

ACCESS DISPUTE ADJUDICATION

Determination in respect of Dispute ADA17

Hearing held at 1 Eversholt Street, London NW1 on Thursday 17 October 2013

Present:

The appointed Adjudication Panel (the "Panel"):

Hearing Chair: Peter Barber
Industry Advisors: Michael Robson
Martin Shrubsole

Dispute Parties:

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

Kevin Newman Senior Commercial Scheme Sponsor
Clare Dwyer Addleshaw Goddard LLP, solicitors
Andrew Roberts Operational Planning Project Manager (East Midlands)
Spencer Gibbens Route Enhancement Manager
Sian Williams Legal Counsel, Routes

DB Schenker Rail (UK) Ltd ("DBS")

Nigel Oatway Access Manager
Pawel Nowak Rail Network Manager
Stan Kitchin Timetable Strategy Manager

GB Railfreight Ltd ("GBRF")

Ian Kapur National Access Manager

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

Jason Bird Track Access Manager, Freightliner Ltd

Interested Parties:

East Midlands Trains Ltd ("EMT")

Simon Taylor Head of Network Development
Lanita Masi Track Access & Network Change Manager

XC Trains Ltd ("XCT")

Bryony Govan Senior Traincrew Diagramming Productivity Manager

First Capital Connect Ltd ("FCC")

John Beer Head of Access Contracts

In attendance:

Tony Skilton Secretary, Access Disputes Committee ("ADC")

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1 INTRODUCTION, SUBSTANCE OF DISPUTE AND JURISDICTION

1.1 In this determination the abbreviations used are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text of the determination.

“**ADA**” means an Access Dispute Adjudication

“**ADRR**” means the Access Dispute Resolution Rules

“**CDRs**” means Conditional Double Reds

“**Condition**” means a numbered condition of Part G of the Network Code (1 August 2010 edition)

“**ORR**” means the Office of Rail Regulation

“**Operators**” means DBS, GBRf and Freightliner, or any of them

“**Parties**” means the Dispute Parties and the Interested Parties

“**PSRs**” means Permissible Speed Restrictions

“**SRTs**” means Sectional Running Times

“**TPRs**” means the Timetable Planning Rules

“**WTT**” means the Working Timetable

1.2 This dispute arises out of a Network Change proposal issued by Network Rail under Condition G1.1 in its “Notification of proposed G1 Network Change” dated 25 January 2013 Ref.NC/G1/2012/LNE/026A (the “**MML Network Change**”), as an amendment to a previous Network Change Notice issued in September 2012, in order to promote changes to various Midland Mainline PSRs as part of NR’s St Pancras to Sheffield Line Speed Improvements scheme (the “**Scheme**”) contained within the Network Rail CP4 Enhancements Delivery Plan published in September 2010. The dispute concerns the entitlement of NR pursuant to Part G of the Network Code to establish and implement the MML Network Change.

1.3 The Dispute Parties followed the procedure set out in Network Code Part G in issuing and responding to the MML Network Change notice and in responding to objections received. Each of the Operators issued to NR a formal notice of rejection under Condition G2.1. Correspondence and consultation was then entered into between NR and the Operators which failed to resolve all the Operators’ objections.

1.4 As the result of failing to reach agreement with the Operators on the proposed MML Network Change, NR referred the matter to dispute pursuant to Conditions G10.1.4(a) and G11.1(b) on the basis that the Operators had failed to agree on a number of issues within the MML Network Change notice, namely:

1.4.1 the removal of “Clay Cross Down Loop”, a loop also referred to as the “Down Goods Loop” situated at SPC 147.69mp, whose entry point is on the north bound (down) direction on the Amber Valley route from Derby prior to its convergence with the Erewash Valley route from Nottingham heading north towards Sheffield and whose egress is on the south of Clay Cross North Junction on the route from Clay Cross to Chesterfield (the “**Loop**”);

1.4.2 the introduction of CDRs at eight signals;

- 1.4.3 possible changes to SRTs on relevant routes;
 - 1.4.4 the effect on existing Junction Margins; and
 - 1.4.5 the merits of the Industry Business Case for the project.
- 1.5 The applicability of Condition G10.1.4(a) as grounding the dispute was subsequently challenged by the Operators and withdrawn by NR, as set out in the Dispute Parties' written statements of case and submissions and discussed in the oral exchanges at the Hearing. The applicability of Condition G11.1(b) was not challenged and remains valid.
 - 1.6 I am satisfied that the matters in dispute raise issues which should properly be heard and determined by an ADA duly convened in accordance with ADRR Chapter G to hear a dispute pursuant to Condition G11.1(b).
 - 1.7 In its consideration of the Parties' documents and submissions and at the Hearing of the dispute the Panel has been mindful that, as provided for in Rule A5, "each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

2 HISTORY OF THIS DISPUTE PROCESS AND DOCUMENTS SUBMITTED

- 2.1 NR constituted the dispute with the ADC by notice dated 23 August 2013 requesting that it be referred to an ADA for determination, noting that this had been agreed with the Operators except DBS. The dispute was registered as ADA17 and a Procedure Agreement with regard to it was entered into between all the Dispute Parties on 4 September 2013 agreeing that the determination procedure would be an ADA in the first instance. 17 October 2013 was set as the date for the ADA Hearing.
- 2.2 EMT, XCT and FCC subsequently declared themselves to be interested parties in the dispute.
- 2.3 In accordance with Rule G17 and within the time limits set by the ADC Secretary, NR served its statement of claim, the Operators served their separate statements of defence and NR served its reply, all setting out their respective positions and submissions.
- 2.4 Following receipt and review of the Dispute Parties' submission of statements of case, I issued a request on 4 October 2013 under ADRR Rules A9 and A10 encouraging them to attend the Hearing with evidence of whatever expectations they might have of future use of the relevant part of the Network.
- 2.5 In accordance with Rule G10(c) I also considered whether there were any relevant issues of law raised by the dispute. I concluded that the submissions did not give rise to any overarching issues of law, but that several issues of contract interpretation arose, relating mainly to the grounds for notice by an Access Beneficiary listed in Network Code Condition G2.1.1(a), the Network Change implementation process required of Network Rail under Network Code Condition G10, and (regarding the CDRs and SRTs arguments) the relationship and relative precedence between Network Code Parts G and D. These, however, were all issues of mixed fact and law which formed part of the substance of the dispute to be determined.
- 2.6 These conclusions were conveyed to the Industry Advisors and the Dispute Parties on 10 October 2013. At the same time the Dispute Parties were requested under ADRR Rules A9 and A10 to consider and attend the Hearing prepared to make representations regarding the treatment of any commercial confidentiality issues

arising from any evidence provided regarding their expectations of future use of the relevant part of the Network, noting that this would be against the established Access Disputes procedural background that all material would normally be required to be disclosed to all Dispute Parties and all of the dispute Panel members unless very cogent reasons were adduced for not doing so.

- 2.7 On 14 October 2013 Network Rail provided its written response in advance of the Hearing to the request for information issued on 4 October 2013. At the same time pursuant to ADRR Rule G17(g) NR provided written legal submissions concerning the issues in dispute. On that date a further request was issued to NR under ADRR Rules A9 and A10 encouraging it to attend the Hearing bringing any modelling or simulation data which supported the arguments being made regarding the issues raised in the dispute.
- 2.8 The Hearing took place on 17 October 2013, when all the Dispute Parties and Interested Parties were present and represented. The Dispute Parties made oral opening statements and provided written copies of them; NR's opening statement was made by its representative whilst a DBS representative made a single opening statement on behalf of all three Operators. The Dispute Parties were then questioned by the Panel and the Interested Parties were given opportunities to comment. None of the Dispute Parties wished to make a closing statement at the conclusion of the oral exchanges.
- 2.9 Of the five aspects of the MML Network Change Notice originally cited in the statements of case as those on which the Operators had failed to agree with NR (as listed in paragraph 1.4 above), existing Junction Margins and the Industry Business Case were acknowledged by the Operators during the submissions at an early stage of the Hearing not to be matters giving rise under Condition G2.1.1 to a right of objection to a Network Change Notice for Access Beneficiaries. SRTs were acknowledged similarly by GBRf (the only Operator to raise this matter) at a later stage of the Hearing, at the end of the oral exchanges. Accordingly, those three matters were withdrawn from and no longer formed part of the grounds for dispute, leaving the Loop and CDRs matters outstanding.
- 2.10 In the course of the oral exchanges regarding the introduction of CDRs, the Dispute Parties had indicated the possibility of reaching agreement to settle that matter with the benefit of further discussion between themselves after the Hearing. At the close of the oral exchanges concerning the removal of the Loop and the introduction of CDRs I indicated that, as regards the Loop matter, I required further information from all the Dispute Parties regarding the principal outstanding issue of future expectations of use of the relevant part of the Network and would be formulating a direction to that effect shortly after the Hearing. In those circumstances I was unable to indicate my position in principle regarding the major points of the dispute at the close of the Hearing, as I would normally have wished to do. I noted therefore that the CDRs matter would remain an open dispute issue for determination in due course unless, during the period given for provision of further information on the Loop matter, sufficient information on the CDRs was provided by NR and accepted by the Operators so as to enable their agreement on that element of the dispute.
- 2.11 NR invited me to make a partial determination on the CDRs matter at this stage, to avoid the delay consequent on waiting for the required further information relevant to the Loop and enable NR to "establish" the rest of the MML Network Change including the CDRs. NR confirmed that the Loop issue by itself would not have an effect on the December 2013 Timetable because of various physical changes already made and the TPRs and Timetable already having been agreed. In the circumstances of the prolonged discussion that had taken place towards the time for implementing the December 2013 Timetable, and having already indicated that such further information was required, I declined to attempt such an immediate partial

determination unless NR chose to withdraw the Loop issue from the dispute, thereby leaving the CDRs matter as the only one to be determined.

- 2.12 Following an adjournment during which the Dispute Parties considered their positions, NR reported having had conversation with the Operators and asked for 24 hours to consider matters further but for the ADA process to be regarded as continuing meanwhile. NR indicated that consideration would be given in this period to withdrawing the Loop proposal and working with the Operators to secure an outcome in the best interests of the industry. I noted that this would still leave the CDRs matter to be determined, so that, unless in the interim the relevant objections to the CDRs were also withdrawn by the Operators, then as no further information on the CDRs was being requested by the Panel, I would proceed to make a determination regarding the CDRs exclusive of the Loop.
- 2.13 Following the Hearing, on 18 October 2013 the Secretary was informed by Network Rail that whilst it appreciated the help of the Operators in trying to come to an alternative resolution, NR's current position remained to await the Adjudication result and not to progress with any alteration to the MML Network Change. On 21 October 2013 accordingly I issued my directions requiring the provision of further information by the Dispute Parties regarding the Loop matter.
- 2.14 By 4 November 2013 and within the required time limits the Dispute Parties had provided and responded to each others' respective provisions of further information relevant to the Loop matter as required by my directions. Also on 4 November Network Rail informed the Secretary that agreement had now been reached on the CDRs matter, the Dispute Parties having analysed the impacts and having elicited the necessary information to enable DBS and GBRf (the only Operators concerned) to withdraw their objections. Accordingly the CDR matter also was now withdrawn from and no longer formed part of the grounds for dispute, leaving only the Loop matter outstanding. On 8 November NR provided further unsolicited comment on the Operators' previous responses on the Loop matter.
- 2.15 Following review of the further information, responses and comments provided by all the Dispute Parties on the Loop matter and after discussion with the Industry Advisors, on 15 November 2013 I issued a Summary of Decisions in respect of the Dispute. I noted then that, having been unable to indicate the substance of the determination at the close of the Hearing, I considered it necessary and expedient to adapt the dispute procedure so as to inform the Dispute Parties of the substance of the decisions and conclusions now reached in accordance with Rules G48 and G49(j), in advance of preparation and publication in due course of the full written determination of the dispute which would incorporate such decisions and conclusions. I confirm that the decisions and conclusions recorded below in this determination are the same as those indicated in the Summary of Decisions.
- 2.16 In summary therefore, the documents and written material provided over the course of this dispute process are as follows:
 - 2.16.1 Notice of Dispute served by NR on 23 August 2013.
 - 2.16.2 Statement of Claim submitted by NR on 12 September 2013.
 - 2.16.3 Statements of Defence to Claim submitted by GBRf on 23 September 2013, and by DBS and Freightliner on 27 September 2013.
 - 2.16.4 Reply to Statements of Defence submitted by NR on 4 October 2013.

- 2.16.5 Request by the Hearing Chair under Rules A9 and A10 for information to be provided by the Dispute Parties at the Hearing regarding expectations of future use of the relevant part of the Network, issued on 4 October 2013.
 - 2.16.6 Conclusions of the Hearing Chair in accordance with Rule G10(c) regarding any relevant issues of law raised by the dispute, issued on 10 October 2013.
 - 2.16.7 Request by the Hearing Chair under Rules A9 and A10 for representations to be made by the Dispute Parties at the Hearing regarding the confidentiality treatment of further information to be provided, issued on 10 October 2013.
 - 2.16.8 Information in response to the 4 October 2013 request and written legal submissions pursuant to Rule G17(g), submitted by NR on 14 October 2013.
 - 2.16.9 Request by the Hearing Chair under Rules A9 and A10 for NR to attend the Hearing with any modelling or simulation data which supported the arguments being made regarding the issues raised in the dispute, issued on 14 October 2013.
 - 2.16.10 Written copies of opening statements made on behalf of NR and collectively on behalf of the Operators at the Hearing on 17 October 2013.
 - 2.16.11 Directions of the Hearing Chair requiring the provision by the Dispute Parties of further information relevant to the Loop matter, issued on 21 October 2013.
 - 2.16.12 Further information as required by the 21 October 2013 Directions, submitted by GBRf on 27 October and by NR, DBS and Freightliner on 28 October 2013.
 - 2.16.13 Responses to the opposite Dispute Parties' further information provided as required by the 21 October 2013 Directions, submitted by GBRf on 28 October 2013 and by NR, DBS and Freightliner on 4 November 2013.
 - 2.16.14 Further submissions in reply to the Operators' responses, submitted by NR on 8 November 2013.
 - 2.16.15 Summary of Decisions by the Hearing Chair, issued on 15 November 2013.
- 2.17 Of the documents and written material listed in paragraph 2.16, all will be published and available on the ADC website together with this determination, with the exception of certain confidential information and material excluded from publication under Rule G61.
- 2.18 I accordingly confirm that I have 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 RELEVANT PROVISIONS OF THE NETWORK CODE

- 3.1 The provisions of the Network Code particularly relevant to this dispute are Part G Definitions and Conditions G1, G2, G10 and G11 (1 August 2010 edition). These are attached as Appendix A to this determination.
- 3.2 It is appropriate to provide here some further background to and explanation of the key parts of these provisions. Paragraph D of the Explanatory Note to Part G of the

Network Code states “The general principle is that *before any Network Change can be implemented* [my emphasis]:

“(i) it must be formally proposed under Part G; and

“(ii) it must be accepted by those Access Beneficiaries whom it will affect (and, where the change is proposed by an Access Beneficiary, by Network Rail); or

“(iii) 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 ADRR) in favour of the change being implemented.”

This principle is given practical effect by the logical succession of provisions in Condition G10. G10.1 enumerates the alternative conditions under which NR is entitled to implement a proposed Network Change, amounting to the absence or resolution of any objection or dispute, and defines a notification process whereby NR may confirm such absence or resolution or refer the matter for ADRR determination. G10.3 enumerates the alternative conditions under which NR is not entitled to implement a proposed Network Change, amounting to the subsistence of an unresolved objection or dispute.

- 3.3 Condition G2.1.1 in effect lists exhaustively the grounds for valid objection by an Access Beneficiary to a proposed Network Change. It states (among other matters):

“The Access Beneficiary shall give notice to Network Rail if it considers that: (a) one or more of the following conditions has been satisfied:

“(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 expectations of the Access Beneficiary as to the future use of the relevant part of the Network.”

- 3.4 Condition G2.1.1(a)(iv) was introduced by an amendment to the Network Code made on 12 January 2007. Prior to this amendment the Network and Vehicle Change Committee determined at first instance and ORR determined an appeal in relation to dispute NV58 dated 28 January 2005. This timing is relevant in assessing the applicability and persuasive authority of NV58 as raised by NR's legal submissions and referred to below in this determination.

- 3.5 During the industry consultation processes leading to this amendment (among others) it was described by ORR as responding to the need for “a right to seek to block a change where it is likely to lead to loss of future capability of the network (including use above and beyond the existing access contract), or is otherwise very difficult to compensate (e.g. loss of overall network resilience)”. ORR noted further: “In terms of the specific criteria underpinning the right to seek to block a change, we have concluded that the proposed change would: ... (c) have a material effect on the ability of train operators (beyond existing access rights) and funders to plan their activities;

and it is not consistent with the efficient use and development of the railway network”.¹

- 3.6 Subsequently, in proposing in 2006 the changes to the Network Code which included the amendment to introduce Condition G2.1.1(a)(iv), Network Rail entitled it “Blocking of a Network Change for future use reasons”. Under this heading NR explained as follows:

“The new drafting would permit train operators... to reject a Network Change if they consider that it does not adequately take account of their needs in relation to the future use of the part of the network in question.

“The need for this additional ‘blocking right’ was set out in the Conclusions Paper [of ORR]. The industry working group has sought to confirm how this would work in practice and it has been agreed that *the new drafting will be supported by guidance setting out how ‘reasonable’ expectations as to future use would be judged and the evidence that will need to be provided to demonstrate such an expectation* [my emphasis]. This guidance will be aimed at assisting any affected parties and, if necessary, the relevant disputes panel or appeal body. In terms of how expectations would be judged Network Rail would assess the industry business case in line with its Business Planning Criteria. Further discussion is underway about what evidence parties would need to provide to demonstrate reasonable expectations”.²

- 3.7 To the best of my knowledge, no such guidance as anticipated by Network Rail has since been forthcoming. Nor has any ADRR determination dealt with or pronounced on the issue of reasonable expectations of future use, since the introduction of Condition G2.1.1(a)(iv) in 2007, with the sole and very recent exception of ADA16. The Hearing in that case took place before this Hearing, on 27 September 2013, but its determination was not published until just after this Hearing, on 21 October 2013. Accordingly I was not able to take account of the ADA16 determination in the course of this Hearing, but I have considered it subsequently and taken it into account in reaching this determination, as mentioned further below.

4 SUBMISSIONS MADE AND OUTCOMES SOUGHT BY DISPUTE PARTIES

- 4.1 As noted above in paragraph 2.16, but subject to the qualification in paragraph 2.17, the statements of case and all further submissions and other material submitted by the Dispute Parties before, during and after the Hearing will be published and made available on the ADC website together with this determination. Other than as regards the determinations sought by the Dispute Parties, therefore, I do not further summarise their submissions in the body of this determination, except insofar as reference is made to them later in the course of my discussion of the oral exchanges at the Hearing and the analysis and consideration of issues involved.

- 4.2 In its Statement of Claim NR sought the following determinations:

4.2.1 NR has provided sufficient particulars of the removal of Clay Cross Loop.

4.2.2 The removal of Clay Cross Loop will not result in a material deterioration in the performance of the Defendants’ (the Operators’) trains which cannot adequately be compensated under Condition G2.

¹ ORR consultation paper “Network Code reform phase 2: Conclusions - the way forward” (November 2005), paragraphs 3.57(d) and 3.59(c).

² Network Rail briefing note to CRC Secretary “Part G Reform - Stakeholder Briefing Document to accompany Proposal for Change No. 42” (27 October 2006).

- 4.2.3 The removal of the Clay Cross Loop adequately takes account of the reasonable expectations of the Defendants as to the future use of the relevant part of the network.
 - 4.2.4 The contents of the notices given to Network Rail maintaining the Defendants' objections to the MML Network Change Notice are unreasonable for the reasons outlined in section 5.1 of its Statement of Claim.
 - 4.2.5 As a result of this determination Network Rail should be permitted to establish the MML Network Change Notice.
- 4.3 In its Statement of Defence GBRf sought the following determinations:
- 4.3.1 As a point of principle, NR has no legal entitlement to implement or have previously implemented any items of a proposed Network Change Notice without the Notice already having been established.
 - 4.3.2 As a point of principle, NR has no legal entitlement to offer train slots to operators that include any operational changes from a Network Change Notice without the Notice already having been established.
 - 4.3.3 As the MML Network Change Notice has not been established, NR be directed to immediately re-connect the Loop to the Network.
 - 4.3.4 The contents of GBRf's response to the MML Network Change Notice, with respect to information on the Removal of the Loop, CDRs and SRTs are reasonable, valid and are required to be addressed by NR.
 - 4.3.5 NR's assessment of the requirement for the Loop has been based on incorrect and incomplete information and, with the reasonable expectations of GBRf's current and future use being incorrect, NR should not be permitted to establish the MML Network Change Notice.
- 4.4 In its Statement of Defence DBS sought the following determinations:
- 4.4.1 NR is not entitled to rely on the provisions of Condition G10.1.4 to refer this matter for determination in accordance with the ADRR.
 - 4.4.2 NR was not entitled to implement the disconnection of the Loop in advance of the establishment of the MML Network Change or a favourable determination being issued pursuant to the ADRR.
 - 4.4.3 NR should withdraw the proposal to remove the Loop from the MML Network Change.
 - 4.4.4 NR should be directed to supply further information to DBS to demonstrate the likely effect on Junction Margins and the availability of capacity that the proposed introduction of CDRs at 8 signals will have for the future.
- 4.5 In its Statement of Defence Freightliner sought the following determinations:
- 4.5.1 That the MML Network Change shall not be established.
 - 4.5.2 NR has no entitlement to implement any part of the proposal, as Condition G10.1 has not been satisfied.

- 4.5.3 The Loop must be reconnected to the Network in at least equivalent format to that provided prior to its disconnection in a timely and expeditious manner.
- 4.6 In its Reply to the Operators' Statements of Defence NR stated as follows in response to the decisions and orders sought by the Operators:
- 4.6.1 NR wished to proceed with the MML Network Change regarding the Loop, so as to enable the Midland Mainline PSR Changes to take place, in addition to the need for rationalisation, and to avoid retention of assets which did not justify ongoing performance risk, maintenance and cost.
- 4.6.2 The Loop had been disconnected as a temporary measure, and could be reconnected if required.
- 4.6.3 Matters which were properly the subject of due process under Part D of the Network Code, such as timetabling and train slots, should be kept separate from Part G proposed Network Changes.
- 4.6.4 NR had provided sufficient particulars of the MML Network Change, including the removal of the Loop and the CDRs.
- 4.6.5 SRTs were not the subject of the MML Network Change.
- 4.6.6 If the Adjudication determined that the Loop should not be removed, then NR requested that the rest of the MML Network Change Notice should be proceeded with.
- 4.7 In its opening statement at the Hearing, NR impliedly qualified the determinations previously sought or accepted in its statements of case, by virtue of certain acknowledgements and admissions as to various significant underlying facts concerning the Loop. NR stated as follows:
- 4.7.1 The entry for the Sectional Appendix for the Loop had shown an incorrect length, and this had lain unchallenged for some length of time. However, the first challenge to this published length had come from GBRf during the consultation process for the Network Change, and not through previous discussions regarding train paths for this route. As soon as the Loop's length was challenged Network Rail had investigated and found that the Sectional Appendix length was incorrect. This was notified to all the Operators in April 2013, in the responses by NR to the Operators' initial response letters. Should the Loop require to be reconnected NR would of course publish its correct length in the updated Sectional Appendix for the route.
- 4.7.2 A single train path had been routed through the Loop since March 2013, that path having been bid for after the MML Network Change Notice was issued. As the Loop had now been temporarily disconnected, this train had been accommodated and planned into an alternative facility nearby from the December 13 Timetable. The impact on performance of this train being replanned could not be measured as Network Rail could not find any evidence of this train running in the last six months (including before disconnection) to enable a comparison to be made.
- 4.7.3 To enable the raising of the line speed in this instance it would therefore be most efficient and cost effective to disconnect and remove the Loop from the Network. This would only require the completion of the removal of the asset, by removal of (non-point) track and signalling. Once fully removed there

would be no further need to incur maintenance and risk assessment costs as the assets would no longer be there.

4.7.4 NR had considered an alternative, which was to retain the Loop by replacing the points leading into and out of it. These new points would have to be a different specification to allow a higher line speed through them, whilst still maintaining a connection to the facility. New pointwork would need to be installed in the adjacent Down Main line, and some adjustments to the signalling equipment would be required. As well as these additional costs the Loop would remain in place incurring maintenance and risk assessment costs.

4.7.5 It would therefore be preferable for the Loop to be removed. However, in order to proceed with the project and the MML Network Change as a whole, if it were to be determined that the Loop should not be removed on the basis of the objections by the Operators, NR requested that the Network Change should be permitted to be established, retaining the Loop, pursuant to ADRR Rules 47 and 48.

4.8 In their collective opening statement at the Hearing presented by DBS, the Operators expressly qualified the determinations previously sought or accepted in their statements of case, as follows:

4.8.1 It was stated on behalf of all the Operators (whereas previously this had been stated only in DBS's Statement of Defence) that they sought a determination that NR should withdraw its proposal to remove the Loop as part of the MML Network Change.

4.8.2 It was stated on behalf of both DBS and GBRf (whereas previously this had been stated only in DBS's Statement of Defence) that they sought a determination that NR should supply further information to demonstrate the likely effects on Junction Margins and the availability of capacity that CDRs would have for the future.

4.9 As noted in paragraph 2.9 above, existing Junction Margins and the Industry Business Case were acknowledged by the Operators at an early stage of the Hearing not to be matters giving rise under Condition G2.1.1 to a right of objection to a Network Change Notice for Access Beneficiaries. SRTs were acknowledged similarly by GBRf at a later stage of the Hearing, at the end of the oral exchanges. Accordingly, as at the close of the Hearing those three matters were withdrawn from and no longer formed part of the grounds for dispute, or determinations sought, leaving the Loop and CDRs matters outstanding. As noted in paragraph 2.14 above, subsequent to the Hearing but prior to issue of this determination, further discussions with NR enabled DBS and GBRf to withdraw their objections to the Network Change in relation to CDRs. Consequently, it is necessary for this determination to reach decisions regarding remedies and entitlements only with regard to the proposal to remove the Loop from the Network.

5 ORAL EXCHANGES AT THE HEARING

5.1 As previously noted, at the Hearing the Dispute Parties made opening statements and were then questioned by the Panel. Written copies of the opening statements will be included in the documents that have been published and made available on the ADC website together with this determination; they are not, therefore, summarised further here (except as in the preceding section, regarding their effect on outcomes sought).

5.2 Having considered the Dispute Parties' written submissions and documents as listed in paragraphs 2.16.1-8 above and heard their opening statements, the Industry

Advisors and I questioned the Parties' representatives to clarify and supplement a number of points arising out of their submissions or otherwise relevant to the issues in dispute. In line with the practice adopted at previous ADA hearings, although the individuals' answers to questions were not taken as sworn evidence (in common with the Dispute Parties' written submissions and statements), I consider that we are entitled and (in the absence of any indication to the contrary) obliged to accept them as true and accurate statements. Accordingly, I have taken them all into account in reaching this determination.

- 5.3 Questioning, clarification and discussion by the Panel with the Parties proceeded as recorded below. References here to "the Operators" being questioned or responding on any point include discussion with all or any of them on behalf of each other, in circumstances where their respective positions and interests did not diverge. References here to questions or comments by "the Panel" mean by either or both of the Industry Advisors rather than by myself.
- 5.4 In an attempt to assist by providing some signposting through the record of Q&A I have listed headings below for the principal issues dealt with in the course of the discussion, in order to identify the particular themes or topics explored. I have also briefly summarised the analysis undertaken of issues and submissions, including various provisional conclusions reached along the way. These issues and analysis are summarised here only according to the chronological sequence in which they were discussed, rather than grouped separately by discrete lines of inquiry. It also proved necessary sometimes to revisit issues previously dealt with, resulting in a certain degree of repetition.

Operators' general expectations of future use

- 5.5 We commenced by inviting the Operators to add to their submissions by way of clarification as to their expectations of future use of the relevant part of the Network, this being the ground for objection under Condition G2.1.1(a)(iv). The Operators explained that such expectations had been considered jointly with NR as a matter of adequacy of capacity, because operators worked in the competitive environment of the total traffic available. The Operators at this point tabled three route maps published by NR which showed aspirations regarding future traffics - Maps numbered 4, 7 and 12. GBRf confirmed that its expectations were part of the general capacity assumption of future traffic.
- 5.6 Asked to clarify whether the figures quoted on the maps were the sum of all traffic in both directions over the routes or if there were reciprocal flows, the Operators said the figures quoted were the sum of trains in both directions, and noted that the current published Strategic Freight Network document gave details of flows in each direction up to 2019. The Operators confirmed that, of the figures stated in para. 20 of their opening statement, about half were Down trains, and that in para. 18 they had given single direction numbers.
- 5.7 The Operators declined at this stage to volunteer any information about individual operators' expectations or aspirations as regards their particular share of the capacity being indicated. The Interested parties also had no comments to make at this stage. I noted that we would return to this issue later.

Grounds for constitution of this dispute

- 5.8 Following an adjournment we turned to consider the points made in the submissions challenging NR's grounds for constitution of the dispute and, therefore, the interpretation and effect of Condition G10. I explained my understanding of how G10 works, namely that the G10.1.4 ground for NR referring a matter for ADRR determination is dependant on an Access Beneficiary's notice of dispute under

G10.1.3, which in turn can only be given in response to a notice from NR under G10.1.2 stating positively that it believes it is entitled to implement a proposed Network Change. Although G10.1.2 is expressed only in facilitative terms - NR "may" issue a notice - it seems that unless it does so there is effectively no way of triggering a right to bring a dispute under G10.1.4.

- 5.9 I noted that it was common ground in this dispute that NR had never issued a notice under Condition G10.1.2. Accordingly, I suggested that logically it should also be common ground that the dispute was not about an Operator's notice under G10.1.3 – and therefore could not be described as being brought under G10.1.4. NR agreed that this was the case.
- 5.10 I noted, however, that Condition G11.1(b) was still potentially available as a ground for NR referring the matter for ADRR determination. The Operators all confirmed their agreement that the dispute was adequately constituted under G11.1(b).
- 5.11 I explained also that it was important to note that Condition G10.3.1 was relevant, not only as potentially having affected the valid constitution of this dispute, but because of its impact on how the whole Network Change consent procedure works. Condition G10.1.1 sets out effectively exhaustively the conditions under which NR shall be entitled to implement an NR proposed Network Change. Condition G10.3.1 then sets out exhaustively the circumstances where NR is not entitled to implement such a Change, i.e. unless it has become entitled under G10.1.1.
- 5.12 In effect therefore, as a matter of practice, it appeared that Condition G10.3.1 precluded NR from being unambiguously in a position to implement any NR proposed Network Change unless it went through the notice stage set out in Condition G10.1.2, despite not being actually obliged to do so, this being expressed only in terms of what it "may" do. NR declined to express a view on this apparent conundrum in the drafting and construction of Condition G10, but confirmed that in the present case, in any event, NR had not reached that stage as it still had an unresolved dispute, and consequently it acknowledged that it had not yet become entitled to implement the Network Change.

Implementation of the MML Network Change

- 5.13 We moved therefore to consider whether NR had in fact already implemented the Network Change in so far as it included removal of the Loop, in breach of Condition G10.3.1. The Operators asserted that the work done so far to the Loop by NR amounted clearly to implementation, noting that the evidence put forward by NR in its submissions accepted that it would put the Loop back if necessary. The Operators considered that what actually constituted NR carrying out the relevant work was NR doing any part of what was set out in the Network Change Notice. Although the MML Network Change had many different elements, that part of the Network which consisted of the Loop was still in situ and intact, and the Operators could expect to use it but were unable to do so because of the works already carried out. The Operators accordingly asserted that the MML Network Change had not been established and therefore the Loop should still currently be available for their use.
- 5.14 Asked what physical work had actually been done at the Loop, NR explained that the switches had been removed but the track and signalling of the Loop were still in place. It always had been NR's intention to leave the Loop until the Network Change had been established, but NR clarified that the switches and crossings at either end of the Loop had been removed and replaced with plain track, so that a train could not get in there. NR confirmed it was not just a question of the points having been secured – there had been a physical change to the rails. However, the signalling was still available and the Loop could be reconnected if the switches and crossings were replaced.

- 5.15 I noted that in its correspondence with the Operators NR had mentioned a “temporary Network Change” and I asked what had happened in that respect. NR explained that its delivery of the overall scheme from St Pancras to Sheffield involved what it referred to as “stageworks”. NR had brought up the suggestion of a temporary Change at a stakeholder meeting but had been told there would be objection to that. NR found itself in the position of work having commenced and there being more than 6 months to implementation since the Loop had been taken out of use, so NR had suggested a temporary Change. It had arrived at this position because it had had the opportunity of an already arranged possession for other works in May 2013, so had brought up the matter of doing the Loop work at a stakeholder meeting. This had avoided having to arrange a separate possession which would have disturbed the train service again. NR confirmed it considered that, in order to do what work was necessary within the timetabling process, it had been essential to do the work in May.
- 5.16 Asked if it considered that the physical works as carried out amounted to a partial implementation of the MML Network Change, NR did not accept that there was any concept of partial implementation, reiterating that the works done to the Loop were simply “stageworks”. It was suggested to NR that, taking this construction to its logical conclusion, it could effectively have done physical works for delivering 99% of all the content in the MML Network Change Notice without this amounting to actually implementing the Change. NR responded that the Loop had not been “removed”; it was still there but was currently out of use, as a temporary measure only. NR confirmed it regarded “removal” as meaning the entire facility being taken out. In this case the Loop remained on the ground but plain line had been inserted so that trains could not access it.
- 5.17 The Operators responded that if the Loop was not attached to the main running line, then it was not a loop. The Operators could not use the Loop any more and believed that NR would put it back only if it lost this dispute. Accordingly the Operators asserted that the Loop had been “removed”.
- 5.18 The Panel noted that NR had removed the switch rails and the closures rails, therefore would have made cuts in the rails, and asked whether, if NR was putting the Loop back into use, the necessary cuts would be made in the same places. NR stated that the cuts had been made compatibly with suiting either outcome, i.e. providing higher line speed or reinstatement of the Loop. The Operators accepted that, as NR had pointed out, there was no specific concept in Part G for partial implementation, but noted that there was no procedure for stageworks either, to which NR agreed.
- 5.19 However, asked to clarify if it was the case that, from an Operator’s perspective the Loop had not been available since May 2013 not because of any defect but because of the Scheme, NR again agreed and stated that it was stageworks and that this had been made clear to the Operators. The Operators confirmed that this point had been made clear by NR but not the process by which the current situation would be arrived at; they were not aware of any timeline for bringing this facility back into use.
- 5.20 Neither NR nor the Operators were aware of any other element of the MML Network Change Notice where a facility had been taken out of use but subsequently was being or had been returned into use. Asked by the Panel if any other parts of the MML Network Change Notice had been carried out already, NR responded that several green banners had been implemented and 2 or 3 CDRs implemented because of realignment of tracks along the route, including provision of places of safety. NR said that all this work had been published to the industry through routine notices and also through briefings. Only the items being discussed here today had been contested.

Effect of implementation on current or recent operations, capability of compensation

- 5.21 The Operators were asked, if it were to be concluded by this Adjudication that the MML Network Change Notice had been implemented by virtue of work already carried out, whether they believed they had been disadvantaged in the current context and in a way which could not be compensated. They responded that this would only emerge through regulating decisions and they were not yet aware of or able to prove any detriment through a regulating decision.
- 5.22 GBRf noted that, as some of the work had already been implemented, the Operators needed to know if the TPRs had been changed for the two CDRs which have been brought in. NR said it would need to check on this point and could do so on that same day, but it could in any event confirm that the TPRs had been changed for Version 3 of the current TPR document. GBRf wanted NR to say if the necessary TPR amendments had been duly proposed and agreed, and NR undertook to check this.
- 5.23 Asked what was the basis of the evidence on which NR was able to demonstrate actual use of the Loop over, say, two Timetables - for example, by documentation - NR replied that the effect would have been recorded in the signalling system by the operation of track circuit berths, and NR would be able to provide this. In response to the Panel, NR also said that in terms of the modelling that it had done - taking as an example a passenger train from Derby - the margin for following a freight train which could go into the Loop or be recessed elsewhere was about 25 minutes.

Interpretation of Part G provisions on current and future use of the Network

- 5.24 As background to our discussion with the Parties at this point, I thought it important to explain my understanding of the interpretation of the Part G provisions on current and future use of the relevant part of the Network. I noted that Condition G2.1.1(a)(iii) called for interpretation as to whether the reference to “a material deterioration in the performance of that Access Beneficiary’s trains” was to current, historic or future trains. My view was that it must refer to current trains, in the sense of the trains in the current Timetable and the agreed next Timetable. This was partly because a “material deterioration” in anything could only be sensibly determined by reference to a currently existing benchmark, and partly because the effect on possible future trains was dealt with in any case by Condition G2.1.1(a)(iv), which had been introduced into Part G expressly for that purpose (see the background explanation on this point at paragraphs 3.4 to 3.7 above).
- 5.25 I noted that in any case Condition G2.1.1(a)(iv) also needed interpretation. It referred to the reasonable expectations of “the Access Beneficiary” as to “the future use of the relevant part of the Network” (my emphasis). This was clearly intended to mean expectations as to more than just that Access Beneficiary’s own trains. However, in order for the “expectations” of any one Access Beneficiary to be considered “reasonable” in this context, I wished to make clear my view that the future use concerned, if it would or could be by someone else, must at least be somehow relevant to that Access Beneficiary and not just a matter concerning the world at large - and therefore that some connection at least would have to be demonstrated between any general forecast of future use and the individual Access Beneficiary’s intended business or operations.

Current and recent use of the Loop

- 5.26 The Operators were asked to what extent they accepted the statement, in paragraph 4.3(b) in NR’s Reply to the Statements of Defence, that the Loop “could in theory be used by FOCs for looping, but has almost never been used by the FOCs in the recent past”. The Operators responded that this was not something that could be

measured, but before its disconnection in May 2013 the rails in the Loop had not been rusty – shiny metal was showing. They had no information as to whose trains might have been keeping it shiny - or it might have been on-track machines but they did not know whose.

- 5.27 GBRf noted, regarding the Network rationalisation study taking place nationally, that NR provided details of the number of times that points had been moved but in some instances the information had been spurious and the reliability of NR's data had been challenged. GBRf stated that it had reservations regarding the reliability and quality of NR's data in these matters.
- 5.28 The Panel asked if the conclusion was that the Loop was not used by freight companies generally or by passenger operators. The Operators said it was not used by passenger operators but it was still necessary to consider how shiny the Loop looked before it was disconnected. Asked what was the relevance of NR's information being incorrect, and if this was contended to show that that the Loop was still used by trains and that its loss would be detrimental to general performance, the Operators said this was not the case but pointed out that the Loop was of use when trains are running out of sync or during degraded working. However, in terms of trains running today, there was no real difference to performance at all.
- 5.29 The Operators therefore confirmed that there was no evidence of past use by operators unknown and that non-availability of the Loop was not affecting the performance of the then current train service. Nonetheless they still maintained that there was evidence of more frequent use of the Loop historically and that this would point to a possible effect on trains either currently or in the future. For example, trains running out of path or being delayed due to perturbation could be looped there to assist performance. The Operators would not accept that the effect on each individual operator based on past use would be that loss of the Loop had no real impact at all, because they now knew that it was longer, so would all look at it differently for pathing their trains. Past use had been kept artificially low because of the length assumption. The Loop was not currently available but the effect was minimal at present.

Future use of the Loop assessed in relation to current use

- 5.30 Consequently the Operators continued to maintain, as indicated in paragraph 18 of their opening statement, that use of the Loop for the future was the issue. Looking at past use was of some assistance, but this was more a situation where the Operators would now, having started to look collaboratively with NR, then taking into account the Strategic Freight Network document and other documents setting out information regarding growth and now knowing the true length of the Loop, be expecting to use it more than before. A possible analogy would be that you would not knock down Waterloo International because it had not been used recently.
- 5.31 The Operators believed there would be a significant amount of traffic in future and they would need all available capacity for looping etc. They pointed out that, when the Erewash Valley resignalling was developed, there was some rationalisation undertaken to raise the speed of trains. Then, there was only one passenger train each way per hour. The intention was to pass out onto the Main Line just beyond the Loop. It was recognised then that a necessity could arise to use the Loop for regulating traffic and, whilst it was not in the Working Timetable, it would still be used as a matter of course by signallers. This scheme was called the North Erewash Scheme and there was a diagram in the Statement of Defence provided by DBS.
- 5.32 The Operators confirmed this meant, regarding the link between past use and future use, that the real point was the disconnect between planned use and what use was made of the facility by the signaller. For example, in the northbound direction there

was a Leicester to Manchester service being mooted, which would use further capacity and possibly call for regulation on occasions on the part of the Network relevant to the Loop. However, they did not know enough about future possible passenger timetables and actual freight traffic growth to say anything other than that the Loop needed to be kept.

- 5.33 NR had asserted that the Loop was currently almost never used by freight operators and not at all by passenger operators. The general view put to the Hearing so far was that loss of the Loop would have no bearing on current trains, which was relevant to limb (iii) of Condition G2.1.1(a). NR was asked generally, therefore, what was its view regarding future use – that is, under limb G2.1.1(a)(iv).
- 5.34 At this point however, the Hearing, having been given only general evidence so far, was asked to revert to limb (iii) and to receive a legal submission from NR. NR noted it agreed that there were imponderables, for example the freight market study for 2023, but it also did not know the likely impact of HS2. In summary, NR thought it should not invest money in the Loop now but should wait until a business case did in future emerge which would justify investment in reinstatement. NR then reminded the Hearing that the points in paragraph 4.3 of its Reply to the Statements of Defence applied to limb (iii) of Condition G2.1.1(a).
- 5.35 The Operators were asked again if they would accept the proposition that the lack of use by the specific Operators today did militate against reliance on limb (iii) which, as just discussed, concerned the performance of individual operators' current trains. They responded that the forecast had not yet been published, but current Strategic Freight Network figures were established – the CP4 figures – and NR was building the railway on the basis of them.
- 5.36 Turning again to future considerations in relation to current use, NR was asked if, were it to renew the Loop with high speed turn-ins and turn-outs, it would then use it more often for regulating existing traffic. NR replied that, though the through line speed would have been increased, 15mph turnout speeds would remain. As a principle, NR otherwise would have replaced it on a like-for-like basis, although the standard was now 25mph. As regards train regulation, a signaller would judge at the time whether it was better to keep a freight train running or not and in many cases this would depend on whether the following passenger train was booked to call at Chesterfield.
- 5.37 GBRf was adamant that the reason for the Loop not being used had been its incorrect published length and not because of lack of use in connection with regulating decisions.
- 5.38 The Panel noted to NR that there had been a recent change of signalling control to the new facility at Derby and asked if, despite the Sectional Appendix showing a shorter length (352 metres) for the Loop, the signal box at the time would not have had information of the correct longer length of 649 metres. NR said its information had come from the signallers at the new Derby facility. It was not sure whether the longer length of the Loop would have been known previously but believed that it would have.
- 5.39 The Panel asked if the knowledge now gained regarding the correct length of the Loop was contested. The Operators said NR had used shortness of the Loop in justification of the lack of usefulness of it. Being now known to be 649 metres long and therefore fitting all trains which currently went along that route would be key for its greater use in the future. NR, however, said it believed that signallers would still not use the Loop but use the refuge facilities at other points along the route.

- 5.40 The Operators rejoined that the Loop had been kept by a previous resignalling scheme because it was considered to be needed. There had since been a 50% increase in the number of passenger trains on the route and another passenger train was being talked about. All these trains passed through Chesterfield. If the Loop were to now be deleted from signalling knowledge, reinstatement would take 5 years for going through the ORR process and in addition the investment costs would be greater than the costs of maintaining it forwards from now.
- 5.41 The Operators did not know if it was now established that the signallers did know the correct length of the Loop, and NR believed it was not. The Operators believed that the Loop used to have a ground frame along it with a siding off that for removing defective vehicles, and thought it seemed likely that the wrong measurement of 352 metres had reflected the position of that former ground frame.
- 5.42 Asked what records existed of use of the Loop in the two Timetables prior to it being taken out of use in May 2013, NR said CCF (Control Centre of the Future) data was only available for the 3 months prior to disconnection in May 2013 and this said that there were only two uses in those 3 months. NR had also checked with local management and it was agreed there was anecdotal evidence that there were only 2 uses in those 3 months. NR had then asked signallers and local managers for anecdotal evidence regarding previous use. Asked if that was accepted or contested by them, the Operators replied that the CCF did have limitations of accuracy. They did not accept that the information provided by NR was in an acceptable order of magnitude to demonstrate use of the Loop: on the contrary, based on observation from a passing train, the Operators believed NR's figure to be too low, because the rails were too shiny.
- 5.43 Asked to explain the shininess of the rails prior to disconnection of the Loop, NR noted that Broadholme Loop was currently rusty but nobody was suggesting that NR should remove it. They were not arguing that the Loop had not been used at all and they also recognised that it had been used by on-track machines. DBS commented that 2 times in 3 months was more credible than 2 times in 2 years, but that in any case the main issue was still about use in the future.
- 5.44 Asked yet again if they were now accepting for current trains that limb (iii) of Condition G2.1.1(a) had been disposed of as a ground for objection to the MML Network Change, the Operators finally conceded that it had, on the basis that my interpretation of limb (iii) was that it applied to the current Timetable or to trains which were the subject of an Offer in the upcoming Working Timetable. I repeated my reasoning that future use was dealt with by limb (iv), and that for the purposes of limb (iii) we could seek to identify an anticipated "material deterioration" in performance of trains only from the baseline of performance in an already known Timetable, not from an unknown baseline of potential future performance. DBS reiterated that, since the Operators' concern was about the future, it was content if that were dealt with under limb (iv) and not limb (iii).

Future use - general growth forecasts and infrastructure capacity projections

- 5.45 Turning then to the issue of assessing future use in its own right (rather than as a function of current use), NR did not believe there was any case law but noted that there was guidance in the Adjudication determination of dispute ADA07 regarding "material effect". As regards current use, NR agreed with the previous conclusion that there needed to be a starting baseline of some known performance.
- 5.46 The Operators were asked, in the light of paragraph 4.4 of NR's Reply to the Statements of Defence, to expand upon the possible future use of the Loop and their expectations in respect of it, to test how those expectations of operators might be

affected now that the length of the Loop was known to be nearly twice as long as previously had been thought.

- 5.47 The Operators said that had the Loop really only been 352 metres long, they would not have objected to the MML Network Change proposal because nearly all trains using the route would have been too long for it, but now that the Loop was known to be 649 metres long it would be capable of accommodating all envisaged traffic. The only longer trains were Channel Tunnel services but they were not going on the Derby to Sheffield route.
- 5.48 Asked if the issue of gauge was in any way relevant to the dispute about future use, the Operators said it was not, since whatever the gauge of the trains, there were no current plans to lengthen freight trains on the route. In the resignalling associated with the Scheme, they normally planned to accommodate 775 metres train lengths.
- 5.49 Asked what use was expected to be made of the Loop now that its length was known, NR said this did not depend on the matter of length; its use would be qualified by speed of entry and exit and proximity to the junction.
- 5.50 Asked what speeds applied and what lengths were available at Broadholme and Barrow Hill loops, NR said that both locations had 15mph entry and exit and Broadholme was 1km long. DBS noted that train weight was a relevant factor. The longer trains were generally faster, the shorter trains generally heavier, with a maximum speed of 60mph, and they were the more likely to be run down by a passenger train. Freightliner said that in timetabling terms, the best place to put a loop was on the approach to a point of conflict, therefore the position of Clay Cross Down Loop was correctly just before the junction.
- 5.51 Asked if heavier trains would affect headways, the Operators thought they would affect margins rather than headways. NR noted that the headways on this line were 4 minutes for all trains.
- 5.52 The Panel asked how long it would be necessary to hold a Down passenger train back at Derby if it was following a freight train running at 60mph with a clear run, before the driver of the passenger train would not get a green signal. Freightliner replied that, assuming the freight train diverged at Clay Cross North Junction, it would be some 25 minutes.
- 5.53 The Panel noted that the document "Network Rail Long Term Planning Process – Freight Market Study" was publicly available on NR's website and that, regarding pathways over this route, 80 paths per day were being indicated. The Panel thought this should not be a surprise to NR as the Study was out for discussion. NR confirmed it was not a surprise.
- 5.54 The Panel asked, if the number of trains being indicated by the Operators in their opening statement was correct, whether there was capacity. NR believed there was a question regarding demand and noted that no specific interventions had been defined by the Government in CP5 for NR to achieve.
- 5.55 The Panel asked if this meant that the assumption for 2019 would be that the existing infrastructure had the necessary capacity. NR said it would be. GBRf said it would not be, because the long-term planning process was looking at likely flows in CP5 and when published it would show the expected number of trains required. GBRf therefore believed it was not right to remove loops of this length until the outcome of the planning process was known. The Panel noted that until there was a political will for meeting anticipated demand through infrastructure planning, it was perhaps not appropriate to consider growth projections which were not within known reasonable expectations of operator.

- 5.56 The Panel noted that NR had said there were other loops within reasonable distance of Clay Cross, and that the Operators had said that there had been no consultation regarding a reasonable looping strategy. The Operators were asked to explain where their suggested 10-mile strategy came from (as asserted in DBS's statement of case). They replied that this strategy was not laid down, but they believed that loops should be about 10 miles apart as this gave opportunity for slower moving trains to travel without affecting other trains. 10 miles was comparable to the East Coast Main Line to the north of Peterborough once the trains were onto the 2-track section: the maximum distance between loops was 12 miles. Studies had been carried out on that route – on the basis of train speeds with passenger trains at 125mph – and this had led to keeping loops about every 10 miles.
- 5.57 GBRf noted that whilst it might be the case that there was a loop 7 or 10 miles either side, the need could well arise to use more than one loop at a time. DBS reiterated that the most useful loops were those approaching a junction so that you could get as far along the journey as possible before recessing. DBS continued that, whilst Broadholme was readily available, Barrow Hill was on a freight line which was not necessarily the line which really needed the facility. If there were no loop at Clay Cross, Down trains would need to make a double conflicting movement to clear the Derby to Chesterfield line and that was unacceptable.
- 5.58 NR noted that for CP5 it had speed improvements planned through Derby, so that intermodal trains would move more quickly. Freightliner believed that with 4 passenger trains per hour, the line would not have capacity. NR said the line would have capacity with Broadholme available if there was room in there.

Future use - Network Rail assessment and high level study of capacity

- 5.59 The Panel asked, regarding substitutability and improvement, what NR would say “foreseeable” meant in terms of a number of Timetables. NR replied that there was only one movement timetabled into Clay Cross Down Loop at the moment. A high level assessment study of this section of the line had showed that unused capacity was available between 07 00 and 22 00 in the December 2013 Working Timetable without affecting passenger trains. NR had provided to all the operators a statement regarding future use and that was the summarised output of that study. The remit had been to find clear paths based on current trains; NR had not considered assumed growth. DBS said NR had used growth information which had been available for about 3 years and had been provided by NR as one unified organisation. Freightliner wanted to know what was meant by a high level assessment. NR said it had reviewed Derby to Clay Cross North Junction using existing services.
- 5.60 The Panel asked if the study – other than the summary of its output – had been seen by operators. NR said not, because it had been waiting for the operators to indicate their expectations. The Operators said NR should know their collective expectations as these were already published in agreement with NR. NR answered that what had been issued regarding growth had not considered capacity. NR had found 10 clean unused paths.
- 5.61 The Panel asked NR what was the level of utilisation of the existing 20 paths per day. NR said it did not readily know. The Panel asked if the Operators wanted or needed sight of NR’s study. NR confirmed that this would not be a problem and NR could make it available for the Operators to peruse here today. GBRf commented that now it knew the Loop to be 649 metres long, then if it were retained GBRf would look at whether it could optimise its train plan to see if it could operate better and more efficiently.

- 5.62 Following an adjournment, during which NR provided the output from the high level study, the Panel invited the Operators to say to what extent – in the context of short- to medium-term capacity requirements – the information from NR’s high level study and from elsewhere did not address their reasonable expectations for the future. DBS noted, whilst recognising that NR had only undertaken a high level study, that this did not really address its concerns about the future as it only covered the current passenger service for the December 2013 Working Timetable, not growth in passenger services. DBS had not had opportunity to delve into what type of trains NR had modelled, such as characteristics of weight and speed.
- 5.63 DBS continued that, looking at matters which were specific to its known requirements, it noted that available unused capacity was not spread throughout the day; 3 paths were prior to the full passenger service and there was only one spare path in the afternoon, i.e. just one spare path in 9 hours. DBS would expect a growth plan to have available capacity spread across 24 hours. There was no opportunity to recess a Down (towards Chesterfield) train without doing so at Clay Cross Down Loop or sitting for 20 minutes at Chesterfield station platform on a through running line, both aspects of which were operationally most undesirable.
- 5.64 GBRf said the same comments applied for it. The Operators were all competing with each other so by definition they would each want 100% of all capacity. This study did not show ability to grow the Operators’ traffic as they would want, across the day. The Operators said there was also cause for concern regarding trains for the Sheffield direction, where they considered there to be a constraint upon Peak District quarry traffic and limitation on the growth requirement. There were environmental restrictions on road movements, so that the ability to remove quarried material by train was essential. Freightliner pointed out that Clay Cross North Junction was a single lead junction, so that having this high level study looking only at the Down direction did not cover all the issues.
- 5.65 The Panel asked if this all meant that NR’s high level study was not fully helpful and did not address the capacity issue. NR responded that all it had been trying to show in its study was that there was capacity available; it had not included use of Broadholme; also it took a 25 minutes standard running time from Derby to Clay Cross North Junction. NR thought there had been some pessimism, as the Down quarry trains were empty, so that they ran faster. NR believed that it was tantalisingly close to identifying the Operators’ expectations. It had provided a generic response to a generic question and it could be understood from its study that there was capacity available for at least 50% growth on this part of the Network.
- 5.66 The Operators contested that. They noted also that the quarry traffic was the same speed – 60mph – whether loaded or empty but the difference was the acceleration. But the Operators still needed paths and the reason why they had only found one free path in the afternoon was because train movements were dictated by customers’ terminal working hours.
- 5.67 I summarised at this point that the onus of demonstrating future expectation was upon the Operators which had raised objection to the MML Network Change. As regards capacity to meet expectation, NR had provided an assessment showing potential capacity by reference to a snapshot of current or recent performance; however the Operators said this was not helpful and that some of it was wrong. I therefore reserved the possibility of requiring further information from the Dispute Parties to support and clarify these contentions.

Future use - freight industry long term expectations and modelling of capacity

- 5.68 I proposed that we would now move on to consider what were the general long term expectations of the freight industry as a whole, based on modelling, etc. The

Operators were invited to speak on this, but also to be mindful of the need when relying on pan-industry documents about the future for such information to be in some way related to their individual company's business and aspirations, as I had previously explained. I noted that further information might be requested from the individual Operators to support what is said.

- 5.69 The Operators referred to the Maps 4, 7 and 12 previously tabled, which were identified as agreed freight forecasts – they had been agreed between NR and operators in the Strategic Freight Network growth figures adopted in 2010 following the DfT's study of 2008 and they were agreed figures up to 2019.
- 5.70 Map 12 showed the forecasts: the Derby to Sheffield route was shown yellow meaning that there was expectation in 2019 of above 5,000 and up to 10,000 trains per annum in each direction – this equated to between 20 and 40 trains per day. This information was reflected in paragraph 18 of the Operators' opening statement.
- 5.71 Maps 4 and 7 showed the Derby to Sheffield route as a designated “core trunk route” for intermodal and metals traffics.
- 5.72 NR accepted the details on the Maps but wanted to point out that the Erewash Valley route was also shown as a trunk route for intermodal on Map 4. The Operators noted that the Erewash Valley route was only shown green on Map 12, indicating up to 5,000 freight trains in each direction per annum.
- 5.73 I asked if it was agreed that there were no issues between the Dispute Parties regarding these forecasts going to 2019. The Operators said they were also tabling a Map associated with a study which was about to become adopted by the industry: it showed freight traffic for last year and the freight traffic forecast for 2033. There were significant differences between the two years, the traffic becoming 55 for Derby to Clay Cross and 25 on the Erewash Valley line. This study had been developed with NR leading the exercise; it was common to all operators and NR and so far as the Operators were aware, what was tabled here today was the document which would be published. These were the numbers of actual trains running now and which were expected to be running in 2033.
- 5.74 NR said the other study provided today by it included NR's own trains for maintenance purposes. The material it had provided was a forecast of trains actually running – the number of actual paths required would be significantly higher. The Panel observed that they understood the take-up of paths to be typically 55%. Freightliner said that take-up was very variable – some traffics have greater path utilisation than others in order to service the relevant operators' commercial contracts.
- 5.75 I summarised that, subject to NR's representatives taking the information at face value because it had not yet formally been published, we could presumably take it as agreed that the Maps tabled today were accepted. I asked what, using the established, published forecast up to 2019, would be the equivalent figure as of now in terms of train movements, as this would enable us to understand growth.
- 5.76 NR said there were currently some 2,875 freight trains per annum each way as a comparison with the figure on Map 12. It took this from the base information of its recent study. The Operators agreed that this figure felt right; they had no reason to argue about it.
- 5.77 I asked if therefore all agreed that the growth in total freight traffic to 2019 on this route was likely to be from 2,875 trains per annum in each direction currently to 5,000 to 10,000 trains in each direction per annum. Without either agreeing or disagreeing these figures, NR said that it did not necessarily accept that the strategic forecast undertaken was readily relevant for saying whether the industry needed the Loop. In

NR's view, arguing from the general to the specific was not necessarily appropriate just as a UK population growth statistic did not indicate firm growth at a particular town. NR said it would accept the position at the lower end of the forecast but that it did not understand where the additional traffic would come from.

Operators' individual reasonable expectations as to future use - proof and evidence

- 5.78 I invited the Operators to indicate their own expectations as to future traffic. DBS said it was in a competitive environment and it believed it would operate all the traffic on offer; it believed that as the major freight operator it was the haulier of choice. DBS did not turn down business which was on offer. That was DBS's aspiration, but if market share stayed the same, then realistically it would expect its traffic to double. DBS's business plan would be to continue what it did now as a minimum.
- 5.79 Asked if this meant necessarily having Clay Cross Down Loop available, DBS said it did, because it believed NR would need the additional capacity to get the trains onto the Network. DBS needed to have the capacity to be able to accept traffic quickly when it came along. It noted that the railway was a limited resource with different characteristics, unlike the road network.
- 5.80 I noted that we did not yet appear to have seen anything evidentially making a specific connection in terms of it being essential to have Clay Cross Down Loop in order to enable growth in DBS's share of the market. DBS confirmed that no timetable study had been undertaken but said it was clear from NR's figures that there was only capacity for one additional path between 11 00 and 19 00 and that any such train stood for a long time at Chesterfield station; DBS said this was simply not a satisfactory basis for growth.
- 5.81 GBRf pointed out again that the Operators were all competitors. Regarding the requirement to provide evidence to link the retention of Clay Cross Loop to GBRf's growth, it just did not know how things would fit in. GBRf, like the others, would like 100% of the business available. It just did not believe that NR could say that the industry did not need the Loop. The Operators noted that NR had spent just under £200m across the Network to put in facilities for freight growth and performance improvement and contended that NR should not buck that trend by taking out this loop without doing a major exercise. However the Operators could not necessarily demonstrate that it was probable that they would achieve the forecast traffic growth.
- 5.82 NR maintained that a full timetable study should not be required for a dispute hearing. Freightliner noted that the Loop was a piece of capacity. It could not see how it would be possible to achieve growth without having that facility. GBRf agreed, based on professional experience over 20 or more years of its representation at the Hearing today. It pointed out that NR's high level study as shown to the Operators today was only for the December 2013 Working Timetable – it did not even reflect the Thameslink service increase known to be coming in a few years.
- 5.83 I noted that it was NR's case that it was all very well having an agreed general total traffic forecast over a number of years but it did not show specific effect on this part of the Network. I asked if the Operators could say how this part of the Network would be affected for their individual traffic uses. DBS said it would be a matter of how many trains were running on the route. It only made a slight difference as to where a train originated or where it went to but DBS was unable to say whether it would need to utilise this particular part of the Network. GBRf believed the growth information was there and that the need to use the Loop was a function of the overall number of trains.
- 5.84 NR said it had a top-down forecast, then there were trains which actually ran when paths are available, then there were other opportunities depending on whether it

used a loop. There could be market reasons why certain trains ran at certain times. But NR still maintained that it should not be required to do a full timetable exercise – this was covered in dispute TTP01.

- 5.85 Asked what proof, if any, NR would like to suggest would be a sufficient way of providing the Operators' reasonable expectations regarding the future, NR said it would expect to see specific evidence to prove that the relevant part of the Network would be used more. It said the ORR decision on Ruscombe Loop in dispute NV58 covered that. It believed it had shown that it could take more trains on this route but it did not have proof of the volume expected. All NR could say was that it was looking for proof of the Operators' reasonable expectations.
- 5.86 Requested again to explain what it considered to constitute or provide the necessary proof, NR said it did not see what could be achieved by the Operators going away now to obtain proof. NR maintained that it still would not see how keeping the Loop would be the right answer. However NR acknowledged, as the Panel knew, that there was no decided case of reasonable expectation of future use.
- 5.87 The Panel noted that Network Code Part D did require NR to be the directing mind and thought the essence must surely be for NR to know its directing mind. NR responded again that it had no precedent on deciding this. NR's initial view of things was that despite the best efforts of the Panel, the Operators had not provided evidence.
- 5.88 The Panel pointed out that, equally, it had not seen any modelling from NR. NR responded that it had not seen where the trains to go into the Loop were to come from, so it was not worthwhile to keep the Loop. I asked therefore what, if anything, NR thought was required to relate the generality of the forecast growth to the expectations of the Operators, noting that they said they were established operators and had reasonable expectation of maintaining market share of whatever growth there was and that that made it probable that they would need the Loop to cope with that growth.
- 5.89 NR replied that there were too many variables involved. It said market segment was also an issue – for example, intermodal traffic was different from other traffics. NR wanted to remind us that ORR had supported “infrequent” as justification for the removal of a facility in relation to dispute NV58. Freightliner pointed out that NV58 applied under a different version of the Network Code, so points from the past were not relevant. GBRf suggested, in order to show in another way that there was a requirement for the Loop, that if the Loop was not there, the information required for funding to build the Loop from new would require similar data, such as agreed industry forecast figures.
- 5.90 The Panel asked the Operators, if they were building from new, whether they would put the Loop where it was currently. The Operators replied that they would do so, just before the point of conflict. NR said it would be positioned as informed by a study using agreed figures and evaluating all the options. GBRf commented that it would have expected NR to have done just that in order to justify this Network Change. NR replied that, without a detailed study and evidence, it would say that the existing Loop was a “nice to have” but that to keep it there had a cost. Even were NR to take the increased growth forecast given for 2033 and divide the number of trains on this route by half to take account that the Loop was only of benefit to Down trains, the resultant figure would still be only equivalent to the middle of the range forecast for 2019.
- 5.91 The Panel observed that it was fine to accept broad-brush methods for predicting a trend but there was no other way except to forecast traffic movements based on specific commodities. The published forecasts were perhaps too broad.

Further information required for reasonable expectations

- 5.92 I summarised here the position reached on the issue of proof of expectations. I was mindful that without the assistance of precedent, we did need to set a benchmark. I proposed to ask the Dispute Parties to assist by providing information on the lines that I had previously hinted at, but I noted that principally it was for the Operators (and I accepted that the onus was on the Operators to prove that they had reasonable expectations) to show their position on two aspects specifically, namely (1) the parameters of traffic anticipated to use this part of the Network and for which they had forecasts; and (2) how these forecasts in some way related to each Operator as an individual Access Beneficiary. I said I would expect each individual company's plans produced to show that they were a genuine aspiration of the company. If an operator decided to rest its position on retaining market share, then so be it. I recognised that there would be possible commercial confidentiality concerns in providing this information.
- 5.93 NR responded that the MML Network Change was published back in January 2013. It contended that the process provided plenty of opportunity for all this to have been done, and that rules of law, the Human Rights Act, etc. meant that it might not be fair process to now adjourn the Hearing to require further information. I replied that the ADRR procedure allowed the Hearing Chair to request further information; this was permitted and envisaged under the Rules. I was also asking NR to produce any modelling it had done other than the study provided here today, including any which others might not have seen.
- 5.94 The Panel asked, if NR had been able to do a high level freight timetabling plan, whether we did not therefore know passenger operators' aspirations for 5 years' time. NR replied that there was an option for an hourly train from Manchester to the East Midlands but it was not yet exactly sure where it would go.
- 5.95 Following GBRf's previous suggestion, the Panel proposed to NR for the purposes of its modelling that if it were to assume that there was not a Loop in situ, an examination of the simple business case for providing one would perhaps give a focus. NR confirmed that it had prepared a business case for both the case where the Loop was to be reinstated straight away and for the position if reinstatement were to be deferred until needed.

CDRs and SRTs

- 5.96 After an adjournment the Hearing moved on to the CDRs matter. As noted in paragraph 2.14 above, this was withdrawn from the dispute following further discussions with NR subsequent to the Hearing which enabled DBS and GBRf to withdraw their objections to the Network Change in relation to CDRs. It is therefore unnecessary here to record the oral exchanges concerning that matter, except to note that I reached the conclusion, with which NR expressed agreement, that there is no interaction between the processes under Parts D and G of the Network Code.
- 5.97 Likewise the SRTs matter was withdrawn at the end of the oral exchanges during the Hearing, so I do not further record here the discussion concerning that.

Further Legal Submissions, Costs, Procedural matters

- 5.98 At the close of the oral exchanges I invited the parties to make any further legal submissions they wished to.
- 5.99 NR having already provided written legal submissions wished to add the following:

- 5.99.1 Regarding limb (iii) of Condition G2.1.1(a), that a materiality test should be applied, in that an Access Beneficiary needed to show deterioration in performance and that deterioration has to be material;
- 5.99.2 That it was generally dangerous to rely upon anecdotal evidence;
- 5.99.3 That NR accepted that there was little precedent regarding what constituted future expectations in the context of the Network Code;
- 5.99.4 That whilst much had been said about the cost of reinstatement of the Loop if undertaken in the future, NR considered that the industry had to assess the need for the Loop now;
- 5.99.5 That expectation of future use of the Loop had not been proved by the Operators and that this was demonstrated by the invitation to submit more information; and
- 5.99.6 To remind the Adjudication of paragraphs. 20 and 21 of ORR's appeal determination of dispute NV58.
- 5.100 The Operators responded as follows:
- 5.100.1 GBRf enquired if it and NR had agreed on a definition of the relevant part of the Network. NR thought that if GBRf were suggesting Derby to Chesterfield, it would be dangerous to do so.
- 5.100.2 DBS noted that Dispute NV58 had arisen when a different version of Network Code Part G applied; that version did not have the future-looking ground for objection available for consideration by either the Network & Vehicle Change Committee or ORR, so that NV58 was not relevant for providing precedent in this current case. DBS contended that objections had to be looked at on a case-by-case basis according to the particular circumstances and conditions applying to the proposed Network Change.
- 5.100.3 GBRf was still uncomfortable regarding the relationship of Parts D and G; it could not see how NR could be permitted to deliver a Timetable for infrastructure which was not there. Part D was about trains on the infrastructure which was there. Asked by me if it was saying that there was an implied requirement for Network Change to be established before the industry could plan trains over the relevant infrastructure, GBRf said Part D included a Condition that a Timetable can only include movements which are on the Network. Changes made under Part G did not become part of the Network until established, therefore these Changes under discussion were not yet part of the Network. GBRf's view was that, for Part D, the "Network" was the network as established and not as it physically existed. NR refuted this contention by saying we had to live in the real world and Part D worked back to "T-60" and would have been drafted differently if GBRf's interpretation was intended.
- 5.100.4 Freightliner had always thought that Part G items should be finalised in a timely manner and before starting on the Part D process.
- 5.101 I asked if there was an issue at all around any of the points about compensation as provided for in Condition G2.1.1(a)(iii). All parties indicated that there were no such issues.

- 5.102 I asked if anybody wished to make a submission regarding costs. No party indicated a wish to discuss costs.
- 5.103 Of the interested parties, only EMT remained in attendance at this stage in the proceedings. Invited by me to make any comments on the issues, EMT reminded the Adjudication that it had a December 2013 service which was already being advertised to the public with journey time improvements between London and Sheffield; East Midlands Trains would wish those journey time improvements to be safeguarded as it could not rewrite the Timetable at this late stage.
- 5.104 Returning from adjournment and in the light of the remarks heard from EMT and recognising the possible effect on the industry and passengers if the overall Network Change did not become established, NR wished to ask me if agreement could be reached that the Network Change could be established in respect of the CDRs (these not having yet been withdrawn at this stage). I asked if that was what was meant in paragraph 16 of NR's opening statement by the words "be permitted to be established".
- 5.105 NR said the position was that the Hearing Chair had power under ADRR Rule G48 to make an order to allow this. NR was left with two issues – one was where the parties might be able to go away and agree how to proceed and the other was where further information was being requested. In the absence of the exercise of Rule G48, NR said it would have to seek to reach an accommodation with the Operators.
- 5.106 I suggested that this was an inevitable and unfortunate consequence of the Part G and Part D processes not running consecutively. NR noted that it was dealing here with a Network Change 110 miles long. GBRf responded that NR appeared now to be suggesting that it needed to remove the Loop in order to achieve the new Line Speed running for the Scheme.
- 5.107 NR rejected this, saying that it could either replace the Loop switches with high speed switches or, as was its preference, remove the Loop altogether. NR confirmed that in any event the Loop issue would not have an effect on the December 2013 Timetable because of the physical changes already made and the TPRs and Timetable already having been agreed. DBS enquired if NR could have issued the Network Change proposal for the Loop separately.
- 5.108 I reached the conclusion that, notwithstanding Rule G48, I did not think it was open to me to make a decision regarding NR's request, particularly in the circumstances of the prolonged discussion that had taken place towards the time for implementing the December 2013 Timetable. I suggested that an alternative might be for NR to issue a notice under Condition G10.1.2 and see if it drew any objections under Condition G10.1.3 regarding the items not in dispute here. Another way might be for NR to withdraw the dispute as regards the Loop; it could then have a determination on the other matter – the CDRs – and leave the Loop to be progressed separately.
- 5.109 DBS suggested, in the light of information now available, the parties could perhaps discuss the Loop issue outside of the Adjudication. EMT observed that this Scheme had started off 5 years ago at a cost of £70m. If it were not implemented now, many operators across the network would find they experienced far-reaching consequences. I noted that EMT's observation was particularly pertinent for the industry and commercially but all those points were irrelevant because it was a fact that the Network Code contractually controlled the outcome of the dispute.
- 5.110 That concluded the oral exchanges at the Hearing.

6 ANALYSIS, CONSIDERATION OF ISSUES AND SUBMISSIONS, CONCLUSIONS

SRTs - Operators' objections

- 6.1 As recorded in paragraph 2.9 above, the SRTs matter cited in GBRf's Statement of Defence and other material provided, and included in its required outcomes, was withdrawn by GBRf as a ground of dispute in the course of the oral exchanges with no further argument having been heard on the matter. Accordingly it no longer forms part of this dispute and requires no decision as part of this determination.
- 6.2 I wish to observe (under Rule G49(j)(iii)) that I think it was entirely appropriate for the SRTs matter to be withdrawn and that, had it proceeded, I would have found in favour of Network Rail on it. This because I endorsed NR's written submissions as to the inapplicability of the Network Code Part G process to the mechanics of changing or justifying SRTs, and concluded that GBRf's questioning the "motivation" of NR was not an admissible ground of objection to a properly constituted Network Change proposal.

CDRs - Operators' objections

- 6.3 As recorded in paragraph 2.14 above, the CDRs matter cited in DBS's and GBRf's Statements of Defence and other material provided, and included in their required outcomes, was withdrawn by those Operators as a ground of dispute as the result of discussion between them and NR subsequent to the Hearing. Accordingly it also no longer forms part of this dispute and requires no decision as part of this determination.
- 6.4 Again I observe (under Rule G49(j)(iii)) that, had the CDRs matter remained in dispute, I would have found in favour of Network Rail on it. I was quite satisfied, on the basis of the Dispute Parties' written submissions and oral argument at the Hearing, that NR had not failed under Condition G2.1.1(a)(ii) to provide sufficient particulars in respect of the proposed MML Network Change as a whole including with regard to the introduction of CDRs. I considered that NR's MML Network Change proposals included the necessary content required under Condition G1.2.
- 6.5 This was because I considered that, as required by Condition G1.2(f) and as argued in NR's written legal submissions, the proposals in respect of the CDRs (among other matters) were "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 persons specified in Condition G.1.1(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". Without the need for reliance on the appeal decision in Dispute NV58 as submitted by NR, I accepted NR's argument that the particulars of proposed changes provided were such as were "reasonably necessary" to enable the Operators to assess their likely effect, and I now so find this as a fact.
- 6.6 In relation to the CDRs matter I also considered that the Network Code Part G process was not applicable to the mechanics of re-analysing or changing TPRs, which are dealt with under the Part D Timetabling process. I agreed with NR's argument (at paragraph 20 of its written legal submissions) that "the WTT process must be realistic, and cannot be made to wait for a Network Change process to catch up when changes are required". I therefore reached the conclusion (as recorded at paragraph 5.96 above), with which Network Rail expressed agreement, that the Part D and Part G processes are not linked or chronologically interdependent.

Clay Cross Down Loop - NR's implementation of MML Network Change

- 6.7 Consideration of the Loop matter was initially complicated by the fact that Network Rail had already carried out physical works in connection with the Loop. That NR had already done so only emerged clearly in the Operators' Statements of Defence; it was referred to only somewhat obliquely in NR's Statement of Claim. This gave rise to its own further issues of interpretation, as to whether the actual physical works done - once clearly ascertained and understood - amounted to a partial implementation of the Change, whether a partial implementation was conceptually possible, and the relationship, if any, between a Network Change being 'implemented' and being "established".
- 6.8 In the course of the oral exchanges (see paragraphs 5.10 and 5.11 above) it became apparent that, as a matter of practice, Condition G10.3.1 effectively prevented NR from acquiring a clear right to implement any NR proposed Network Change without going through the notice stage set out in Condition G10.1.2, despite not being technically obliged to do so by the wording of G10.1.2. NR confirmed that in the present case, in any event, it had not reached the stage of serving a G10.1.2 notice as it knew it still had an unresolved dispute, and consequently NR acknowledged that it had not yet become entitled to implement the MML Network Change.
- 6.9 The issue therefore arose whether, by virtue of the works already done to the Loop, NR had in fact already implemented the MML Network Change, effectively in breach of Condition 10.3.1. At the outset of the Hearing I considered in principle that this would turn on whether the work already done were capable of being reversed remotely, i.e. electronically by a switched reconnection, or whether some physical operation would be required, necessitating a possession and therefore advance notice to operators in accordance with their Track Access Agreements. In the oral exchanges (see paragraph 5.13 above) it emerged that the work done at the entrance and exit of the Loop consisted of full "plain lining", namely that the switches and crossings at either end of the Loop had been removed and replaced with plain track, so that a train could not get in there. The work had been done in May 2013 because a possession was available then. NR confirmed it was not just a question of the points having been secured – there had been a physical change to the rails. However, NR said, the signalling was still available and the Loop could be reconnected if the switches and crossings were replaced.
- 6.10 I accept the Operators' contention, and find as a fact, that this work done to the Loop by NR amounted clearly to implementation of the MML Network Change. To my mind this was endorsed by the evidence put forward by NR in its submissions accepting that it would put the Loop back if necessary, and that this could be done equally in its original form or in modern equivalent form. I also accept the Operators' proposal that what actually constituted NR carrying out the relevant work was NR doing any part of what was set out in the MML Network Change Notice.
- 6.11 I reject NR's contentions that the Loop had not been "removed" from the Network because in this case it had remained on the ground and was still there but currently out of use, as a temporary measure only, with plain line inserted so that trains could not access it; or that "removal" should be regarded as meaning the entire facility being taken out. I accept the Operators' contention, and find as a fact, that, if the Loop is not attached to the main running line, then it is not a loop.
- 6.12 I also reject NR's contentions that there could be no concept of partial implementation of a Network Change or that an exercise described repeatedly as mere "stageworks" (a procedure not known to the Network Code, as acknowledged by NR) could not amount to such implementation. In any event it matters not whether the works involved amounted to a partial or total implementation. It cannot be necessary for an entire Network Change proposal to be the subject of operators' objections in order

for only some part of it to be modified, withdrawn or disputed; therefore it cannot be necessary for the totality of works required by the proposal to be completed before this can amount to implementation.

- 6.13 Accordingly I find as a fact that the MML Network Change has been implemented by NR by virtue of the “plain lining” works carried out to the Loop notwithstanding their appellation by NR as “stageworks”. I also find as a matter of contract interpretation that such implementation constituted a breach of Condition 10.3.1. No claim has been made, however, by any of the Operators for compensation for such breach and, on the basis of the evidence in the oral exchanges, it appears likely that none of them have suffered any loss as a result of it.
- 6.14 On this issue it is appropriate to observe that, in initiating and progressing the MML Network Change in relation to the Scheme as a whole, Network Rail could have chosen to avail itself of the Complex Projects Procedure with its facility for carrying out Preparatory Works under Conditions G5, G6 and G7. This might have avoided the practical complexities of having the entire Network Change, and possibly in some measure the Scheme, dependent on satisfying operators regarding a relatively minor aspect of it.

Clay Cross Down Loop - Operators’ objections to removal of the Loop

- 6.15 At the outset of the dispute the overall issue was whether any of the objections of the Operators to the Loop removal element of the MML Network Change under Condition G2.1.1(a) could be sustained. No issue as to compensation for this or any other element was raised by any of the Operators either in their statements of case or at the Hearing.
- 6.16 The Operators all grounded their objections to the removal of the Loop on Condition G2.1.1(a) subparagraphs (iii) and (iv) (sometimes referred to as “Limbs” (iii) and (iv)). As I had noted in my consideration of issues of law raised by the dispute (as referred to in paragraph 2.5 above), some degree of contract interpretation was required in relation to both these grounds for notice by an Access Beneficiary. I summarised the provisional interpretation of these that I had reached in the course of the oral exchanges at the Hearing, as noted at paragraphs 5.24 and 5.25 above, and I now confirm that this remains my analysis of the correct interpretation of those provisions, as expressed further below.
- 6.17 A general theme running through the Operators' objections to removal of the Loop was that it had been recently ascertained to be, at 649 metres, nearly twice as long as it had always been represented to be in the Sectional Appendix (see for example paragraph 5.47 above). Though there was debate as to the extent to which this had already been known to the signallers, it was clear that this was a significant difference which would undoubtedly condition the Operators' expectations as to future possible use of the Loop to accommodate anticipated growth in traffic. The true length of the Loop was also a factor which could not but have affected NR's view of its usefulness and potential effect on capacity assessment, had NR been aware of it when carrying out its previous high level studies.

Condition G2.1.1(a) (iii) - material deterioration in performance of trains

- 6.18 Limb (iii) requires that “the implementation of the proposed change would result in a material deterioration in the performance of that [i.e. the objecting] Access Beneficiary’s trains which cannot adequately be compensated under this Condition G2”. My analysis of this wording is that it calls for interpretation as to whether the reference is to the performance of current, historic or future trains. My conclusion is that it must refer to current trains, in the broad sense of the trains in the WTT current

at the time of the dispute (including the immediately preceding subsidiary WTT) or the offered and agreed next WTT.

- 6.19 This is for two reasons. In the first place a “deterioration” in anything is inherently a relative concept which can sensibly be discerned only by reference to some currently existing or clearly ascertained benchmark from which to assess a change for the worse. Secondly, it was clearly the intent of the framers of the most recent version of Network Code Part G that the effect of a Network Change on possible future trains should be dealt with in any case by Limb (iv), which was newly introduced into Part G expressly for that purpose (see further on this point the background explanation at paragraphs 3.4 to 3.7 above concerning the process leading to the 2010 revision to the relevant provisions of the Network Code). If future trains had already been covered by Limb (iii), the introduction of Limb (iv) would not have been necessary, and I therefore decline an interpretation of Limb (iii) which merely duplicates the more recent Limb (iv).
- 6.20 In reaching this conclusion as to the interpretation of Limb (iii) I am mindful that the recently published determination of dispute ADA16 approached this same issue on the equivocal supposition that Limb (iii) might possibly be applicable equally to current or future trains, but that in any event the analysis and findings as regards future trains would be identical under both limbs. That being so, I am content to conclude that Limb (iii) applies only to current trains and that it would be otiose here to consider expectations of future use at all under Limb (iii).
- 6.21 Applying Limb (iii), then, to current trains only (in the broad sense described above), in the course of the oral exchanges (see paragraph 5.29 above) all the Dispute Parties eventually agreed there was no evidence of likelihood of any material deterioration in performance of any of the Operators’ current trains. Apart from anything else, the Loop’s having been put out of action by NR since May 2013 (whether rightly or wrongly - as to which, see paragraph 6.13 above) had apparently had no effect whatsoever on the performance of any trains of the Operators or any other operator, and no trains were timetabled to use the Loop in the WTT commencing in December 2013. The Operators therefore effectively conceded a withdrawal of reliance on Limb (iii) as a ground for objection to the MML Network Change.
- 6.22 However, in its written legal submissions regarding the Operators' reliance on Limb (iii), NR referred again to the determination in Dispute NV58, particularly paragraph 9.5 stating that “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 safety of that network”. I must make it clear that I do not accept this determination, which is only of persuasive authority as regards an ADA, as being at all persuasive, or applicable to this dispute, in advocating the attribution of any general discretion to NR to act as it sees fit in its general management of the Network because it has accountability for efficiency and safety. In my view Network Rail is accountable to its contracting partners, or customers, first and foremost to observe and perform to the letter its contractual commitments to them. These commitments include compliance with all provisions of the Network Code equally, and the Network Code includes provisions calculated sufficiently to promote efficiency and safety in balance with other considerations. I therefore reject any suggestion that NR has some kind of residual "freedom to exercise its discretion" in managing the network, whether based on efficiency, safety or any other general principle, such as to override or qualify the detail of its contractual obligations, even in what NR in its sole judgement perceives to be the more general interests of the industry (as I have also had occasion to observe previously in a number of Timetabling Disputes).
- 6.23 I take the same view as regards NR’s citation of Dispute ADP13, which in turn relied on NV58. Without accepting either of these determinations as precedents, therefore,

it is sufficient that I find as a fact that Limb (iii) has not been sustained evidentially as a ground for objection by the Operators to the MML Network Change including the removal of the Loop. I believe this conclusion is also borne out by the fact that none of the Operators made mention of or attempted any calculation to disprove the possibility of compensation for the originally asserted material deterioration in current performance, notwithstanding that Limb (iii) refers to a deterioration in performance which cannot adequately be compensated under Condition G2.

- 6.24 Network Rail referred frequently to the need for its Network Change proposal to be “established” as well as implemented. Network Code Part G refers to this concept only once, in the heading to Condition G10 - “Establishment and Implementation”, which by itself does not tell us what the word is intended to mean. If “establishment” has any meaning distinct from implementation, it appears to be used in practice to mean the process of finally authorising or entitling the implementation of a proposed Network Change, and this is how I interpret it. If this is correct it is clear that NR, in implementing the removal of the Loop, did so without first having “established” the proposed MML Network Change.

Condition G2.1.1(a)(iv) - taking account of reasonable expectations as to future use

- 6.25 The dispute as to removal of the Loop therefore rests on Limb (iv). This in effect requires satisfaction of two tests in order to sustain an operator’s objection to a Network Rail proposal for a Network Change: proof of the reasonable expectations of that operator as to the future use of the relevant part of the Network; and demonstration that the proposal does not adequately take account of those expectations. Like Limb (iii), as previously noted, both the Limb (iv) tests need a degree of contract interpretation and I mentioned this at the Hearing.

Reasonable expectations

- 6.26 Condition G2.1.1(a)(iv) refers to the reasonable expectations of “the Access Beneficiary” as to “the future use of the relevant part of the Network” (my emphasis). This was clearly intended to mean expectations as to more than just that Access Beneficiary’s own trains. However, as I noted in the oral exchanges (see paragraph 5.25 above), in order for the “expectations” of any one operator to be considered “reasonable” in this context, my view is that the future use expected, if it would or could be by someone else, must at least be somehow relevant to that operator and not just a matter concerning the world at large - and therefore that some connection at least would have to be demonstrated between any general forecast of future use and the individual operator’s intended business or operations. If it were otherwise, an individual operator could not itself reasonably hold any expectations at all of its own deriving from a general forecast.
- 6.27 The consequence in my view is that any one operator cannot make an individual case based only on an assumed general anticipated use of the relevant part of the Network, unless it has a genuine concrete expectation of itself needing to use it for the particular traffic as forecast. I recognise that freight operators will always find it difficult to establish individually with any certainty a specific anticipated contract pattern, since to a large extent they will be in competition with each other for available traffic. In that context I do not consider it necessary for the operator to show an actual present contract in order to demonstrate the future expectation, but in relying on industry wide forecasts it would at least need to show a genuine intention and capability of being active in that particular kind of business.
- 6.28 I noted also in the oral exchanges that I took “the relevant part of the Network” to mean not only the precise location or network assets directly physically affected by the proposed Network Change, but the routes and network assets on which there

would clearly be a knock-on direct effect on the operation of trains resulting from the proposed Network Change, as a matter of necessary causation.

- 6.29 The information previously provided by the Operators (and by NR in commenting on the same) with their statements of case and submissions, as to future growth of freight traffic, consisted almost entirely of global studies and forecasts common to the whole UK rail freight industry. It was in order to afford the Operators sufficient opportunity to satisfy the interpretation of “reasonable expectations” that I have just outlined, by particularising the relationship of these forecasts and studies to their respective individual businesses, that I required the production of further information after the Hearing. At that time Network Rail objected on the ground that it gave the Operators an unfair and unwarranted opportunity to provide further evidence to the Panel, asserting that “rules of law and the Human Rights Act” meant that it might not be fair process to adjourn the Hearing to require further information. I rejected that assertion then and I continue to do so. As I made clear in my subsequent Directions, I considered it necessary for a fair and competent determination of the issues in dispute to exercise the power afforded by the ADRR to require this further information.
- 6.30 In its written legal submissions on the issue of reasonable expectations of future use, NR again invoked the determination in Dispute NV58, as supporting reliance on previous use statistics (of the Ruscombe Loop facility itself involved in that case, rather than the whole relevant part of the Network) to indicate possible future use. In the oral exchanges, however, NR accepted my suggestion that NV58 was not persuasive or necessarily even relevant on this issue, having preceded the introduction of the "blocking right" for future use in Limb (iv), and that this dispute (as well as ADA16) is the first to have considered the application of Limb (iv).
- 6.31 My conclusion therefore, having considered all the information and submissions provided by the Operators, including in particular the further information provided after the Hearing in accordance with my Directions and NR's observations on that information, is that this does now amount to sufficient evidence of the Operators' expectations as to the future use of the relevant part of the network. I have also concluded, and I so find as a fact, that each of the Operators has shown sufficient specific relevance and connection of its individual expectations as to such general freight (and passenger) use, to its own businesses and particular aspirations, as to make those expectations reasonable for it to hold.

Taking account of expectations

- 6.32 In trying to assess what might be considered appropriate in order to “adequately take account” of reasonable expectations I accept NR's contention, based partly on precedent and partly on practicality, that a full Timetabling simulation should not be required. However I consider that merely dismissing expectations of use of a particular facility as being an unsupported “nice to have”, but on the basis of high level studies only with no or minimal detailed backup modelling or analysis, goes too far in the opposite direction. My view is that there is a middle ground; operators participating in this process are entitled to have taken into account by NR what is reasonably likely to be necessary to meet their genuine and demonstrably achievable aspirations, because that is what constitutes their reasonable expectations. Just as it is unreasonable to expect NR to undertake a detailed Timetable study as part of the Network Change process, it is also unreasonable to expect operators to have to go to the lengths of proving beyond doubt that everything they seek to be taken account of in assessing a Network Change is 100% guaranteed to be absolutely critical and essential to their future plans.
- 6.33 Against that background, having considered all NR's information and submissions, and particularly the modelling and further information provided after the Hearing, and

the Operators' individual and collective comments on such information, I have reached the conclusion that all the material provided shows that NR has not taken adequate account of the reasonable expectations of the Operators as to the future use of the relevant part of the Network.

- 6.34 I must make it clear that I regard the modelling provided by NR after the Hearing as being admissible, notwithstanding all the Operators' strongly expressed contentions that it should not be allowed because it had clearly been undertaken only after the Hearing, whereas my Directions had expressly required NR to provide "any relevant modelling that has already been undertaken but not seen by the Adjudication". I am willing - and, I believe, empowered by the ADRR - to admit any material that I consider to be relevant and of assistance, which clearly this is. Nevertheless, though technically admissible, NR's post-Hearing modelling inevitably carries considerably less weight as evidence of NR having adequately taken account of the Operators' expectations, than would have been the case had it been carried out at the time of the Network Change consultation process in dialogue with the Operators and in response to their specific concerns.
- 6.35 Indeed, the fact that NR carried out this detailed modelling only as the result of a Direction at a dispute Hearing seems symptomatic of NR not having adequately taken the Operators' expectations into account when it should have done, at an earlier stage of the process altogether. Had it done so, it might have had the opportunity to debate with the Operators and allay their many concerns on points of both principle and detail. Instead, NR seems historically to have considered capacity by reference only to current traffic demands, and when it started in this instance to consider capacity in relation to future growth, it did so by reference only to its general capacity studies showing numbers of paths per day or per hour, without addressing the suitability of paths to meet actual service characteristics and the commercial imperatives of growth (for example, that many train movements will have to be determined by freight customers' terminal working hours) (see paragraph 5.66 above in the oral exchanges).
- 6.36 Thus, as things turned out, it was clear from the Operators' responses to NR's post-Hearing modelling that there were still several outstanding substantive points of objection, clarification and detail left to be resolved, with regard to NR's analysis. This showed basically that there could be up to 3 freight paths per standard hour in the Down direction, but appeared not to deal with the characteristics of the paths, among other matters. The rest of the document referred to the Freight Market Strategy ("FMS"), in respect of which NR eventually accepted at least that it provided an evidence based assessment of future freight needs. The FMS was finally published shortly after the Hearing and I place no weight on NR's representations (in its note on modelling submitted after the Operators' responses to NR's further information) that it had been unable to take account of it as fully indicative of the Operators' expectations at an earlier stage of the process, just because it had not actually been formally published by then. Even the published FMS contains apparently low detailed projections for 2019 (the date of the principal Map forecasts produced at the Hearing) for certain traffics that are otherwise predicted to remain steady or to grow, notably Engineering Haulage and Biomass.
- 6.37 Without going to the lengths of requiring a full Timetable study by NR of the affected routes indefinitely into the future or even till 2019, I still believe that there must be some middle way between that and the relatively limited modelling done by NR probably in some haste in response to my post-Hearing Direction, that could either put the Operators' objections to rest or demonstrate conclusively that they are ill-founded. It appears that NR had not undertaken at least this level of analysis and dialogue prior to constituting the dispute or participating in the Hearing, and that it still has not done so, in the light of the Operators' residual detailed objections to what has been produced most lately.

- 6.38 As mentioned above in connection with the FMS, I am not persuaded by NR's contention that it could not have taken more focused account of the Operators' particular expectations at an earlier stage because it was unaware of the levels of growth in freight traffic upon which they were predicated. On the contrary, NR specifically acknowledged (see paragraph 5.59 of the oral exchanges) that it had simply not taken account of any assumed growth. That is why the fact that NR started modelling only after the Hearing seems to me indicative that it had not previously focused on taking account of the Operators' expectations, even as they were then more loosely expressed. However, it may well be that NR would have been able to dispose of the Operators' residual concerns in full had it engaged more fully at an earlier stage, and indeed that it may yet be able to do so, given some more time.
- 6.39 Consequently it seems to me that the proper course in resolving this dispute is to determine that NR has not yet taken account of the Operators' reasonable expectations in implementing the removal of the Loop, but to give NR time before being required to reinstate the Loop, in case it is eventually able properly to allay the Operators' concerns through sufficient market analysis and further modelling and to persuade them that reinstatement is unnecessary, in which event NR would be able clearly to remove the matter from further potential dispute by duly following the Condition G10 notice process.

7 DECISIONS

Having carefully considered the submissions and evidence as set out in sections 2 to 5 and based on my analysis of the issues and submissions set out in section 6, I determine as follows:

Clay Cross Down Loop - Entitlement

- 7.1 Network Rail is not entitled to have implemented, as I find that it has done, that part of the MML Network Change consisting of the removal of the Loop from the Network, in advance of having duly established that part of the MML Network Change and while there is an unresolved dispute concerning it. I find that Network Rail has so implemented the removal of the Loop in breach of Network Code Condition G10.3.1, by carrying out in May 2013 what it has referred to as 'Stageworks' comprising the disconnection and removal of the points at either end of the Loop (the "**Implementation Stageworks**").
- 7.2 Network Rail is not entitled to and, subject to paragraph 7.5 below, shall not take any further action, beyond the Implementation Stageworks already physically carried out and completed, to dismantle the Loop or render it unusable or otherwise such as to preclude its future reinstatement and reconnection to the Network.

Clay Cross Loop - Remedy

- 7.3 Network Rail is required, and is permitted specifically pursuant to this decision, to withdraw completely and exclude from the MML Network Change proposal the removal of the Loop from the Network. Such withdrawal and exclusion shall not prejudice or affect Network Rail's entitlement, subject to and in accordance with the procedures prescribed in Network Code Part G, to maintain the rest of the MML Network Change proposal apart from the removal of the Loop and at any time to establish and implement the whole or any part of the rest of the MML Network Change.
- 7.4 Subject to paragraph 7.5 below Network Rail is required to reinstate and reconnect to the Network the Loop in its full length (as now made known and confirmed at the

Hearing) of 649 metres and in a form at least equivalent to the physical form and layout in which it stood immediately prior to the Implementation Stageworks, and otherwise is permitted specifically pursuant to this decision to reinstate the Loop in its modern equivalent form at the time of reinstatement, in either case without being obliged to establish or implement a new Network Change solely in respect of such reinstatement and reconnection.

- 7.5 Any such reinstatement and reconnection shall be commenced and completed prior to the date of commencement of the Timetable coming into effect in December 2014, and Network Rail shall observe all such procedures and take all such actions as are required of or permitted to it under the Network Code and any relevant Track Access Agreement in order reasonably to enable or facilitate such reinstatement and reconnection, unless prior to such date Network Rail shall have duly established and implemented in accordance with Network Code Part G a new Network Change, distinct from the MML Network Change, consisting solely of or comprising the removal of the Loop.

Conditional Double Reds - Entitlement

- 7.6 The element of the dispute regarding that part of the MML Network Change consisting of the introduction of Conditional Double Reds at 8 signals has been resolved between the Dispute Parties following the Hearing and subsequently has been withdrawn. Accordingly I make no decision as to entitlement in respect of that element of the dispute.

Sectional Running Times - Entitlement

- 7.7 The element of the dispute regarding the alleged inclusion by Network Rail in the MML Network Change of proposals for changes in relation to certain Sectional Running Times was resolved between the Dispute Parties in the course of the Hearing and was withdrawn. Accordingly I make no decision as to entitlement in respect of that element of the dispute.
- 7.8 I make no order for costs.
- 7.9 I confirm that, so far as I am aware, this determination and the process by which it has been reached is compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Peter Barber
Hearing Chair
3 January 2014

APPENDIX "A"

EXTRACTS FROM THE NETWORK CODE, PART G (1 August 2010)

Definitions

- "change" Includes:
(a) improvement or deterioration, enlargement or reduction; and
(b) for the purposes of paragraph (b) of the definition of Network Change, a series of changes
- "established Network Change" Means a change falling within the definition of "Network Change" and which:
(a) in the case of a Network Change proposed by Network Rail, Network Rail is entitled to carry out having complied with the procedural and other requirements of this Part G; and
- "Network Change" means, in relation to an Access Beneficiary:
(a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:
(i) the Network; or
(ii) trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; or
(b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:
(i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and
(ii) has lasted or is likely to last for more than six months,
including
(x) a temporary speed restriction;
(y) a material change to the location of any of the specified points referred to in Condition B1.1 (a); or
(z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or
(c) any material variation to an established Network Change, other than an authorised variation,
but does not include a closure (as defined in the Railways Act 2005) or a change made under the Systems Code

CONDITION G1 - NETWORK CHANGE PROPOSAL BY NETWORK RAIL

1.1 Notice of proposal

Subject to Conditions G1.9 and G1.10, if Network Rail wishes to make a Network Change, it shall:

- (a) give notice of its proposal for Network Change to:
 - (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;
 - (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
 - (iii) the Office of Rail Regulation; and
 - (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change; and
- (b) without delay publish on its website a summary of its proposal for Network Change.

1.2 Content of notice of proposed Network Change

A notice of a proposed Network Change given by Network Rail under Condition G1.1 shall:

- (a) state the relevant response date and the obligations of Access Parties under Conditions G1 and G2;
- (b) indicate whether and to what extent the proposed Network Change has been progressed using the Complex Projects Procedure;
- (c) indicate whether the proposed Network Change is a Short Term Network Change;
- (d) invite the persons specified in Condition G1.1(a)(ii)-(iv) to submit comments by the relevant response date;
- (e) 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) Network Rail’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) in the case of a Short Term Network Change:
 - (vi) any additional terms and conditions which Network Rail proposes should apply to the change, including any proposed variation procedure;

- (vii) the results of any consultation undertaken in accordance with Condition G5; and
- (viii) the results of any Preparatory Works undertaken in accordance with Condition G6; and

(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 persons 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.

1.3 Consultation

1.3.1 Network Rail shall, after giving notice of any proposal for Network Change under Condition G1.1, consult with each operator of railway assets likely to be materially affected by the proposed change to the extent reasonably necessary so as properly to inform that operator of the change and to enable that operator to assess the consequences for it of the proposed change.

1.3.2 After consultation under this Condition G1.3, Network Rail may notify a later relevant response date to the persons to whom the notice of proposal for Network Change was given.

1.4 Obligations on Access Beneficiaries to facilitate Network Change

1.4.1 Except in the circumstances and to the extent specified in Condition G1.4.2, an Access Beneficiary shall, when consulted by Network Rail under Condition G1.3, take all reasonable steps to comply with any written request of Network Rail to provide Network Rail, within a reasonable period of time and at no cost to Network Rail, with:

- (a) a preliminary estimate of those costs, losses and expenses referred to in Condition G2.2; or
- (b) a preliminary written response in respect of the proposed Network Change, which shall:
 - (i) be binding on the Access Beneficiary, unless the Access Beneficiary indicates otherwise; and
 - (ii) if it is negative, include reasons.

1.4.2 An Access Beneficiary shall not be obliged to comply with a request from Network Rail under Condition G1.4.1:

- (a) unless:
 - (i) the relevant response date is 60 or more days after the date on which the proposal for Network Change was given; and
 - (ii) the request is made at the same time as Network Rail gives its notice under Condition G1.1; or
- (b) to the extent that the Access Beneficiary is unable to comply with such a request, having regard to the information reasonably available to it.

.....

1.9 Changes to the operation of the Network

In the case of a Network Change within the meaning of paragraph (b) of that term's definition, Network Rail may commence implementing the procedure set out in this Part G and shall, upon notice being given by the relevant Access Beneficiary to Network Rail at any time after the expiry of the relevant period, promptly commence implementing and thereafter comply with that procedure as if that change were a Network Change proposed by Network Rail.

1.10 Network Change for safety reasons

To the extent that a Network Change within the meaning of paragraph (a) of that term's definition is required to be made by Network Rail for safety reasons, Network Rail shall not be obliged to implement the procedure set out in this Part G in relation to that change until the change has lasted for three months. Upon expiry of the relevant period, Network Rail shall promptly commence implementing and thereafter comply with the procedure set out in this Part G as if the relevant Network Change were a Network Change proposed by Network Rail.

CONDITION G2 - RESPONSE BY ACCESS BENEFICIARY TO NETWORK CHANGE PROPOSAL

2.1 Obligation to give notice of response

2.1.1 The Access Beneficiary shall give notice to Network Rail 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 expectations of the Access Beneficiary as to the future use of the relevant part of the Network; and/or

(b) one or more of the conditions set out in Condition G2.1.1(a) has been satisfied but it is prevented by Condition G5.7 from objecting to the proposed Network Change and the proposed Network Change is not, on the basis of the available evidence and taking account of the alternative solutions available and the progress made with the proposed Network Change, to the benefit of the industry as a whole; and/or

2.1.2 Any notice of the kind referred to in Condition G2.1.1(a) above shall include the reasons for the Access Beneficiary's opinion.

The notice referred to above shall contain such detail as is reasonable to enable Network Rail to assess the merits of the Access Beneficiary's decision.

CONDITION G10 - ESTABLISHMENT AND IMPLEMENTATION

10.1 Implementation of a Network Rail proposed Network Change

10.1.1 Network Rail shall be entitled to implement a proposed Network Change if:

(a) it has not received a notice from any Access Beneficiary under Condition G2.1 by the relevant response date; or

(b) it has received notice by the relevant response date from an Access Beneficiary under Condition G2.1(c) and either the amount of any compensation referred to in Condition G2.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and

(c) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between Network Rail and any affected Access Beneficiary.

10.1.2 Network Rail may, if it considers it expedient to do so in order to confirm whether or not Condition G10.1.1 has been satisfied, issue a notice to all affected Access Beneficiaries when it reasonably believes it is entitled to implement a proposed Network Change.

10.1.3 Network Rail's entitlement to implement a proposed Network Change shall be treated as confirmed 21 days after it has served a notice in respect of that Network Change in accordance with Condition G10.1.2 unless it receives notice from an Access Beneficiary within those 21 days disputing Network Rail's entitlement to implement that proposed Network Change under Condition G10.1.1 and giving full particulars of its reasons.

10.1.4 If Network Rail does not agree with the contents of a notice served by an affected Access Beneficiary in accordance with Condition G10.1.3, Network Rail may:

(a) refer the matter for determination in accordance with the ADRR and Condition G11 shall apply; or

(b) withdraw the proposed Network Change.

.....

10.3 When a Network Change may not be implemented

10.3.1 Network Rail shall not be entitled, and a Sponsor shall not be entitled to require Network Rail, to implement a proposed Network Change unless it is so entitled to implement, or require the implementation of that Network Change under Condition G10.1.1 or Condition G10.2.1.

10.3.2 For the purposes of the Conditions G10.1.1 and G10.2.1, unresolved disputes shall include:

(a) a notice has been served under Condition G2.1.1(a) or (b) or Condition G4.1.1(a) or (b) which has not been withdrawn, resolved under Condition G11 or agreed not to apply; and

(b) a notice has been served under Condition G2.1.1(c) or Condition G4.1.1(c) or (d) which has not been agreed or resolved as referred to in Condition G10.1.1(b) or G10.2.1(b) or (c) or otherwise agreed, resolved or withdrawn.

CONDITION G11 - APPEAL PROCEDURE

11.1 *Right of referral in accordance with the ADRR*

If any Access Party is dissatisfied as to:

- (a) any matter concerning the operation of the procedure in this Part G;
- (b) the contents of any notice given under Condition G2.1, G4.1, G5.5, G8.1.1 or G10 (and, in particular, the amount of any compensation referred to in those Conditions);
- (c) any estimate referred to in Condition G1.6 or G3.6;
- (d) the:
 - (i) proposed Expiry Date; or
 - (ii) estimated timescale in which a Short Term Network Change can be reasonably reversed,in a notice of proposed Network Change given under Condition G1.1; or
- (e) the reasons given by Network Rail as to why it does not believe that the effect of the Short Term Network Change is preventing the Access Beneficiary using the Network in accordance with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network under Condition G8.1.4(b),

that Access Party may refer the matter for determination in accordance with the ADRR.