NV58 as I explain later in this Determination.

2.8 NR said in submissions that the consultations in relation to the rationalisation of assets in the Slough area had commenced several years earlier resulting in some changes to the proposed plans, for example at Langley. Consultations were conducted in relation to the Network Change that forms part of this Determination.

2.9 FGW gave formal notice of rejection of the Network Change pursuant to Condition G2.1.1 by letters dated 25 March 2013 and 22 May 2013, in the following terms:

2.9.1 NR had failed to provide sufficient particulars of the Network Change pursuant to Condition G.2.1.1(a)(ii)

2.9.2 Pursuant to Condition G2.1.1.(a)(iii) the Network Change would result in a material deterioration in the performance of FGW's trains which cannot adequately be compensated under condition G2 and

2.9.3 Pursuant to Condition G2.1.1.(a)(iv) the Network Change does not adequately take account of the reasonable expectations of FGW as to the future use of the network.

2.10 In summary, the written material and evidence provided over the course of this dispute process was as follows:

2.10.1 Statement of Claim by NR.

2.10.2 Statement of Defence to Claim by FGW.

2.10.3 Reply to Statement of Defence by NR.

2.10.4 Statement to Dispute by Freightliner.

2.10.5 Additional information by FGW in response to a request and written submission of FGW pursuant to Rule G17(g).

2.10.6 Additional information by NR in response to a request and written submission of NR pursuant to Rule G17(g).

2.10.7 Opening Statements, Responses to Questions and Closing Remarks at the Hearing on 27 September 2013 by NR, FGW and Freightliner. DB Schenker made representations.

2.11 I accordingly confirm that the Panel has taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarised in this Determination.

3 SUBMISSIONS MADE AND OUTCOMES SOUGHT BY DISPUTE PARTIES

3.1 NR's principal submissions were as follows:

3.1.1 NR had provided sufficient particulars of Network Change and that FGW had failed to indentify in what respect those particulars were deficient.

3.1.2 The assets subject to the Network Change were not in a critical location.

3.1.3 In proposing to remove the assets, NR had taken into account both the current operations and the future changes to the network as part of the Intercity Express

Programme (IEP), Crossrail and electrification and such demand as was anticipated regarding the routes affected.

3.1.4 NR had an obligation to review, risk assess and manage each asset so as to fully justify the management, planning and operational time taken, and the space and land occupied, rather than being used very rarely as a result of train set failure.

3.1.5 The implementation of the proposed Network Change would only have a minor impact on the Windsor Branch Line, and almost no effect on the Great Western Main Line (GWML). FGW had failed to prove that there would be any material deterioration in the performance of its trains.

3.1.6 FGW should manage its own trains to minimise any issues in their performance. NR should not be obliged to maintain and support assets in order to deal solely with set swap arrangements, a matter within the control of FGW. The Access Agreements are there to encourage train set reliability, and it would not be appropriate to retain the Windsor Bay Line purely to support train set issues which would remove some of the incentives on FGW to improve train set reliability.

3.1.7 (a) The previous use of the Windsor Bay Line was relevant. There were 25 instances when FGW units had failed or stopped due to driver issues on the Windsor Branch Line, and one instance where a FGW mainline train from Paddington to Oxford was shunted onto the Windsor Branch Loop. Of the 25 instances, seven did not require a set swap. Of the 18 instances where a set swap was required, 17 could have been undertaken on the proposed rationalised infrastructure.

(b) A more recent analysis had revealed that there were 19 train set swaps, all of which could have been undertaken on the proposed rationalised structure.

3.1.8 At paragraph 6.22 of its Statement of Claim, NR provided a detailed analysis to demonstrate that following removal of the Windsor Bay Line, functionality would meet FGW's requirements to swap sets in designated scenarios.

3.1.9 When EMUs are introduced at the end of 2016, the number of cars anticipated in relation to those EMUs likely to be deployed on the Windsor Branch is 3 cars and not 4 cars.

3.1.10 There is no evidence to show that Crossrail enhancements will lead to any increased growth in the use of the Windsor Branch Line such that train sets will need to be any longer than 3 cars.

3.1.11 In its London and South East Route Utilisation Study ("RUS"), NR estimated future growth of passenger numbers related to the main and relief lines and, as such the figures were not relevant to the Windsor Branch Line. The figures were not indicative of how a single branch line might perform in the future. A more appropriate comparison is the London Waterloo to Windsor Line where the growth by 2031 was anticipated at a figure of 20.4%.

3.1.12 The FGW proposal for a headshunt would involve the retention of the Windsor Bay Line and would result in NR retaining more assets which would require risk assessment, management and maintenance. The likely cost would be £2,015,000 (two million fifteen thousand pounds) and would result in a redesigning of the project and expensive delay over several months. The headshunt would not be long enough to take an IEP or an HST train set, making it unsuitable for stabling of almost all GWML's services.

3.1.13 Freightliner did not respond substantially, or in time to the Notice of Network Change as it was obliged to do so under Condition G2. Freightliner does not use the Windsor Bay Line or the Windsor Branch Line and only runs approximately four trains per day on the GWML, and therefore there should be no effect on its business or the performance of its operations.

3.1.14 The Department for Transport ("DfT") had been given notice of the proposed Network Change and there had been no form of response, as was usual. Email responses before the Adjudication from DfT were the personal views of members of the Department and did not form part of the formal process.

3.2 FGW's principal submissions were as follows:

3.2.1 The dispute raised issues specific to the location, but also raised important issues of principles firstly with regard to the twin drivers of the shared drive for efficiency following the McNulty Report, and secondly a successful expanding network showing sustained passenger growth and significant long term project investments in capacity and reliability.

3.2.2 A submission by NR of a thirty year framework of reference for gross cost reductions was inconsistent if such a reference was measured by reference to current service patterns and those in the imminent future. Model infrastructure costs should be evaluated against long term service patterns.

3.2.3 The assertion of savings over a thirty year period failed to address the aspects of impending electrification and more intense GWML through line use with the advent of Crossrail and IEP. The particulars of Network Change must address the operational aspects of these committed and funded proposals.

3.2.4 NR supplied insufficient particulars of the Network Change and in particular failed to engage with the operational areas raised as matters of concern by FGW.

3.2.5 A Network Change Notice should take account of the potential impact, if it is to be fit for purpose, in the context of an expanding network based on a significant passenger and freight growth.

3.2.6 The underlying assumption on the part of NR that networks should be planned on the basis of 100% reliability was flawed; there was a need to plan network infrastructures with regard to service recovery capacity.

3.2.7 The NR approach to service recovery capacity based on a distinction between incident cause is not a sensible approach.

3.2.8 The removal of the Windsor Bay Line would result in a material deterioration in the performance of FGW's trains which cannot be adequately compensated. The removal of the line would mean a severe reduction in the current capacity to address failed trains on the branch line.

3.2.9 The removal of the Windsor Bay Line would have future implications that would mean a level of disruption to an even more intensively used GWML.

3.2.10 It is reasonable to expect replacements of three car units to include three or four car units as these are the vehicle formations expected to be operated in the Slough area.

3.2.11 Compensation mechanisms are not sufficient. The majority of rolling stock failures will result in TOC attribution, and the removal of recovery capacity would result in an increase of payments by the TOC to the Infrastructure Manager.

3.2.12 It was common ground that this section of the network was to be electrified on the 25 kv AC overhead system. There are no 2 car 25 kv AC EMUs, and only 3 or 4 car sets have been manufactured. The DfT email of 19 September 2013 suggested that there would be a four car use and swapping manoeuvres using Slough Platform 1 were not viable.

3.2.13 The increase in services planned for the Main Line makes Slough Platform 2 (or any other platform at Slough) neither a sensible nor sustainable solution to aid train recovery.

3.2.14 An alternative solution would be to create a headshunt on the Windsor Bay Line and that would achieve 70% of the projected savings and the service recovery capability.

3.3 Freightliner's Principal Submissions were as follows:

3.3.1 Freightliner were unable to read the embedded signalling schemes served with the Notice of Network Change, and therefore had insufficient information upon which to make a reasonable assessment of the suggested change.

3.3.2 The workshop organised by NR on 14 February 2013 was attended by Driver Managers who were not authorised to represent the company on wider issues. The meeting on 4 April 2013 was not called in relation to Network Change, but rather the method of working to be used on the Colnbrook Branch.

3.4 DB Schenker, as an interested party made the following comments:

3.4.1 DB Schenker's comments were directed to matters of procedure and not merits. Crossrail was used as a trigger for rationalisation.

3.5 NR sought the following determination:

3.5.1 NR has provided sufficient particulars of the removal of the Windsor Bay Line.

3.5.2 The removal of the Windsor Bay Line will not result in a material deterioration in the performance of FGW's trains which cannot adequately be compensated under Condition G2.

3.5.3 The removal of the Windsor Bay Line adequately takes account of the reasonable expectations of FGW as to the future use of the relevant part of the network.

3.6 FGW sought a Determination as follows:

3.6.1 Upholding the validity of each of the grounds of its Notice of Objections to the Network Change in respect of the proposed removal of the Windsor Bay Line from the Windsor Branch Line at Slough West, so that the proposed removal may not proceed.

3.6.2 If FGW's objections regarding the adequacy of the Network Change Notice are not upheld, that other parties notified by NR of the Network Change are given the opportunity to reconsider their position in the light of the issues raised by FGW and to participate in these proceedings if they so wish.

3.6.3 If FGW's objections to the removal of the Windsor Bay Line are not upheld, NR is directed to consider, evaluate and consult FGW and other Access Parties on the alternative proposals suggested by FGW, and any other alternatives which it may identify, before reaching a conclusion on whether to establish the Network Change for that removal.

3.6.4 Further and other relief pursuant to paragraphs 47 and 48 of the Access Dispute Resolution Rules as appropriate.

4 ORAL EXCHANGES AT THE HEARING

4.1 At the hearing the Dispute Parties made opening statements and were then questioned by the Panel. At the conclusion of the hearing each of the Dispute Parties made closing statements. DB Schenker as an Interested Party made representations.

4.2 NR's opening submissions are summarised as follows:

4.2.1 The context was that for Control Period 4 (April 2009 to March 2014), the ORR's final determination of Funding agreed an industry finance package based on rail infrastructure, operations, maintenance, renewals and enhancements. NR was tasked with achieving cost savings through efficiencies of 21% over the five year period. The funding negotiations currently taking place for CP5 are seeking to reduce costs even further in line with the McNulty Report's findings with a likely efficiency savings target of a further 18% reduction in costs.

4.2.2 In recent years the trend has been to remove redundant and seldom used infrastructure to realise savings by reducing ongoing maintenance and renewal costs associated with replacing such assets.

4.2.3 The Thames Valley Signalling Centre at Didcot will allow for all rail operations and signalling on the GWML to be controlled from one hub. The next step in the migration is the transfer of the signalling area controlled by the Slough Power Signal Box, and this includes the proposed rationalisation of the Windsor Branch Line.

4.2.4 The removal of a life expired and fragile signalling infrastructure will remove risk from future Crossrail construction works, with the improved signalling control benefitting the performance of the Crossrail service, from its opening in 2018. The removal of the Windsor Bay Line will provide substantial savings to the migration project as well as future savings of maintenance and renewal budgets and removal of the ongoing need for risk review and management.

4.2.5 The retention of infrastructure as "nice to have" is outweighed by the expense of keeping it for use in its current state in the event that there might be a fault for the train set.

4.2.6 Eighteen out of twenty five fleet failure incidences in a three year period reported by FGW could have been reduced by a minor investment in rolling stock and improvement in basic train care maintenance. Such an approach would have removed the likelihood of needing to replace a train and, therefore, to undertake a set swap using the Windsor Bay Line. Platform 1 at Slough station can hold a 2 + 2, 2 + 3, or 3 + 2 pairing of trains where one has failed and the other operates the Branch. The only time a set swap or full Windsor Branch Operation could not operate is where a 3 car unit fails and is unable to be used, and only a 3 car is available as a replacement.

4.2.7 The Route Utilisation Study from July 2011 produces figures for the GWML, and not for the Windsor Branch Line. No evidence had been provided that the growth on the Windsor Branch Line would increase at anything like the rates indicated for GWML.

4.2.8 The Network Change process had been accompanied by an extensive consultation process.

4.2.9 The DfT had produced two emails which were before the Panel, and which reflected varying views within the Department.

4.3 FGW's submission are summarised as follows:

4.3.1 The dispute is predominantly about two issues; namely, those of expected future use of the Network, and potential for material impact upon train services' performance. There is a secondary issue of the quality of particulars provided by NR in the Network Change Notice.

4.3.2 Slough station is situated on a busy four line railway. By 2019 there will be 17 trains per hour on each of the down and up main lines at 125 mph running. The suburban services would be formed of three or four car electric multiple units and so predicting operational planning on less than three car train operations was wrong in principle.

4.3.3 Electrical multiple units fail less often. However it is less easy to assist an electric multiple unit, and so when a train fails in the future it will have a greater impact on the running of other services.

4.3.4 The suggested alternative by FGW was an appropriate alternative to the Network Change suggested by NR. The cost of a headshunt only equated to about 1.5 minutes of delay per day, which made the headshunt a wholly worthwhile investment.

4.3.5 The use of the word "courageous" by a civil servant at the DfT in an email was not a term of flattery, but an alert that in this particular context NR would be taking out a facility at its peril.

4.3.6 Ruscombe (Dispute V58) and Rugby (ADP13) and other previously disputed change locations were not similar to the present adjudication and each situation should be looked at individually.

4.3.7 Critically, the Ruscombe decision was made prior to Phase 2 of the Network Code Reform Process, which adopted the logic of a need to look forward. That approach, which did not exist in the previous version of Part G, was now embodied in Condition G2.1.1(a)(iv).

4.4 Freightliner's submissions are summarised as follows:

4.4.1 Freightliner had still not received all the information considered necessary for giving consideration to the proposed change. The points now being raised by FGW would have a potential impact on the GWML performance.

4.5 The following issues were questioned, discussed and clarified by NR.

4.5.1 The Windsor & Eton Central Line does not currently provide direct services into Paddington; passengers are always required to change at Slough.

4.5.2 The industry is investing actively in the Waterloo Route. The passenger numbers over the whole route between Windsor & Eton Riverside and Waterloo are greater than via Slough. There is no representative figure to use for the Windsor Branch Line and aggregating it into the GWML data is not realistic.

4.5.3 The RUS figures are only for the route from Reading to Paddington.

4.5.4 From 2019 there will be four extra trains per hour passing through Slough. Until then it is intended to run two extra paths per hour so there will be an opportunity to move across to the relief lines. Future impact of this proposal is difficult to anticipate because the characteristics of the electric trains which are going to be used are not available.

4.5.5 Amortisation over 30 years is in accordance with standard policy, whilst the existing Windsor Branch line infrastructure under notice is of uncertain age.

4.5.6 The maintenance figures are taken from RUS information. The question on the Windsor Branch is access and timing of the ability to do maintenance checks due to the density of service and overall timing of the daily service operation.

4.5.7 In relation to other facilities to clear a train from the Main Line, Southall Yard is about 8 miles from Paddington, Slough is about 16 miles and Reading at about 32 miles. There is no other facility on the Main Line side of the tracks between Paddington and Reading.

4.5.8 Contracts for the replacement work at Slough have already been signed by NR. The significant level of requirements for engineering resources, and in particular the signalling test requirements, requires a commitment at an early stage.

4.5.9 If the Network Change is not approved then it will cost approximately £600k in payments to contractors, and will also impact on the programme of work generally.

4.5.10 The headshunt option was not discussed in earlier conversations between NR and Operators.

4.5.11 NR has been advised by the DfT that there is no intention to run 4 car trains where there is currently no 4 car infrastructure for running them, including platform lengths.

4.5.12 If the suggested headshunt had been agreed two years ago it would have been feasible, but the layouts for the Thames Valley Signalling Centre have now been developed by contractors.

4.5.13 The maintenance strategy for the stabling of on track plant is that it will be stabled at Maidenhead.

4.6 The following issues were questioned, discussed and clarified by FGW:

4.6.1 In relation to particulars of Network Change then although NR is not required to undertake modelling before making a change proposal, it is nevertheless obliged to explain the effect both on present and future operations.

4.6.2 The Notice of Change is devoid of recognition of the intended increase in services on the GWML. The Notice does not take into account the likely effect from 2019 once the route to Bristol is electrified, a policy which was known at the date when the Notice was issued.

4.6.3 The Network Notice was promulgated but it was not placed on NR's website. The Notice does not satisfy Condition G1.2(f) because not all the Access Beneficiaries would have been able to work out the consequences.

4.6.4 No system can be planned for 100% performance. There will always be some element of failure. NR is proposing to remove any capability to contain a failure to the Branch Line, and any problem on the Branch Line will impact on the GWML.

4.6.5 High Speed train sets will not fit the Branch Line and IEP sets will probably not fit either. As can be seen from the log items provided to the Adjudication there have been instances when the Branch Line has been used for clearing a Main Line train set from the Main Lines.

4.6.6 FGW are Train Operators. TOCs/FOCs are not generally set up to have infrastructure specialist knowledge within them.

4.6.7 The new franchise agreement is expected in a few weeks time, but its intended content is not yet known.

4.6.8 The procurement of buses in this area can be very difficult and it varies at different times of the day.

4.6.9 There will be no 2 car electric multiple units available as a matter of fact. Even if 2 car units were retained, the future growth would necessitate much longer trains.

4.6.10 The core of the submission is that when planning for the industry over a long period there should be an element of planning for the worst scenarios. There can be no doubt that there will be increased traffic density through Slough station.

4.6.11 Electric multiple units may fail less frequently, but electric units add complexities so that failures are often more catastrophic. The 25kV electrification system also imports additional delays into operation, being specifically noted in the Electrification RUS.

4.6.12 The scale of change on the GWML is vast for both NR and FGW, with much learning to be undertaken and the need for consideration to approach the upgraded railway with an increased timetable. A very serious workstream has to be undertaken about how to mitigate failure situations.

4.6.13 The alternative proposal advanced by FGW is the creation of a headshunt which would maintain capability for handling failure situations on the Branch Line, but at a substantially reduced level of maintenance cost and facility.

4.7 The following issues were questioned, discussed and clarified by Freightliner:

4.7.1 In process terms Freightliner had a draft Network Change Notice but in the absence of a final full Change Proposal document Freightliner could not formally sign it off.

4.7.2 There were two workshops attended by Freightliner. One was not relevant to the Windsor Branch and the other meeting was not attended by the correct representatives.

4.7.3 Freightliner did not appreciate the potential impact on the GWML and had previously thought from the Change Notice that the effect of the changes were limited to the Branch Line.

4.7.4 The Network Change Notice concentrates on signals rather than on the permanent way.

4.8 In closing, NR made the following submissions:

4.8.1 Sufficient particulars of Network Change have been provided by NR. It was a very straightforward suggestion, and there could be no doubt that sufficient particulars had been provided.

4.8.2 NR had demonstrated by reference to previous operations that FGW could complete the train swap arrangements if the proposed infrastructure was in place.

4.8.3 Although NV58 had been decided prior to the amendments made to the Network Code nevertheless paragraph 9 of the Committee's Decision made it clear that by using the words "or would" indicated that the Committee had regard to the future use of the Network.

4.8.4 Paragraph 9.5 of the Committee's Decision in NV58 made it clear that where no rights, or reasonably prospective rights are infringed it would be wrong to curb NR's freedom to exercise its discretion as to the detailed management of the Network. It was NR that was the accountable body for both the efficiency and the safety of the Network.

4.8.5 The Branch Line frequency of three trains an hour would not increase. Although there would be an increased service on the GWML in the future, there were still sufficient gaps in the timetable to enable trains to be moved across the Main Line in the event of a failure.

4.9 In closing, FGW made the following submissions:

4.9.1 There were limited recovery facilities between Paddington and Reading and it was essential to retain the Windsor Branch Bay Line. This need would increase with the advent of Crossrail, IEP and electrification.

4.9.2 The NR Proposal for Network Change was silo thinking on their part and an inability to look forward. NR had taken a very narrow view in relation to the Network and it was vital to look at the wider picture.

4.9.3 It was regrettable that NR advanced the view that design had been frozen at an early stage and therefore could not be reviewed.

4.9.4 The particulars contained in the Network Change Notice were inadequate. They were signalling focussed and failed to have regard to the effect of that change by reference to future agreed and funded projects.

4.9.5 Crossrail would undoubtedly generate growth for passenger traffic at Slough.

4.9.6 The removal of the Windsor Bay Line would have a material impact both on the functioning of the Branch Line and of the GWML.

4.9.7 The alleged sum of £600k for carrying out the alternative proposal was neutral when balanced against expenditure that could be avoided on providing extra signals on the single line.

4.9.8 In the event of the objections being upheld by the Panel then FGW sought a Direction that Network Rail consider and evaluate the alternative proposal for the construction of a headshunt.

4.10 Freightliner made the following closing submissions:

4.10.1 Freightliner did not lodge any objections to the Network Change when it was issued in February 2013. However Freightliner were unable to read the embedded Signalling Scheme Plans that were served with the Notice and therefore are still not able to confirm acceptance of the Proposal owing to the lack of information to make a reasonable assessment of the detail.

5 CONSIDERATION, ISSUES AND SUBMISSIONS

5.1 I need to deal with a number of preliminary matters. They are:

- Approach
- Precedent
- Evidence of Future Use of the GWML
- Costs of the Network Change

I will deal with each of these matters in turn which will then inform my Determination as to the issues between the parties.

5.2 Approach

My primary approach and principal obligation is to reach a determination on the basis of the legal entitlements of the parties and upon no other basis. The principle is set out in A5 of the Rules and provides as follows:

"Each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis. Each and every Forum shall act in accordance with the law; and all its decisions, including determinations and decisions on procedure, shall be in accordance with the law."

5.3 Precedent

In this dispute both parties made reference to certain previous decisions. They are:

- NV58
- ADP13

5.4 I remind myself as to the approach to be taken with regard to previous determinations which is set out in A7 of the Rules:

"In reaching its determination, each and every Forum shall:

(a) *take note of relevant published ADA or TTP determinations (and those of any previous predecessor bodies) and of any other relevant tribunal excluding (to the extent referred to in (b) below) the ORR, as persuasive authority but need not be bound by them;*

(b) *be bound by any relevant decision of the ORR on a Regulatory Issue and any relevant decisions of the courts".*

5.5 NV58

(a) The decision was made by the Network and Vehicle Change Committee on 19 April 2004. The Committee had been asked whether or not NR was entitled to implement a Network Change and recover Ruscombe Up Goods Loop on the GWML and to plain line the Up Relief Line. It is common ground that the decision that was made under a previous version of the Network Code.

(b) The decision was the subject of an appeal to the Office of Rail Regulation (ORR) which was determined on 28 January 2005.

(c) NR in that case was obliged to provide "particulars of the proposed change which are reasonably necessary to enable [an Access Beneficiary] to assess the effects of the proposed change". ORR noted that the words *"reasonably necessary" need to be viewed in the circumstance of the case".*

(d) Paragraph 39 (c) of the decision of ORR stated:

"Condition G1.1 refers to the effect of the proposed change. It does not require Network Rail to provide a justification for the proposed change. In ORR's view, there is no reason why "effect" in this context should be given anything other that its ordinary and natural meaning i.e. the effect on the Train Operator that needs to be notified under Condition G1.1. It follows that ORR does not accept EWS' argument that material flaws in Network Rail's costs savings assumptions are relevant for the Train Operator under Condition G1.1."

5.6 In applying this reasoning to the facts of that case ORR noted *"whilst there is disagreement about the likely future use of the Loop if it is retained the Loop was used infrequently in the two years before November 2003, so the effect on anyone operator of its removal was unlikely to be serious". . .* In NV58 the Committee had found as a matter of fact that the Loop in question had been used 161 times over 21 months; a fact that the ORR regarded as being used "infrequently". NR relies on the fact that that in the present case there have only been 19 uses of the Loop in a period of three years.

5.7 NR suggested to me that the Committee in NV58 had carefully considered the future use of the Loop as was evidenced by the words "any Train Operator had, or would (my underlining) suffer detriment".

5.8 I approach that submission with some caution. The Network Code was amended on 12 January 2007 some two years after the Determination of NV58 by the inclusion of G2.1.1 (a)(iv). In my view there is now a clear requirement which requires me to take into

account the reasonable expectations of the Access Beneficiary as to the future use of the relevant part of the Network.

5.9 The determination of Network Change will involve the balancing of a number of interests and the Committee in NV58 stated two of the factors that need to be considered in that balancing exercise:

"9.5 Where no rights, or reasonably prospective rights are infringed, it would be wrong to curb Network Rail's freedom to exercise its discretion as to the detailed management of the Network, given that it is Network Rail that is the accountable body for both the efficiency and the safety of that Network".

"9.1 There must always be great care taken in any decision that results in the reduction of Network capability, in particular in respect of facilities that can help to minimise the impact upon service perturbations. As a general rule facilities that are closed are unlikely to be reinstated. In the context of continuing performance problems on the GWML, Network Rail should be particularly mindful of the need to make a soundly based decision on such a matter".

ADP13

5.10 This was a Determination by an Access Dispute Panel dated 20 February 2006. The case concerned two aspects of Rugby remodelling. The Panel identified a number of questions of principle including:

"3.3 What is a reasonable level of assurance for Network Rail to provide to Train Operators in respect of the functionality of the changes planned? What is the level of reassurance to which a Train Operator is entitled, and what is potentially unreasonable? Is EWS entitled to require Network Rail to provide comprehensive timetabling proposals (for the 2008 timetable) in order to demonstrate the feasibility of the moves in dispute?"

5.11 The Panel rejected the submission on the part of EWS that NR should carry out a full timetabling exercise and determined that NR had acted responsibly and in compliance with EWS' entitlements.

Evidence of Future Use of the Relevant Parts of the Network

5.12 The present factual position of the Windsor Branch Line was common ground between the parties. Paragraph 6.19 of NR's Statement of Claim stated as follows:

"6.19. The Windsor Branch Line runs the short distance of two miles from Slough and Windsor & Eton Central. The Line is used by tourists to reach Windsor Castle, and is therefore much busier for around three months in the summer. FGW operates three trains per hour each way. The trains take six minutes each way. For the busy summer months, 3 car trains sets are used. For the remaining nine or so months of the year, FGW operates two trains per hour. Platform 1 at Slough, and where the Windsor Branch Line runs can take 5 cars".

5.13 The Windsor Branch Line connects to the GWML and its operation both present and future (and in particular any recovery of failed vehicles) must in my opinion require an analysis of how the Branch Line is affected by the operations of the Main Line which in normal circumstances will take precedence over the operation of the Branch Line.

5.14 There was much common ground in relation to the present operations and the relationship that now exists between the Branch Line and the Main Line. There was, however, considerable divergence in views when a consideration of future operations on the GWML was undertaken. There was of course common ground as to the projects that had been approved and funded, and in particular:

- Crossrail
- I. E. P.
- Electrification

5.15 A number of submissions related to the likely increase in numbers of passengers on the GWML. I was referred to the London and South East Route Utilisation Study (RUS) published by NR. Their Network Licence requires NR to publish and maintain RUS documents where appropriate to deal with forecast changes in demand. NR urged upon

me as a suitable comparison the London Waterloo to Windsor Line which shows an anticipated growth of 20.4% by 2031.

5.16 FGW in answer to one of the Pre-Hearing questions asked by me, relied on the RUS study. Their interpretation of the Report in relation to growth numbers to 2031 was a 51% increase in passengers for services serving Reading and beyond, and 211% on Relief Line services reflecting the added attraction of Crossrail. FGW submitted that with the Branch Line providing a connection to Crossrail, the Branch Line is likely to reflect Crossrail growth rates. Growth on the Windsor Branch Line currently mirrors the growth on Paddington suburban services.

5.17 One of my industry advisors drew attention to the RUS for the Western Route which predicted rail passenger demand for the shorter to medium commuter market to London Paddington over the Relief Lines will increase by 21% in the peak, and by 25% all day between 2008 and 2019. The forecasts "predominantly represent demand from stations to the east of Reading to Central London such as Maidenhead, Slough and West Drayton".

5.18 The assessment of passenger growth is difficult given the many future variables. I am not convinced by the NR argument that the London Waterloo to Windsor line is the appropriate comparison particularly given their respective travel times. One of the effects of Crossrail will be to increase the penetration of London, rather than as at present travel to the termini of Waterloo or Paddington. I think it very likely that the advent of Crossrail will cause a greater number of people to travel to Slough, and the two RUS reports I have referred to provide evidence of that likelihood.

5.19 I therefore conclude that the committed and funded projects of IEP, Crossrail and electrification are likely to cause a substantial rise in passenger numbers travelling on the Windsor Branch Line.

5.20 The forecasted increase in passengers leads to the next question of the number of vehicles that will be required on the Windsor Branch Line in the future. The importance of the number of vehicles is related to the length of Platform 1 at Slough. There is a

detailed disagreement between FGW and NR as to the working length of the platform required to effect a train swap in the event of a failure. It is common ground that 2 car DMUs can be accommodated. It is also common ground that two 3 car units (diesel or electric) cannot be accommodated.

5.21 All parties agree that the Windsor Branch Line will be electrified on the 25 kv AC overhead line system. DMUs will therefore not be used in the longer term. There is no clear picture emerging from the DfT who will be the eventual funders, but it seems clear to me that the evidence is that there are no 2 car 25 kV AC EMUs operating on the system and that only 3 car and 4 car sets have been manufactured to date. The Department's email of 5 June 2013 disclosed by NR suggests that the working assumption is a 4 car use. I am therefore persuaded that looking ahead to electrification the swapping manoeuvres using Slough Platform 1 will not be viable.

COSTS OF THE NETWORK CHANGE

5.22 NR makes a strong submission in relation to the cost savings achieved by the Network Change, and in particular that it "cannot be right that NR should be obliged to maintain and support assets which will costs £6.75 million (six million seven hundred and fifty thousand pounds) over 30 years in order to deal with swap requirements, a matter within the control of FGW".

5.23 These savings are challenged and one of my industry advisors produced a copy of a maintenance cost calculation database that suggested savings on a much smaller scale.

5.24 In NV58, EWS had argued that there were flaws in NR's cost savings assumptions. I am reminded that such an argument was rejected by ORR who decided that Condition G1.1 refers to the effect of the proposed change and that there was no requirement on the part of NR to provide a justification for the proposed change. I therefore do not consider that this is a matter that I need take any further, other than to record the challenge to the cost savings claim by NR.

5.25 I have completed my consideration of the preliminary matters and now turn to those decisions sought by the Dispute Parties.

5.26 It is right to record that there is much common ground between the Dispute Parties as to the industry dynamics in the drive for efficiency as identified by McNulty and the sustained passenger growth identified in RUS and other industry publications. In carrying out a balancing exercise the parties' views diverge in relation to the proposed Network Change and its effect on both the Windsor Branch Line and on the GWML.

5.27 I set out the details of the formal Notice of Rejection of the Network Change by FGW in paragraph 2.9 above, and I now deal with each objection in turn.

NR has failed to provide sufficient particulars of the Network Change pursuant to Condition G2.1.1 (I)(ii).

5.28 The formal Network Change Notice is dated 26 February 2013 and it is common ground that there was a process of consultation. Freightliner take issue with the two workshops organised by NR, namely that on 14 February 2013 the wrong people were invited, and in relation to the workshop on 4 April 2013 it was called to discuss other matters namely the matter of working on the Colnbrook Branch.

5.29 The Network Code at Condition G1.2(f) requires that the Notice of a Proposed Network Change given by Network Rail . . .

be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the person specified in Condition G1.1(a), to enable any such person to assess any likely affect of the proposed change on the business and its performance of any obligations or the exercise of any discretions which it has in relation to railway services.

5.30 A plain reading of the Formal Notice of Network Change indicates to the reader a substantial emphasis on signalling and the refurbishment of an ageing signalling system. The description of the project objective "is fundamentally a signalling and relock and signalling re-control project" and one that included the "rationalisation of the existing

signalling arrangements of the Windsor Bay Branch Line and the removal of the Bay Line".

5.31 In subsequent correspondence between FGW and NR the wider issues were developed, but characterised by a discussion by NR as to the train swap arrangements that could be achieved by the proposed arrangements, and as I mention later, I think the NR arguments were of a convincing nature in relation to the present operations.

5.32 The obligation of NR is to explain, but not justify, the proposed Network Change. In my view, and in order to explain the effect of Network Change, there must be an analysis of the relationship between the operation of the Branch Line and the Main Line. It is fundamental in that analysis that future committed and funded projects must be taken into account if the full effect of that change is to be understood, accepting that there must be due regard to the level of knowledge of those likely to be affected by that change.

5.33 The committed and funding projects of Crossrail, IEP and electrification will have a substantial affect upon Slough station and its operation. In my view NR have not explained the effect of these projects in relation to the proposed Network Change.

5.34 There is evidence that the number of train operators did not fully appreciate the effect of the Network Change. "Freightliner" (two Dispute Parties) and DB Schenker (an interested party) were clear in their complaint as to the lacking of detail provided as to the effect of the Network Change Notice. The examination of the wider issues in this Adjudication was one of the reasons for the late joining to this process of both Freightliner and the interest of DB Schenker.

5.35 It is common ground that NR are in breach of Condition G1.1(b) in failing "without delay to publish on its website a summary of its proposals for Network Change". In my view this would have been another important means of communication when NR could have explained the effect of the Network Change, and it was an opportunity that was lost by NR through its failure to place a summary on its own website.

5.36 I therefore find for these reasons that NR has not provided sufficient particulars of the Network Change pursuant to Condition G2.1.1(a)(ii).

The implications of the proposed change would result in a material deterioration in the performance of that Access Beneficiary's trains which cannot adequately be compensated under Condition G2.

5.37 A plain reading of Condition G2.1 does not assist in understanding the time frame that has to be addressed in considering whether the proposed change would result in material deterioration in the performance of that Beneficiary's trains. It may not be a matter of any significance because G2.1.1(a)(iv) clearly requires an examination by the Access Beneficiary of the future use of the relevant part of the Network; such use does not necessarily have to be use by that Access Beneficiary itself.

5.38 In determining whether this Condition has been satisfied I will restrict my reasons to the present and immediate future, and the extent that I am required to consider the future use of the Network under this condition then I adopt my reasoning under Condition G2.1.1.(a)(iv).

5.39 I do not accept NR's reliance on the submission that train set failure is primarily the responsibility of FGW, and that it cannot be right to support assets which deal with train swap requirements which are a matter within the control of FGW. It is a matter of balance. Train failures in my view are an operational occurrence and it would be unwise to plan the Network on the basis of 100% reliability. It is right in my view to adopt an approach of service recovery capacity where it is reasonable and possible so to do.

5.40 NR has submitted with some force that in order to consider FGW's concern as to the swapping of trains then it is important to analyse the previous use of the Windsor Bay Line. I agree that is a helpful approach because it enables the proposed change to be considered by reference to evidence of present operations.

5.41 The results of the Log List in relation to train swapping was provided to the Panel and was summarised in NR's letter of 20 June 2013 as follows:

"There were 25 instances where FGW units have faulted, failed or been stopped due to driver issues on the Windsor Branch, and one instance where a FGW Main Line Paddington to Oxford Service was shunted . . . onto the Windsor Branch Loop. Of these 25 instances seven did not require a set swap. Of the 18 instances where a set swap was required 17 could have been undertaken on the proposed rationalised infrastructure . . . all 26 examples are attributable to FGW".

5.42 NR submitted a more recent analysis that revealed there were 19 train set swaps in the past 3 years, all of which could have been undertaken on the proposed rationalised structure.

5.43 I am satisfied that by reference to present operations of the Windsor Bay Line NR have demonstrated that the issue of train swapping could be undertaken on the proposed rationalised structure.

5.44 Condition G2.1.1.(a)(iii) requires me to consider in addition to the matter of material deterioration whether in that event the Access Beneficiary can be adequately compensated. It is common ground that not all failures relating to rolling stock attract a TOC attribution. The evidence in front of me by reference to the logs that were provided suggests that the position to date has been that the majority of rolling stock failures will clearly be a TOC attribution. I therefore conclude on the evidence in front of me that the net result of removal of recovery capacity will be to increase the payment by the TOC to the Infrastructure Manager. In those circumstances the compensation mechanisms will not assist the TOC.

5.45 However, I am satisfied that the implementation of the proposed change will not result in a material deterioration in the performance of the Access Beneficiary's trains if the consideration and analysis is confined to the present operation. The question of compensation does not arise. If I am required to consider the future position under this Condition then I consider that the implementation of the proposed change would result in a material deterioration to the Access Beneficiary's train for the reasons I set out in the next section.

5.46 **The proposed change does not adequately take account of the reasonable expectations of the Access Beneficiary as to the future use of the relevant part of the Network.**

5.47 I am required to consider the reasonable expectations of the Access Beneficiary as to the future use of the relevant part of the Network. I consider that the relevant part to this Adjudication relates to a consideration of both the Windsor Branch Line and the GWML.

5.48 In my preliminary considerations I considered in particular the possible impact of Crossrail, IEP and electrification. That led me to an analysis of future passenger numbers and the consequent likely train formations.

5.49 I determined at paragraph 5.33 that the committed and funded projects mentioned in the previous paragraph will have a substantial affect upon Slough station and its operation, the effect of which has not been explained by NR in its proposed Network Change Notice and subsequent consultations.

5.50 The reasonable expectations of the Access Beneficiary must include as a priority the running of an efficient service. I am satisfied that in seeking to run an efficient service the Access Beneficiary is entitled to have regard to the Network capacity available to it and others to recover from service disruption caused by a faulty train.

5.51 I am not prepared to go as far as FGW and describe the NR thinking as "silo, not system thinking". However I do think, and so find, that the Network Change proposed does not take account of the significant changes that are planned, funded and committed, as I have detailed in my consideration of the preliminary matters.

5.52 Accordingly, I am satisfied that the Network Change does not adequately take account of the reasonable expectations of the Access Beneficiaries as to the <u>future</u> use of the relevant part of the Network.

An alternative solution

5.53 FGW has proposed what they describe as a viable alternative, namely the provision of a headshunt on the Windsor Bay Line. In making that proposal FGW suggests that such a solution would capture 70% of the benefits sought by NR under its Crossrail Related Enhancement Project.

5.54 NR object to such an alternative on the grounds of cost (£2.15 million) but substantially on the grounds that the project would have to be re-timetabled completely, putting other key signalling works at risk. Time would have to be found for the work itself to take place. Also, the headshunt would not be long enough to take an IEP or an HST train set.

5.55 I am invited by FGW to make a Direction for the headshunt alternative to be implemented pursuant to Rules 47 and 48 of the Access Dispute Resolution Rules. I decline such an invitation for the following reasons. I do not have sufficient factual details of what would be involved in the implementation of such an alternative, and in particular the wider implications that I have no knowledge about. I am also conscious of the objections advanced by NR. I do not consider it appropriate to make a Direction in circumstances when the full facts of such an alternative are not before the Panel. However I will say that on the limited information available to me such an alternative does appear to have a number of proportionate attractions. There is the retention of what in the future may be a valuable part of the Network that aids service recovery, although there was disagreement on the figures as to the possible saving to NR. On FGW's case that saving would capture 70% of the benefit saving sought by NR under its Crossrail Enhancement Project.

6 DETERMINATION

Having carefully considered the submissions and evidence as set out in sections 2, 3 and 4 and based on the Panel's analysis of the issues and submissions set out in section 5, I determine as follows:

6.1 NR has failed, in respect of the proposed Change, to provide sufficient particulars to Access Beneficiaries under Condition G1.2.

6.2 The implementation of the Proposed Change would not result in a material deterioration in the performance of Access Beneficiaries' trains by reference to present operations and in that event the question of compensation does not arise. If Condition G2.1.1(a)(iii) requires me to consider the future position then I determine that the proposed Change would result in a material deterioration in the performance of Access Beneficiaries' trains for which compensation would not be an adequate remedy.

6.3 The proposed Change does not adequately take account of the reasonable expectations of FGW, an Access Beneficiary, as to the future use of the relevant part of the Network.

6.4 I decline to make a direction in relation to the alternative headshunt advanced by FGW.

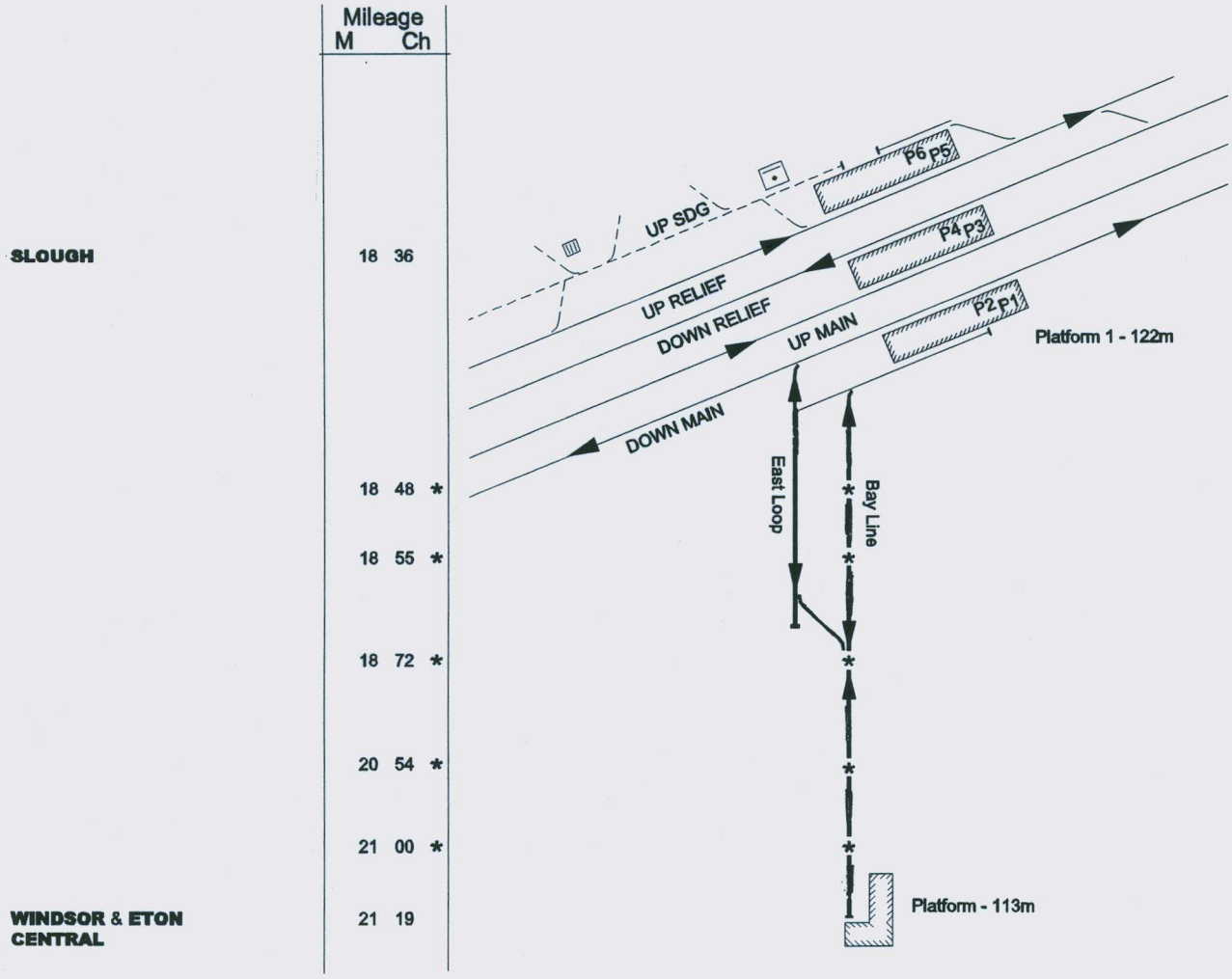
6.5 I make no order for costs.

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

Stephen Murfitt
Hearing Chair

21 October 2013

APPENDIX A PLAN SHOWING WINDSOR BAY LINE



APPENDIX B NETWORK CODE PART G (1 AUGUST 2010)

Attached