

## **Determination in respect of reference ADP21**

*(following a Hearing held at Central House, Euston on 16<sup>th</sup> November 2006)*

### **The Panel**

<b>John Boon:</b>	appointed representative of Network Rail
<b>Nick Hortin:</b>	elected representative for Franchised Passenger Class, Band 2
<b>Mike Leadbetter:</b>	elected representative for Non-Passenger Class, Band 2
<b>Bil McGregor:</b>	elected representative for Franchised Passenger Class, Band 1
Panel Chairman:	<b>Sir Anthony Holland</b>

### **Brief Summary of Dispute, and the jurisdiction of the Panel**

1. The Panel was asked, in a joint reference from First Capital Connect Ltd (FCC) and Network Rail Infrastructure Ltd ("Network Rail"), to consider the nature of the works being undertaken to renew the overhead wiring ("the Rewiring Works") on the East Coast Main Line (ECML), in order to establish whether or not
  - 1.1. the Rewiring Works fulfilled the terms of the definition of a "Major Project", in the Network Code Part D (pink pages);
  - 1.2. the possessions/Restrictions of Use ("ROUs") necessary for the undertaking of the Rewiring Works should have been the subject of documentation fulfilling the terms of the definition of a "Major Project Notice" in Schedule 4 of the Track Access Contract between the parties; and therefore
  - 1.3. the possessions would qualify, under the terms of paragraph 2.7 of Schedule 4, as Significant Restrictions of Use (SROUs), and therefore, in consequence, for the application of a compensation regime devised and agreed in accordance with paragraph 2.6 of Schedule 4.
2. FCC had assumed responsibility for the former Great Northern Franchise on the ECML, with effect from 1<sup>st</sup> April 2006, from which date until 10<sup>th</sup> June 2006 it benefited (by virtue of a statutory Transfer) from the Track Access Agreement of the previous franchisee. With effect from 11<sup>th</sup> June, (and effective until 9<sup>th</sup> December 2007) FCC has the benefit of a new Track Access Contract. The new Track Access Contract contains the same template Schedule 4 as did the older agreement.
3. In referring the dispute for the consideration of "*the relevant ADRR panel*" the parties had relied on two discrete bases for making the reference, namely
  - 3.1. Condition D2.2.4 of Part D of the Network Code (normally for consideration by a Timetabling Panel); and
  - 3.2. paragraph 8.4 of Schedule 4 to the Track Access Contract (normally for consideration by an Access Disputes Panel).

4. Access Dispute Resolution Rules A1.13 and A1.14 state that

*“1.13. The Disputes Chairman shall, subject to the provisions of Part F (Mixed Disputes) or as is otherwise prescribed, ensure that each dispute is allocated to the most appropriate forum to determine the issues raised by that dispute.*

*1.14. There is a presumption that disputes referred to the Panel under Condition D5.1.1 shall, unless there are compelling reasons relating to subject matter, be allocated to the Timetabling Panel. The Disputes Chairman shall not allocate a dispute ostensibly falling within Condition D5.1.1 other than to the Timetabling Panel without first inviting written representations from the dispute parties on his intention to do so and giving proper consideration to any representations made.”*

5. The Disputes Chairman had therefore directed the parties, in a letter of 13<sup>th</sup> November 2006 that

- *“Having considered the range of issues, both raised by the parties, and as set out below, I have concluded that some of the issues of interpretation of the meaning and intentions of Schedule 4 of the Track Access Contract may lie beyond the competence of a Timetabling Panel. I therefore propose that the appeal be heard in full by an Access Disputes Panel, but recognising that such a hearing could result in the following potential outcomes:*
  1. *the Panel concludes that the essence of the dispute relates to matters governed significantly by factors outside Part D, and therefore proceeds to a full determination of the dispute;*
  2. *the Panel concludes that the matters governed by factors outside Part D are material, and require determination, but that, once those matters have been determined, there remains a core dispute that should then logically, and in accordance with Rule A1.14, be heard by a Timetabling Panel; OR*
  3. *the Panel concludes that there are no matters that require it to make a determination, and that the parties’ case should be heard by a Timetabling Panel.*
- *By adopting this approach I am seeking to protect the interests of both parties. In particular, I shall be concerned to ensure that, whatever the determinations of substance made by the Access Disputes Panel, the parties’ rights, should they be dissatisfied with the outcome of the hearing, to take matters in relation to Part D on appeal to the Office of Rail Regulation, and those in relation to Schedule 4 to arbitration, are not impaired.”*

6. The Parties had replied to the effect that they were content that the reference be determined in its entirety by an Access Disputes Panel, and re-affirmed that position at the outset of the hearing.

## The Panel's findings in respect of facts and the sequence of events

7. The Panel found that
  - 7.1. Network Rail is undertaking a significant renewal of the Overhead line equipment (OHLE) on the ECML, with FCC being particularly affected by those works between Peterborough and Kings Cross. The renewals in question include replacement of Span wires, droppers and catenary wires, and the replacement of aluminium contact wire with copper contact wire.
  - 7.2. possessions, in which work on the OHLE renewal programme will be undertaken, and which affect FCC, have been scheduled for
    - 7.2.1. every weekend in 2006 between Saturday 1<sup>st</sup> April, and Saturday 9<sup>th</sup> December;
    - 7.2.2. every weekend in 2007 between Saturday 3<sup>rd</sup> February, and Saturday 19<sup>th</sup> May;
    - 7.2.3. every weekend in 2007 between Saturday 15<sup>th</sup> September, and Saturday 8<sup>th</sup> December; and
    - 7.2.4. on the 4 Bank holiday weekends in 2006, and the Easter, Spring and August Bank Holidays in 2007 the possessions have been further extended.
  - 7.3. within the 21 month (84 weeks) period from 1<sup>st</sup> April 2006 to 8<sup>th</sup> December 2007, of a total of 74 possessions incorporated into the Rules of the Route wholly or partially for the Rewiring Works
    - 7.3.1. 44 are for less than 10 hours, and affect only the first hours of Sundays, and
    - 7.3.2. 19 (including 2 of the Bank holidays) last over 50 hours, affecting services throughout Saturday, Sunday, and, in some cases, some of Monday;
    - 7.3.3. the other 5 Bank holidays have 3 possessions of 30 hours (Sunday to Monday morning), 1 of 35 hours (late Saturday to Monday morning) and 1 of 45 hours (Saturday afternoon to Monday morning);
  - 7.4. none on these possessions are of such a duration that, on grounds alone of duration, they would qualify as SROUs;
  - 7.5. in many instances (asserted but not quantified) the possessions also serve to permit work on maintenance or renewals of other parts of the infrastructure (i.e. track etc);
  - 7.6. all the possessions have been included in the applicable Rules of the Route, following the provisions of Network Code Part D (yellow pages);
  - 7.7. no form of notice qualifying as either a Major Projects Notice, or a Possession Strategy Notice (whether or not identified as relating to a Major Project), has been issued by Network Rail in respect of either the above possessions or the Rewiring Works. However,
  - 7.8. in minutes of a meeting of 14<sup>th</sup> September 2004, ("OHL Renewals Outline of Access Requirements for 2005TTY to 2007TTY") Network Rail's representative is recorded as stating that "a MPN would be issued". The version of Part D applicable at that date was the Pink pages: the Yellow pages were not issued until May 2005. The proposal to issue a MPN was later countermanded within Network Rail and no MPN in respect of the Rewiring Works was issued;

7.9. the other significant dates governing this dispute were summarised as

September 2004	Meeting at which Network Rail advised intention to issue MPN. Not subsequently done or challenged.
December 2005	Award of Franchise (incorporating GN) to FCC
January to March 2006	Initial discussions over the treatment of the possessions raised prior to FCC commencing operations
1 <sup>st</sup> April 2006	FCC commence operation of Franchise pursuant to Statutory transfer of ex GN Track Access Agreement under
15 May 2006	NR PowerPoint Presentation detailing the scope of the Rewiring Works
17 May	FCC letter to NR disputing the treatment of ROUs which relate to the Rewiring Works
11 June 2006	FCC commence new Track Access Contract (valid 'til Dec 2007)
29 June 2006	NR conclusive response to FCC
14 August 2006	NR press release regarding the Rewiring Works
22 August 2006	FCC letter to NR noting the inconsistency of NR's letter of 29 June and press coverage
August to October 2006	Iteration of Joint reference to conclusion and submission to Panel

## The Contentions of the Parties

8. FCC contended that

- 8.1. the Rewiring Works was a large single co-ordinated programme of activity, and that, by its nature it was causing “*exceptional disruption*” to FCC services (Submission 4.4), and resulting in significant additional costs to FCC, in providing substitute or amended services.
- 8.2. because the Rewiring Works was regularly described by Network Rail (albeit in non-contractual documents) as a “project”, managed by a “project management team” and process, and the range of possessions, over a period of more than a year, appeared to fulfil the criteria of a Major Project (as defined in Network Code Part D (Pink pages) and amplified in the Determination AD53 (December 2003)), the Rewiring Works should be the subject of a Major Project Notice. And that
- 8.3. as a consequence of the issue of such a notice it would follow that FCC would potentially be compensated for the Direct Costs suffered as a consequence of the disruption arising from those possessions, in accordance with bespoke terms devised in compliance with paragraph 2.6 of Schedule 4 of the Track Access Contract.

9. Network Rail contended that
  - 9.1. the Rewiring Works related essentially to the renewal of the OHLE system either on a direct like for like basis, or, as in the case of the contact wire (where copper is being substituted for aluminium), on a modern equivalent asset basis, and therefore
  - 9.2. did not have the characteristics to qualify as a Major Project as defined in Part D Pink pages, and that this conclusion was consistent with Determination AD53; and that therefore
  - 9.3. it was not under any obligation to issue any documentation giving the Rewiring Works any contractual status beyond that of other renewals or maintenance work; and that therefore
  - 9.4. any disruption of services experienced by FCC would fall properly to be compensated through the provisions of Schedule 4, and without the benefit of any bespoke arrangements.
10. The legal advisors to FCC advised the Panel that there had existed, between the previous franchisee and Network Rail, a “confidential” agreement relating to the status of the Rewiring Works. The Panel sought further clarification from Network Rail, and was advised by a senior lawyer that Network Rail had made an ex-gratia payment to the previous holders of the franchise. Network Rail was not prepared to reveal any further details of the confidential settlement. Given these somewhat unusual circumstances the Panel felt constrained in the interpretation it could put upon them.

### **The Panel’s findings in respect of entitlements**

11. The Panel acknowledged that its role, as defined in Access Dispute Resolution Rule A1.18 is to “*reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis*”. It found that the entitlements of the parties required to be deduced from the sum of the provisions set out in
  - 11.1. Network Code Part D, Pink pages;
  - 11.2. Network Code Part D, Yellow pages, and in particular the notes thereto; and
  - 11.3. the provisions of the FCC Track Access Contract, in particular Clause 19.1, and Schedule 4, both of which are template provisions.
12. In addition the Panel is required to take account of relevant precedents. In this case the principal precedent cited by the parties is determination NV53 of December 2003, relating to a programme of works on the Forth Bridge. The Panel noted that “*In reaching its determination, the Panel shall....take note of its prior determinations (and those of any predecessor body) and of any other relevant tribunal other than a superior tribunal, as persuasive authority but need not be bound by the same*”. (Access Dispute Resolution Rule A1.17)

13. The Panel noted that, in accordance with his duties under Access Dispute Resolution Rule A1.4, the Chairman had written to the parties (letter of 10<sup>th</sup> November 2006) requiring them to present written arguments addressing specific questions, including

8. *For the purposes of the Track Access Contract now in force between FCC and Network Rail, is Major Project a defined term within the body of that contract? If so, what are the terms of that definition? If not, is the definition derived from common English usage, or does it depend upon the Notes to Part D Yellow pages?*
9. *What is the purpose of the Notes to Part D Yellow pages? For example, are they intended to facilitate the completion of processes commenced under preceding versions of Part D during a period of transition, or are they intended to perpetuate certain concepts and processes indefinitely?*
10. *Can a concept in a Track Access Contract, such as "Major Project" be defined in the terms of a document (the Part D Pink pages) that has been superseded as at the signing date of the Track Access Contract? Does Note 5(c) to the Part D Yellow pages have that standing in relation to either the new FCC Track Access Contract, or any other as yet unsigned Track Access Contracts?*
11. ....
12. *In relation to paragraph 2.7 of Schedule 4 of the Track Access Contract;*
- 12.1. *do the parties construe this paragraph as meaning that a Restriction of Use qualifies as a Significant ROU if it fulfils only one, or all, of the conditions in sub-paragraphs a), b) or c)?*
- 12.2. *does the "upgrading" from ROU to SROU depend upon the nature of the undertaking (Major or Minor), or is it dependent upon the circumstances of each individual ROU?"*

14. The Panel considered that determination of the dispute required it to reach conclusions, informed by the responses from the parties to the above questions, in respect of each of the following points

- 14.1. At a period when Part D of the Network Code (the Yellow pages) lays down explicit conditions in respect of the use of Possession Strategy Notices ("PSN"), and also includes references to Major Project Notices ("MPN"), what is the practical difference between the two?
- 14.2. Was Network Rail acting within its rights in choosing to issue neither a PSN, nor a MPN, but to rely solely upon the normal processes for deriving the applicable Rules of the Route?
- 14.3. Do the circumstances of the current case compare with the circumstances of determination AD53?
- 14.4. What other factors should be taken into account?
- 14.5. Did Network Rail make a right decision?

15. The Panel noted that
  - 15.1. the parties had not asked it to address any question of quantification, although some indications were given of the sums of money that might depend upon the Panel's determination.
  - 15.2. the current situation between the parties is that FCC is receiving the benefit of the compensation due for ROUs under the terms of Schedule 4.
  - 15.3. were the Panel to determine that the circumstances of the case were such that Network Rail should have issued a PSN "*relating to a Major Project*" ("PSN(MP)") in respect of the Rewiring Works, this would give grounds for FCC
    - 15.3.1. to press for ROUs to be re-classified as SROUs (in the terms of Schedule 4 Part 3 paragraph 2.7, and where they also fulfilled sub-paragraphs 2.7(b) and (c)), and
    - 15.3.2. to seek from Network Rail, "*bespoke arrangements in relation to compensation*" in accordance with the terms of Schedule 4 Part 3 paragraph 2.6.
16. The Panel concluded that, in practical terms, the amount of additional compensation that FCC might, or might not receive under "*bespoke arrangements*" was purely a consequence of a primary decision as to whether or not the circumstances of the cases warranted, or required, that the Rewiring Works should be deemed a "Major Project", demanding the issue of a PSN(MP). The Panel had therefore to take care to ensure that, in reaching a conclusion as to whether or not the Rewiring Works should be deemed a "Major Project", it should consider only the parties' entitlements relative to the circumstances of the case, and should ignore considerations of which amount of compensation was in any way "fairer".

## **The Panel's preliminary conclusions**

**At a period when Part D of the Network Code (the Yellow pages) lays down explicit conditions in respect of the use of Possession Strategy Notices ("PSN"), and also includes references to Major Project Notices ("MPN"), what is the practical difference between the two?**

17. As at the time of the preparation of the timetable in force when FCC took over the franchise, the operative Part D was the Yellow pages. In the Yellow pages, the working presumption is that ROUs will normally be included into the applicable Rules of the Route. Where there are operational benefits to Network Rail of scheduling "*a programme of coordinated ROUs extending over...a period of more than one year*" (Condition D2.2.1(a)) then Network Rail "*at its discretion*" may give notice to bidders and consult on a "*method of implementation*".
18. Subsequently, if Network Rail has elected to open consultation in accordance with Conditions D2.2.1 and D2.2.2, it is then required by D2.2.3 ("*Network Rail shall issue*") to draw all its proposals together into a Possessions Strategy Notice (PSN), stating the method of implementation, including advance notice of ROUs that will need to be incorporated into the applicable Rules of the Route for future Timetables.
19. Issuing a PSN is essentially a matter of procedural convenience to Network Rail and Train Operators alike, and
  - 19.1. does not correlate with any particular activity, or category of work,

- 19.2. may be associated with one-off exercises, or routine activities, or any combination of either,
  - 19.3. is not in any normal circumstance mandatory until Network Rail has made its election under D2.2.1, and
  - 19.4. has no implications in respect of the standing of ROUs, or the levels of compensation payable under Schedule 4.
20. By contrast, a Major Project Notice (MPN) derived essentially from the definition of a Major Project, as given in the superseded Pink pages version of Part D. As such an MPN
- 20.1. related specifically to *“any engineering, maintenance, or renewal project”* of more than a year’s duration,
  - 20.2. depended upon a common understanding of the concept (not otherwise defined) of a *“project”*,
  - 20.3. was a mandatory requirement in circumstances where both criteria of duration and project were fulfilled, and
  - 20.4. had a direct consequence on levels of compensation under Schedule 4, in those circumstances where an ROU “in connection with an MPN” also involved cancellations or diversions, and incurred the Train Operator in Direct costs in excess of £10,000 (i.e. where the individual ROU qualified as an SROU).
21. Under the Yellow pages, Note 5(c), a PSN *“relating to a Major Project”* ( a “PSN(MP)”) is the nominal counterpart to a MPN under the Pink pages.

**Was Network Rail acting within its rights in choosing to issue neither a PSN nor a MPN, but to rely solely upon the normal processes for deriving the applicable Rules of the Route?**

22. The Panel found that the principal responsibility for administration of Part D of the Network Code rests upon Network Rail. It follows that, where there is a need to make a choice as to which of the procedures envisaged in Part D should be adopted, that choice is one that falls to be made by Network Rail. This choice is necessarily informed by the terms of the applicable Part D of the Network Code, and by the facts of the case as seen by Network Rail, and may require to be defended, in the event that there is a formal challenge brought by a Train Operator under Condition D5.
23. The Yellow pages version of Part D clearly envisages that Network Rail will in general rely solely upon the normal processes for deriving the applicable Rules of the Route, but may *“at its discretion”* have recourse to a PSN. In addition, it has to consider, because of the provisions of Note 5(c) to Part D Yellow pages, whether there are circumstances such that it could with advantage declare a Major Project, or is required so to do. However, note 5(c) is clear that the requirement to issue a PSN(MP) is predicated upon an act of will of Network Rail, namely *“in the event that Network Rail wishes to implement a Major Project, it shall issue a Possessions Strategy Notice in respect thereof in accordance with Condition C2.2 and identify that notice as one relating to a Major Project”*.
24. For the avoidance of doubt, the Panel construed this Note 5(c) as imposing on Network Rail the obligation, where it had decided that works fulfil the definition of a “Major Project”, to



progress those works under the cover of a PSN(MP). The decision as to whether works constitute a “Major Project” is material, and liable to challenge under D2.2.4. The failure to issue a PSN(MP) is not, of itself, confirmation that there is no Major Project.

**Do the circumstances of the current case compare with the circumstances of determination NV53?**

25. The Panel noted that both parties had sought to buttress their arguments by reference to Determination NV53 of the Network and Vehicle Change Committee. The Panel considered that it should review the circumstances of the current case as compared with the particular circumstances of NV53, in particular given the very clear conclusion of NV53 that *“In taking that view the Committee did so in the context of this particular and unique set of facts. It was not in any way moving in a direction whereby other more usual types of maintenance could be categorised as Major Projects.”* (NV53 paragraph 10).

26. The Panel noted that, in NV53, the Committee had formulated, for the purposes of that determination, an understanding of the meaning of a Major Project, as defined in the Part D at that time:

*“9.2 the definition brings together a number of discrete elements, all of which would appear to require to be met, for there to be an **obligation** on Network Rail to categorise and manage an activity as a “Major Project”. These are:*

*9.2.1. the activity relates to “engineering, maintenance or renewal”;*

*9.2.2.. it requires “a possession or series of possessions of one or more sections of track”;*

*9.2.3. that requirement lasts “ a period of more than one year”; and*

*9.2.4. the activity relates to a defined “project”.*

*9.3 “project is not a defined term in either the Track Access Conditions, or the Railways Act, and therefore must be construed in line with common English usage. In this regard a project is something not “run of the mill”, but is non-repetitive, is undertaken to achieve a specific objective, implies the commitment of identified resources, and, probably, extends over a sustained period of time.”*

{Determination NV53, paragraphs 9.2 and 9.3 verbatim}

27. The Panel considered that this clarification, whilst helpful, had to be kept in the context of the original reference. In effect NV53 related to Network Rail’s choices, comparable with the choices to be made in the context of the Rewiring Works. However,

27.1. the Forth Bridge is, for the purposes of planning possessions, or for determining its maintenance regime, a single indivisible structure;

27.2. the process for implementing the revised painting technique was specific and unique to the Forth Bridge, and

27.3. the benefits (to Network Rail and Train Operator alike) from making the change depended ultimately in making the complete changeover, so that the previous processes could be discontinued.

28. The Panel members could not agree as to whether the Rewiring Works in this case shared the characteristics of the Forth Bridge works addressed in NV53.

28.1. On the one hand was a view that replacement of OHLE components

- 28.1.1. does not relate to a large indivisible entity: it is a granular task that is essentially run-of-the-mill, and condition-related, driven (for the most part) by rates of usage and deterioration.
- 28.1.2. is not intrinsically different whether it relates to one such component or one million, and in practice this case relates to the way in which Network Rail has chosen to manage the replacement of large numbers of components.
- 28.1.3. differs significantly from the circumstances of NV53, in that in NV53 the “engineering, maintenance or renewal” input was distinctive in kind, whereas in this case it is only distinctive in volume.
- 28.2. On the other hand was a view that the Rewiring works had much in common with NV53, because
  - 28.2.1. a programme of renewal taking more than a year to execute, and deemed thereafter to last for 30 years, cannot be described as “run of the mill”; and that
  - 28.2.2. the disruption would be experienced solely by the current franchise incumbent, against a benefit that would be felt by both the current franchisee, and other potential successors.

**What other considerations should be taken into account?**

- 29. Both parties advanced further commentaries on the meanings of the word “project”, including by reference to the definition used by the Association of Project Management, and the liberal use of the word in publicity material describing the Rewiring Works. Panel Members could not agree on whether these amplifications added to either the understanding derived from NV53, or their respective constructions placed upon the status of the Rewiring Works.
- 30. The number and duration of the ROUs is, in this case, as in others, the factor that impinges upon the business of the Train Operator, and generates additional Direct Costs. It is appropriate to note, in relation to the disruption potentially caused to the services of the Train Operator, that
  - 30.1. a significant number of the possessions only affect the traditional engineering period of early Sunday morning, and
  - 30.2. none of the other longer possessions exceed the thresholds at which, at the direction of the Regulator, and as recorded in Schedule 4 paragraph 2.7 b), c) and d), disruption is such that a ROU graduates to a SROU.
- 31. In other words, the ROUs are not, in themselves, extraordinary, or beyond the scale of what is compensated by the normal provisions of Schedule 4; the issue is whether, taken in aggregate, and given the nature of the tasks undertaken and the way they are managed, the ROUs should be deemed to be the result of a Major Project.
- 32. The Panel was not given any documentary evidence that any Train Operator using the lines affected by the Rewiring Works had actively contested Network Rail’s decision not to treat the Rewiring Works as a Major Project, before FCC acquired its interest in the Franchise.
- 33. The Panel considered whether the fact that the franchise has changed hands, or the date at which FCC acceded to the franchise, has any material bearing upon its determination of the entitlements of the parties to the Track Access Contract in relation to whether or not the Rewiring Works should be accorded the status of “Major Project”, (and whether or not, as a

consequence, levels of compensation should be changed). The Panel concluded that, because the Franchising process in this case provided first for the transfer of the previous Franchisee's Track Access Agreement, and subsequently for a new Track Access Contract incorporating (in accordance with the provisions of second sub-clause 5 of section 19.1 of the template transitional arrangements) any bespoke compensation arrangements, the fact that the parties could not produce documentary evidence of the existence of such arrangements, implied that, for the purposes of any determination, none could be deemed to exist.

### **Did Network Rail make a right decision? The Panel Members' Determinations**

34. Network Rail has decided that the Rewiring Works in this case does not qualify as a "Major Project". In consequence compensation to FCC is being paid on the basis of Schedule 4. Furthermore, Network Rail's ongoing decision is that it has made the correct decision, and that the Rewiring Works still does not qualify to be treated as a Major Project.
35. The Panel Members are divided on the correctness of Network Rail's decision:
  - 35.1. **Mr Boon** considers that Network Rail's decision is correct and therefore finds for Network Rail, because
    - 35.1.1. a Major Projects Notice was not issued by Network Rail and all operators signed up to the possessions on the basis that they were Restrictions of Use and not Significant Restrictions of Use;
    - 35.1.2. no operator challenged this through the contractual mechanisms;
    - 35.1.3. in advance of the franchise process, FCC would have been able to review Rules of the Route and make enquiries about plans that might disrupt or impact upon the delivery of their franchise plans and, therefore, factor into their franchise bid the effect of the rewiring possessions being compensated for as restrictions of use (normal S4);
    - 35.1.4. for a Major Project Notice to be issued it must relate to a "project" (definition – in Part D) and these possessions do not form a "project" as defined within NV53. The rewiring renewals comprise discrete work elements which are repetitive in nature. There is no novelty involved or change in output or maintenance approach for the future. The only reason that these individual restrictions of use are packaged is to reflect that renewals are required at the same timing due to age and condition and to deliver efficiently – to spread the renewals on the route over say 25 years would mean advance or deferred renewals of certain sections which would be sub-optimal;
    - 35.1.5. the contact wire change of material is to use the modern equivalent form rather than to change the asset output;
    - 35.1.6. a large proportion of the possessions are fairly "standard" in length – a Major Project would typically be characterised by longer duration possessions.
  - 35.2. **Mr Hortin** considers that Network Rail's decision is wrong, and therefore finds for FCC because
    - 35.2.1. Every aspect of this programme other than TOC compensation was handled as a project. Semantic definition arguments should not deprive FCC of their bespoke compensation Schedule 4 part 3 paragraph 2.6/2.7 entitlement.

- 35.2.2. The determination should be informed by the fact that a confidential agreement (details unknown) linked to the Rewiring Works existed with the previous Operator.
- 35.3. **Mr Leadbetter** considers that Network Rail's decision is correct, and therefore finds for Network Rail, because
- 35.3.1. It is a matter for Network Rail's discretion as to whether a PSN(MP) is issued;
- 35.3.2. A PSN(MP) was not issued and nor were the possessions challenged under D2.1.7 and therefore they were deemed to be accepted by the incumbent operator. As the new franchisee inherits these decisions they have to accept decisions made by their predecessor.
- 35.3.3. Therefore the restrictions should be treated as not being part of an MPN for the purpose of schedule 4 and therefore the existing compensation should apply.
- 35.4. **Mr McGregor** considers that Network Rail's decision is wrong, and therefore finds for FCC, because the Rewiring Works
- 35.4.1. is "*engineering, maintenance or renewal*", requires a possession or series of possessions of one or more section of track, and extends over a period of time of more than one year and a period that contains one or more passenger change dates;
- 35.4.2. is, by Network Rail, referred to in common parlance as a "project";
- 35.4.3. appears to be consistent with the Committee's attempt to define a Major Project as per paragraph 9 of NV53, and therefore, it should reasonably be considered,
- 35.4.4. fulfils the Pink pages contractual definition of Major Project.

### **Chairman's ruling**

36. Under Rule A1.70, In the absence of unanimity in the Panel, "the Panel Chairman shall make a determination of the dispute in accordance with rule A1.72". In making such a determination I have reviewed all the considerations that have been addressed previously, and set out above, and make my ruling accordingly.
37. In respect of the matters of fact, I find as follows.
- 37.1. It is the case that in presentations to Train Operators and in published articles the Rewiring Works have been referred to by Network Rail as a "project".
- 37.2. The necessity of the Rewiring Works, and the desirability that it be undertaken as expeditiously as possible, appears to be common ground between the parties.
- 37.3. The detail nature of the tasks being undertaken is not inconsistent with other forms of renewal or maintenance that are carried out across the Network, year in year out. The replacement of aluminium with copper in the contact wire can, and should, reasonably be categorized as modern equivalent replacement. If such a change modifies the capability of the OHLE then there is provision within the Network Code for the implications of such a change to be addressed. However, for the purposes of this case, no evidence has been placed before the Panel to demonstrate there has, or will

be, a change of capability that should affect the contractual status of the Rewiring Works in the context of the matter here at issue.

- 37.4. There is no dispute but that carrying out the Rewiring Works requires a programme of possessions, and that these possessions will disrupt the services of both FCC and other Train Operators. However, the majority of the possessions in question last less than 10 hours, and occupy the 'normal' early hours of Sunday morning. The longer possessions are all still sufficiently short that they do not breach the standard (as laid down by the Office of Rail Regulation) beyond which they would acquire the special contractual status of SROU.
- 37.5. It is possible that the way in which the Rewiring Works are being undertaken results in a greater number of longer possessions in one year than might be the case in another year, or were the Rewiring Works to be undertaken to a different timeframe. However, no evidence was presented in this regard.
- 37.6. It is the case that, in September 2004, a statement was made by Network Rail that the Rewiring Works would be made the subject of a MPN. It is also the case that that statement was not acted upon, and, to the best knowledge of the Panel, on the basis of the evidence presented to it, no MPN was ever issued, nor was any appeal against that decision initiated either by the Train Operator then in possession of the Franchise or by any other affected Train Operator.
- 37.7. When, in April 2006, FCC assumed control of the franchise for the GN line services, the Track Access Contract that was transferred to it did not include any form of agreement in respect of "*bespoke arrangements*" as envisaged in Schedule 4 Part 3 paragraph 2.6 of the Track Access Contract. Nor were any such arrangements incorporated into the new Track Access Contract (in accordance with Clause 19.1 "Corresponding Rights") effective from June 2006.
38. In respect of the matters of entitlement, I find that the entitlements of the parties in a case relating to the operation of Part D of the Network Code, and the Performance Schedules of the Track Access Contract, derive from a combination of provisions;
  - 38.1. those that confer, or allow the existence of, rights, and
  - 38.2. those that impose obligations upon the Access Parties in respect of the procedures to be followed to assert, and/or protect those rights.
39. I find that I am in agreement with the thinking of the Panel members that the key element affecting the determination of this case relates to
  - 39.1. whether or not circumstances of the Rewiring Works fulfil the definition of a "Major Project" as contained the version of Part D (the Pink pages) of the Network; and
  - 39.2. the extent that the behaviour of the parties has not vitiated the rights of either in respect of such definition .
40. I understand why the Panel members are of different minds and consider that the definition of a Major Project, even with the benefit of the previous Determination AD53, is not clear-cut, and there has been no other determination, either before or after the transition to the Part D Yellow pages, that may be of assistance.

41. In such a case, I consider that minimising uncertainty depends upon interpreting the relevant provisions of Network Code Condition D2.2 in the context of what those provisions appear intended to achieve. I consider, that in compliance with Rule A1.17(b), I am bound to such a course (but only when the Panel has exhausted, and failed to reach agreement on, all other possible ways of deriving a clear understanding of the relative entitlements of the parties) by the terms of the ruling of the Office of Rail Regulation in its '**Decision on Grand Central Railway Company Limited's Notice of Appeal against the decision of the Timetabling Panel made on 4 October 2006**' which lays down, at Paragraph 18 the principle that "*in view of the existence of two alternative constructions of the Rules, we have considered which of them appears to accord most with the purpose of Part D and the Rules*". I am of the view therefore that this principle should logically also apply in respect of two alternative constructions of Part D.
42. I consider therefore that a key to understanding the concept of the Major Project depends on considering the benefits that accrue to either party (Network Rail or the Train Operator) from a decision that a particular set of works should be implemented as a Major Project, subject to an established MPN. Under the provisions of Part D, Pink pages, those benefits were:
  - 42.1. for Network Rail, that all ROUs/SROUs for the duration of the timetables covered in the MPN, were established, and could not (by virtue of Condition D2.1.6) be the subject of objection or appeal. This level of certainty allows for long term scheduling of tasks and the efficient deployment of engineering resources; and
  - 42.2. for a Train Operator, that the consequential individual ROUs, where they fulfilled the requirements of Schedule 4 paragraph 2.7 b) and c), would qualify as SROUs under Schedule 4 paragraph 2.7a), irrespective of the duration of the possession, and would therefore be subject to the (potentially more advantageous) compensation arrangements envisaged in Schedule 4 Part 3 paragraph 2.7.
43. With the change of Part D to the Yellow pages, the concept of the MPN largely disappears, to be replaced by that of the Possessions Strategy Notice. The key practical difference between the two versions of the conditions is that,
  - 43.1. under the Pink pages, the only means by which Network Rail could secure the ROUs for a long term programme of works (of any kind) spanning more than one timetable, was by declaring the works to be a Major Project, and triggering the relevant provisions of Schedule 4 Part 3 paragraph 2.7 and 2.6. By Contrast
  - 43.2. under the Yellow pages, the ROUs for a long term programme of works of any kind can be secured by the establishment of a PSN. A PSN, once established, under the provisions of Condition D2.2, confers on Network Rail the same benefit in respect of incorporation of ROUs into future Rules of the Route and future timetables as under the Pink pages, but does not trigger the provisions of Schedule 4 Part 3 paragraph 2.7 and 2.6.
44. That said, there is, in Note 5 to the Yellow pages, an acknowledged need to preserve the [Pink pages] status of a MPN in three specific circumstances, namely
  - 44.1. where there is an established MPN (Note 5(a)),
  - 44.2. where the process of achieving an MPN has progressed beyond the giving of formal notice of a Major Project, but requires the formulation of the proposed method of implementation to become established (Note 5(b)), or

- 44.3. whilst there are Track Access Agreements that still use the term MPN “*in defining a SROU*”, then “*In the event that Network Rail wishes to implement a Major Project, it shall issue a Possessions Strategy Notice in respect thereof in accordance with Condition D2.2 and identify that notice as one relating to a Major Project (and for these purposes ‘Major Project’ shall have the same definition as in the Preceding Code)*”.
45. I am satisfied in my own mind that when the drafters of the Yellow pages, in Note 5(c), made provision for a PSN “relating to a Major Project”, they were also, by the same act, making provision for PSNs that did not relate to Major Projects; that is that the PSN “relating to a Major Project” should be a sub-set of the generic PSN. Starting from this perception, I have to pose the question, “What is it that, in the regime of the Yellow pages, differentiates a Major Project (as defined in the Pink pages) from a possessions strategy (as defined in Yellow pages 2.2.1)?”.
46. I note that both have in common the requirement for possessions/ ROUs “*extending over..(a) a period of more than one year; or...(b) a period which contains two or more Passenger change dates*”, and conclude therefore that the two must be differentiated by that qualitative component in respect of “*engineering, maintenance or renewal*” that warrants the use of the contractually undefined term of “*project*”. This I consider has to be a function of a reasoned, and if necessary defended, judgement by Network Rail as to the content of the task in hand, and not simply as to the number of tasks, or the scale of the disruption to Train Operators.
47. I am particularly insistent that this need for a reasoned case means that there is no obligation upon Network Rail to declare a Major Project solely to make itself liable for higher levels of compensation to Train Operators.
48. In the current case the Panel has been given
- 48.1. evidence that a representative of Network Rail, in September 2004, at which time the only published version of Part D was the Pink Pages, stated that Network Rail would issue a MPN to cover the Rewiring Works;
- 48.2. no evidence that such a Notice was ever issued, or that that failure to follow up a previous statement was ever made the subject of a formal challenge (under either the Pink pages or the Yellow pages), or reference to the Disputes procedure, by any Train Operator within the timeframes of the development of the Timetable commencing in December 2005 ; and
- 48.3. no evidence that the Rewiring Works has been made the subject of any PSN, in relation to those Timetables finalised since the coming into force of the Yellow pages in May 2005.
49. By contrast the Panel has been given an intimation of the concluding, between Network Rail and the previous franchisee, of some form of agreement, relating to the statement made at the meeting in September 2004. The details of the nature and substance of that agreement, and the date at which it was reached have not been given to the Panel, and as at the date of this hearing there is no documented evidence to support a contention that such an agreement could be represented as a bespoke compensation arrangement covered by Schedule 4 Part 3 paragraph 2.6.
50. Equally, given that
- 50.1. no such bespoke arrangements relative to the Rewiring Works were incorporated in the Track Access Agreement that transferred to FCC on 1st April 2006, and therefore

- 50.2. there were no such “*bespoke compensation agreements established under the Previous Access Agreements*” available to be transferred (under Template Clause 19.1) into the new Track Access Contract effective from June 2006,
- I consider that FCC, if it wishes to argue the possible status of the Rewiring Works as a Major Project has to rely solely upon the force of its own analysis of the nature of the Rewiring Works.
51. Taking all of the forgoing arguments into consideration, I find that
- 51.1. Network Rail is entitled to make the decision whether or not the Rewiring Works can be implemented with or without the benefit of either a PSN, or a MPN, subject to challenge in accordance with D2.2.4;
- 51.2. such a challenge must bear the burden of proof that the nature and circumstances of the Rewiring Works to be undertaken should necessarily be categorised as a Major Project, requiring not just a PSN, but a PSN “relating to a Major Project”;
- 51.3. that FCC has not discharged that burden of proof, in that it has not demonstrated that the nature of the Rewiring Works in this case differs in kind (as opposed to volume), in some fundamental way from the routine task of renewing and maintaining the Network, and therefore
- 51.4. FCC has not made the case for my directing that Network Rail should declare the Rewiring Works a Major Project, and in consequence invoke the provisions of Schedule 4 Part 3 paragraph 2.6.
52. I therefore find, with Panel members Boon and Leadbetter, in favour of Network Rail and against FCC.
53. In making this ruling I wish to make clear that
- 53.1. this issue has been made unnecessarily more difficult to resolve by
- 53.1.1. the clumsy form of the drafting, in particular in respect of the Notes, of the Yellow pages version of Part D of the Network Code; and
- 53.1.2. the cavalier use by Network Rail of the word “project” in contexts where it could be presumed to have a contractual as well as a PR significance;
- 53.2. I consider that neither I, nor the Panel, has acted or ruled in any way that should be any sort of inhibition on the parties, should either so desire, from appealing this ruling to the Office of Rail Regulation in accordance with the terms of Network Code Condition D5.2.
54. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

**Sir Anthony Holland**  
**Panel Chairman**