

THE OFFICE OF RAIL REGULATION’S DETERMINATION OF THE APPEAL BY NETWORK RAIL INFRASTRUCTURE LIMITED (“NETWORK RAIL”) AGAINST THE INTERIM DETERMINATION “ADP20” OF THE ACCESS DISPUTES PANEL IN RESPECT OF A JOINT REFERENCE BROUGHT BY NETWORK RAIL AND FIRST GREATER WESTERN LIMITED (“FGW”).

DETERMINATION: *The Office of Rail Regulation determines the appeal as set out at paragraph 119 of this determination.*

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I Introduction

1. This is the determination of the Office of Rail Regulation (“ORR”) of an appeal brought by Network Rail on 18 April 2007. The Notice of Appeal challenges the interim determination ADP20 (“the Interim Determination”) published on 13 March 2007 by the Access Disputes Panel (“the Panel”).
2. In relation to this appeal there are three track access agreements that operated in respect of the relevant period in dispute (weeks 1 to 24 of the Financial Year 2006/7). The relevant agreements are:
 - (a) Track Access Contract (Passenger Services) dated 14 June 2002 originally between Network Rail and Great Western Trains Company Limited;
 - (b) Track Access Contract (Passenger Services) dated 30 March 2004 originally between Network Rail and Wales & West Passenger Trains Limited; and
 - (c) Track Access Contract (Passenger Services) dated 7 December 2004 originally between Network Rail and First Great Western Link Limited.
3. The agreements were transferred to FGW by a statutory transfer scheme with effect from 1 April 2006. The provisions of the agreements are based on the model track access agreement for passenger services published by ORR in October 2004. For the purpose of this determination, the three agreements are referred to as “the TAA” and references to a provision of the TAA are references to the relevant provision in each agreement.
4. A dispute arose concerning the compensation payable by Network Rail to FGW in respect of certain Restrictions of Use¹ (“ROUs”), which occurred in weeks 1 to 24 of the financial year 2006/7. In particular, there was a dispute as to the Notification Factor², which should be applied in the formula for determining the amount of compensation due to FGW. This in turn raised a number of issues as to the true legal interpretation and construction of paragraph 4 of Part 3 of Schedule 4 of the TAA, and Part D of the Network Code (“the Code”).
5. Network Rail and FGW jointly referred this dispute to the Panel. The Panel Chairman determined that the dispute would be resolved in three stages. First, the Panel would consider the relevant provisions of Schedule 4 of the TAA and Part D of the Code, and determine any issues of legal interpretation and construction in relation to them.

¹ Definition set out in Annex B.

² Definition set out Annex B.

Secondly, the Panel would resolve any disputes of fact between the parties, which were relevant to the dispute. Thirdly, the Panel would determine the level of compensation payable by Network Rail to FGW.

6. Following a hearing on 24 January 2007, the Panel published the Interim Determination dealing with the issues of legal interpretation and construction referred to above. The Panel's Interim Determination is summarised at paragraph 7 below.

II Panel's Findings

7. The Panel's findings are set out at paragraph 56 of the Interim Determination, and for convenience are quoted below.

"56.1 a Revised Bid must be submitted by T-18³. A Bid submitted after T-18 may be a Spot Bid but cannot be a Revised Bid.

56.2 a Revised Bid must specify the Bidder's requirements (if any) under Condition D3.3. If the Bidder specifies no requirements under one or more of the paragraphs within Condition D3.3, Network Rail is entitled to assume that it has none;

56.3 notwithstanding the use of 'shall' in Condition D4.8.3, a Train Operator is not required to submit a Revised Bid, in the sense that if it did not do so it would be in breach of the Network Code. However, if a Train Operator fails to submit a Revised Bid, it must accept the consequences of not doing so;

56.4 a material alteration or addition to the terms of a Revised Bid constitutes a new Bid replacing the Bid previously made. If the alteration or addition is made after T-18, the new bid will not be a Revised Bid;

56.5 if a Revised Bid has been superseded by another bid made after T-18, there will be no Revised Bid in respect of the relevant Train Slots;

56.6 the provision of further information by way of clarification or amplification of a Bid not involving a material alteration or addition to its terms will not normally constitute a new bid unless it requires Network Rail to revise or re-edit relevant Train Slot(s) materially;

56.7 when carrying out the consultation required in Condition D4.8.2(b), including the setting of 'agreed criteria', Network Rail is entitled to consider and stipulate what, for the purposes of Condition D4.8.5, should be the content of a Revised Bid

³ Expressed to refer to the week of prospective travel as "T" and to categorise earlier weeks as T minus the number of weeks.

'properly submitted', and in deciding whether a Revised Bid has actually been 'properly submitted' for the purposes of that Condition D4.8.5, Network Rail must act reasonably and fairly. Fairness requires that it should treat all Industry Parties affected by the same ROUs, and with rights to operate over a specified route, equally;

- 56.8 it would be reasonable for Network Rail to conclude that a Revised Bid had not been properly submitted if the effect of the Bidder having failed to state its requirements under one or more of the paragraphs of Condition D3.3 imposed on Network Rail unreasonable burdens or delays in formulating an amended Timetable;*
- 56.9 where Network Rail, acting reasonably, concludes that a Revised Bid has not been 'properly submitted', this will mean in practice that 'the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3';*
- 56.10 the column C Notification Factor applies only where the facts of the case fit the wording of paragraph 4.1 of Schedule 4. If they do not (for example, because the ROU was not reflected in the First Working Timetable, and this was not because of a request by FGW that it should not be) Network Rail cannot claim the benefit of column C whatever FGW's shortcomings may have been;*
- 56.11 the use of the word 'because' in paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Schedule 4 to the Track Access Contract means that the column C (or as the case may be D) [Notification Factor] applies only where Network Rail's failure to upload to TSDB by T-12⁴ has been caused by FGW's failure to submit a revised bid by T-18 (taking account of all that is said in this determination). A 'but for' test should be applied. This test would not be satisfied if it appeared that the true cause was a complete failure of Network Rail's systems. It would be unlikely to be satisfied if what FGW had prepared and intended as a Revised Bid failed to qualify as such only because it was submitted a day late;*
- 56.12 given the discretions and authorities at Network Rail's disposal in the operation of Condition D4.8.2, instances when a failure to 'upload to TSDB at T-12' is 'because the Train Operator has failed to give Network Rail a Revised Bid in accordance with*

⁴ The Panel uses the expression "upload to TSDB at T-12" to mean that "the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train services database at 2200 hours on the date which is 12 weeks before the Restrictions of Use Date" (see paragraph 7 of the Interim Determination).

Condition D4.8.3', and the 'but for' test is therefore satisfied, are likely to be specialised and infrequent;

56.13 Schedule 4, and in particular paragraphs 5 and 4, are drafted on the basis that a) all ROUs require Network Rail to pay compensation to the Train Operator; b) the extent to which the compensation factor is reduced by one Notification Factor rather than another depends largely on steps taken by Network Rail; accordingly c) the onus of proof is on Network Rail to demonstrate that those steps were taken to justify application of a particular Notification Factor."

III Relevant Provisions of the Code and the TAA

8. Network Rail and FGW are parties to the TAA. By clause 2.1 of the TAA, the Code is incorporated into, and forms part of, the TAA. The effect of clause 2.2 and Schedule 10 of the TAA is that if the Code is modified at any time, the modifications are incorporated into the contract on a prospective basis.
9. The version of the Code applicable to this dispute is that issued on 16 October 2005. The relevant provisions and definitions of the Code are set out in Annex A to this determination.
10. The relevant provisions and definitions of the TAA are set out in Annex B to this determination.

IV The Grounds of Appeal and Relief Sought

11. By a Notice of Appeal dated 18 April 2007 Network Rail has appealed to ORR against certain aspects of the Panel's Interim Determination. In its Notice of Appeal, Network Rail states that it appeals pursuant to Condition D5.2 of the Code, which governs appeals against decisions of an ADRR panel. Network Rail recognises, however, that it is arguable that certain aspects of the Panel's Interim Determination relating to the interpretation of paragraph 4 of Part 3 of Schedule 4 of the TAA should be appealed to an arbitrator pursuant to paragraph 8.4 of Part 3 of Schedule 4 of that contract. Network Rail indicates, however, that it wishes all aspects of its appeal against the Panel's Interim Determination to be addressed by ORR.
12. In summary, Network Rail asks ORR in its Notice of Appeal to:
 - (a) reject the Panel's findings at paragraphs 56.3 and 56.8 of the Interim Determination and substitute alternative findings;
 - (b) make additional findings in relation to the Panel's findings at paragraphs 56.2, 56.7 and 56.9 of the Interim Determination;
 - (c) confirm that nothing in the Panel's finding at paragraph 56.10 of the Interim Determination adversely affects the operation of paragraph 4.1(b)(iii) of Part 3 of Schedule 4 of the TAA;

- (d) reject the Panel's findings at paragraphs 56.11, 56.12 and 56.13 of the Interim Determination and, if ORR agrees with Network Rail in relation to its request regarding paragraphs 56.8 and 56.9 of the Interim Determination, make no further findings but, if it does not, make an additional finding; and
 - (e) confirm its agreement with the Panel's findings in paragraphs 56.1, 56.4, 56.5 and 56.6 of the Interim Determination.
- 13. Network Rail's submissions in support of its request are summarised below when ORR addresses the substantive issues.
- 14. FGW served its Response to the Notice of Appeal on 30 May 2007. In its Response it opposes Network Rail's Appeal. It recognises that Network Rail's Appeal relates both to the application of Part D of the Code, and also to the interpretation of Part 3 of Schedule 4 of the TAA. It accepts that there is merit in addressing these issues together, and states that it is prepared to consent to all aspects of the current appeal being determined by ORR.
- 15. In its Response, FGW asks ORR to:
 - (a) reject Network Rail's request in relation to the Panel's findings at paragraphs 56.2, 56.3, 56.8 and 56.11 of the Interim Determination but asks that if ORR finds in Network Rail's favour that its findings address the specific issues highlighted by it;
 - (b) reject Network Rail's request in relation to the Panel's findings at paragraphs 56.7, 56.9, 56.12 and 56.13 of the Interim Determination;
 - (c) accept Network Rail's request in relation to the Panel's findings at paragraph 56.10 of the Interim Determination but to clarify that this does not affect the Panel's findings at paragraph 56.11; and
 - (d) address the points it has raised in relation to the Panel's findings at paragraphs 56.1, 56.4, 56.5 and 56.6 of the Interim Determination if ORR confirms these paragraphs.
- 16. FGW's submissions in support of its request are summarised below when ORR addresses the substantive issues.
- 17. Network Rail served a Reply to FGW's Response on 29 June 2007.
- 18. FGW provided comments on Network Rail's Reply on 20 July 2007.

V Conduct of the Appeal

- 19. ORR decided that this appeal would proceed by way of a review of the Panel's decision. It did not consider it necessary to hold an oral hearing. This determination is therefore based on consideration of the written representations submitted by both parties.

20. The parties both agreed to this approach.⁵

VI Jurisdiction

21. The Interim Determination of the Panel addresses issues arising in relation to both Part D of the Code and paragraph 4 of Part 3 of Schedule 4 of the TAA. As noted above, both Network Rail and FGW wish ORR to determine all aspects of the current appeal.⁶
22. Although ORR has jurisdiction in respect of appeals brought under D5.2 of the Code, appeals regarding the interpretation of paragraph 4 of Part 3 of Schedule 4 of the TAA would ordinarily be heard by an arbitrator. It is open to the parties to agree in writing to an alternative dispute resolution mechanism.⁷ In this instance both parties have agreed in writing⁸ to invite ORR to accept jurisdiction to determine the elements of this appeal that relate to Schedule 4 of the TAA.
23. However, ORR does not consider that the mutual agreement of the parties is sufficient for ORR to be required to accept jurisdiction over a dispute that would otherwise be referred to arbitration under the TAA. ORR has a discretion whether or not to accept jurisdiction and the exercise of its discretion is governed by its general duties under section 4 of the Railways Act 1993, as amended (“the Act”).
24. Section 4 of the Act sets out a number of duties of ORR. There is no statutory order of priority amongst these duties, and it is for ORR to balance them and give each appropriate weight in the circumstances of an individual case. In this case, ORR needs to consider the interests of the parties in achieving prompt and effective resolution of the interpretation of paragraph 4 of Part 3 of Schedule 4 of the TAA and the wider public interest in the use of ORR’s resources for this purpose. In particular, ORR considers that its section 4 duties of exercising its functions in the manner it considers best calculated to promote efficiency and economy on the part of the persons providing railway services and to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance, are relevant in this case.⁹

⁵ Network Rail indicated its agreement by a letter dated 16 July 2007. FGW indicated its agreement by a letter dated 19 July 2007.

⁶ Paragraphs 1.4 and 1.5 of Network Rail’s Notice of Appeal and Paragraph 4.1 of FGW’s Response.

⁷ Clause 13.1(e) of the Track Access Agreement expressly confers this right on the parties.

⁸ Paragraph 1.5 of Network Rail’s Notice of Appeal, Paragraph 4.2 of FGW’s Response to Notice of Appeal.

⁹ Sections 4(1)(c) and (g) of the Act.

25. It should be noted that the access regime, as embodied in track access agreements and the Code, generally makes a clear distinction between matters that affect multilateral relations with industry-wide significance (over which ORR has an appeal function) and contractual matters usually of relevance only to the immediate parties to a particular track access agreement (where the appropriate method of dispute resolution is arbitration). Before accepting jurisdiction over matters that would usually go to arbitration, ORR would need to be satisfied that there was a good reason to do so.
26. In this case, the TAA issues over which the parties have asked ORR to accept jurisdiction involve a legal interpretation of paragraph 4 of Part 3 of Schedule 4 of the TAA. ORR considers that the legal interpretation of paragraph 4 is not simply a matter of bilateral importance to the parties, because it involves general points of principle regarding the timetabling process and its interaction with the compensation regime that concern the industry as a whole. ORR also considers that the interpretation of paragraph 4 is closely linked to the other issues relating to Part D of the Code, which it will determine in this appeal. Further, because the scope of the issues under paragraph 4 referred to ORR are narrow, and because ORR has all the information before it to review the Panel's determination of these issues, ORR considers it can determine the issues promptly and efficiently as part of the process of conducting the appeal on the Part D issues.

ORR's Conclusion

27. For the reasons set out above, ORR considers that the balance of its section 4 duties, in particular those under section 4(1)(c) and 4(1)(g) of the Act, mean that, in this case, ORR should accept jurisdiction over the issues that arise in this appeal in relation to paragraph 4 of Part 3 of Schedule 4 the TAA and determine them together with the issues arising under Part D of the Code.

VII ORR's Consideration of the Appeal

28. ORR's determination of the issues which arise in this appeal, and the reasoning supporting its determination, are set out below. The issues are dealt with in the logical order in which they fall to be considered. In some instances, neither party has sought to challenge particular conclusions reached by the Panel, although they have nonetheless asked ORR to confirm them and have made representations in respect of those conclusions. In light of this ORR has also considered and expressed conclusions below about those aspects of the Panel's Interim Determination.
29. In considering this appeal ORR has been mindful that the purpose of the supplemental timetable revision process in Part D of the Code is to provide a mechanism to enable revisions to be made to the national timetable, where ROUs are needed. It is a collaborative process between Network Rail and train operators involving a sequence of

interdependent steps to ensure that train operators have information on train times at least twelve weeks before the relevant timetable week, so that the information can be provided to passengers in a timely fashion. Indeed, Network Rail and train operators that run passenger services have licence conditions complementing these contractual obligations.

30. The contractual provisions reflect the multilateral and collaborative nature of the process and the fact that the latest date by which a revised timetable must be available is fixed.
31. ORR notes that it has been asked to determine matters of pure legal interpretation without consideration of the factual circumstances in dispute. The determination involves ORR construing some of the parties' contractual obligations and entitlements contained in Part D of the Code and paragraph 4 of Part 3 of Schedule 4 of the TAA. In doing so, ORR has applied the legal principle that the words used in the contract should be given their ordinary and natural meaning. ORR considers that if this construction does not represent the practice which the parties follow or would like to follow then it is open to the industry to propose changes to Part D of the Code to reflect this.

A. What is a Revised Bid?

(i) Contents

Summary of the Panel's Determination on paragraphs 56.2 and 56.7

32. This issue arises out of paragraphs 56.2 and 56.7 of the Panel's Interim Determination. The Panel held that a Revised Bid "must" specify the Bidder's requirements (if any) under Condition D3.3, and that if a Bidder did not specify any requirements under one or more of the paragraphs within Condition D3.3, Network Rail is entitled to assume that the Bidder has no such requirements. The Panel also held that, when carrying out the consultation required under Condition D4.8.2(b), including the setting of "agreed criteria", Network Rail was entitled to consider and stipulate what, for the purposes of Condition D4.8.5, should be the content of a Revised Bid "properly submitted". In addition the Panel held that in deciding whether a Revised Bid had actually been "properly submitted" Network Rail must act reasonably and fairly, fairness requiring that it should treat all industry parties affected by the same ROUs, and with rights to operate over a specified route, equally.

Summary of Network Rail's Representations

33. Network Rail's case on these issues is contained in sections 4 and 6 and paragraphs 12.1 and 12.3 of its Notice of Appeal, and section 6 of its Reply.
34. In summary, Network Rail does not challenge the Panel's finding at paragraph 57.2 of the Interim Determination but invites ORR to make an additional finding in relation to the issues covered by that paragraph.

Network Rail contends that the phrase “if any”, in Condition D3.3, refers to categories of requirements which are not relevant to a particular Revised Bid. It contends, however, that the phrase “if any” does not permit a train operator to submit a Revised Bid which does not make any reference to one or more of the matters listed under Condition D3.3, which are clearly relevant for timetabling purposes. Network Rail seeks a determination from ORR that a failure by a train operator to submit a Revised Bid containing details under the categories set out in Condition D3.3, when such information is relevant to the timetabling exercise, entitles Network Rail to assume that no Revised Bid has been made at all.

35. Network Rail does not specifically challenge the Panel’s finding at paragraph 56.7 of the Interim Determination, but invites ORR to make an additional finding in relation to the issues covered by that paragraph. Network Rail seeks clarification that a train operator’s obligation to comply with Condition D4.8.3 is not dependent on Network Rail defining what information is required from the train operator as part of the “agreed criteria” under Condition D4.8.2(b) or through the process in Condition D2.2 to establish the Rules of the Plan.

Summary of FGW’s Representations

36. FGW’s case on these issues is contained in sections 8 and 10 and paragraphs 17.2 and 17.4 of its Response to the Notice of Appeal.
37. FGW supports the Panel’s finding at paragraph 56.2 of the Interim Determination. It opposes the additional wording, which Network Rail proposes is added to this finding because it contends it is contrary to the proper construction of Conditions D3.3 and D4.8.6.
38. FGW does not challenge the Panel’s finding at paragraph 56.7 of the Interim Determination, and relies on it to support its case on the construction of Condition D3.3.

ORR’s Analysis - Contents of a Revised Bid

39. To understand Condition D3.3, it is first necessary to consider certain defined terms. The terms “Bid”, “Revised Bid” and “Spot Bid” are all defined in the Definitions section at the beginning of Part D of the Code. “Bid” is defined as meaning:

“any Train Slot included in the Base Timetable (to the extent not varied or withdrawn by any subsequent Bid), or any bid made to Network Rail for one or more Train Slots (comprising, as the case may be, the notifications (if any) made in accordance with Conditions D3.2.1, D3.2.4 and D3.2.6, any Spot Bid or any Revised Bid)”.

40. It is clear from this definition that “Bid” is given a broad meaning, which encompasses both Revised Bids and Spot Bids. A Spot Bid is defined as meaning:

“any Bid (other than a Revised Bid) made during the Timetable Period to which that Bid relates or during the Supplemental Period immediately prior to that Timetable Period”;

and Revised Bid is defined as meaning:

“any Spot Bid seeking to revise a Train Slot scheduled in the relevant Working Timetable, as submitted to Network Rail by a Train Operator in accordance with Condition D4.8.3”.

41. At first sight, the definitions of “Revised Bid” and “Spot Bid” are inconsistent, because a Revised Bid is defined by reference to Spot Bids, but Spot Bids are defined in a way that specifically excludes Revised Bids. Notwithstanding this apparent confusion, however, the interrelationship between these two types of bids is clear. A Spot Bid is any bid made during the relevant Timetable Period or Supplemental Period other than a Revised Bid. A Revised Bid is any Spot bid which:
- (a) is seeking to revise a Train Slot in the relevant working timetable; and
 - (b) is submitted in accordance with Condition D4.8.3.
42. For a Revised Bid to be “submitted in accordance with Condition 4.8.3” it must satisfy three requirements. A Revised Bid must:
- (a) follow receipt of notification from Network Rail under Condition D4.8.2(c)(ii);
 - (b) relate to Train Slots¹⁰ in respect of which Network Rail’s notification required a Revised Bid and other Train Slots, if any, materially affected by the revisions; and
 - (c) must be submitted no later than 4 weeks prior to the applicable Revision Finalisation Date.
43. In the light of the definition of “Bid”, as indicated above, it is clear that Condition D3.3 applies to Revised Bids.
44. Condition D3.3 sets out the contents of a Revised Bid. It states:

¹⁰ ORR notes that Condition D4.8.3 uses the term Timetable Week Slot as defined in Annex A to this Determination and it is essentially a Train Slot scheduled in the Working Timetable in respect of a Timetable Week.

"A Bidder shall, in making a Bid, indicate, in respect of any Train Slots for which the Bid is being made, the extent of its requirements (if any) as to:

- (a) dates on which the Train Slots are intended to be used;*
- (b) start and end points of the train movement;*
- (c) intermediate calling points;*
- (d) the times of arrival and departure from any point specified under paragraphs (b) and (c) above;*
- (e) railway vehicles to be used;*
- (f) train connections with other railway passenger services;*
- (g) the route to be followed;*
- (h) any Ancillary Movements;*
- (i) platforming at any points specified pursuant to paragraphs (b) and (c) above;*
- (j) any relevant commercial and service codes; and*
- (k) the maximum train speed, maximum train weight and maximum train length."*

45. The term "Train Slots" is defined in the Definitions section at the beginning of Section D of the Code as meaning *"a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement"*. In the light of this definition, the effect of the first two lines of Condition D3.3 is that any Bid must necessarily include the start and end points, the times of arrival and departure at start, end and (where appropriate) intermediate calling points, and by necessary implication the dates on which the train movements are to take place. As a result, any Bid must, as a minimum, include the information specified in Conditions D3.3(a), (b) and (d) and, if there are intermediate calling points, the information required by Condition D3.3(c). Failure to include any of this information will mean that a purported bid is not a "Bid", as defined in the Code.¹¹
46. In relation to the information specified in Conditions D3.3(e) to (k), the position is different. ORR considers that the natural meaning of the words "a Bidder shall, in making a Bid, indicate, in respect of the Train

¹¹ ORR considers the other requirements necessary for a Bid to be a Revised Bid "properly submitted" when it considers the Panel's finding in relation to paragraph 56.8 of the Interim Determination at paragraphs 71 and 73 of this determination.

Slots for which the Bid is being made, the extent of its requirements (if any) ..." is that a Bidder must include in any Bid any specific requirements that it has as to the matters listed in those sub-paragraphs. A failure to do so will mean that a purported bid is not a "Bid" as defined in the Code. However, it may not be apparent on submission of a purported Revised Bid that any required information is missing. This might emerge in circumstances where Network Rail wishes to ask a Bidder for information through the consultation process which is provided for in Condition D4.8.4. If this process demonstrates that the Bidder had requirements as to the matters listed in Condition D3.3 (e) to (k), which were not included in its Revised Bid, this raises the question as to the status of the Revised Bid where amendments are subsequently made. ORR addresses this issue where it considers the Panel's findings on paragraph 56.4 of the Interim Determination (see paragraphs 83 to 93 below).

47. If a Bid is silent on matters listed in Condition D3.3 (e) to (k), Network Rail is entitled to assume a Bidder has no requirements. Under Condition D4.8.4(b) Network Rail is required to compile an amended timetable, which (subject to Condition D4.8.5) takes account of any Revised Bids submitted in accordance with Condition D4.8.3. If, therefore, a Bidder does not state any requirement in respect of the matters set out in sub-clauses (e) to (k) as part of its Revised Bid, it cannot subsequently complain that Network Rail has failed to take such a requirement into account.

ORR Analysis - Network Rail's ability to stipulate the contents of a Revised Bid

48. Although neither party has specifically challenged the Panel's finding in paragraph 56.7 of the Interim Determination, both parties have commented on those findings and Network Rail has requested that ORR make an additional finding.
49. In paragraph 56.7, the Panel found that the consultation required in Condition D4.8.2(b) of the Code, including the setting of the "agreed criteria", permitted Network Rail to stipulate what should be the content of a Revised Bid, at least for the purposes of determining whether it had been properly submitted under Condition D4.8.5. The meaning of "properly submitted" is considered where ORR deals with the Panel's finding on paragraph 56.8 at paragraphs 71 and 73 of this determination. However, Network Rail's ability to stipulate the contents of a bid under Condition D4.8.2(b) is addressed here as it is closely related to the issue arising in relation to Condition D3.3.
50. ORR does not consider that the natural meaning of this Condition gives Network Rail the ability to stipulate additional requirements as to the content of a Revised Bid. In particular, ORR considers that the "agreed criteria" referred to in Condition D4.8.2(b) of the Code are the criteria set out in the Rules of the Plan to which Network Rail must have regard when making decisions regarding capacity allocation and the structure

of the amended timetable. These criteria do not relate to the submission, or the required content, of a Revised Bid.

51. Although ORR disagrees with the Panel that Condition D4.8.2(b) (including the reference to “agreed criteria”) gives Network Rail the ability to stipulate the content of a Revised Bid, it has considered whether any other provision of the Code might permit Network Rail to do so. In this regard, ORR notes Conditions D2.1.1 to D2.1.5 and D2.1.10. These set out procedures to allow the Rules of the Route and the Rules of the Plan to be amended as part of the normal timetabling cycle or otherwise as necessary. If Network Rail wishes to stipulate additional requirements for Revised Bids, ORR considers that it is open to Network Rail to use these processes to put forward additional requirements as amendments to the Rules of the Route and the Rules of the Plan, which would take effect subject to compliance with the procedures laid out.
52. It should be noted that any Revised Bids made by train operators must comply with the Rules of the Route and the Rules of the Plan, because under Condition D4.8.5 any Revised Bid, which conflicts with the Rules of the Route or the Rules of the Plan, must not be accepted.

ORR's Conclusions

53. Subject to the additional points below, ORR agrees with the Panel's finding that a Revised Bid must specify the Bidder's requirements, if any, under Condition D3.3. For the reasons set out above, ORR considers that any Bid must, as a minimum, include the information set out in sub-paragraphs (a), (b) and (d) of Condition D3.3 and, if there are intermediate calling points, the information required by Condition D3.3(c). Failure to do so will mean that a purported bid is not a Bid as defined in the Code (and, therefore, cannot be a Revised Bid). In relation to the information specified in Conditions D3.3 (e) to (k), the position is different. If a Bidder has requirements under these sub-paragraphs, it must include them in any Bid (and a failure to do so will mean that a purported bid is not a Bid as defined in the Code). However, it may not be apparent on submission of a Revised Bid that any required information is missing. ORR agrees with the Panel's finding at paragraph 56.2 that if a Bidder does not specify any requirements in relation to a particular sub-paragraph of Condition D3.3 Network Rail is entitled to assume it has none.
54. ORR does not agree with the Panel's finding at paragraph 56.7. It is not open to Network Rail to stipulate additional requirements in relation to the contents of a Revised Bid pursuant to Condition D4.8.2. However, Conditions D2.1.1 to D2.1.5 and D2.1.10 permit Network Rail, subject to compliance with the procedures contained in those Conditions, to amend the Rules of the Route and the Rules of the Plan to stipulate additional requirements in relation to a Revised Bid. If these are not complied with the Revised Bid must not be accepted by Network Rail in accordance with Condition D4.8.5.

(ii) Timing

Summary of Panel's Determination at paragraph 56.1

55. At paragraph 56.1 of the Interim Determination, the Panel found that a Revised Bid must be submitted by T-18; and that a Bid submitted after T-18 may be a Spot Bid but cannot be a Revised Bid.

Summary of Network Rail's Representations

56. At paragraph 12.9 of the Notice of Appeal, Network Rail seeks ORR's confirmation of its agreement with paragraph 56.1 of the Interim Determination, and makes some further comments in relation to the finding in paragraph 5.2 of its Reply.

Summary of FGW's Representations

57. FGW's submissions on this issue are contained in paragraphs 16.2 and 17.10 of its Response. In summary, FGW contends that a Train Operator is not required to offer a Revised Bid in circumstances where the request for the Revised Bid is not in accordance with Condition D4.8.2(c). FGW submits that the terms should be construed to prevent Network Rail taking advantage of its own defaults and where it has made materially late amendments this should enable bids submitted in a timely way in response to be considered through the Condition D4.8.4 and D4.8.5 process.

ORR's Analysis

58. ORR has been mindful of the purpose of Part D of the Code, as set out in paragraph 29 above, when considering this issue. ORR notes that the objective of the sequential steps set out in Condition D4.8 is to enable information about train times to be provided to train operators at least twelve weeks before the relevant timetable week, so that it can be provided to passengers in a timely fashion.
59. The supplemental timetable revision process set out in Condition D4.8 of the Code usually begins between 29 and 26 weeks before any Passenger Change Date, with the notification by Network Rail of its specific proposals for the various key dates affecting the timetable revision process (see Condition D4.8.1). The process ends with the notification by Network Rail of its decisions in relation to additional, amended and deleted Timetable Week Slots¹² (see Condition D4.8.7), and confirmation by the train operator as to whether it accepts or disputes those decisions (see Condition D4.8.8). Notification by Network Rail of its decisions has to take place at least fourteen weeks before the relevant Timetable Week (see the definitions of Revision Finalisation Date and Revision Period End Date) and confirmation by

¹² Definition set out in Annex A.

the train operator whether it accepts or rejects the decisions at least thirteen weeks before the relevant Timetable Week. This is so the process is completed twelve weeks before the relevant Timetable Week.

60. The basic framework of the process set out in Condition D4.8 is as follows:

Defined Term in process	Timeframe for completion	What must be done
Revision Period Commencement Date	Normally T-29 to T-26	Network Rail to provide outline proposals for revision of allocation of capacity (D4.8.2(a))
		Network Rail to develop the structure of an amended train plan for the relevant Timetable Week (D4.8.2(b))
Supplemental Period commences	No later than T-22	Network Rail to notify affected bidders of its capacity allocation decisions, the proposed structure of the amended train plan and whether it requires bidders to submit a Revised Bid (D4.8.2(c))
(No title)	No later than T-18	Each Bidder, who has received a request, to prepare and submit a Revised Bid (D4.8.3)
		Network Rail, in consultation with Bidders, to compile an amended timetable in respect of the relevant Timetable Week which should take account of any Revised Bids, subject to Network Rail being entitled as reasonably necessary to modify or reject a Revised Bid in accordance with certain conditions (D4.8.4 and D4.8.5)
		Network Rail entitled as reasonably necessary to amend any Timetable Week Slot in respect of which it invited Revised Bids, but no Revised Bids were submitted, for the purposes of enabling Network

		Rail to take ROUs (D4.8.6)
Revision Finalisation Date	T-14	Network Rail to notify its decision to Bidders in respect of additional, amended and deleted Timetable Week Slots based on Revised Bids (D4.8.7)
Revision Response Date	T-13	Bidder to notify Network Rail whether it accepts or disputes Network Rail's decision (D4.8.8)
Revision Period End Date	T-12	Details of revised timetable made available to Bidders

61. The parties' submissions in relation to paragraph 56.1 of the Interim Determination raise a question as to the impact on the timetable described above if one of the parties fails to fulfil a given step in accordance with the stated time limits.
62. FGW makes two submissions as to why the Panel is wrong.¹³ First it contends that a train operator should not be required to offer a Revised Bid if Network Rail's request is not in accordance with Condition D4.8.2(c)(ii). In effect this submission appears to propose that a failure to comply with a particular step by the stated date would mean that all subsequent steps and related timescales in the process were nullified. Its second submission is that where Network Rail is late in complying with its obligation to notify amendments arising from Condition D4.8.2(c) then this should mean that a train operator's response bid should still be classified as a Revised Bid and subject to the Condition D4.8.4 and D4.8.5 processes as long as it is provided in a timely way. In effect FGW submits that a delay by one party in taking one step would extend time for performance of subsequent steps.
63. ORR does not accept either of these proposed interpretations of Condition D4.8. ORR considers that the use of the word "shall" in both Conditions D4.8.2 and D4.8.3 imposes obligations on Network Rail and train operators to carry out certain steps within certain timeframes and that there is nothing in the wording of the process in the Code to excuse non-compliance with such timescales, even where the non-compliance might be because of a delay by the other party in complying with a prior step in the process. A strict interpretation of such obligations is consistent with the purpose of Condition D4.8, which, as ORR noted above, is to provide a procedure to enable a revised timetable to be produced by no later than twelve weeks before the relevant Timetable

¹³ Paragraph 16.2 of FGW's Reply

Week. Further, ORR considers that a strict interpretation of the Conditions' wording is consistent with the multilateral nature of the process. ORR considers that the procedure would become unworkable if, in respect of one Bidder, but possibly not others, the timetable became extended, as would occur if FGW's second interpretation was adopted.

64. FGW has also submitted that Network Rail should not be able to take advantage of its own defaults¹⁴ in that if it is late in complying with Condition D4.8.2(c) and this causes the train operator to miss its deadline set out in Condition D4.8.3, Network Rail should not be able to say that the late bid is not a Revised Bid. ORR considers that in many instances a failure by one party to meet a timeframe will not cause any practical difficulties for the other party in meeting subsequent obligations. Where it does, however, a strict interpretation of the obligations and timeframes in the Condition D4.8 process is consistent with FGW's submission that the party in default should not be able to use this to its advantage. This is because a failure by a party to comply with one of its obligations under Condition D4.8 would render that party in breach of the Code for which the other party would have a right of action for breach of contract under the TAA. If such a breach then led to the other party not being able to comply with its obligations and suffering financial loss then this party could seek an indemnity from the party originally in breach under Clause 8.2 of the TAA. Such a claim could be in respect of all relevant losses arising from that party's failure to comply with the relevant Condition, subject to any other relevant provisions in the TAA.
65. Having considered these arguments by FGW, ORR remains of the view that the effect of a delay by one of the parties in complying with one of its obligations under Condition D4.8 has no effect on the obligations of the parties to carry out their subsequent obligations under Condition D4.8 by the times expressly stated in the Code.
66. ORR has considered the scenario in which a Bidder who is invited to submit a Revised Bid under Condition D4.8.2(c)(ii) delivers a purported Revised Bid after the date set in Condition D4.8.3. In this scenario, Network Rail would not be required to take into account the purported Revised Bid in compiling an amended timetable, because the purported Revised Bid was not (in the language of condition D4.8.4(b)) "submitted in accordance with Condition D4.8.3" and hence does not meet the definition of "Revised Bid" set out in the Code (see further paragraphs 71 to 74 below). Network Rail would, however, be required to consider the purported Revised Bid as a Spot Bid, and take account of it in the Supplemental Timetable Revision Process in accordance with Condition D4.5 of the Code.

¹⁴ Paragraph 16.2 of FGW's Reply

ORR's Conclusions

67. ORR agrees with the Panel's finding stated at paragraph 56.1 of the Interim Determination for the reasons set out in paragraphs 58 to 66. ORR agrees that a Revised Bid must be submitted no later than four weeks prior to the Revision Finalisation Date (i.e. by T-18); and that a Bid submitted after that date may be a Spot Bid but cannot be a Revised Bid.

(iii) Application of Condition D4.8.3

Summary of Panel's Determination at paragraph 56.8 and 56.9

68. At paragraph 56.8 of the Interim Determination the Panel stated that it would be reasonable for Network Rail to conclude that a Revised Bid had not been properly submitted if the effect of the Bidder having failed to state its requirements under one or more of the paragraphs of Condition D3.3 imposed on Network Rail unreasonable burdens or delays in formulating an amended timetable. At paragraph 56.9 the Panel stated that where Network Rail, acting reasonably, concludes that a Revised Bid has not been "properly submitted", this will mean in practice that the train operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3.

Summary of Network Rail's Representations

69. Network Rail's representations on these issues are set out in sections 7 and 8 and paragraphs 12.4 and 12.5 of its Notice of Appeal. In summary in relation to paragraph 56.8, Network Rail argues that on a true construction of the Code, the question whether a failure by a Bidder to state its requirements under one or more paragraphs of Condition D3.3 imposed unreasonable burdens or delays on Network Rail in formulating an amended timetable is irrelevant. Network Rail's position is that if a Revised Bid is late, or does not comply with the requirements of Condition D3.3, it has not been "properly submitted" for the purposes of Condition D4.8.5. Network Rail agrees with the Panel's conclusions stated at paragraph 56.9 of the Interim Determination but asks that ORR clarify that the exercise of deciding whether a Revised Bid has been "properly submitted" in accordance with D4.8.3 is an assessment of whether the Revised Bid has been submitted in time and whether it contains details under the categories set out at Condition D3.3 when such information is relevant to the timetabling exercise.

Summary of FGW's Representations

70. FGW's representations on these issues are set out in sections 11 and 12 and paragraphs 17.5 and 17.6 of its Response. FGW agrees in substance with the Panel's conclusions stated in paragraph 56.8 of the Interim Determination, subject to the point that a Revised Bid is not required to address each of the matters listed under Condition D3.3. FGW also generally agrees with the Panel's conclusions stated at

paragraph 56.9 of the Interim Determination subject to the proviso that the interpretation includes a “substantial shortfall in content” test to assess whether what was submitted fails to meet the requirements for a Revised Bid. In addition FGW contends that the finding should reflect that where Network Rail was late in submitting its capacity allocation decision or request for a Revised Bid in accordance with Condition D4.8.2(c), the train operator’s time to submit a Revised Bid is extended reasonably by a corresponding time period.

ORR’s Analysis

71. ORR’s view is that the Panel’s finding at paragraphs 56.8 does not reflect what Condition D4.8 says nor does it take into account the definition of “Revised Bid” set out in the Code. ORR’s conclusions as to the requirements, which a Revised Bid must meet, under Condition D3.3 are set out at paragraphs 39 to 47 above. In order for a bid to be a Revised Bid it must, as a minimum, set out the information required by Condition D3.3(a), (b) and (d) and, if there are intermediate calling points, the information required by Condition D3.3(c). If the Bidder has any specific requirements under Condition D3.3 (e) to (k) the Revised Bid must also include those. It must also be submitted in accordance with Condition D4.8.3¹⁵, including being submitted no later than 4 weeks prior to the applicable Revision Finalisation Date. If a Revised Bid satisfies these requirements, ORR considers that it is not open to Network Rail to take the view that the Revised Bid has not been properly submitted.
72. As to the Panel’s conclusions at paragraph 56.9 of the Interim Determination, ORR does not agree with the provisos that FGW has submitted in relation to that finding. This is because, as stated above, ORR considers that there is a minimum necessary content for a bid to be a Revised Bid and it must be submitted in accordance with Condition D4.8.3, including the timeframe. ORR does agree, however, with Network Rail that the question of whether a bid submitted as a “Revised Bid” is “properly submitted” depends on whether the bid complies with the requirements of Condition D3.3 (as construed in this determination) and is submitted in accordance with Condition D4.8.3, including the timeframe. ORR agrees with the Panel that if a train operator purports to submit a Revised Bid under Condition D4.8.3, but that Revised Bid does not meet the requirements of Condition D3.3 as ORR has construed them or it is not submitted in accordance with Condition D4.8.3, then the effect is that the train operator has failed to submit a Revised Bid under the Code.

¹⁵ see paragraph 42.

ORR's Conclusions

73. ORR does not accept the Panel's conclusions stated at paragraph 56.8 of the Interim Determination. If a Revised Bid is submitted which complies with the requirements of Condition D3.3 (as construed in this Determination) and it is submitted in accordance with Condition D4.8.3, including the timeframe, then it has been "properly submitted".
74. As to the Panel's conclusions stated at paragraph 56.9, ORR agrees that if a train operator purports to submit a Revised Bid, but that purported Revised Bid does not comply with the requirements of Condition D3.3 (as construed in this determination), or the requirements of Condition D4.8.3¹⁶, then the effect is that the train operator has failed to submit a Revised Bid under the Code.

B. Is a Bidder required to submit a Revised Bid after receiving notification from Network Rail in accordance with Condition D4.8.2(c)(ii)?

Summary of Panel's Determination at paragraph 56.3

75. At paragraph 56.3 of the Interim Determination, the Panel concluded that, notwithstanding the use of the word 'shall' in Condition D4.8.3, a train operator is not required to submit a Revised Bid, in the sense that if it did not do so it would be in breach of its obligations under the Code. However, if a train operator fails to submit a Revised Bid, it must accept the consequences of not doing so.

Summary of Network Rail's Representations

76. Network Rail's representations in relation to this issue are set out in section 5 and paragraph 12.2 of its Notice of Appeal. In summary, Network Rail's position is that a Bidder who has been notified under Condition D4.8.2(c) that it is required to submit a Revised Bid is under an obligation to submit a Revised Bid pursuant to Condition D4.8.3. In support of this position Network Rail submits that the clear and obvious meaning of Condition D4.8.3 should be adopted. In addition, Network Rail submits that the principal objective of Condition D4.8 to allow for the running of alternative services is relevant and that in light of this Condition D4.8.3 requires the train operator to participate in that process.

Summary of FGW's Representations

77. FGW's representations in relation to this issue are set out at section 9 and paragraph 17.3 of its Response. In summary, FGW supports the Panel's conclusions. In support of its position FGW submits that Condition D4.8.3 is adopting the term "shall" because this is the

¹⁶ see paragraph 42.

appropriate terminology to describe the stages in a process for which the process itself sets out consequences, in this case in Condition D4.8.6. Further, FGW submits that other mechanisms apply to ensure train operators abide by the requirements of the process including commercial incentives and licence commitments. FGW also submits that if ORR is minded to find in favour of Network Rail on this point then its finding should address that:

- (a) there would be no breach where the delay was a consequence of Network Rail's late and material amendment to its requirements for a Revised Bid;
- (b) the categorisation of "breach" would not affect the interpretation paragraph 4.1(b)(iii) or paragraph 4.2(b)(ii) of Part 3 of Schedule 4 in that there would still need to be a causal link established between the failure of the Revised Bid constituting the breach and the delayed upload of the timetable;
- (c) Network Rail should not be able to claim any such breach where it fails to notify the Bidder promptly of any such failure and proceeds to process the bid in accordance with Condition D4.8.4 and Condition D4.8.5 as if it were properly submitted; and
- (d) whether the declaration of a breach should be permitted if Network Rail's claim of such is outside the timescale for raising issues set out in paragraph 8.3(b) of Part 3 of Schedule 4.

ORR's Analysis

78. Where Network Rail notifies a Bidder under Condition D4.8.2(c) that it is required to submit a Revised Bid in respect of a Timetable Week Slot, then, under Condition D4.8.3:

"Each Bidder shall ... submit (a) a Revised Bid in respect of that Timetable Week Slot ... no later than 4 weeks prior to the applicable Revision Finalisation Date." (Emphasis added.)

79. ORR does not agree with Panel's finding or FGW's submissions in effect that the word "shall" does not impose an obligation on a train operator. ORR considers that such an interpretation is contrary to the wording of Condition D4.8.3. The word "shall" should be construed using its natural meaning which is that of imposing an obligation, in this case, on the train operator. ORR considers that it is not open to the Bidder to decline to submit a Revised Bid: it must submit one. If it fails to submit one, then it has breached its obligations under the Code, which is actionable under the TAA. Condition D4.8.6 provides a means by which the process of producing an amended timetable can continue even where a train operator has failed to submit a Revised Bid. ORR does not consider that this detracts from the fact that the clear language of Condition D4.8.3 imposes an obligation to submit such a bid.

80. ORR notes that the implication of its determination is that if a Bidder, who had a service timetabled in a particular Train Slot, and was requested to submit a Revised Bid in respect of that Train Slot, did not wish to run a revised service in that Train Slot (effectively preferring to cancel the service, rather than make a Revised Bid for it), then the Bidder would still be required to notify Network Rail of that fact within the time limit for submitting Revised Bids, identifying the service in question.
81. In relation to FGW's other submissions on this point, ORR considers that it has already addressed the treatment of a Bid which was delayed as a consequence of Network Rail's late amendment to its requirements for a Revised Bid at paragraphs 61 to 67 of this determination. ORR addresses the causal link point below at paragraphs 105 and 106. ORR considers that the final two points raised by FGW (summarised at paragraph 77 (c) and (d) above) raise issues which go beyond what ORR is required to determine as part of this appeal and it does not therefore deal with them in this determination.

ORR's Conclusions

82. ORR does not accept the Panel's conclusions stated at paragraph 56.3 of the Interim Determination. The effect of Condition D4.8.3 is that a train operator who has been notified under Condition D4.8.2(c) that it is required to submit a Revised Bid is under an obligation to submit a Revised Bid pursuant to Condition D4.8.3. If a train operator fails to do this then it is in breach of the Code, which is actionable under the TAA.

C. Is a Train Operator entitled to amend a Revised Bid?

Summary of Panel's Determination at paragraphs 56.4, 56.5 and 56.6

83. At paragraph 56.4 of the Interim Determination the Panel concluded that a material alteration or addition to the terms of a Revised Bid constitutes a new Bid replacing the Bid previously made. If the alteration or addition is made after T-18, the new Bid will not be a Revised Bid. At paragraph 56.5 the Panel concluded that if a Revised Bid has been superseded by another Bid made after T-18, there will be no Revised Bid in respect of the relevant Train Slots. Finally, at paragraph 56.6 the Panel concluded that the provision of further information by way of clarification or amplification of a Bid not involving a material alteration or addition to its terms will not normally constitute a new bid unless it requires Network Rail to revise or re-edit the relevant Train Slot(s) materially.

Summary of Network Rail's Representations

84. At paragraph 12.9 of its Notice of Appeal, Network Rail invites ORR to confirm its agreement with these conclusions and repeats this position at paragraphs 5.3 and 5.4 of its Reply.

Summary of FGW's Representations

85. FGW's position is set out in paragraphs 16.3, 16.4 and 17.10 of its Response. In relation to paragraphs 56.4 and 56.5 of the Interim Determination, in summary, FGW accepts the findings but in the context of the sequential stages of the timetabling process established in Part D. FGW submits that the fact of the Revised Bid submission should not be affected or expunged from the record by, for example:
- (a) amendments made as part of the consultation process under Condition D4.8.4;
 - (b) revisions made in response to modifications to the Revised Bid proposed by Network Rail under Condition D.4.8.5; or
 - (c) Spot Bids made after T-18 that get considered after the Supplemental Timetable Process.
86. In relation to paragraph 56.6 of the Interim Determination, in summary, FGW agrees with the finding and considers that this will include the working out of the processes at Condition D4.8.5 and Condition D4.8.6 where Revised Bids are amended or rejected and revised or replaced.

ORR's Analysis

87. ORR has considered the scenario in which a Bidder who has submitted a Revised Bid in accordance with Condition D4.8.3 subsequently seeks to introduce new requirements in respect of its Revised Bid. The Panel considered whether the introduction of new requirements might, in effect, amount to a new Bid, superseding the Revised Bid initially submitted. If this were the effect of the introduction of new requirements, it would have important implications because the new Bid might well be submitted after the date provided for by Condition D4.8.3. ORR agrees with the Panel and the parties that this would mean that there would be no "Revised Bid" in respect of the relevant Train Slots for the purposes of Condition D4.8 or Schedule 4 of the TAA.
88. ORR considers that whether the provision of new information about a Revised Bid amounts to a new Bid, superseding the original Revised Bid, is a question of fact and degree, which must be judged on the facts of each case. In the first instance Network Rail makes this judgement subject to the rights of the aggrieved Bidder to challenge Network Rail's decision under the appeal mechanisms set out in the Code or the TAA.
89. However, ORR accepts FGW's submissions that the provision of some additional information in respect of a Revised Bid is, at least in certain circumstances, permissible. ORR agrees that Condition D4.8 contemplates that there will be a period of consultation between Network Rail and Bidders following the submission of Revised Bids (see Condition D4.8.4). The purpose of this consultation is to assist Network Rail in the production of an amended timetable. For the

consultation process to fulfil its purpose, it must, at the very least, be permissible for Network Rail to pose questions to Bidders about their Revised Bids, and for Bidders to supply supplemental information in response to those questions, without the consequence that their Revised Bids are necessarily treated as superseded. It may well be that a Bidder would also be able to volunteer some additional information about a Revised Bid without being deemed to have made a new Bid.

90. Equally, it may well be that if a Bidder sought to alter the requirements included in the original Revised Bid, or to introduce entirely new requirements which had not previously been stated, the effect may be that the Bidder is regarded as having made a new Bid superseding the Revised Bid previously made. This could occur, for example, if during the consultation process it emerges that a Bidder did have specific requirements under Condition D3.3 (e) to (k) but had failed to stipulate them in its original Revised Bid. If such a new Bid is made after the date set in accordance with Condition D4.8.3 then it will not be a Revised Bid or a Spot Bid referred to under Condition D4.8.4, and Network Rail will not be under an obligation to take it into account in compiling an amended timetable under Condition D4.8.4. Network Rail would, however, be required to deal with such a Spot Bid under Condition D4.5.
91. ORR has also considered FGW's submissions set out at paragraphs 85 (b) and (c) above. ORR's view is that it will also be a question of fact and degree whether amendments, made to a Revised Bid further to the modification process in Condition D4.8.5, would affect the status of the Revised Bid having been submitted. Although not relevant to the issues in this appeal, ORR agrees that generally a Spot Bid made after T-18, which is considered after the supplemental timetable revision process, should not affect the status of a Revised Bid.
92. ORR does not consider that this appeal requires it to formulate a test which can be applied in every case to determine whether a new Bid has been made. If it were necessary to formulate such a test, ORR would be reluctant to do so separately from an inquiry into the facts to which the test would have to be applied.

ORR's Conclusions

93. ORR agrees with the Panel's finding at paragraph 56.5 that if a Revised Bid has been superseded by another Bid made after T-18 there will be no Revised Bid in respect of the Train Slots. ORR rejects the tests for establishing whether a Revised Bid has been superseded set out in the Panel's findings at paragraph 56.4 and 56.6. Whether the provision of additional information in respect of a Revised Bid is sufficiently significant to constitute a new Bid, superseding the Revised Bid, is a question of fact and degree, which must be judged in the particular circumstances of each case. In the absence of facts, ORR considers that it can only provide general principles as a guide to the parties on

this issue. ORR accepts that when viewed in the context of particular facts these may be difficult to apply or non-exhaustive. However, ORR considers that, if application of the general principles cannot be agreed by the parties, the appeal processes in the Code or the TAA provide a mechanism for such issues to be determined in more detail in the context of the facts to which they apply.

D. What is the interaction between Condition D4 of the Code and the Schedule 4 Notification Factors?

Summary of Panel's Determination at paragraphs 56.10, 56.11 and 56.12

94. In paragraph 56.10 of the Interim Determination, the Panel concluded that the column C Notification Factor applies only where the facts of the case fit the wording of paragraph 4.1 of Part 3 of Schedule 4 of the TAA. If they do not (for example, because the ROU was not reflected in the First Working Timetable, and this was not because of a request by FGW that it should not be) Network Rail cannot claim the benefit of column C whatever FGW's shortcomings may have been.
95. In paragraph 56.11 of the Interim Determination, the Panel concluded that the use of the word 'because' in paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Part 3 of Schedule 4 to the TAA means that the column C (or as the case may be D) Notification Factor applies only where Network Rail's failure to upload to the train services database by T-12 has been caused by FGW's failure to submit a revised bid by T-18 (taking account of all that is said in the Interim Determination). The Panel concluded that a "but for" test should be applied. This test would not be satisfied if it appeared that the true cause of the failure to upload to train services database by T-12 was a complete failure of Network Rail's systems. It would be unlikely to be satisfied if what FGW had prepared and intended as a Revised Bid failed to qualify as such only because it was submitted a day late.
96. Finally, in paragraph 56.12 of the Interim Determination, the Panel concluded that given the discretions and authorities at Network Rail's disposal in the operation of Condition D4.8.2, instances when a failure to "upload to TSDB at T-12" is "because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3", and the 'but for' test is therefore satisfied, are likely to be specialised and infrequent.

Summary of Network Rail's Representations

97. Network Rail's representations on these issues are found in sections 9, 10 and 11, and paragraphs 12.6, 12.7 and 12.8 of its Notice of Appeal and section 11 of its Reply. Network Rail accepts the Panel's conclusions set out in paragraph 56.10 of the Interim Determination (although it indicates that it does not understand the significance of the qualification of "whatever FGW's shortcomings may have been" included in the finding). Network Rail invites ORR to confirm that

nothing in the Panel's findings adversely affects the operation of paragraph 4.1(b)(iii) of Part 3 of Schedule 4 of the TAA. In respect of the conclusions at paragraph 56.11 of the Interim Determination, Network Rail contends that the true meaning of paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Part 3 of Schedule 4 to the TAA is that if no Revised Bid is submitted in accordance with Condition D4.8.3, the provisions of paragraph 4.1(b)(iii) are satisfied. Network Rail does not accept the Panel's conclusions contained in paragraph 56.12 of the Interim Determination. Network Rail submits that if ORR does not find as it requests in respect of paragraphs 56.8 and 56.9 of the Interim Determination then in respect of paragraphs 56.11 and 56.12 of the Interim Determination ORR find that: (a) if a Revised Bid is submitted late or a Revised Bid does not contain details under the categories set out at Condition D3.3 when such information is relevant to the timetabling exercise; and (b) Network Rail fails to upload to the train services database by T-12; then the onus is on the train operator to demonstrate that its failings have not caused the delay in uploading.

Summary of FGW's Representations

98. FGW's representations on these issues are found in sections 13, 14 and 15 and paragraphs 17.7, 17.8 and 17.9 of its Response. In summary FGW agrees with the Panel's findings set out at paragraph 56.10, 56.11 and 56.12 of the Interim Determination.
99. More specifically in relation to paragraph 56.10 of the Interim Determination FGW agrees with Network Rail that nothing in this finding adversely affects the operation of paragraph 4.1(b)(iii) of Part 3 of Schedule 4 of the TAA although it submits that such a finding should only be applied to paragraph 56.10 of the Interim Determination and not paragraph 56.11.
100. In addition in relation to paragraph 56.11 of the Interim Determination FGW submits that any finding by ORR in favour of Network Rail should address that:
 - (a) the categorisation of "breach" would not affect the interpretation paragraph 4.1(b)(iii) or paragraph 4.2(b)(ii) of Part 3 of Schedule 4 in that there would still need to be a causal link established between the failure of the Revised Bid constituting the breach and the delayed upload of the timetable;
 - (b) Network Rail should not be able to claim any such breach where it fails to notify the Bidder promptly of any such failure and proceeds to process the bid in accordance with Condition D4.8.4 and Condition D4.8.5 as if it were properly submitted; and
 - (c) whether the declaration of a breach should be permitted if Network Rail's claim of such is outside the timescale for raising issues set out in paragraph 8.3(b) of Part 3 of Schedule 4.

101. In relation to paragraph 56.12 of the Interim Determination, FGW agrees with the finding. It submits that Condition D4.8 caters expressly for when a Revised Bid is given and when it is not and therefore Network Rail should be resourced to manage the timetable generally to safeguard the delivery of T-12 in either situation.

ORR's Analysis

102. Paragraph 4.1 of Part 3 of Schedule 4 to the TAA provides:

"4.1 Early notification

The [Notification Factor] in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in Column C of Annex A to this Part 3 if and to the extent that:

- (a) the Network Rail Restriction of Use is reflected in the First Working Timetable; or*
- (b) (i) details of the Network Rail Restriction of Use are notified to the Train Operator on or before the end of the Drafting Period in the Applicable Rules of the Route for the Timetable Period in respect of the Restriction of Use Day but, at the request of the Train Operator (as accepted by Network Rail), are not reflected in the First Working Timetable; and*
 - (ii) subject to paragraph 4.1(b)(iii), the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 2200 hours on the day which is 12 weeks before the Restriction of Use Day; or*
 - (iii) where paragraph 4.1(b)(ii) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day."*

103. It is clear from the wording of paragraph 4.1 that the Notification Factor used for a Network Rail ROU will only have the value specified in column C of Annex A to Part 3 of Schedule 4 if the criteria set out in paragraph 4.1(a) or (b) are satisfied. In relation to the criteria in sub-paragraph (b), ORR notes that sub-paragraph (b)(i) must be satisfied whenever sub-paragraph (b) applies but that only one of sub-paragraphs (b)(ii) and (b)(iii) must also apply, as these are alternatives.

104. Network Rail queried the significance of the last six words of the Panel's finding at paragraph 56.10 ("whatever FGW's shortcomings

may have been”). ORR considers that the Panel’s meaning is clear. The Panel was considering an example of where the criteria in paragraph 4.1(b) might not be satisfied, that is when the ROU is not reflected in the First Working Timetable, but not because of a request by the train operator. The Panel’s finding means that where the requirements of either paragraph 4.1(a) or 4.1(b)(i) are not satisfied then the column C Notification Factor does not apply. In such circumstances, it is irrelevant whether either of sub-paragraphs (b)(ii) or (iii) is also satisfied. ORR considers the Panel’s wording “whatever FGW’s shortcomings may have been” simply reflects this point.

105. As to the meaning of the word “because”, ORR considers that for paragraph 4.1(b)(iii) to apply Network Rail must have been prevented from reflecting the relevant Restriction of Use in the Working Timetable published at T-12 by the train operator’s failure to submit a Revised Bid in accordance with Condition D4.8.3. In other words, there must be a causal connection between the train operator’s failure to submit a Revised Bid in accordance with Condition D4.8.3, and the fact that the Restriction of Use was not reflected in the Working Timetable at T-12. To interpret paragraph 4.1(b)(iii) as requiring no such causal connection would be to deprive the word “because” of its natural meaning.
106. The Panel held that the relevant test to assess the causal connection was the “but for” test, but did not indicate why it thought this was the appropriate test. The “but for” test was the traditional test in English law for determining causation for the purpose of assessing damages. However, the English Courts have moved away from the “but for” test of causation, because it was insufficiently flexible, and led to difficulties in distinguishing between events which simply coincided with the suffering of the loss (or in the language of the cases were the “occasion” of a loss), and events which are the cause of a loss. The test now favoured is whether the breach of contract is a sufficiently substantial cause of the claimant’s loss¹⁷. Since paragraph 4 of Part 3 of Schedule 4 to the TAA is about calculating compensation to be paid by one contracting party to another, ORR considers that it is appropriate to have regard to the English Courts’ interpretation of causation for the purposes of assessing damages and that the most recent test should be the test adopted. Therefore, the relevant test of causation under paragraph 4 of Part 3 of Schedule 4 should be whether the failure to submit a Revised Bid by the train operator is a “substantial cause” of the fact that the ROU is not included in the Working Timetable, even if there are other concurrent causes.
107. In light of this and ORR’s conclusion reached above regarding paragraphs 56.8 and 56.9 of the Interim Determination at paragraphs

¹⁷ See *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360, 1374-1375; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 1047-1048; *County Ltd v Girozentrale Securities* [1996] 3 All ER 834.

73 to 74, ORR is not required to address the additional representations about paragraph 56.11 of the Interim Determination submitted by Network Rail and FGW set out above at paragraphs 97 and 100.

108. The Panel's findings at paragraph 56.12 of the Interim Determination comment on the likelihood of the causation test referred to in paragraph 106 being met. It is not appropriate for ORR to speculate generally on the likelihood of such a test being met because application of the test must be considered specifically in each individual cases in light of the relevant facts.

ORR's Conclusions

109. ORR agrees with the Panel's conclusion, expressed in paragraph 56.10 of the Interim Determination, that the column C Notification Factor applies only where the facts of the case fit the wording of paragraph 4.1 of Part 3 of Schedule 4 of the TAA. ORR agrees that nothing in the Panel's finding adversely affects the operation of paragraph 4.1(b)(iii) of Part 3 of Schedule 4 of the TAA.
110. ORR agrees with the Panel's conclusion, expressed in paragraph 56.11 of the Interim Determination, that for paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Part 3 of Schedule 4 to the TAA to apply there must be a causal connection between the train operator's failure to submit a Revised Bid in accordance with Condition D4.8.3 and the fact that the ROU was not reflected in the Working Timetable at T-12. ORR does not agree, however, that the appropriate test for causation is the "but for" test. The relevant test is whether the failure to submit a Revised Bid is a substantial cause of the fact that the Restriction of Use is not included in the Working Timetable, even if there are other concurrent causes.
111. For the reasons set out in paragraph 108, ORR rejects paragraph 56.12 of the Interim Determination.

E. What is the Burden of Proof?

Summary of the Panel's Determination at paragraph 56.13

112. At paragraph 56.13 of the Interim Determination the Panel concluded that Part 3 of Schedule 4 of the TAA, and in particular paragraphs 4 and 5, are drafted on the basis that:
- (a) all ROUs require Network Rail to pay compensation to the train operator;
 - (b) the extent to which the compensation factor is reduced by one Notification Factor rather than another depends largely on steps taken by Network Rail; and
 - (c) the onus of proof is on Network Rail to demonstrate that those steps were taken to justify the application of a particular Notification Factor.

Summary of Network Rail's Representations

113. Network Rail's representations in respect of this issue are set out in section 11 and paragraph 12.8 of the Notice of Appeal. In summary Network Rail contends that there is no special responsibility on its part, which could be interpreted as placing on it the onus of proof to demonstrate entitlement to a particular Notification Factor. Network Rail submits that if ORR does not find as it requests in respect of paragraphs 56.8 and 56.9 of the Interim Determination then in respect of paragraph 56.13 of the Interim Determination ORR should find that:
- (a) if a Revised Bid is submitted late or a Revised Bid does not contain details under the categories set out at Condition D3.3 when such information is relevant to the timetabling exercise; and
 - (b) Network Rail fails to upload to the train services database by T-12;
- then the onus is on the train operator to demonstrate that its failings have not caused the delay in uploading.

Summary of FGW's Representations

114. FGW's representations in respect of this issue are set out in section 15 and paragraph 17.9 of the Response. FGW supports the Panel's conclusions set out in paragraph 56.13.

ORR's Analysis

115. If, by this finding, the Panel meant to clarify that, because Network Rail is responsible for the operation of Condition D4 and the resulting compensation process, it should be able to justify the decisions it takes as part of the process, ORR would agree that this is the case. However because of the wording of the finding ORR has also considered the application of the concept of the burden of proof to any disputes arising in relation to the calculation of compensation under Part 3 of Schedule 4 of the TAA.
116. In so far as there are any disputes of fact between Network Rail and the train operator, then ORR considers that the general legal principle that the party alleging the relevant fact will bear the burden of proving that fact will apply. The relevant standard of proof applicable to such disputes is the normal civil standard (i.e. the balance of probabilities).
117. Save to the extent that there are disputes of fact of this kind, the concept of the burden of proof will have no application to disputes as to compensation under Part 3 of Schedule 4. The duty of any tribunal considering a dispute in relation to compensation will be to construe the relevant provisions of the contract, and apply them either to the facts as agreed by the parties, or the facts as found by the tribunal.

ORR's Conclusions

118. Whilst, generally, ORR accepts that Network Rail is responsible for the operation of Condition D4 and the resulting compensation process and therefore it should be able to justify any decisions it takes as part of the process, ORR does not accept the Panel's conclusion as expressed in paragraph 56.13 of the Interim Determination. ORR concludes that in so far as there is a dispute of fact between the parties, the onus of proof is on the party alleging the relevant fact. Once the facts are established, the duty of any Tribunal will be to construe the relevant provisions of the contract, and apply them to the facts. This duty of the Tribunal is not an exercise to which the concept of the onus of proof is relevant.

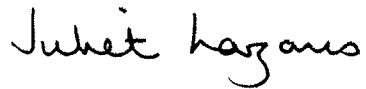
VIII Conclusion

119. For the reasons above, ORR determines the appeal by finding the following in respect of the Interim Determination:
- (a) ORR upholds the Panel's finding at paragraph 56.1 of the Interim Determination;
 - (b) ORR upholds the Panel's finding at paragraph 56.2 of the Interim Determination subject to two additional points:
 - (i) any Bid must, as a minimum, include the information specified in Conditions D.3.3(a), (b) and (d) and, if there are intermediate calling points, the information specified by Condition D.3.3(c). A failure to do so will mean that the purported bid is not a Bid under the Code (and, therefore, cannot be a Revised Bid); and
 - (ii) if a Bidder has requirements under Condition D3.3 (e) to (k) they must be included in any Bid. A failure to do so will mean that a purported bid is not a Bid under the Code.
 - (c) ORR rejects the Panel's finding at paragraph 56.3 of the Interim Determination and finds that the effect of Condition D4.8.3 is that a train operator who has been notified under Condition D.4.8.2(c) that it is required to submit a Revised Bid is under an obligation to submit a Revised Bid pursuant to Condition D4.8.3 of the Code. A failure to do so will be a breach of its obligations under the Code actionable under the TAA;
 - (d) ORR rejects the tests set out in the Panel's findings at paragraphs 56.4 and 56.6 of the Interim Determination and finds that whether the provision of additional information in respect of a Revised Bid is sufficiently significant to constitute a new Bid, superseding the Revised Bid, is a question of fact and degree

which must be judged in the particular circumstances of each case;

- (e) ORR upholds the Panel's finding at paragraph 56.5 of the Interim Determination;
- (f) ORR rejects the Panel's finding at paragraph 56.7 of the Interim Determination and finds that it is not open to Network Rail to stipulate additional requirements in relation to a Revised Bid pursuant to Condition D4.8.2. However, ORR finds that the process set out in Conditions D2.1.1 to D2.1.5 and D2.1.10 of the Code permit Network Rail to amend the Rules of the Route and Rules of the Plan, and amendments could stipulate additional requirements in relation to a Revised Bid, subject to compliance with the procedures laid down in those Conditions;
- (g) ORR rejects the Panel's finding at paragraph 56.8 of the Interim Determination and finds that if a Revised Bid is submitted which complies with the requirements of Condition D3.3 (as construed in this determination) and is submitted in accordance with Condition D4.8.3, it has been "properly submitted";
- (h) ORR upholds the Panel's finding at paragraph 56.9 of the Interim Determination;
- (i) ORR upholds the Panel's finding at paragraph 56.10 of the Interim Determination;
- (j) ORR upholds the Panel's finding at paragraph 56.11 of the Interim Determination in that it agrees that the word "because" in paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Part 3 of Schedule 4 of the TAA means there must be a causal connection between the train operator's failure to submit a Revised Bid in accordance with Condition D4.8.3, and the fact that the ROU was not reflected in the Working Timetable on the relevant day. ORR rejects the Panel's finding that the appropriate test for causation is the "but for" test and finds that the correct test is whether the failure to submit a Revised Bid is a substantial cause of the fact that the ROU is not included in the Working Timetable, even if there are other concurrent causes;
- (k) ORR rejects the Panel's finding at paragraph 56.12 of the Interim Determination;
- (l) ORR rejects the Panel's finding at paragraph 56.13 of the Interim Determination and finds that in so far as there is a dispute of fact between the parties, the onus of proof is on the party alleging the relevant fact and once the facts are established the duty of any tribunal will be to construe the relevant provisions of the contract, and apply them to the facts.

120. In the absence of any request from either of the parties, the parties' costs should lie where they fall.



Juliet Lazarus

Director of Legal Services

Duly Authorised by the Office of Rail Regulation

4 October 2007

ANNEX A

Network Code Provisions

Definitions

(From Part A and Part D of the Network Code dated 16 October 2005.)

Access Option Holder	<p>means any person who may exercise an access option (as defined in section 17(6) of the Act) in respect of a railway facility:</p> <p>(a) which is not a station or a light maintenance depot; and</p> <p>(b) in respect of which the facility owner is Network Rail;</p>
Base Timetable	<p>means, in respect of any Timetable Period, the timetable issued by Network Rail in accordance with Condition D2A.3 showing those Train Slots which Network Rail expects to include in the Working Timetable applicable to that Timetable Period;</p>
Bid	<p>means any Train Slot included in the Base Timetable (to the extent not varied or withdrawn by any subsequent Bid), or any bid made to Network Rail for one or more Train Slots (comprising, as the case may be, the notifications (if any) made in accordance with Conditions D3.2.1, D3.2.4 and D3.2.6, any Spot Bid or any Revised Bid);</p>
Bidder	<p>means each Train Operator, each Access Option Holder and each other person who has been allowed to participate in the procedure set out in this Part D pursuant to Condition D1.2;</p>
Decision Criteria	<p>means those decision criteria set out in Condition D6;</p>
Drafting Period	<p>means a period, to be notified by Network Rail in accordance with Condition D1.4, normally of 16 weeks and commencing on the first day following the end of the Preliminary Period;</p>
Finalisation Period	<p>means a period, to be notified by Network Rail in accordance with Condition D1.4, normally of 6 weeks and commencing on the first day following the end of the Drafting Period;</p>

First Working Timetable	means the version of the Working Timetable in respect of which Network Rail gives notice pursuant to Condition D3.2.7, as that version may be amended in accordance with Condition D3.2.9;
Network Code	means the document entitled “Network Code”;
Passenger Change Date	means the Principal Change Date or, as the case may be, the Subsidiary Change Date;
Preliminary Period	means a period, to be notified by Network Rail in accordance with Condition D1.4, normally of 10 weeks and commencing on the first day of the Timetable Development Period;
Principal Change Date	means the date, to be notified by Network Rail in accordance with Condition D1.4 and normally falling on the Sunday next following the second Saturday in December in any calendar year, or such alternative dates as may be notified by Network Rail in accordance with the provisions of Directive 2001/14/EC;
Priority Date	means the date, notified under Condition D1.4 and in any event occurring not more than 7 days after the commencement of the Drafting Period relating to a Timetable Development Period ending on a Principal Change Date, by which Bidders, in accordance with Condition D3.2.1, must notify to Network Rail those rights which they intend or, as the case may be, do not intend to exercise in either or both of the Timetable Period commencing on that Principal Change Date and the Timetable Period commencing on the next following Subsidiary Change Date;
Relevant ADRR Panel	means the Panel established under Part E of the Access Dispute Resolution Rules which is to determine a relevant dispute in accordance with the principles and procedures set out in Part A of the Access Dispute Resolution Rules;
Restrictions of Use	means, for the purposes of the Network Code, a restriction of use of all or any part of the Network;
Revised Bid	means any Spot Bid seeking to revise a Train Slot scheduled in the relevant Working Timetable, as submitted to Network Rail by a Train Operator in accordance with Condition D4.8.3;

Revision Finalisation Date	means, in respect of any Supplemental Timetable Revision Period, a date to be specified by Network Rail in accordance with Condition D4.8.1, occurring 2 weeks prior to the relevant Revision Period End Date, or, when Christmas Day falls no more than 14 days prior to the relevant Revision Period End Date, the date occurring 3 weeks prior to the relevant Revision Period End Date, being the last date for notification by Network Rail of its decisions in respect of the Timetable Week to which that Revision Finalisation Date relates;
Revision Period Commencement Date	means, in respect of any Supplemental Timetable Revision Period, a date to be specified by Network Rail in accordance with Condition D4.8.1, normally occurring between 14 and 17 weeks prior to the relevant Revision Period End Date for the Supplemental Timetable Revision Period in question;
Revision Period End Date	means, in respect of any Supplemental Timetable Revision Period, the date occurring 12 weeks prior to the commencement of the Timetable Week to which that period relates;
Rules of the Plan	<p>means rules regulating, for any part of the Network, the standard timings and other matters necessary to enable trains to be scheduled into the Working Timetable applicable to that part of the Network, being rules which specify (amongst other matters):</p> <ul style="list-style-type: none"> (a) the timings (including specified allowances) allowed for travel between specified points on the Network for each type of train and for each type of traction used, taking into account any particular constraints imposed by railway vehicles which may form part of the train; (b) timing margins or allowances for stopping at junctions and other specified points; (c) minimum timing margins or headways between successive trains travelling on the same section of track; (d) minimum and maximum time periods for stopping at stations and other specified points; (e) restrictions as to the speed of railway vehicles on any section of track; and

	(f) any Priority Dates referred to in Part D of this code;
Rules of the Route	<p>means rules regulating, for any part of the Network, each of the following matters:</p> <p>(a) the location, number, timing and duration of any Restrictions of Use of any track or section of track, which enable inspection, maintenance, renewal and repair thereof or of any other railway asset or any other works in relation thereto; and</p> <p>(b) any alternative train routes or stopping patterns which may apply during any Restriction of Use referred to in paragraph (a) above;</p> <p>and, for the purpose of this definition, track shall be regarded as subject to a Restriction of Use if it has been temporarily taken out of service or its capacity otherwise affected for the purposes stated in paragraph (a) above;</p>
Spot Bid	means any Bid (other than a Revised Bid) made during the Timetable Period to which that Bid relates or during the Supplemental Period immediately prior to that Timetable Period;
Subsidiary Change Date	means the date to be notified by Network Rail in accordance with Condition D1.4 and normally falling on the Sunday next following the second Saturday in June in any calendar year, or such alternative dates as may be notified by Network Rail in accordance with the provisions of Directive 2001/14/EC;
Supplemental Period	means the period, to be notified by Network Rail in accordance with Condition D1.4, normally of 22 weeks, commencing on the first day following the end of the Finalisation Period and ending on the day before the relevant Passenger Change Date;
Supplemental Timetable Revision Period	means, in respect of any Timetable Week, the period commencing on the relevant Revision Period Commencement Date and ending on the relevant Revision Period End Date;
Timetable Development Period	means, in respect of any Passenger Change Date, the period of development of the Working Timetable to be implemented on that date, being a period, to be notified by Network Rail in accordance with Condition

D1.4, normally of 55 weeks, ending on the day before that date and comprising, in chronological order:

- (a) a Preliminary Period;
- (b) a Drafting Period;
- (c) a Finalisation Period; and
- (d) a Supplemental Period;

Timetable Period	means the period of operation of a Working Timetable;
Timetable Week	means, in respect of a Timetable Period, any week (or, in the case of the first and last such week of such period, part thereof) occurring during that period and commencing at 0001 hours on any Saturday and ending at 2400 hours on the next following Friday;
Timetable Week Slot	means, in respect of any Timetable Week, any Train Slot that is scheduled in the Working Timetable to leave its point of origin during that week;
Train Operator	means (without prejudice to Condition A1.3), in respect of an Access Agreement, a person (whether or not an operator of trains) who has permission to use track pursuant to that agreement;
Train Slot	means a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement;
Working Day	means each of Monday to Friday (inclusive) excluding common law and statutory public holidays;
Working Timetable	means the timetable which Network Rail is obliged to draw up pursuant to Condition D1.6.1.

Condition D3.3

3.3 Contents of a Bid

A Bidder shall, in making a Bid, indicate, in respect of the Train Slots for which the Bid is being made, the extent of its requirements (if any) as to:

- (a) dates on which the Train Slots are intended to be used;
- (b) start and end points of the train movement;

- (c) intermediate calling points;
- (d) the times of arrival and departure from any point specified under paragraphs (b) and (c) above;
- (e) railway vehicles to be used;
- (f) train connections with other railway passenger services;
- (g) the route to be followed;
- (h) any Ancillary Movements;
- (i) platforming at any points specified pursuant to paragraphs (b) and (c) above;
- (j) any relevant commercial and service codes; and
- (k) the maximum train speed, maximum train weight and maximum train length.

Condition D4.8

4.8 *Supplemental Timetable Revision Process*

4.8.1 Network Rail shall, at least 26 weeks prior to any Passenger Change Date (and having previously consulted with each affected Bidder), provide to all those persons referred to in Condition D3.2.7, its specific proposals as to the Revision Period Commencement Dates, Revision Bid Dates and Revision Finalisation Dates applicable to the Timetable Period commencing on that Passenger Change Date.

4.8.2 Network Rail shall:

- (a) on or before each Revision Period Commencement Date, provide to each Bidder its outline proposals for revision of the allocation of capacity in respect of the Timetable Week to which such Revision Period Commencement Date relates in order to enable Network Rail to take the Restrictions of Use contained in the Rules of the Route and/or Rules of the Plan applicable to that Timetable Week;
- (b) in consultation with Bidders, develop the structure of the amended train plan for the relevant Timetable Week, including any revision of the allocation of capacity, in accordance with agreed criteria, on Routes directly affected by Restrictions of Use included in the applicable Rules of the Route and/or Rules of the Plan and on diversionary routes; and

(c) within 4 weeks of each Revision Period Commencement Date, notify each affected Bidder:

- (i) of its capacity allocation decisions and proposed structure for the amended train plan for the relevant Timetable Week; and
- (ii) whether Network Rail requires any Bidder to prepare a Revised Bid in respect of any Timetable Week Slot in that Timetable Week.

4.8.3 Each Bidder shall, following receipt of notification from Network Rail under Condition D4.8.2(c)(ii) in respect of a particular Timetable Week Slot, submit:

- (a) a Revised Bid in respect of that Timetable Week Slot; and
- (b) a Revised Bid in respect of any other Timetable Week Slot, if any, which is materially affected by the revision of the Timetable Week Slot to which that notification relates;

in each case no later than 4 weeks prior to the applicable Revision Finalisation Date.

4.8.4 Network Rail in consultation with Bidders, will compile and amend timetable in respect of each Timetable Week, which is in accordance with its decisions notified under Condition D4.8.2(c)(i) and which:

- (a) in Network Rail's opinion is capable of being brought into operation;
- (b) subject to Condition D4.8.5, takes account of any Revised Bids submitted in accordance with Condition D4.8.3; and
- (c) takes account of any Spot Bids received no later than 4 weeks prior to the applicable Revision Finalisation Date.

4.8.5 Network Rail shall, where it is in receipt of a Revised Bid which it considers to have been properly submitted to it in accordance with the provisions of this Condition D4.8.3, in determining whether to accept, modify or reject that Revised Bid:

- (a) not accept such Revised Bid if to do so would give rise to any conflict with any Train Slot already scheduled in the Working Timetable or with the applicable Rules of the Route or applicable Rules of the Plan; and
- (b) otherwise have due regard to the Decision Criteria,

and any notice of modification or rejection of a Revised Bid shall include a concise explanation therefore.

- 4.8.6 Network Rail shall be entitled as reasonably necessary to amend any Timetable Week Slot notified in accordance with Condition D4.8.2(c)(ii) and in relation to which no Revised Bid has been submitted to Network Rail by a Train Operator in accordance with Condition D4.8.3 in order to enable Network Rail to take Restrictions of Use for the purpose of carrying out work included in the Rules of the Route and / or Rules of the Plan applicable to that Timetable Week Slot and that Train Operator shall not, in respect of that decision, be entitled to make a reference to the relevant ADRR panel or the Office of Rail Regulation pursuant to Condition D5.
- 4.8.7 Network Rail shall, by no later than the Revision Finalisation Date in respect of each Timetable Week, notify each Bidder of its decisions regarding additional, amended and deleted Timetable Week Slots, including its decisions to accept, reject or modify any Revised Bid or any Spot Bid which has been submitted to it not less than 4 weeks prior to the Revision Finalisation Date in respect of the relevant Timetable Week.
- 4.8.8 The Train Operator shall, following the receipt by it of notice of any decision by Network Rail pursuant to Condition D4.8.2(c) or Condition D4.8.7, notify Network Rail whether it accepts or disputes that decision of Network Rail, in each case prior to the relevant Revision Response Date, and the provisions of Conditions D4.6.2, D4.6.3 and D4.7.1 shall apply, *mutatis mutandis*.
- 4.8.9 Without prejudice to Conditions D4.4 and D4.7, nothing in this Condition D4.8 shall entitle Network Rail to amend any Train Slot already scheduled in the relevant Working Timetable except:
- (a) in order to take Restrictions of Use in accordance with the applicable Rules of the Route and the applicable Rules of the Plan; or
 - (b) by way of revision of the allocation of capacity on Routes directly affected by such Restrictions of Use and on diversionary routes in accordance with this Condition D4.8.

ANNEX B

Track Access Provisions

(The provisions below are from the model track access agreement for passenger services published by ORR in October 2004. These provisions are included in the three track access agreements referred to in paragraph 2 of the determination with the necessary customisation. For the purpose of this determination, there are no material differences between the relevant provisions of each track access agreement and the relevant provision of the model track access agreement as set out below).

Definitions

Applicable Rules of the Route	means the Rules of the Route in force in respect of the Routes on [the date on which Services may first be operated by the Train Operator under the Track Access Contract], as from time to time amended or replaced under Part D of the Network Code;
Applicable Timetable	means, in respect of any day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Condition D1.6.1 [of the Network Code] as at 2200 hours on the day prior to that day, and which is applicable to the Trains;
Network Code	means the document now known as the Network Code and formerly known as the Railtrack Track Access Conditions 1995;
Network Rail Restriction of Use	means any Restriction of Use other than an Operator Restriction of Use, a Competent Authority Restriction of Use, a CTRL Possession or, if applicable, a Thameslink Possession; .
Notification Factor or NF	shall have the meaning ascribed to it in paragraph 4 of Part 3 of Schedule 4 [of the Track Access Agreement];
Relevant Dispute	means any difference between the parties arising out of or in connection with this contract;
Restrictions of Use	means, in respect of any day, any restriction of use of all or any part of the Routes (other than one caused by a Recovery Allowance which was contained in the Applicable Rules of the Plan relevant to that day notified to each Bidder on or before the end of the Drafting Period under Part D of the Network Code) which results in:

(a) a difference between the Applicable Timetable on that day as compared with the First Working Timetable in respect of that day; and/or

(b) a difference between the First Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day;

Restrictions of Use Day means a day on which a Network Rail Restriction of Use is taken or deemed to be taken;

Service Group means a collection of Services contained within the service groups specified in column A of Appendix 1 [of the Track Access Agreement];

Working Timetable has the meaning ascribed to it in Part A of the Network Code.

Paragraph 4 of Part 3 of Schedule 4

4 Notification Factors

4.1 Early notification

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column C of Annex A to this Part 3 if and to the extent that:

- (a) the Network Rail Restriction of Use is reflected in the First Working Timetable; or
- (b) (i) details of the Network Rail Restriction of Use are notified to the Train Operator on or before the end of the Drafting Period in the Applicable Rules of the Route for the Timetable Period in respect of the Restriction of Use Day but, at the request of the Train Operator (as accepted by Network Rail), are not reflected in the First Working Timetable; and
- (ii) subject to paragraph 4.1(b)(iii), the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 2200 hours on the day which is 12 Weeks before the Restriction of Use Day; or
- (iii) where paragraph 4.1(b)(ii) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

4.2 Notification by Revision Notification Date

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column D of Annex A to this Part 3 if and to the extent that paragraph 4.1 does not apply, and:

- (a) details of the Network Rail Restriction of Use are notified to the Train Operator by the Revision Notification Date; and
- (b) (i) the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 2200 hours on the day which is 12 Weeks before the Restriction of Use Day; or
- (ii) where paragraph 4.2(b)(i) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

4.3 Late Notification

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column E of Annex A to this Part 3 if and to the extent paragraphs 4.1 and 4.2 do not apply but the Network Rail Restriction of Use is reflected in the Applicable Timetable, and includes where paragraph 4.1(b) or paragraph 4.2 would have been applicable but for a failure by Network Rail to fulfil the terms of paragraph 4.1(b)(ii) or paragraph 4.2(b)(i) respectively, notwithstanding the Train Operator having given a Revised Bid in accordance with Condition D4.8.3.