TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP1174

(following hearings held at 1 Eversholt Street, London on 11 and 31 October 2017)

The Panel:

Peter Barber	Hearing Chair

Members appointed from the Timetabling Pool

Robert McCarthy	elected representative for Franchised Passenger Class, Band 1 (present only on 11 October 2017)
Nigel Oatway	elected representative for Non-Passenger Class, Band 2
Toby Patrick-Bailey	appointed representative of Network Rail

The Dispute Parties:

For **XC Trains Ltd ("XC")**

David Fletcher	Timetable Strategy Manager
Richard Thackray	Head of Timetabling & Diagramming
Matthew Guttridge	Route Performance Manager (present only on 11 October 2017)
Nathan Thompson	Service Specification Advisor (present only on 11 October 2017)
Joanna Davey	Head of Track Access & Possession Strategy (observer) (present only on 11 October 2017)

For **Network Rail Infrastructure Ltd** ("**Network Rail**" or "**NR**")

Matthew Allen	Head of Timetable Production (present only on 11 October 2017)
Andrew Bray	Timetable Production (Scotland) (present only on 31 October 2017)
Charlotte Ashton	Operational Planner - Scotland
Don Roberts	Route Customer Service Manager – Scotland (present only on 11 October 2017)
Katherine McManus	Project Manager (Timetable Change)

For **Abellio Scotrail Ltd ("ASR")**

Collin Berry	Strategic Planning Manager (present only on 11 October 2017)
Neil Sutton	Senior Permanent Planning Manager (present only on 31 October 2017)

Interested party:

For **West Coast Trains Ltd ("WCT")**

Mike Hoptroff	Head of Operations Strategy
Alex Grimes	Long Term Planning Manager

In attendance:

Tony Skilton	Secretary, Access Disputes Committee
Stenographer (Ubiqus)	(present only on 31 October 2017)

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1 Introduction: Substance of Dispute, Jurisdiction and Interpretation

1.1 This dispute TTP1174 is somewhat unusual in two ways.

First, it follows on immediately from a previous timetabling dispute under the ADR Rules, TTP1122, concerning the same issues and arising out of the same basic factual situation. The substance of both disputes is an appeal by XC against Network Rail's award for the December 2017 Timetable, in response to XC's Rolled Over Access Proposal for that Timetable, regarding seven particular existing XC train services into Glasgow Central. NR's award is challenged by XC on the grounds that these seven services have all been retimed to arrive 3 minutes later than in the existing Timetable, namely by their respective arrival times having been changed from xx12 to xx15 in each relevant hour; that the corresponding xx12 slot has instead been awarded in each case to an ASR service which currently occupies the equivalent xx15 slot; and that such "swapping" of slots has been awarded by NR entirely on its own initiative. This is because it had not been sought by either ASR or XC in their respective Rolled Over Access Proposals for the December 2017 Timetable. This dispute was first heard on 11 October 2017 (the "**First Hearing**").

Secondly, 7 working days after the First Hearing, Network Rail notified the Secretary that, contrary to what it had stated at the First Hearing, it had subsequently become aware that for technical reasons concerning the TPRs it was unable to comply with the Panel's determination of the dispute, as it had been summarised at the conclusion of the First Hearing in advance of the issue of a written Determination. As a result it proved necessary to reconvene a second Hearing of the dispute on 31 October 2017 (the "**Second Hearing**"). This Determination is the product of the submissions, evidence and arguments produced at or for both the First and the Second Hearing.

1.2 Dispute TTP1122, which first considered Network Rail's challenged award the subject of this dispute, was heard on 8 September 2017 by a different Hearing Chair. In bringing that first dispute it was XC's understanding that NR had instigated the retimings in order to provide a standard patterned 30 minute interval between local services from Lanark to Glasgow Central operated by ASR, including a change to the current xx15 arrival times. ASR had not requested the award of these altered timings in its Access Proposal for the December 2017 Timetable. XC maintained that in making its awards NR, acting on its own initiative, had wrongly prioritised this objective over the possibility of maintaining or reducing journey times for long distance trains and that the Decision Criteria, if applicable at all in the circumstances (which XC contested), had not been applied correctly by NR.

1.3 Guidance to the parties was given orally by the Hearing Chair at the conclusion of the the TTP1122 hearing and confirmed in a provisional note of the determination of the dispute issued on 11 September 2017, which was in turn confirmed by directions given in the full written determination issued on 29 September 2017. These were that NR should, in the light of further necessary information to be identified by it and provided by the dispute parties to TTP1122, reconsider generally its previously disputed award regarding the timetabling of the seven XC train services in question; also, as a provisional view, that five of the services should be timetabled as proposed by XC. The provisional note of determination and subsequent full written determination of TTP1122 are published on the ADC website.

1.4 This fresh dispute TTP1174 results from Network Rail having followed the TTP1122 guidance and directions given in the subsequent full determination. NR's duly reconsidered timetabling award was issued on 15 September 2017 this year, essentially endorsing and repeating its earlier award but giving a more detailed retrospective account of its application of the Decision Criteria to the process. On 21 September 2017, pursuant to Condition D5.1, XC notified this further appeal against NR's reconsidered award.

1.5 The seven XC train services concerned are:

1S31 SX 06 00 Birmingham New Street to Glasgow Central
1S35 SX 06 09 Bath Spa to Glasgow Central
1S39 SX 09 25 Plymouth to Glasgow Central
1S31 SO 05 58 Birmingham New Street to Glasgow Central
1S35 SO 06 15 Bristol Temple Meads to Glasgow Central
1S39 SO 09 25 Plymouth to Glasgow Central
1S47 SO 08 28 Penzance to Glasgow Central

"**SX**" means Saturdays excepted, i.e. Mondays to Fridays. "**SO**" means Saturdays only.

1.6 I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Condition D5.

1.7 In its consideration of the Parties' submissions and its hearings of the dispute, the Panel has been mindful that, as provided for in ADR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

1.8 **Definitions and Interpretation**: The abbreviations and other short form terms used in this Determination are as set out in the list of Parties above, in the list of terms immediately below, and as introduced in Bold type elsewhere in this section 1. References in this Determination to a numbered "Condition" are to that Condition of Part D of the applicable version of the Network Code. Capitalised terms used in this Determination which are defined in the Network Code have the meanings there given.

"**ADC**" means the Access Disputes Committee
"**ADR Rules**" means the Access Disputes Resolution Rules
"**ORR**" means the Office of Rail and Road (formerly the Office of Rail Regulation)
"**Parties**" means the Dispute Parties and the interested party
"**Record**" means the Record of evidence given and arguments presented during the First Hearing as set out at Annex B to this Determination
"**Secretary**" means the Secretary of the Access Disputes Committee
"**SRT**" means Sectional Running Time
"**Timetable**" or "**WTT**" means the New Working Timetable publication for introduction in May or December of the relevant year as the context may require
"**TPR**" means Timetable Planning Rule
"**Transcript**" means the Transcript of proceedings at the Second Hearing as set out at Annex D to this Determination

2 Background, history of this dispute process and documents submitted

2.1 This dispute was registered and I was appointed as Hearing Chair on 21 September 2017 and 11 October 2017 was set as the date for the Hearing. At my request, the Dispute Parties - XC and Network Rail and anyone else becoming a Dispute Party - were required to provide Sole Reference Documents within a defined timescale.

2.2 Other train operators who might wish to become a Dispute Party or an interested party were notified of the hearing arrangements on 21 September 2017. On 22 September 2017 WCT declared itself to be an interested party and on 26 September 2017 ASR declared itself to be a Dispute Party.

2.3 XC served its Sole Reference Document on 27 September 2017. XC requested that information which it regarded as commercially sensitive - such as passenger loading data and farebox revenue - should be redacted from its Sole Reference Document when placed on the ADC website and proposed that related ASR information to which it had referred (having been contained in material provided by ASR during Network Rail's recent information gathering process pursuant to TTP1122) should be treated similarly. With my consent, XC's Sole Reference Document is published on the ADC website with appropriate redaction.

2.4 Network Rail served its Sole Reference Document on 4 October 2017; this also is published on the ADC website. At 14.29 on 4 October 2017 (almost half an hour outside the timescale set for service of a Dispute Party's Sole Reference Document) ASR submitted a brief email stating that it had seen Network Rail's Defendant's Response, agreed with the evidence/arguments presented in it and had no further comments to add at that time.

2.5 In accordance with ADR Rule H18(c), having reviewed the dispute following submission of statements of case by the Dispute Parties, on 5 October 2017 I informed the appointed Panel members that I had not identified for their consideration any general issues of law raised by this dispute. The dispute did raise issues of specific contract interpretation relating to the appropriate methodology for applying the rules in Condition D4.2 governing Network Rail's timetabling decisions and particularly its application of the Decision Criteria; these, however, were issues of mixed fact and law which formed part of the substance of the dispute to be determined.

2.6 I also noted that ASR's brief response to the request for a Sole Reference Document, after declaring itself a Dispute Party, was neither compliant in form with the ADR Rules nor provided within the requested time. Having considered this, in the light of the material produced in the foregoing dispute TTP1122 and at this relatively late stage before the hearing of this dispute TTP1174, I did not think anything would be achieved by issuing a direction demanding a further document from ASR now, if it did not otherwise wish to produce one. I was, however, of the view that the lack of any further substantive arguments or evidence generated by ASR on its own behalf, particularly as to its actual aspirations regarding the specific services in issue, was likely to be taken into account in evaluating the merits of the dispute. As required by ADR Rule H18(c) this information was advised to the Dispute Parties and the interested party on 6 October 2017.

2.7 As previously noted, what proved to be the First Hearing of the dispute took place on 11 October 2017. Of the Dispute Parties, XC and Network Rail made oral opening statements (written copies of which were provided to the Panel) whilst ASR declined to do so, and the interested party was invited to make opening comments. I then made opening remarks in which I explained the structure and objectives that the Panel's Q&A would pursue. The Parties were questioned by me and the other members of the Panel. Following and in the light of the Q&A session the Parties were invited to make closing statements. The Dispute Parties' opening statements are set out at Annex A and the Record of evidence given and arguments presented in Q&A, Parties' closing statements and Chair's summary of conclusions at the First Hearing is set out at Annex B to this Determination.

2.8 At the end of the First Hearing, having conferred with the other members of the Panel, I outlined to the Parties the substance of the Panel's intended determination of the dispute, as later to be confirmed in this written Determination. This was, in summary, that five out of the seven XC train services concerned should be awarded the xx12 arrival times into Glasgow Central, Network Rail having indicated that, whatever its views on the merits of that conclusion by reference to the Decision Criteria, it could at least find TPR-compliant solutions for such an award in respect of those five services.

2.9 On 20 October 2017 Network Rail e-mailed the Secretary to the effect that, in light of certain further work it had carried out and other developments, NR now did not believe it was possible both to comply with the Panel's intended determination in respect of the relevant XC services, to "reorder the XC and ASR services", and in so doing still achieve a TPR-compliant timetable plan. NR said it was not aware of this scenario having occurred before, and sought guidance as to how it should "move forward within the spirit of the intended determination, as our existing position is one of not changing the running order of these trains". That e-mail and its attachments are included at Annex C to this Determination.

2.10 I understood Network Rail's e-mail of 20 October 2017 as indicating that, however much it might wish to, it believed it could not comply technically with the Panel's

intended determination from the First Hearing by finding any TPR-compliant solution, and therefore did not intend to attempt to do so. From that e-mail I concluded that the most appropriate and expeditious way of dealing with the situation would be urgently to reconvene the hearing of this dispute to explore and test NR's further information, and accordingly the Second Hearing was convened, as noted above, for 31 October 2017.

2.11 At my request, the Dispute Parties were again required to provide further information and responses within a tightly defined timescale prior to the Second Hearing, explaining the 'new' TPR issue and identifying any other options for a solution to it, including possibilities for adjusting the services of any other Timetable Participants. NR was required to identify any other Timetable Participants who might be affected through the adoption of any possible solution, alert them to the hearing arrangements and supply them with necessary documentation. On 27 October 2017 NR e-mailed a further paper on the subject to the Secretary; that e-mail and its attachments are also included at Annex C to this Determination. No other Timetable Participants were identified by NR as being potentially involved. XC and ASR declared themselves unable to respond to NR's further information in the time available before the Second Hearing.

2.12 At the Second Hearing on 31 October 2017 Network Rail, XC and ASR made oral opening statements (a written copy of ASR's statement being provided to the Panel), and the interested party (WCT) was again invited to make opening comments but declined to do so. After an adjournment for the Panel to consider the new information provided to this Hearing, the Parties were again questioned by the Panel. Following and in the light of the Q&A session the Parties were invited to make closing statements. Since the necessity of convening a further Hearing had already delayed determination of the dispute closer towards the December 2017 Timetable Change Date, in order to save further time in compiling a Record I had directed that a Transcript of proceedings at the Second Hearing should be taken. The Transcript including opening statements, evidence given and arguments presented in Q&A, closing statements and Chair's summary of conclusions, is set out at Annex D to this Determination.

2.13 At the end of the Second Hearing, having conferred with the other members of the Panel, I again outlined to the Parties the substance of the Panel's intended revised determination of the dispute, as later to be confirmed in this written Determination. This was now, in summary, that all of the seven XC train services concerned should be awarded the xx12 arrival times into Glasgow Central, Network Rail having now indicated that, whatever its views on the merits of that conclusion by reference to the Decision Criteria, it could at least find TPR-compliant solutions for such an award in respect of all the seven XC services (including the two services previously excepted at the conclusion of the First Hearing).

2.14 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of this dispute process, both written and oral, at or in relation to both the First and Second Hearings, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this Determination.

3 Relevant provisions of the Network Code

3.1 The version of the Network Code Part D in force from 12 July 2017 was applicable to the matters to be determined in this dispute. The provisions of the Network Code in issue in this dispute are, principally, the following Conditions:

D1.1.11 Definition of 'Flexing Right'

D2.5 Content of an Access Proposal

D2.6 Timetable Preparation – D-40 to D-26

D4.2 Decisions arising in the preparation of a New Working Timetable

D4.6 The Decision Criteria

D5.3 Powers of dispute resolution bodies
D5.6 Implementing an appeal ruling

The relevant extracts of the Network Code are reproduced at Annex E to this Determination.

4 Submissions made by the Dispute Parties

4.1 As previously noted, XC's and Network Rail's submissions in their respective Sole Reference Documents (including all Appendices) to the First Hearing are published on the ADC website, XC's material having been redacted to exclude commercially sensitive content. NR's new material instigating or informing the Second Hearing is set out in full at Annex C to this Determination. The full texts of XC's and NR's respective opening statements to the First Hearing are set out at Annex A to this Determination. Their and ASR's opening statements to the Second Hearing are included in full in the Transcript at Annex D to this Determination. All three Dispute Parties' closing statements to the First and (very briefly) Second Hearings are respectively summarised in the Record at Annex B and set out in full in the Transcript at Annex D to this Determination.

4.2 In summary, XC's submissions to the First Hearing noted that this dispute arose from TTP1122 having instructed Network Rail to revisit its award in respect of the seven train services in issue after having obtained a more complete set of data. XC did not claim that Network Rail had failed to comply with these instructions, but maintained that its reconsidered decision had still been based upon a flawed application of the Decision Criteria, taking into account inaccurate data, assumptions regarding aspirations made without evidence and inaccurate comparisons made between different issues. XC also maintained that, in addition to this flawed application of the Decision Criteria, some of the weightings applied to individual criteria were also incorrect, and that the reasoning underpinning these weightings was unclear.

XC maintained that there were several instances of these issues of flawed application and weighting throughout both Network Rail's decision document and its Sole Reference Document. XC described a number of specific examples of this treatment in both its Sole Reference Document and its opening statement to the First Hearing.

4.3 In its Sole Reference Document to the First Hearing, XC sought the following decisions from the Panel:

- to find that, given the repeated failure of Network Rail to correctly apply the Decision Criteria and the proximity to the start of the Timetable, the matters raised at this hearing constituted exceptional circumstances as per Condition D5.3.1(c);
- to direct Network Rail to overturn its decision made during the preparation period for the December 2017 Timetable and restore the xx12 arrival time of the 1Sxx service group into Glasgow Central; and
- to confirm that correct weighting and application of the Decision Criteria would have seen the xx12 arrival time of the 1Sxx Service Group, as bid by XC, published in the December 2017 Timetable at D-26.

4.4 In summary, Network Rail's submissions to the First Hearing were that its obligation was to consider the overall interest of all current and prospective users of the network (by reference to Condition D4.6.1 – the Objective). NR maintained that it was not its job simply to consider whether a particular change to the running order of a train might cause a degree of inconvenience and potentially some loss of income to a particular Timetable Participant, but that its obligation and focus was much wider than that; it had to balance a whole series of interests.

Taking that into account, NR maintained, where the application of two or more of the relevant Considerations in the Decision Criteria would lead to a conflicting result, it had to decide which was the most important and apply the appropriate weight to them accordingly. NR said it had identified the weighting it had given to the various Considerations; and that XC had responded by generally disputing NR's weighting but

had failed to suggest an alternative or give specific examples of perceived incorrect application of weighting.

4.5 In its Sole Reference Document to the First Hearing responding to the issues raised by XC, Network Rail sought the following decisions from the Panel:

- to determine that Network Rail had considered and applied the Decision Criteria in accordance with Conditions D4.6.1 and D4.6.2;
- to reject the claim that the circumstances of this appeal constituted exceptional circumstances; and
- to uphold the decision of Network Rail to allocate the xx12 arrival Train Slot at Glasgow Central to ASR and to allocate the xx15 arrival Train Slot to XC.

4.6 Network Rail's new submission in its email of 20 October 2017 which instigated the Second Hearing, as noted at paragraph 2.9 above, was initially that, having examined the detail of the proposed retimings of the five XC services concerned, it now was not able to "change the running order between ASR and XC as first thought" and at the same time produce a plan which was fully TPR-compliant, without removing one Train Slot from a Rolled Over Access Proposal. NR stated that its original assessment of the proposed re-ordering of the relevant XC and ASR services, undertaken in limited time in the course of the Hearing of dispute TTP1122, had not included the full range of consequential retimings that might be required and consequently had failed to recognise that it was not possible to achieve a TPR-compliant solution to retiming the XC services whilst also providing TPR-compliant solutions for all the consequential retimings.

4.7 Network Rail's further e-mail of 27 October 2017, however, appeared to indicate that on further examination of the overall picture of consequential retimings in response to the Panel's request to identify alternative possible solutions for the Second Hearing, it had proved possible after all to accommodate all the relevant train slots without removing any and in compliance with the TPR, albeit with some journey time impact to a number of ASR services. NR's paper produced with that e-mail set out the detail of the ultimately TPR-compliant solution it had now found, and particularised all the individual journey time extensions that would be required in order to make it work. These amounted in aggregate to 7 minutes' total journey time extension across all the ASR services affected across the course of a week.

4.8 In its opening statement to the Second Hearing, Network Rail confirmed that the further work done since its original communication on 20 October 2017 had indeed resulted in a change to the position, in finding a TPR-compliant solution across the board. NR also revealed that in fact there had been a further change even since its subsequent communication on 27 October 2017, in that, having worked with all parties, it had now concluded that in fact it could accommodate all Train Slots without removing a Rolled Over Train Slot from the Timetable.

4.9 Without specifically confirming or withdrawing its requests for decisions from the Panel as stated in its original Sole Reference Document, NR suggested that it was now for the Panel to decide on how NR should deal with the consequential impact of the newly identified retimings to ASR services and resulting journey time extensions. NR said it was now looking for clarity in what it believed was an "unprecedented situation".

4.10 XC's opening statement to the Second Hearing confirmed that its position had not changed since the First Hearing. XC noted simply that Network Rail's position had moved on since its original communication precipitating this Second Hearing (on 20 October 2017) and that there was now a TPR-compliant solution identified that did not remove any Train Slots from the Timetable. XC also noted that the range of consequent journey time extensions for ASR services referred to by NR were in fact extensions only in relation to the offered December 2017 Timetable and not in relation to the current May 2017 Timetable, so would not represent a change from the timetable presently being used by passengers. XC made no request for any change to the decisions sought in its original Sole Reference Document.

4.11 ASR's opening statement to the Second Hearing was abridged in light of Network Rail's change of position between its 20 October and 27 October 2017 documents. In summary, ASR interpreted the 27 October 2017 document as substantially increasing the 'knock-on' effects on the ASR services involved – retimings, numbers of passengers affected, rediagramming of traincrews and associated further union consultations, holding off printing public timetables - demonstrating how interconnected the suburban services around Glasgow were. Based generally on all these disruptive factors, ASR requested that the Panel did not amend the times of those services as offered by Network Rail, so that ASR did not have to re-extract its public timetables and amend its train crew diagrams, as the Timetable commenced operation in less than six weeks.

5 Oral exchanges at the Hearings: evidence and arguments submitted

5.1 A number of facts emerged in the course of the Hearing of TTP1122, which are set out at section 5 of the written determination of that dispute, as published on the ADC website. These facts concern the processes adopted and steps taken by Network Rail in compiling the December 2017 WTT in response to the proposals of XC and ASR regarding the services concerned; and the chronology of events and actions leading up to the bringing of dispute TTP1122. Those findings of fact are therefore material also to this dispute TTP1174 and I adopt them as so recorded in that determination.

5.2 At both the First and Second Hearings of this dispute, after considering the written submissions of the Dispute Parties as referred to in section 2 above, and having heard the Parties' further oral submissions in their various opening statements as referred to in section 4 above, the Panel questioned the Parties' representatives to clarify a number of points arising. In line with the practice adopted at previous Timetabling Panel Hearings, although the individuals' answers to questions were not taken as sworn evidence (in common with the Parties' written submissions), I consider that we are entitled and indeed (in the absence of any indication to the contrary) obliged to accept them as true and accurate statements. Accordingly I have taken them into account in reaching this Determination.

5.3 The Record at Annex B describes in detail the Q&A conducted during the First Hearing, and the Transcript at Annex D includes a verbatim account of the Q&A conducted during the Second Hearing, including in both cases incidental observations by the Panel and the Parties. The Record and Transcript constitute integral parts of this Determination for this purpose. The following, therefore, is only a digest of the main evidential themes explored and arguments advanced in the discussion during those Q&A sessions.

First Hearing

5.4 At the First Hearing the discussion followed a sequence of topics which I outlined at the outset. I noted that because this hearing was not an appeal from TTP1122 but a fresh consideration of a new dispute based substantially on new facts and evidence (even though also based largely on the same as those in TTP1122), it was therefore required also to consider afresh any contentious issues of principle arising. In my view two such issues arose, on which I wished to have the Parties' views, being issues where TTP1122 had made findings from which this Panel in TTP1174, having reached certain provisional conclusions based on the submissions so far and after due further consideration, was minded to depart:

-first, the extent, if any, to which Network Rail is entitled, in compiling the New WTT, to make a decision on its own initiative rejecting or changing (by exercising a Flexing Right) some aspect of an Access Proposal generally by reference to the Decision Criteria, when no 'decision' as such strictly needs to be made because there is no conflict with another Access Proposal or other specific overriding obstacle;

-secondly, the question whether there is actually a need for finding "exceptional circumstances" under Condition D5.3.1(c) if the Panel's direction can avoid substituting its own alternative decision for that of Network Rail and fall instead within Condition D5.3.1(a) by directing NR only to grant certain specific times as bid for by an

operator whilst leaving (and empowering) NR to sort out any 'knock-on' timetabling issues arising by reason of that grant.
I noted that following consideration of these points of principle the Panel's questioning would turn to an examination of Network Rail's reconsidered decisions in respect of the seven trains the subject of TTP1122 by reference to NR's revised Decision Criteria document (included as Appendix E to XC's Sole Reference Document for the First Hearing). The Panel would try to consider each train separately, so far as that Decision Criteria document permitted, in accordance with the TTP1122 Panel's advice to the Dispute Parties expressed in its preliminary note of determination issued on 11 September 2017.

First Hearing – Principles governing applicability of Decision Criteria

5.5 The Q&A at the First Hearing followed the sequence I had outlined, as described in the Record. On the first point of principle I noted that the Panel's provisional conclusion, departing from that of TTP1122 which had preferred NR's submissions on the point, was that the contract, in the form of the Network Code, did not appear to provide authority for NR when compiling the New WTT to make what it considered to be improvements to the Timetable on its own initiative, solely by reference to the Decision Criteria whether generally in the abstract or specifically through the use of its Flexing Right. The Panel could see that the wording of the Objective in Condition D4.6 might have been construed as introducing the idea that this was a possibility but it did not spell out any basis on which NR might actually be entitled to use it in the abstract – and there was no other express indication of NR having a unilateral right to make changes to the Timetable other than through the variations procedure in Condition D3, which was a different process altogether.

5.6 Network Rail responded that it was not in agreement with this provisional conclusion on the point of principle and we proceeded to a debate on the issue, as described in the Record. NR's route of interpretation through the relevant provisions of Part D led to Condition D4.6, where it says what NR's objective shall be "when required to decide any matter". NR maintained that this entitled NR simply to use the Decision Criteria for deciding any matter it wished to. I proposed in return that in circumstances where NR had to compile the New WTT, the interpretation route led to Condition D4.2.2, which I thought NR's submissions both now and in TTP1122 seemed to have ignored, whereby NR is required to endeavour wherever possible to comply with all (or rather, in effect, all valid) Access Proposals and accommodate all Rolled Over Access Proposals, subject to, among other things, being entitled to exercise its Flexing Right under D4.2.2(c). I suggested to NR that this imposed in effect an overriding duty to accommodate a Rolled Over Access Proposal wherever possible, subject to using its Flexing Right under D4.2.2(c) only if necessary to enable it to perform that duty, that is to say, to make possible the acceptance of a proposal that would otherwise be impossible. I suggested, in consequence, that because the duty (and power) under D4.6 to apply the Decision Criteria was expressed to arise only where NR was "required to decide any matter in this Part D", it therefore arose only when a 'decision' as such was specifically necessary to resolve either a direct conflict between Access Proposals or a conflict between Access Proposals brought on by some other overriding matter such as supervening TPRs, in a situation where NR would otherwise be unable to comply with the duty laid down in Condition D4.2.2.

5.7 NR resisted these suggestions, pointing out that there had been a lot of change on this line of route following amendment of the TPRs for December 2017. NR thought the Panel's provisional conclusion could be taken to say that NR could not make an intervention to improve the Timetable unless it arose out of an Access Proposal from an operator. NR maintained that the contract should be interpreted differently and that NR could work through the Decision Criteria to change the WTT on its own initiative – but that the operators would still have protection in this arrangement because of the appeal mechanism. It pointed out that it made thousands of timetabling decisions every year and very few were challenged. NR said it was difficult to accept that it could not change the Timetable by itself. NR acknowledged that many of the changes it had proposed in making offers to Timetable Participants had been in order to resolve

problems arising due to the effect of the new TPRs, many of which had not been taken into account in Participants' access proposals; it believed that the resolution of these problems required it to make 'decisions' of a sort, thereby engaging the application of the Decision Criteria, even if they were not necessary to resolve conflicts between Access Proposals because there were no such conflicts.

5.8 I observed that NR seemed to be viewing a decision to do something generally for the good of the industry in its opinion – such as to make rail more competitive with other modes of transport in Scotland – as being its prerogative. However laudable an objective that might be, in my understanding it was not a decision that the contract (in the form of the Track Access Agreement and Network Code) actually 'required' NR to make. On the contrary, as previously suggested, the proper interpretation of the contract did indeed appear to be that NR was required and entitled to apply the Decision Criteria only when it was otherwise unable to accept an Access Proposal as submitted without making a decision between that Proposal and something else conflicting with it – usually another Access Proposal.

5.9 NR noted that it did have at least one express power to make general changes, which would involve the use of the Flexing Right, in Condition D2.3.4(b), to "identify opportunities to develop strategic initiatives and to promote network benefits" etc. NR acknowledged however that this particular power was not relevant here because it had to be exercised before D-40 and NR accepted that it had not done that. The Panel noted that, for that matter (as had previously been acknowledged), use of the Flexing Right was also mentioned in connection with variations; but this likewise was not relevant here.

5.10 In subsequent discussion NR acknowledged that most of the changes it had proposed in making offers to Timetable Participants had been in order to resolve problems arising due to the effect of the new TPRs, many of which had not been taken into account in Participants' Access Proposals – and could not reasonably have been factored in at the time of the Proposals, because of the necessary timing of the TPR process. NR felt that the resolution of these new TPR problems required it to make 'decisions' of a sort, thereby engaging the application of the Decision Criteria, even if they were not necessary to resolve conflicts between Access Proposals because there were no such conflicts.

5.11 XC pointed out that on 22 May 2017 Network Rail's timetabling work was completed and, whilst possibly subject to change, no extension to XC's journey times was envisaged, so that it had been confident that the new TPRs would not have an effect on its journeys. As now published the new Timetable would have XC and ASR trains arriving at Uddingston Junction at the same time, so notwithstanding the TPRs and pathing time which was already there in XC's timings, NR had decided that the ASR train should go into Glasgow Central first and so had changed the current order. NR said that decision was prompted by current performance and its quest for resilience. XC noted that that had not been the explanation given at the time, which was that it was to achieve a patterned Timetable. XC's view was that although NR might have had a decision of some sort to make because the TPRs had changed, it had not needed to decide to change the order of trains from Uddingston Junction.

5.12 In further discussion NR accepted that, whilst it believed this exercise had involved a decision of some sort, it was to do with the process of accommodating the new TPRs, not a conflicting Access Proposal; and that had not been identified in NR's Sole Reference Document to this Panel as the decision which justified engagement with the Decision Criteria (nor in either of NR's Decision Criteria documents). NR accepted this amounted to saying that if it could find a hook to requiring some sort of decision involving use of its Flexing Right to resolve a conflict, it could then apply the Decision Criteria to a different decision or otherwise in some more general way. NR's view was that when the former (i.e. the now current) WTT had been looked at, there had appeared to be opportunity to improve things, and NR did not think there was anything in the Track Access Contracts or the Network Code which said that a Rolled Over Access Proposal must be accepted. It was more a case where, following a review of

the TPRs, the consequence of the WTT going up in the air had given opportunity to improve performance and the resilience of the plan, otherwise there would be no opportunities for getting improvement. What had driven the change in the order of XC's and ASR's trains had been conflicts between XC trains and ASR trains at Uddingston Junction due to the new TPRs, which required a fresh decision. Apart from one XC train, NR found it could now reverse the order and still be TPR-compliant. But the change had not been discussed with anyone, including ASR, until 25 May 2017, so was only decided upon between 22 May and 25 May 2017 when, it was admitted, somebody in NR sat down and realised that the timing of the trains could be "done better".

5.13 At this point I explained that having heard NR, the Panel was still minded to conclude that as a matter of principle there was no entitlement for NR to use its Flexing Right or apply the Decision Criteria in a vacuum, which was to say, without there being a decision required upon which to hook such entitlement. The Panel had noted the view of NR as being that as long as there was a 'decision' of some sort involved, which could include just a general desire to do the best for the Network in compiling the timetable, it did not matter whether that decision was strictly relevant or necessary to enable NR to act in accordance with the Condition D4.2.2 duty to comply with all Access Proposals etc "wherever possible". It was still the Panel's provisional view that a proper interpretation of Condition D4.2 was that NR could use its Flexing Right and apply the Decision Criteria only when a 'decision' was necessary specifically in order to resolve something, e.g. conflicting Access Proposals or in any other situation where there was something specific (such as new TPRs) which would otherwise make impossible the timetabling of a train as requested by a valid Access Proposal.

5.14 Wrapping up on this point of principle I suggested again that the preamble to Condition D4.2.2, which said "endeavour wherever possible", gave NR the duty to leave the Rolled Over Access Proposals as they were and the keep the trains in the existing order. NR replied again that it was "difficult to accept" that it could not change the Timetable. Asked if it agreed that it was possible to retain the previous Timetable and leave the trains in the present order, NR said a decision was necessary because the trains concerned arrived at Uddingston Junction at the same time. XC pointed out that the content of an Access Proposal (Condition D2.5.1) did not include the passing time at a junction, only the arrival time at destination. XC repeated that it had asked for arrival at Glasgow Central at xx12 and ASR had asked to arrive at xx15, so that there had been no decision to be made by NR regarding the order of the trains. NR said its concern was that no operator could bid with certainty in the situation of the new TPRs, but finally agreed with my conclusion that NR had already accepted that the New WTT could have included the XC and ASR trains arriving at Glasgow Central at xx12 and xx15 in the same order as currently, whilst still complying with the new TPRs, with the exception of the one hour 14:00-15:00 (with which at that stage there was acknowledged to be a TPR compliance problem).

First Hearing – Principles governing finding of 'exceptional circumstances'

5.15 I then reminded the Dispute Parties that the second point of principle to address was whether there was actually a need for finding "exceptional circumstances" under Condition D5.3.1(c), if the Panel could avoid "substituting" its own alternative decision for that of Network Rail, by simply directing NR to grant certain specific times as bid for by an operator whilst leaving NR to sort out any conflict arising as a result of that grant. I advised that the Panel's provisional conclusion on this issue, again departing from NR's submissions and the apparent finding in TTP1122, was that, because limb (a) of Condition D5.3.1 allows the Panel to give directions to NR specifying a particular result to be achieved but without specifying the means of achieving it, this actually does allow the Panel to direct NR to do something specific with regard to accepting an Access Proposal but not to stipulate how NR is to deal with the knock-on effects of such acceptance; and that therefore, contrary to the apparent conclusion of TTP1122, a Timetabling Panel is <u>not</u> in effect wholly precluded from allowing an appeal in any way from an NR timetabling decision without engaging the notion of exceptional circumstances. I said we would in any case, however, go on to consider what might

constitute exceptional circumstances for the purposes of Condition D5.3.1(c) and whether they could be found in this case – partly because XC had raised this expressly in its submission and partly in case the Panel was found to be wrong on the principle.

5.16 In the discussion which followed on the principle, no Party seemed to contest the proposition that a Panel was not in fact confined to rejecting a timetabling appeal against Network Rail unless the elusive 'exceptional circumstances' could be proved. NR was unsure if being directed just to accept an Access Proposal without the detail of how to do it would be "acceptable" without engaging exceptional circumstances, unless it had done something outside the contract such as incorrect application of process. Various views were expressed but it became clear on all sides that merely bringing a dispute that resulted in a determination only very late in the timetabling process and quite close to the new Timetable date was not considered of itself to constitute exceptional circumstances. It was not thought exceptional to be having matters resolved so close to the start of the New WTT; there were still now unresolved dispute registrations relating to the December 2017 WTT. Asked what might constitute exceptional circumstances, XC was not sure other than in effect anything arising which required advertising of products already issued to be corrected; NR suggested if the New WTT was not operable or it was found that NR had been discriminatory, perhaps also if NR was found not have carried out its duties properly; and ASR suggested if there was an appeal to be heard after the start of the WTT.

First Hearing – Evaluation of practical application of Decision Criteria

5.17 The Panel then turned, as previously indicated, to an examination of Network Rail's reconsidered decisions in respect of the seven specific XC services in contention under TTP1122, trying to look at each one separately so far as possible by reference to NR's revised Decision Criteria document following TTP1122 issued on 15 September 2017(included as Appendix E to XC's Sole Reference Document to this TTP1174 and usually referred to by NR simply as the "**Decision Document**"). Because of the way in which the Decision Document was structured, as a listing under each successive 'Consideration' of the Decision Criteria, in many cases generally rather than separately by reference to each service, it proved difficult to follow rigorously a process of considering each service by itself and the exercise inevitably progressed to an examination of how each Consideration had been weighted and/or applied to all the relevant services, trying to understand NR's methodology and the evidence for its application. For the detail of this examination I refer to the relevant parts of the annexed Record rather than attempt to paraphrase it here.

5.18 In summary, the evidence was that in respect of Network Rail's application of each Consideration, the submissions of XC in its Opening Statement (as referenced at paragraph 4.2 above) were borne out: that the application was flawed, took into account inaccurate data (taken at face value, without being verified), assumptions regarding aspirations made without evidence, and inaccurate comparisons made between different issues; and that some of the weightings applied to individual Considerations were also incorrect, and the reasoning underpinning these weightings was unclear. Several instances of such flaws were given and substantiated and, as the Record shows, many of these evidential points were acknowledged without demur by Network Rail as the discussion proceeded.

5.19 As regards the methodology of weighting the Considerations the Panel found it increasingly difficult to understand on what basis generally Network Rail weighted one Consideration as important or not important. I eventually pointed out that where one Consideration had a more marked result in favouring one party against another, NR seemed to give it a high weighting because it had a more noticeable effect, and that we had the impression that NR had no consistent standards for doing this weighting. NR simply observed that there was "no laid down way to do this". By this stage of the discussion, having discussed nearly all of the Considerations, NR seemed to have come round to regarding Considerations (c) (performance) and (f) (commercial interests) as the most important, most of the others having fallen by the wayside in

one way or another. I asked how NR had applied Condition D4.6.3, which went some way towards prescribing a methodology for applying the Considerations including their appropriate weighting. NR replied that it seemed to have fallen into a trap in how to decide on the relevance of a Consideration, so had got into a behaviour which tried to consider all the Considerations. NR said its attention to Consideration (c) had been consistent throughout but in the case of Consideration (f), differing information had been presented by the operators and it was difficult for NR's Planners to judge. I noted that according to Condition D4.6.3, the weighting should be the second part of the exercise, after deciding which of the Considerations are relevant and, of those, which are in conflict. Here, (c) and (f) were the main Considerations in conflict according to the additional evidence received from the parties after TTP1122, but the way the decision had been expressed by NR was that it first gave the weighting in the abstract and then identified the conflict. Accordingly it was evident that there was no particularly coherent method in NR for applying the Decision Criteria to the particular circumstances involved.

5.20 I noted that the Panel had inevitably been distracted from its intended service by service consideration of Network Rail's decisions, due to the largely general application of the Decision Criteria by the Decision Document across all of the relevant services. Nonetheless, one way or another in the course of that exercise the Panel seemed to have covered the relevant evidence specific to each individual service. The only further point now raised by NR was that for the 1412 SX Train Slot, it still did not believe that it had a TPR-compliant solution in this hour if it had to swap the trains back round, i.e. award it to XC. This was not contested by XC. With the information to hand, NR did not have a solution without increasing the journey time for ASR's resulting 1415 service under its Flexing Right but having made the offer to ASR, NR believed it did not now have the power to flex it unless under the direction of the Panel. NR did not know whether it might have been able to arrive at a TPR-compliant solution if it had had the time before making the offer, because although it had previously re-looked at it, it had not looked at it since the information came to hand nor had it been an issue raised previously.

Second Hearing

5.21 At the Second Hearing of this dispute, as for the First Hearing, after considering the new written material e-mailed by Network Rail as referred to in section 2 above (there was no response from XC or ASR in the time available), and having heard the Parties' further oral submissions in their various opening statements as referred to in section 4 above, the Panel again questioned the Parties' representatives. Before looking at the detailed impact of the specific matters raised by NR, I wanted to deal with the basic issue of clarifying the overall position resulting from the two very different communications received from NR on 20 and 27 October 2017 which had instigated this reconvened Hearing. As the Panel understood it, the former stated unequivocally that NR could not comply technically with the Panel's previously announced determination because it could not find a TPR-compliant solution; whereas the latter communication completely superseded the former in saying that, from further work completed in the intervening week, NR was satisfied that it could find at least one TPR-compliant solution in respect of all the seven XC services concerned, albeit with a number of other 'knock-on' effects as mentioned. NR confirmed that this was indeed the case and that it was now the knock-on effects that it wished the Panel to consider, though these no longer included removing a Train Slot from a Rolled Over Access Proposal. NR wanted to understand whether the Panel considered it was able to go and make these knock-on changes at this stage but, subject to that, was now satisfied that it was indeed possible to comply with the determination indicated at the First Hearing and also come up with at least one generally TPR-compliant timetable plan. Asked if there were other TPR-compliant options that could equally achieve the outcome of the determination, NR could not say if there were any other possibilities, just that the one currently identified would appear to cause the least amount of disruption to the operators affected.

Second Hearing – Principles governing applicability of Decision Criteria

5.22 I said the Panel was minded to maintain the decision that it had come to at the First Hearing requiring NR to accept XC's proposal and do what needed to be done in order to achieve that, but without specifying what that might be, NR having now said unequivocally that it could be done with at least one TPR-compliant solution. The Panel had not thought there was any doubt about that before but a possible doubt had been raised (by NR's 20 October communication) and now had been resolved. This was of course on the supposition that the Panel's previous conclusion was still valid on the principle that the Decision Criteria were not applicable in the abstract where there were no conflicting proposals to resolve. All the same, I noted, the Panel would still come to consider the subsidiary issue of application of the Decision Criteria in the same way as it had at the First Hearing, against the theoretical possibility that it could be found in error on that finding of principle and therefore in the alternative should have looked at the relative merits of all factors by reference to the Decision Criteria and in the light of the new points that had been raised for this second Hearing.

5.23 First, though, in the light of what Network Rail had now confirmed I wanted to revisit the question of TPR compliance on the one service (1S35SX) where previously the Panel had not directed Network Rail to accept XC's proposal for the 1412 arrival time, because it had been said then that there was no TPR-compliant solution for it. At the time all Parties had seemed to accept this at face value, so the Panel had not then said it would be directing acceptance of XC's proposal in respect of that service. NR confirmed that it had now found a TPR-compliant solution for that service as for all the others concerned, and XC agreed that the solution for this service appeared with all the others in NR's latest 27 October 2017 document. ASR, however, pointed out that the more significant issue which had been particular to ASR's 2B77SX versus that XC service, had been the causing of a broken driver diagram, apparently raising all sorts of associated traincrew and union consultation issues. A very lengthy discussion followed on the ramifications of this broken driver diagram, for the detail of which I refer to the relevant part of the Transcript. The upshot of this seemed to be a recognition that it actually resulted from the overlaying of the TPR changes on the existing service which ASR had bid for as part of its Rolled Over Access Proposal. ASR had unsuccessfully challenged some of the TPR changes (TTP1064), including those affecting 2B77SX, and had even unsuccessfully appealed that decision to ORR. The Panel pointed out that ASR would therefore have had to accommodate the detail of the TPR changes into its services, and adjust its diagramming accordingly, even if NR had not, on its own initiative, swapped round the times of the ASR and XC services. ASR acknowledged that it would have had to go through the rediagramming process anyway and that the necessity of doing so after D-26 was in reality just a 'timing issue'. With regard, therefore, to that particular service, the conclusion was that there was a TPR-compliant solution to an award in favour of XC just as for the other services concerned, but there was also, for that one service, an additional specific commercial consideration, which it would be relevant to take into account if the Decision Criteria were applicable and were applied.

Second Hearing – Evaluation of practical application of Decision Criteria

5.24 I had said the Panel would return to the subsidiary issue of application of the Decision Criteria on the basis that its primary conclusion was that this was not a situation where the Decision Criteria could or should have been applied unilaterally by Network Rail, but that it needed to address it in case a later authority should conclude differently. The Panel had been through that issue in some detail at the First Hearing, on the basis of Network Rail's new Decision Document, which it had produced as a result of the direction of TTP1122. Among other things, the broken driver diagram was mentioned in that, though not the particular consequences of it. At the First Hearing the Panel had been through the relevant Considerations and come to the conclusion that the best one could say was that a coherent case for applying them in a particular way, favouring the swap of the arrival times, had not been made. Now the Panel had some additional arguments to consider, first in ASR's opening statement, and now

with this particular issue of the broken driver diagram, to try and assess the most relevant two Considerations, a Decision Criteria decision, if the Decision Criteria were theoretically applicable. (Though NR had in fact acknowledged at the First Hearing that a peer review of its decision would have said to ASR that the driver diagram issue was only a product of the decision, i.e. not a factor to be taken into account in making the decision.)
The question arose again how relatively important were all these Considerations, including not only the detail relating to the broken driver diagram but all the other things mentioned in ASR's opening statement, if it had taken until now actually to flush out all this detail. I suggested that ASR's challenge and then appeal against the TPR changes might be thought to have led it at least to some general anticipation that it would be quite a significant issue to deal with all the 'knock-on' effects on its services that were only now being raised by NR.

5.25 ASR noted that it had subsequently been subject to TPR changes that had been proposed for May 2018, which had been withdrawn or were in the process of being withdrawn because if the changes for the Argyle line and the North Electric were applied together they did not work. ASR had highlighted this as part of TTP1064 but the appeal went against it, possibly, ASR believed, because it argued it at a too general level rather getting down to the actual granularity of one train versus another train versus one margin versus another, etc. I explained that this seemed the case here also, that getting to that level of granularity was something ASR could have done at an earlier time - if not at TTP1122, then certainly at the first stage of this TTP1174, which actually resulted from TTP1122 determining that it was not granular enough and that more information was needed. Instead it seemed that Network Rail's now TPR-compliant solution had come as something of a surprise, with ASR saying it couldn't really have worked it out for itself or come to the conclusion at a rather earlier stage that a solution might appear if it looked at it in more detail. Even when invited to put its case here, ASR apparently didn't then think these things were sufficiently important to put in a more cogent detailed submission than it actually did, which was simply a short e-mail saying it agreed with Network Rail. ASR noted that the Timetable as published at D-26 and as it was now, was not yet compliant, because it was still the subject of numerous Variation Requests from both Network Rail and ASR, to try and fix conflicts and issues discovered on the Timetable, separate from this – which process it described as 'business as usual'. The Panel pointed out that this made the types of changes now under discussion from NR's 27 October 2017 document feel relatively minor and something that one would expect to see as a matter of course, particularly having regard to how ASR chose to manage its service throughout the Timetable.

5.26 I reminded Network Rail that the relevance of the topic under discussion was to help form a view on how and when the Decision Criteria might have been applied, had they been applicable. The Panel's thought was that if these new details had been so important they might have come up at an earlier stage in the process and it seemed to make a difference that the problem was now being spoken of as one of timing rather than substance. NR said it was not just a timing exercise when on conclusion of TTP1122 it was asked to go away and reapply the Decision Criteria, based on new information to be supplied. NR at that stage did not consider the detail of what the timetable construct would look like. That then led on to this TTP1174, and only now, following the First Hearing, had NR looked into this in the detail that it needed to and that had led it to the stage where it could share the finer details of what was required to be done. So at no point up to now would NR have produced a Variation Request, because it had not yet been required to. Nor did NR on reflection think it had been beneficial to be asked to come up with an answer in a very short time during the TTP1122 Hearing. This had led to a position where NR incorrectly thought there was a compliant alternative solution, which had remained in everyone's thinking throughout the rest of the process, whereas in fact it had not been visited in any great detail until this stage here.

5.27 The Panel noted that, whereas the outcome of TTP1122 was for Network Rail to invite more information to make a decision around how it had used the Decision Criteria, as part of the reconsidering of its decision it did not actually do any timetabling work, but

just applied the information that it received on top of the Timetable as it was, i.e. as had already been offered with the XC service arriving at xx15. NR accepted this, and that it then did not look at the alternatives. NR thought its subconscious assumption must have been that there was a solution available so that it could alternate the paths if required to, but NR therefore did not then go back and look at any detailed timing work as part of that process to see what the alternatives would look like. The Panel suggested that NR should have envisaged that TTP1174 could still go the way indicated by the possible outcome of a Decision Criteria application as provisionally proposed by TTP1122. And therefore that it would have been incumbent on NR to find out the effects if it did go that way, as to whether there were any other facts that it hadn't looked at so far, i.e. in the timetabling sense, to counteract that. That could have saved the necessity for this Second Hearing. NR accepted this and the Panel commented that this was a key learning point for NR in preparing for any kind of Decision Criteria application in conversation with a Timetabling Panel; information presented at TTP1174 could not possibly be viable if the Panel only had one verified timetable outcome and had to apply the information on top of it and just had a set of assumptions for the other outcome.

5.28 The Panel reverted to discussing the broken driver diagram issue in respect of the one ASR service referred to, viewing that as a commercial matter coming under the commercial interests Consideration in the Decision Criteria. ASR had roughly put a figure on that, of £72,000 for the driver. I asked if ASR were really saying that all that additional cost plus the circumstantial cost resulted from that single requirement, or if having that additional driver would not somehow be factored into its roster and its other services. ASR said the former was the case; and having incurred the cost, there would not be any compensating benefit other than just solving this particular problem. I asked if ASR was looking to recover any compensation from Network Rail; it showed no interest in this and clearly considered that it had no entitlement or reason to do so under its Track Access Agreement or otherwise. It seemed to view the possible swap back of services with XC just as a timing problem, because it would occur relatively late in the day; had it happened earlier in the process ASR confirmed it would have been dealt with in the ordinary course of business.

Second Hearing – Principles governing finding of 'exceptional circumstances'

5.29 I turned back to the question of exceptional circumstances, which was raised by XC in its submissions. The Panel's provisional conclusion, at the end of the First Hearing, had been that it did not need to find exceptional circumstances in order to make the decision that it was minded to make, because it would not be making a decision which substituted the Panel's timetabling decision for that of Network Rail, which is what the Network Code says requires something called 'exceptional circumstances'. Instead, the Panel would be making a direction that required Network Rail to achieve a particular result without specifying the means by which it was to do that. I thought that would still be the conclusion after the Second Hearing but nevertheless, again, as an alternative and in case that first conclusion was wrong, the Panel did consider whether, as it had been raised, the particular circumstances of this dispute did amount to exceptional circumstances which would have justified the Panel actually substituting a decision in detail for that of Network Rail. At the First Hearing the Panel had concluded it did not think that the mere fact of late timing and proximity to the Timetable date of these decisions being made amounted to exceptional circumstances. I asked for views on whether, in the light of **the** information available now, the Panel should reconsider that, i.e. whether it might be considered exceptional circumstances, particularly in view of what was said in Network Rail's first e-mail, which had precipitated this reconvened hearing. NR's e-mail to the ADC Secretary had said 'I am not aware of this scenario having occurred before, and seek your guidance as to how you would recommend Network Rail to move forward', and that had been echoed in Network Rail's opening statement, that it was an unprecedented situation.

5.30 NR still did not consider it as exceptional circumstances. It thought Condition D5.3.2 applied, under which NR could seek further directions, giving guidance as to what was

in the determination in terms of the outcome that NR should reach.
I mentioned also the relevance of Condition D5.6.1 concerning implementing an appeal ruling: 'Network Rail shall be bound and empowered to take such steps as may be necessary to implement all rulings made by a Timetabling Panel or the ORR pursuant to this Condition D5. All such steps shall be taken promptly.' I considered that as lending weight to the ability to go under Condition D5.3.1(a), which empowered the Panel to direct a result to achieve without stating the steps to be done; Condition D5.6.1 empowered Network Rail to take those steps, i.e. for example, to make these 'knock-on' decisions provided they are compliant. NR thought this helped its position in implementing a determination. I noted that this should get over the potential problem otherwise of the offers having already been made: the Panal's provisional conclusion was that Condition D5.6.1 did empower Network Rail do this and Condition D4.7.1 provided that everything was binding unless changed by an appeal through Part D, which could either be to a Timetabling Panel or then to ORR.

5.31 I confirmed that as far as the Panel was concerned, it could arrive at a decision on what it had heard so far without going into further detail on the specifics of the compliant solution plan i.e. going through all or any of those services point by point to to see if what Network Rail now proposed (in the 27 October 2017 document) was accepted as viable. XC and the other Parties confirmed they did not wish to ask anything on that, or explore that further.I therefore confirmed that the Panel could safely conclude, for the purposes of coming to a decision, that it was accepted on all sides that there was a TPR-compliant solution to accepting XC's original Rolled Over Access Proposal for the xx12 arrival times of those seven services, notwithstanding that there were other considerations in respect of all of them and one in particular which had been fully evaluated, and all Parties confirmed their acceptance of this.

Second Hearing - Costs

5.32 At the end of the Second Hearing, before inviting any closing remarks from the Parties, in view of the fact that the Panel had been prompted by Network Rail's communications to convene this second hearing day I thought it appropriate to raise the matter of costs and invite submissions. Some of the Parties had confused claims for costs with claims for damages or compensation, but once I had clarified the position and reminded them of the Rules regarding claims for costs (Rules H59 and H60), it became apparent that none really wished to pursue a claim in relation to their costs of the Second Hearing, largely because they had not incurred anything significant. However, the reason I had raised the subject at all was because the possibly relevant costs of the Second Hearing included those of the ADC itself. I explained that it was purely the issue of conduct (limb (b) of Rule H60) being possibly such as to justify an award of costs - not improper conduct, just conduct that was factually the cause of incurring costs that would not otherwise have been incurred. And the reason I had raised it, was because the Second Hearing had come about through Network Rail sending a statement to the ADC, about a week after the First Hearing, stating in effect its inability to comply with the decision that had been indicated in advance of the written determination. That statement, as a result of further work by Network Rail, had been shown to be incorrect, and therefore, in a purely causative sense, the reason why the Second Hearing had taken place. I was contemplating making an order of costs to the ADC for this hearing for that reason. Network Rail said it would accept an order of the costs of the ADC in these circumstances.

Second Hearing - Closing remarks

5.33 I then invited closing remarks from the Parties. Network Rail did not feel there was anything further to add following the previous two hearings and today's hearing; everything had been covered that was required to be covered. XC just wished to note a point from its opening statement that some of the increased journey times highlighted by Network Rail in its proposed TPR-compliant solution were not journey time increases against the currently operating Timetable, so that passengers would not see any impact from these changes. And equally XC believed that some of the

non-compliances that it sought to fix were non-compliances that existed in the currently published Timetable as well and therefore were not strictly related to the decision at hand here. ASR and WCT had nothing to add.

6 Analysis and consideration of issues and submissions

6.1 I now consider the issues raised by this dispute. I confirm this analysis takes into account, as previously noted, the Dispute Parties' submissions prior to and at the two Hearings, including the oral exchanges on particular points of information raised during the Hearings. It is these matters that inform the conclusions of this Determination

6.2 In essence I conclude, on the basis of the evidence and arguments presented at the two Hearings (as appear from the Record and the Transcript) and my own interpretation of the relevant sections of Part D of the Network Code, that XC has made out its case as expressed in the Notice of Dispute, its original Sole Reference Document and subsequent submissions.

6.3 The analysis of the issues in this dispute mainly follows the structure and content of the propositions discussed and established in the course and at the end of the oral exchanges sequentially during the two Hearings.

Applicability of Decision Criteria

6.4 As indicated in the course of both Hearings, I thought it important to revisit the significant issue of principle already addressed in TTP1122, of whether NR is entitled, in compiling the New WTT, to make a unilateral decision rejecting or changing (by exercising a Flexing Right) some aspect of an Access Proposal or Rolled Over Access Proposal generally by reference to the Decision Criteria in the abstract, when a 'decision' as such is not strictly required because there is no conflict with another Access Proposal or some other specific overriding and contractually effective obstacle, such as the TPRs, nor any other conflict needing resolution under the Network Code. Whilst conscious of departing from the finding of TTP1122 on this point, I concluded at the end of the First Hearing that a proper contractual interpretation of the relevant provisions of Part D of the Network Code does not give NR the right to make such a decision in the abstract on its own initiative, even for what it considers to be improvements to the Timetable or other general industry benefit purposes, nor do the Decision Criteria (including the Objective as well as the Considerations) by themselves give NR such a right. I remain of that view, for the following reasons:

6.4.1 In determining the process for arriving at a New WTT the route of contractual interpretation through Part D starts at Condition D2.6.1: "During the Timetable Preparation Period (D-40 to D-26).... Network Rail shall compile the proposed New Working Timetable." This leads to Condition D2.6.3: "In compiling the New Working Timetable Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2." This in turn leads to Condition D4.2.1 which requires NR, in compiling a New WTT, both to "apply the Decision Criteria in accordance with Condition D4.6" and "conduct itself as set out in this Condition D4.2". This introduces directly the preamble to Condition D4.2.2 (which the submissions in TTP1122 seem to have ignored), whereby NR is required to "endeavour wherever possible to comply with" all (meaning, in effect, all valid) Access Proposals and accommodate all Rolled Over Access Proposals subject to, among other things, being entitled to exercise its Flexing Right under Condition D4.2.2(c) - and where that eventually proves impossible, to allocate Train Slots according to the order of priority in the much exercised Condition 4.2.2(d).

6.4.2 By this sequence the general responsibility stated in Condition D2.6.3 for NR to compile the New WTT gives rise to a specific duty expressed in the Condition D4.2.2 preamble to accept an Access Proposal or accommodate a Rolled Over Access Proposal wherever possible. For that duty to be in any way meaningful, the entitlement to which it is subject, to exercise NR's Flexing Right under D4.2.2(c), must

be intended to apply only if or to the extent necessary to enable it to perform such a duty, that is to say, to make possible the acceptance or accommodation of an Access Proposal that would otherwise be impossible. (There are other specific entitlements under Part D to use the Flexing Right, but they are not relevant to this situation.)

6.4.3 Condition D4 is entitled "Decisions by Network Rail". The sub-sections of Condition D4 deal with the different kinds of decisions that Network Rail has to make under the Network Code: concerning the Rules (D4.1), preparation of a New WTT (D4.2), Train Operator Variations (D4.3), Network Rail Variations (D4.4), and Possessions Strategy Notices(D4.5). Consequently NR's stated obligation and corresponding right under Condition D4.6 entitled "The Decision Criteria", to achieve the Objective by applying the Considerations, which obligation is stated to arise "Where NR is required to decide any matter in this Part D", can be expected to arise only when a decision of a kind expressly contemplated somewhere in Part D – and therefore within a category picked up and regulated in Condition D4 - is actually needed. And in the case of a Condition D4.2 "Decision arising in the preparation of a New Working Timetable" this therefore can only sensibly refer to a decision which is compatible with, or necessary to enable it to discharge, its other duties or obligations under Condition D4.2, including the need to resolve a conflict between Access Proposals or between an Access Proposal and some other technically supervening matter such as the TPRs, in a situation where without such resolution NR would otherwise be unable to discharge the overriding duty laid down in the Condition D4.2.2 preamble.

6.5 I concluded therefore at the end of the First Hearing that Network Rail under the Network Code does not have the power or the right to apply the Decision Criteria in the abstract, generally on its own initiative, to any part of the process of compiling the Timetable; nor, at least in the context of the facts of this dispute, to exercise its Flexing Right – or apply the Decision Criteria to the exercise of a Flexing Right – unless there is an actual decision to be made on accepting an Access Proposal or Rolled Over Access Proposal because it conflicts with another Access Proposal or Rolled Over Access Proposal. I remained of that conclusion at the end of the Second Hearing. Where there was no such conflict – as was the case here – I therefore decided that the need or entitlement to exercise a Flexing Right on an otherwise unconflicted Access Proposal did not arise.

6.6 The exception to that, as previously noted, was if there was some other overriding contractual or technical reason for rejecting or changing an otherwise unconflicted Access Proposal – the obvious example being non-compliance with the TPRs. At the First Hearing I concluded that that was the case for the 1412 SX arrival slot requested in XC's Rolled Over Access Proposal, where it was stated and accepted on all sides – as far as we understood – that awarding the 1412SX arrival time to XC for that service would in some way have given rise to an irremediable non-compliance with the TPRs. That appeared to give rise to a sufficient conflict to require an actual decision on the part of NR applying the Decision Criteria and entitling NR correctly to use its Flexing Right in order to amend XC's proposal by providing for its 1S35SX service to arrive at 1415 rather than 1412. My decision, therefore, as announced at the end of the First Hearing, was that the arrival time of 1412 for service 1S35SX would not be awarded to XC; but that the arrival time of xx12 in respect of all the other six services would be awarded to XC. NR would have been able consequently to award the 1412 SX arrival to ASR if it saw fit, but would not have been specifically directed to do so.

6.7 At the Second Hearing, however, it was eventually confirmed conclusively by Network Rail that TPR-compliant solutions for all seven XC services arriving at xx12 had been found. There therefore appears to be no conflict with XC's Rolled Over Access Proposal sufficient to require an actual decision on the part of NR applying the Decision Criteria in order to amend XC's proposal. My conclusion on that issue now, in the light of that new evidence, is that the arrival time of 1412 for service 1S35SX should be awarded to XC. In practical terms, therefore, the decision will be that the xx12 arrival times are directed to be awarded to XC for all seven of its 1Sxx services.

'Exceptional Circumstances'

6.8 In the course of both Hearings I addressed the other question of principle raised in XC's submissions and also considered by TTP1122 as outlined earlier, of what constitutes "exceptional circumstances" for the purposes of Condition D5.3.1(c) (substituting an alternative decision in place of a challenged decision of NR); or (at my suggestion) whether there is actually any need for going under Condition D5.3.1(c) at all or for finding "exceptional circumstances" for that purpose, if the TTP's direction can avoid actually "substituting" its own alternative decision for that of NR and instead fall within Condition D5.3.1(a), by simply directing NR to grant certain specific times or otherwise accept a specific proposal as bid for by an operator whilst leaving (and empowering) NR to sort out any 'knock-on' timetabling issues or other conflict arising by reason of that grant. After further consideration I have concluded that a TTP does have the power under both Condition D5.3.1(a) and ADR Rule H50 (which permits an order that "one Dispute Party should take or not take specified action" - not discussed in the Q&A) to make such a direction and that a finding of exceptional circumstances is therefore not necessary as a condition of that direction. I am conscious that reaching that conclusion does not accord with the finding of TTP1122 (at paragraph 6.5 of the Determination) that "In effect the Panel may reject an appeal, but cannot allow an appeal, or substitute an alternative decision in place of that disputed, save in exceptional circumstances". Very many determinations of Timetabling Panels have effectively allowed appeals without going so far as to substitute an alternative decision in place of that disputed and thereby engage the need for "exceptional circumstances".

6.9 At both the First and Second Hearings I confirmed that the determination nonetheless would also express the view that the timing of a requirement for a timetabling determination not very long, or even very shortly, before the start of the New WTT is unlikely of itself to constitute exceptional circumstances. Having discussed this at both Hearings, all Parties appeared to accept that the mere fact of a decision from a dispute process butting up close to the Timetable Date does not of itself constitute exceptional circumstances because everybody seems to accept that it happens all the time and sometimes decisions happen in much closer proximity to the Timetable Date than even this. Notwithstanding that, in this case, the fact of the decision getting close to the Timetable Date is the product of an unusual set of iterations of the same problem – the Parties coming back and having several goes at it – and that it is also unusual for Network Rail saying, at one stage, that the situation is 'unprecedented', it still seems to be accepted that it is not exceptional for those purposes.

6.10 Accordingly, I decided that the decision will be, as I said again at the end of the Second Hearing, to accept XC's proposal in respect of the arrival times for those particular services – now all seven – without directing Network Rail specifically to do it in the way outlined in its 27 October 2017 paper or in any other way, but secure in the knowledge that – NR having outlined it in that paper – there is at least one TPR-compliant solution (there may still be others) open to Network Rail. It will then be up to Network Rail to deal with that as it thinks appropriate.

Practical Application of the Decision Criteria

6.6 As I said at the outset, notwithstanding the conclusion on the lack of applicability of the Decision Criteria to Network Rail's particular actions under dispute here in compiling the New WTT, I think it appropriate to indicate an alternative decision in the event that I am later found to be wrong on that first decision, as to what the position would be if the Decision Criteria had been applicable and applied as they apparently have been applied.

6.7 Having used its best efforts to engage in the service-by-service analysis of NR's reconsidered and very much more elaborate Decision Criteria document produced for TTP1174, as was recommended by TTP1122, but having been drawn into the document's approach of analysing each Consideration across all the services rather than the other way round, the Panel concluded that Network Rail's case for not accommodating XC's Rolled Over Access Proposal for the seven 1Sxx services, by

reference to the Decision Criteria in the light of the new information provided, was not coherent. It did not follow a clear, consistent or logical path either in principle or practically in relation to the specific evidence produced by the Operators and cited in NR's second Decision Criteria document.

6.8 XC's arguments for rejecting NR's analysis of the Decision Criteria included NR taking into account inaccurate data, making assumptions without evidence regarding aspirations and making inaccurate comparisons made between different issues. These arguments were sustained. XC also maintained cogently that some of the weightings applied to individual Considerations were incorrect, and that the reasoning underpinning these weightings was unclear. NR had clearly both weighted and applied the Considerations incorrectly in evaluating both the Proposals under examination and any potential alternative solutions. XC's arguments were relevant and persuasive. This is a situation where the onus was on NR to make its case for altering or otherwise not accommodating some element of a Rolled Over Access Proposal, and it failed to do so.

6.9 In respect of that 1412SX service the reordering of which was previously thought to be non-TPR-compliant, but which turned out to have a compliant solution, there was also the additional issue of ASR's broken driver diagram. The Panel concluded that even taking that into account in comparing the costs and factoring it into the Decision Criteria process, the case had not been made out on application of the Decision Criteria. A further reason for that conclusion in respect of the effect of the broken driver diagram, was the fact that consideration of it arose only after the decision had been made by Network Rail to reorder the services concerned. The Decision Criteria, if applicable, should have been applied by reference to the circumstances at the time when the original decision was made. And if they had been applied then, as we understand it, the broken driver diagram would not have been an issue, because if XC's proposal had been accepted originally then ASR would have kept the same times that it had previously and would have done its diagramming and rostering accordingly.

6.10 Accordingly, that particular problem, which was factored into Network Rail's later construction of the application of the Decision Criteria, was actually just another example of what came to be acknowledged by ASR as a 'timing problem' – namely, as I understand it, something that arises just because that is the nature of the process and ASR like other Timetable Participants has to do certain things in advance of knowing what the outcome would be; as a result of which, it has to incur some costs in undoing them when it knows how it all pans out. And, as the Panel understands ASR's view on that, it is accepted as being all part of the circumstances of participating in the process. ASR does not apparently think it necessary to claim any compensation in respect of that 'timing problem'. There are apparently other such problems but they will be dealt with, if at all, by bringing another dispute.

Costs

6.11 The Dispute Parties did not wish to pursue an application for Costs, so I will not make an award of costs or consider it in respect of them. But I do think it appropriate to make an award of the costs of the ADC – in respect of the Second Hearing only – under the conduct limb (b) of Rule H40. I note again that this is not a question of improper or blameworthy conduct, it is just that – as was very fairly accepted by Network Rail – the holding of the Second Hearing, considering the matter afresh, and to some extent revisiting work that had already been done, arose from NR's original 20 October 2017 statement that there was a problem over compliance with the previously indicated decision, which was later countermanded, and then turned out not to be an issue.

7 Guidance and observations

7.1 Rule H51(j)(iii) contemplates a dispute determination including guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy. I offer some such observations here.

7.2 The generality and obviously beneficial intention of the wording of the Objective of the Decision Criteria in Condition D4.6, taken by itself, could give the impression that it is somehow generally applicable to the conduct of business by Network Rail. There seems to have been a number of instances where NR has construed the Objective and the Considerations as introducing the possibility of regarding a decision to do something generally for the good of the rail industry in its opinion – such as to tidy up the Timetable and make rail more competitive with other modes of transport – as being its prerogative. However laudable an objective that might be, in my understanding that is not the kind of decision that the contract (in the form of the Track Access Agreement and Network Code) actually 'requires' NR to make, and we have to go by the contract. I have to emphasise therefore that Condition D4.6 does not provide, either expressly or by implication, any basis on which NR might actually be entitled to use 'The Decision Criteria' - achieving the Objective by applying the Considerations - in the abstract for general objectives arising in the discharge of its role as infrastructure manager. If NR wants to exercise such an entitlement, then the contract – the Network Code - needs to be changed to provide it.

7.3 I have had occasion in previous timetabling disputes to make and/or cite observations in the same vein as that above concerning Network Rail's apparent inclination, albeit for perfectly proper motives, to extend the ambit of its use and application of the Decision Criteria beyond what the contract permits. I would refer to extracts from precedent determinations of previous Timetabling Panels that I believe support my conclusions on this issue:

7.3.1 TTP834 (heard on 6 October 2015), which I chaired, concerned the authority and ambit of Network Rail's internal 'Sale of Access Rights' Panel ('SOAR') in relation to NR's contractual timetabling obligations under Part D of the Network Code. The importance then attached by NR's train planners to the deliberations of the SOAR Panel were comparable to NR's internal management emphasis here on non-contractual timetabling goals such as a standard patterned timetable.

7.3.2 Paragraph 6.4.4 of the TTP834 determination states:

" With regard to NR's published processes and criteria for "selling" Rights, including its SOAR Panel, I drew to NR's attention that the Network Code in Condition D4.2.2 specifically implied an overriding principle that it did not have the right to refuse an otherwise compliant Access Proposal; this said "Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it" etc. In the absence of any suggestion otherwise from NR I concluded that there is nowhere whence it can derive any contractual entitlement not to sell an access right in cases where there is specific technical capacity (in the sense of TPR compliance) and no operational conflict. NR's vague references to the need for an overview of its business and consequent involvement of its SOAR Panel using the Decision Criteria in considering individual requests across the network bore no relationship to the contractual provisions of the Network Code and operators' track access contracts."

7.3.3 Paragraphs 7.2 and 7.3 of the TTP834 determination state:

"If NR is to continue to exercise the residual discretion over granting access rights to train operators (in NR's own expression, the "sale" of rights) that it assumes to itself through the processes of the SOAR Panel and otherwise, and even if as suggested it is supported by ORR in this exercise, then it seems imperative that the contractual processes developed in Part D of the Network Code to govern the timetabling process be operated distinctly and without influence from NR's internal governance structures. There is opportunity at all times for NR (or others) to propose and consult the industry on future change to Part D if it believes there is benefit, and such change may prove necessary in order to align the contract with prevailing circumstances."

"In their present form, the Part D processes do not confer a discretion on NR to determine whether it wishes to "sell" Rights at all, whether on general grounds of caution as to potential network congestion, service recovery or industry reputation, or

in any way otherwise than on the basis of compliance with the TPR. It is the function of the TPR to denominate the configuration and technical characteristics of services, and of their relationship with each other, that can safely and productively be accommodated within the known existing capacity and other parameters of the Network."

7.3.3 Finally, in TTP324 (heard on 29 March 2010), Paragraph 36.1 (which I cited in TTP834), notes as follows:

"The Decision Criteria only come into any force in those circumstances explicitly contemplated by the Network Code, where there is the potential need for Network Rail to exercise its discretion in relation to possible conflicts of priorities, for example:

1 As between the Firm Rights of two or more Train Operators...; or

2 As between the Firm Rights of any Train Operator and those of Network Rail....

In either case, recourse is to be had to the Decision Criteria as providing the benchmark for deciding which of several permissible courses of action is the better justified. ***The Decision Criteria cannot be prayed in aid as a reason for initiating a new policy, or for circumventing provisions within the Track Access Contract.***" (My emphasis).

7.4 The concept of "exceptional circumstances" under Condition D5.3.1(c), as a condition to the exercise of the power of a Timetabling Panel to "substitute an alternative decision in place of a challenged decision of Network Rail", has quite often been the subject of scrutiny in Panels' decisions without, as far as I am aware, any conclusive definition or general interpretation of the term being achieved. I doubt whether it is actually capable of satisfactory definition. In TTP1122 the provision was interpreted as possibly having the effect even of precluding a Panel from allowing any appeal against a decision of Network Rail save in "exceptional circumstances". This Determination finds that such an extreme result, and any doubtful use of the power itself, can reasonably be circumvented by making a positive or negative specific direction without expressly substituting a Network Rail decision. However, with any doubt remaining, it must be time for a rethink of Condition D5.3.1(c) and consideration of whether that or the "exceptional circumstances" limitation serve any useful purpose.

8 Determination

8.1 Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, I determine as follows:

8.1.1 As a matter of legal entitlement: the meaning of the relevant provisions of Part D of the Network Code (12 July 2017 Edition), particularly Condition D4 'Decisions by Network Rail', is that Network Rail does not have the power or the right to apply the Decision Criteria in the abstract, generally on its own initiative or for whatever motive, to any part of the process of compiling a New Working Timetable; nor, in the context of compiling a New Working Timetable, to exercise its Flexing Right – or apply the Decision Criteria to the exercise of a Flexing Right – unless it is required to make a decision regarding acceptance of an Access Proposal or Rolled Over Access Proposal because it conflicts with another Access Proposal or Rolled Over Access Proposal or gives rise to an irresolvable conflict with the Timetable Planning Rules for the time being in force.

8.1.2 As a matter of legal entitlement: Network Rail's application of the Decision Criteria in Condition D4.6, if the same were applicable, as recorded in its document (undated) produced to XC on 15 September 2017 entitled 'Network Rail's application of Network Code Part D, 4.6 – TTP1122 Decision Criteria', was not valid or sufficient to justify a rejection of the xx12 arrival times into Glasgow Central station for XC's seven 1Sxx sevices requested in XC's Rolled Over Access Proposal for the December 2017 Timetable.

8.1.3 As a matter of legal entitlement: XC is entitled to have its Rolled Over Access Proposal accepted by Network Rail for, and therefore to be granted, the inclusion of

xx12 arrival times into Glasgow Central station for XC's seven 1Sxx sevices in the December 2017 Timetable, subject to continued due compliance with the normal exigencies and processes of the Network Code governing the compilation of the New Working Timetable.

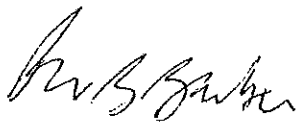
8.1.4 As a matter of remedy: I direct Network Rail to accept XC's Rolled Over Access Proposal for the December 2017 Timetable insofar as that proposal requires xx12 arrival times into Glasgow Central station for all seven of XC's 1Sxx services, subject to the same matters as are set out in paragraph 8.1.2 above. I make no direction as to how Network Rail is to achieve that result and this direction in and of itself does not substitute an alternative decision in place of a challenged decision of Network Rail. I confirm and direct that Network Rail under Condition D5.6.1 shall be bound and empowered to take such steps as may be necessary to implement this ruling made by a Timetabling Panel, including but not limited to retiming or other adjustment of the services of any other Timetable Participant for the purpose of securing compliance of any service with the Timetable Planning Rules for the time being in force and notwithstanding that offers for the inclusion of such services and/or particular characteristics of such services in the New Working Timetable may already have been made by Network Rail to such Timetable Participant.

8.1.5 As a matter of legal entitlement: under the Network Code as presently constituted and incorporated in Timetable Participants' Track Access Contracts, NR is not entitled to reject an otherwise contractually valid and compliant Access Proposal or Rolled Over Access Proposal otherwise than in accordance with the relevant provisions of the Network Code for the time being in force.

8.1.6 As a matter of legal entitlement: the meaning of Condition D5.3.1 is that the timing of a requirement for a Timetabling Panel determination of a dispute under Chapter H of the ADRR within a relatively short time before the start of the New Working Timetable is unlikely of itself to constitute "exceptional circumstances" entitling the exercise of the power described in Condition 5.3.1(c), to substitute an alternative decision in place of a challenged decision of Network Rail.

8.1.7 I award the ADC's costs incurred in connection with the Second Hearing of this TTP against Network Rail, in amounts to be assessed summarily if not agreed between Network Rail and the ADC. This award is made on the basis described in paragraphs 5.32 and 6.11 above. Network Rail shall pay to the ADC its Costs and expenses incurred in constituting the Second Hearing of this TTP and arranging for it to be duly heard and determined. Network Rail shall pay the full amount of the ADC's such Costs and expenses within 30 days of receiving the Secretary's certification of and claim for the same following my assessment.

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



Peter Barber
Hearing Chair

14 November 2017