
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of references TTP356 & TTP375
(following a hearing held at Eversholt Street, Euston on Monday 23 August 2010)

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Appendix 1

Extracts from Part D of the Network Code

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Determination in respect of references TTP356 & TTP375
(following a hearing held at Eversholt Street, Euston on Monday 23 August 2010)

Hearing Chair: Suzanne Lloyd Holt

The Panel:

Simon Taylor (East Midlands Trains) - elected Panel member for Franchised Passenger Class, Band 3

Nigel Oatway (EWS International) - elected Panel member for Non Passenger Class, Band 2

Matthew Allen (Network Rail) - appointed Panel member for Network Rail

Parties to the dispute:

For First Capital Connect Ltd ("FCC")

John Beer	Access Contracts Manager
Paul French	Head of Planning
Chris Patman	Senior Commercial Manager

For Network Rail Infrastructure Limited ("NR"):

Fiona Dolman	Customer Relationship Executive (FCC)
Paul Hebditch	Programme manager (Operations & Customer Services)
Paul Thomas	Customer Relationship Executive (Southern)

For Southern Railway Ltd ("Southern")

Kai Hills	Head of Franchise and Access Contracts
Dave Walker	Head of Train Specification and Planning
Phil Hutchinson	Specification Planning Manager

In attendance

Tony Skilton (Secretary)

1 INTRODUCTION AND JURISDICTION

1.1 This dispute arises out of two complaints by FCC relating to:

1.1.1 NR's Offer for the 2011 Principal Timetable re Brighton Main Line and its acceptance of Southern's Bid for certain Saturday services (TTP356); and

1.1.2 NR's acceptance of Spot Bids for additional and amended weekday Train Slots as submitted by Southern for inclusion within the 2011 Principal Timetable re Brighton Main Line (TTP375).

In respect of 1.1.1 above, the acceptance was contained in NR's Offer of the First Working Timetable in respect of the Principal Change Date 2010 under Condition D 3.2.7 of the version of the Network Code in force during the period when the First Working Timetable was issued (i.e. covering 25 June 2010 to 16 July 2010). In respect of 1.1.2 above, after initially rejecting Southern's request for additional and amended weekday services in its Offer of the First Working Timetable, NR subsequently accepted Spot Bids from Southern in respect of these services for inclusion in the 2011 Principal Timetable.

1.2 The Panel was satisfied that the matter was one which should properly be heard by a Timetabling Panel, meeting under the terms of Network Code Part D, as all matters in question arose because a "*Bidder is dissatisfied with [a] decision of Network Rail made under this Part D*" - D5.1.1.

- 1.3 One intending Panel member - Jason Lewis of Eurostar International (elected Panel member for Non-Franchised Passenger Class) - was prevented at short notice from attending the hearing, due to sickness. The Panel was, however, quorate, as provided for in Access Dispute Resolution Rule H17.
- 1.4 Given the obvious and close connection between the two disputes under, respectively, references TTP356 and TTP375 I directed, in the interests of speed and of saving costs, that the two references should be heard together.
- 1.5 The abbreviations used in this determination are as set out on pages 2 and 3 hereof or as specified in the text below.

2 BACKGROUND

- 2.1 As appears from the submissions of the parties - see for example paragraph 5.1 of FCC's submission dated 3 August 2010 in TTP356, the First Working Timetable Offer in respect of the Principal Change Date 2010 was issued in 3 stages between 25 June and 16 July 2010:
- 2.1.1 The first stage was issued on 25 June 2010 and referred to weekday trains only;
- 2.1.2 The second stage was issued on 9 July 2010 and referred to weekday trains, and weekend trains within Timetable Periods A & B;
- 2.1.3 The third stage was issued on 16 July 2010 and referred to weekday trains, and weekend trains within Timetable Periods A, B, C & D.
- 2.2 FCC's complaint is that, both in relation to the Offer for the 2011 Principal Timetable - reference TTP356, and NR's acceptance of Spot Bids for additional and amended weekday Train Slots submitted by Southern for inclusion within the 2011

Principal Timetable - reference TTP375, NR has applied incorrectly the Decision Criteria set out in Network Code Condition D6.

3 RELEVANT PROVISIONS OF THE NETWORK CODE

3.1 The provisions of the Network Code in issue in these two references are, principally:

3.1.1 D3.2.2 Compilation of the First Working Timetable

3.1.2 D3.2.7 Offer of the First Working Timetable

3.1.3 D3.2.8 Acceptance of the First Working Timetable

3.1.4 D6 Decision Criteria

The relevant extracts are set out at Appendix 1 to this Determination.

4 SUBMISSIONS

4.1.1 Before I turn to a review of the submissions of the parties, it is right that I record at this point that whilst the original parties to the dispute were FCC and NR, at the hearing on Monday 23 August 2010, Southern indicated their wish to declare themselves a Dispute Party. I directed that they should be so joined as a Further Dispute Party.

4.1.2 While certain parts of the submissions and evidence will specifically be referred to in the course of this Determination, I have taken into account all of the written and oral submissions and evidence of the parties in reaching my decision.

4.1.3 The written material provided to the Panel was as follows:

4.1.3.1 Sole submission from FCC reference TTP356 dated 3 August 2010;

4.1.3.2 Sole submission from FCC reference TTP375 dated 16 August 2010;

- 4.1.3.3 Sole response from NR references TTP356 & TTP375 dated 17 August 2010;
- 4.1.3.4 Response document from FCC dated 20 August 2010 re certain issues raised in the sole response of NR listed under 4.1.3.3 above;
- 4.1.3.5 Opening statement by NR provided at the hearing on 23 August 2010;
- 4.1.3.6 Opening statement by Southern provided in advance of the hearing dated 20 August 2010.

4.2 FCC's principal arguments were as follows:-

- 4.2.1 FCC's arguments were extensively canvassed in their written submissions referred to under 4.1 above and in response to points of clarification put to them at the hearing by Panel members and by me but essentially, in respect of each of the two references before the Panel, those arguments relate to the way in which the Decision Criteria have been applied by NR and, in particular, to the effect on service reliability and performance of the acceptance by NR of Southern's Bids;
- 4.2.2 FCC argued that the effect of Condition D3.2.2(b) was that, when applying Decision Criterion (d), NR had to take account of the applicable Rules of the Plan and that, in the circumstances of this case, NR had failed to do so. FCC further contended that there were performance implications which were inherent in NR's acceptance of Southern's Bids and which should outweigh journey time advantages and sharing of capacity under Decision Criterion (a). Indeed, FCC argued that what had been offered by NR to Southern would make the overall service on the London Bridge - Brighton line less reliable.

- 4.2.3 FCC commented in particular on the Performance Assessment at Appendix A of the NR submission dated 17 August 2010 and challenged the assertions in that Performance Assessment that running more trains would not increase Southern's delay minutes noticeably. FCC also commented on NR's failure to take into account the alleged lower reliability of the rolling stock proposed to be used to source the Southern Bid (Class 442 electric multiple units).
- 4.2.4 Those were FCC's principal arguments in respect of the crucial importance of Decision Criterion (d) and on the weight which they argued it should be given by NR over Decision Criterion (a) which is about sharing capacity and developing the network.
- 4.2.5 FCC also submitted arguments in relation to the application of Decision Criterion (c) - enabling a Bidder to comply with any contract to which it is party. Essentially, and bearing in mind that FCC hold a Relevant Track Access Agreement with NR dated 9 February 2006, they wished to understand whether all of the proposed Train Slots formed part of the Service Level Commitment ("SLC") to which Southern was committed with the Department of Transport since, they argued, that information was relevant to the degree to which Decision Criterion (c) had been applied by NR when formulating the Offer. FCC asserted that the correct process was for the Access Agreement application to be made and considered by the Office of Rail Regulation ("ORR") so that issues of abstraction and performance implications could be properly assessed before the services in question were committed to in the Timetable. As appears at paragraph 5.1.4 below, FCC's request for that information was dealt with in the course of the Panel's questions to the parties at the hearing.

4.2.6 In relation to Decision Criterion (o) - taking into account the commercial interests of Network Rail and the existing and potential operators - FCC argued that material changes to Timetable patterns on routes where there is more than one franchised passenger operator will inevitably generate movements in the allocation of revenue. In this case, they asserted that their initial assessment indicated that the acceptance by NR of Southern's Bids would have a significant revenue impact on FCC "*due to the services being abstractive in nature*" - see page 4 of FCC's response dated 20 August 2010. FCC submitted that the Decision Criteria at Condition D6 obliged NR to consider this revenue impact and to balance it when applying the other Decision Criteria.

4.2.7 FCC also made complaint about what might be characterised as procedural irregularities in the Offer of the disputed Train Slots to Southern. FCC pointed out that:

4.2.7.1 Southern's Bid to operate additional and amended Train Slots between London Victoria and Brighton, with standard weekday off-peak repeating pattern was originally rejected by NR as non-compliant with the Rules of the Plan but had subsequently been offered; and

4.2.7.2 the same services were offered to Southern on Saturdays and although NR conceded that was an initial administrative error, that Offer was not withdrawn and was subsequently confirmed.

In relation to the latter, FCC sought a direction from the Panel that what was considered as an administrative error Offer should be withdrawn but did not explain, under the terms of the Network Code, under what provision that error might be rectified.

4.2.8 In summary, relying on the alleged failure by NR properly to take account of the Rules of the Plan and correctly to apply the Decision Criteria, FCC asked that NR be directed:

4.2.8.1 to withdraw the Offer to Southern for a Train Slot to start the 08:50 (Mondays - Fridays) Gatwick Airport to Victoria service from Brighton at 08:13;

4.2.8.2 to withdraw the Offer to Southern of Saturday Train Slots between Brighton and Victoria to a level that is consistent with the weekday Offer; and

4.2.8.3 to withdraw the acceptance of Spot Bids to Southern of additional Train Slots between Brighton and Victoria (Mondays - Fridays) to a level that is consistent with the Offer of the First Working Timetable.

4.3 NR's position was argued as follows:

4.3.1 NR acknowledged that an administrative error occurred when the Offer of the Saturday Train Slots was made to FCC - see paragraph 5.3 of FCC's TTP356 submission and paragraph 5.4 of NR's combined submission in respect of TTP356 & TTP375. In their opening statement at the hearing, NR did apologise for any confusion which might have been caused as a result of that error but, as appears below, NR ultimately decided that Offer should stand in any event. In passing, I should note that NR expressed the view that the Network Code did not provide a mechanism for amending or withdrawing an Offer. I return to that point in my analysis under paragraph 6.2.2.2 below.

4.3.2 In relation to the process, NR explained that, at the point at which the Offer was made, their view was that the Train Slots bid for by Southern did

not adhere to the Rules of the Plan. NR said the technical non-compliance with the Rules of the Plan potentially impacted on the level of service reliability and that, in their initial consideration, gave weight to Decision Criterion (d).

4.3.3 However, NR indicated they had subsequently reviewed the application of the Decision Criteria and ultimately accepted Southern's Spot Bids for the relevant weekday services, NR taking the view that Decision Criterion (a) should be afforded greater weight because of the additional capacity provided to passengers by the introduction of the Southern services.

4.3.4 In relation to performance - Decision Criterion (d), NR explained they had carried out a Performance Assessment and in their view, that Assessment indicated that whilst performance may worsen in certain circumstances, the overall impact was not so significant as to warrant not including the train paths solely on the basis of Decision Criterion (d).

4.4 In response to FCC's criticism of the way in which NR had applied Decision Criterion (c), NR pointed out that the provisions of Condition D3.2.1 (d) did not require an operator to have Firm Rights prior to submitting a Bid, albeit NR accepted that Rights needed to be properly established prior to the operation of services on the Network.

4.5 In relation to Decision Criterion (o), the position on the submissions was this. In their initial sole submission - paragraph 6.5 of TTP356 and paragraph 6.4 of TTP375, FCC asserted that the Train Slots offered to Southern contravened, inter alia, Decision Criterion (o). In their sole response dated 17 August 2010, NR indicated they felt not able to respond to that allegation without further details from FCC. FCC did, in their sole response document dated 20 August 2010 at page 4

provide brief details of that allegation - see paragraph 4.2.6 of my summary of FCC's submissions above. FCC's argument was not further pursued by NR at the hearing.

4.6 In summary, it was NR's case that it had made capacity allocation decisions based on a balance between the benefits to passengers of additional services and the impact those services would have upon industry measures of train service performance. NR did recognise the potential impact on performance of the introduction of additional services and revised stopping patterns but their analysis indicated that the impact could be mitigated to acceptable levels for each operator. Although they had initially given weight to Criterion (d), upon further consideration, NR had given greater weight to Criterion (a) - the benefits of provision of railway services - rather than (d).

4.7 NR were asking the Panel to determine that:

4.7.1 NR's Offer to Southern for a Train Slot for an 08:13 Brighton to London Victoria service was correct;

4.7.2 NR's Offer to Southern of Saturday Train Slots between Brighton and London Victoria was correct; and

4.7.3 NR's acceptance of Southern's Spot Bid for additional Train Slots on weekdays on the Brighton Main Line was correct.

4.8 I now turn to Southern's Submission:

4.8.1 As indicated under paragraph 4.1 above, Southern confirmed at the hearing their wish to be joined formally as a Dispute Party and I so directed.

4.8.2 Southern submitted that, as they understood the position, the concerns of FCC which had resulted in the present references related to two trains in

the standard hour Timetable in each direction between London Victoria and Brighton. The first was the addition of a fourth fast service in the off-peak standard hour Timetable on weekdays and Saturdays between Victoria and Brighton (“the Fourth Train”). The second was the re-timing of an existing off-peak standard hour service between the same stations (“the Third Train”). FCC’s appeals related to NR’s acceptance of Southern’s Bid for Saturday services for the Third Train and the Fourth Train (TTP356) and Spot Bids for weekdays (TTP375).

- 4.8.3 Southern underlined that its proposals were not new. Specifically, Southern had maintained its proposal to operate the Third Train and the Fourth Train at the start of the Timetable development process pursuant to the Network Code, in respect of the Timetable commencing December 2010. Southern’s position was that although they were aware from FCC’s submission that they had expressed, during the Timetable development process, concerns about the performance implications of the Third Train and the Fourth Train, those performance concerns had been adequately addressed by NR and in the view of Southern were unfounded.
- 4.8.4 In relation to FCC’s assertion that Criterion (o) had been misapplied, Southern submitted that FCC had not stated what the financial effect would be upon it such that Southern could not comment further.
- 4.8.5 Further, in relation to FCC’s assertion that Southern’s proposals in some way infringed the Rules of the Plan, Southern took the view that those assertions were not, in the submissions Southern had seen, substantiated by providing sufficient detail to make them capable of being understood or responded to adequately.

4.8.6 Southern confirmed it did not yet have Firm Rights in relation to the Third Train and the Fourth Train although it had rights in relation to the Third Train. Southern pointed out that Conditions D3.2.1 and D3.2.3 specifically dealt with the way in which services may be included in the Timetable on the basis of Bids made before Firm Rights had been obtained. Southern indicated they expected to negotiate appropriate Firm Rights with NR as envisaged by the Network Code.

4.8.7 In summary, Southern's position was that:

4.8.7.1 NR had acted properly and had properly applied the Decision Criteria in accepting Southern's Bid;

4.8.7.2 FCC had failed to substantiate in good time any objectively justifiable basis for its appeal and had no right to prevent NR's proper acceptance of Southern's Bid.

4.8.7.3 Whilst the procedural anomalies of which FCC complained might give FCC legitimate reason to complain about the way NR had operated the process, they did not, in Southern's submission, call into question the legitimacy of the decision which NR had made in accepting Southern's Bid.

5 ORAL EXCHANGES AT THE HEARING

5.1 Having studied the various submissions of the parties as listed at paragraph 4.1.3 above and having listened carefully to their opening statements, Panel members and I sought clarification on a number of matters arising out of those submissions and statements. Although the parties' answers to questions were not put as sworn evidence, I have taken the view that the Panel and I were entitled to regard them

as true statements provided to assist the hearing and I have therefore taken them into account when reaching my determination. The following specific points were clarified:

- 5.1.1 NR explained why they had changed their mind following their initial rejection of Southern's Bid. They explained that they had initially rejected that Bid on the grounds of performance - Decision Criterion (d). They did appreciate there were issues about performance but following discussions within the industry at senior level regarding services on the Brighton Main Line, they concluded that Decision Criterion (a) should have more weight, given the number of additional seats which would be provided on the Line by the additional trains.
- 5.1.2 NR conceded they had not made a proper assessment of the Decision Criteria at the time they made the Offer.
- 5.1.3 Southern explained that the reason the additional service had been introduced was in the context of improving the attractiveness of the London to Brighton market by having more frequent trains, not by increasing train length.
- 5.1.4 Southern confirmed that their SLC required a Third Train per hour. The Fourth Train was not in their SLC: it was a "commercial train" and not a franchise SLC train.
- 5.1.5 FCC confirmed that their own services had been preserved: none had been flexed or altered in any way as a result of the Offers which NR had made to Southern.
- 5.1.6 NR confirmed there was no agreement in place or envisaged in relation to revenue sharing for the additional services.

5.1.7 All parties acknowledged that, in relation to the Rules of the Plan, there were currently a number of non-compliances in respect of the various headways specified in those Rules relating to the Brighton Main Line.

5.2 Those were the arguments and clarifications put to the Panel.

6 ANALYSIS

I now turn to my consideration and analysis of the arguments put by the parties.

6.1 It was plain from the submissions of the parties that FCC's complaints fell essentially into two areas:

6.1.1 procedure, namely the processes and procedures which NR followed when reaching their decisions to award the Train Slots now in dispute;

6.1.2 performance, namely FCC's expressed concerns about the effect on service reliability of the coming in to operation of the additional Train Slots.

I deal with each of those areas of complaint in turn.

6.2 Procedure

6.2.1 It appeared, from the submissions of the parties and from the clarifications provided to the Panel by the parties in the course of oral exchanges at the hearing that NR, having rejected Southern's Bid for additional weekday Train Slots, then inadvertently offered them the Saturday slots for which they had bid. Subsequently, in response to Spot Bids, from Southern, NR accepted the weekday Train Slots they had initially rejected and, having accepted those Spot Bids, proceeded to confirm the Saturday Train Slots.

6.2.2 On any view, and as NR acknowledged and for which they have apologised, their handling of the process was clumsy and had the potential to cause confusion. There are two points here:

6.2.2.1 First, whilst all parties recognise that the process was not handled well by NR, I do not consider that the way in which NR handled the process is a matter which should, in this case, influence my decision on the outcome. The real issue, which I deal with below, is the extent to which NR correctly applied the Decision Criteria when making their ultimate assessment of the Bids.

6.2.2.2 Second, and although none of the parties put in any detailed argument on the point, it seems to me that there is, under Part D of the Network Code, no mechanism by which NR could unilaterally have withdrawn its inadvertent Offer to Southern of the Saturday Train Slots. Condition D4.7.1 seems to me to be clear on the point:

“4.7.1 Once.....Network Rail have accepted a Bidder’s Bid in accordance with Condition D3.2.7 [offer of the First Working Timetable] or D4.5 [timing of acceptance, modification or rejection of Spot Bids] both the Bidder and Network Rail shall, subject to Conditions D3.4.2 [Flexing Rights] D4.4.2 [Flexing Rights - Spot Bids] and D4.7.2, be bound by that decision”

D4.7.2, in so far as relevant here, provides:

“4.7.2 (a) Train Slots scheduled in the Working Timetable may be varied by Network Rail:

.....

(b) by agreement between Network Rail and the Bidder (provided that every other affected party has also agreed in writing); or

(c) in order to give effect to a decision of the relevant ADR Panel or the office of Rail Regulation as provided for in Condition D5”.

6.3 Performance

6.3.1 As I indicate above, FCC’s second area of complaint was, bearing in mind, that, as appears under 4.3.3 above, NR changed their minds in the course of the Bidding process, whether they had correctly applied the Decision Criteria when coming to their decision and, in parallel, whether NR had correctly applied the relevant Rules of the Plan.

6.4 I deal first with the Rules of the Plan issue:

6.4.1 Essentially, and to reiterate the point, it was FCC’s contention that NR had not met its contractual obligations in regard to *“its duties to offer Train Slots that comply with Rules of the Plan as set out in Condition D3.2.2”* - see paragraph 6.1 of FCC’s submission dated 3 August 2010. There are two points here:

6.4.1.1 What the relevant provisions of Condition D3.3.2 actually say is:

“3.3.2 Network Rail, in consultation with Bidders will compile a Working Timetable which is in accordance with the following provisions of this Condition D3.2 and which.....

(b) takes account of the need to achieve optimal balance between the notified aspirations of each Bidder and the aspirations of Network Rail as expressed in the applicable Rules of the Route and the applicable Rules of the Plan;.....”

Applying those provisions, in my judgment what NR had to do was, against the backdrop of the Rules of the Plan, try to balance their own and the aspirations of each Bidder. Put another way, the First Working Timetable is to take account of the applicable Rules of the Plan. I accept of course that timings should comply with the Rules of the Plan to be incorporated in the Working Timetable (Network Code Condition A1.2 - Definition of Rules of the Plan on page A7). Bearing in mind that if Southern's Bids are upheld, it will still be necessary for them to secure the associated access rights through the regulatory process and that process would enable concerns over such matters as risk to train service performance to be addressed with the ORR, I do not consider that technical non-compliance with the Rules of the Plan alone would be sufficient to require NR to withdraw their Offers to Southern.

6.4.1.2 Although FCC alluded to alleged non-compliances with the Rules of the Plan in their original submission dated 3 August 2010 - see for example paragraph 6.1 - it was not until very late in the day that FCC provided any particulars of alleged non-compliance - FCC's response document dated 20 August 2010 refers. As a result, at the hearing on 23 August, only quite limited evidence on the non-compliance issue was available to the Panel. Summarising, as best I can, the position which emerged was that there were substantial numbers of trains on the Brighton Main Line run by both FCC and Southern over a number of years which were non-compliant to some degree. As a result, NR were reviewing the Rules of the Plan to be applied from the 2011 Principal Change Date.

Further, given that, on the evidence, all parties seem to have accepted non-compliances from time to time, I do not consider it right that FCC, when apparently it seems convenient to do so, should complain of further perceived non-compliances to assist their arguments in these disputes. In any case, Southern confirmed in evidence that the non-compliances have subsequently been mitigated following the retiming of other services.

In summary, and whilst recognising that the Rules of the Plan position in this dispute is not entirely satisfactory, I conclude on the basis of the evidence available, and bearing in mind that concerns about train service performance can be considered at the Access Rights application stage by the ORR, that FCC's complaint under this head is not sufficient such as to convince me to require NR to set aside its Offers to Southern.

6.5 I now turn to the arguments in relation to the application of the Decision Criteria on which the Panel and I heard specific submissions, namely, Decision Criteria (a), (c), (d) and (o). I deal with each of those Decision Criteria in turn:

6.5.1 Decision Criterion (a) *“Sharing the capacity, and securing the development, of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network;”*

To recap, it was FCC's contention that the disputed Train Slots did not satisfy this Criterion. They argued that the proposals provided an increase

in quantum of services when there was still the opportunity to strengthen existing services such that the most efficient and economical solution had not been fully examined. Consistent with what FCC argued in relation to Decision Criterion (d) to which I refer below, since, in their submission, the proposal would have the effect of making the services operated on the Brighton Main Line less reliable, that was itself not efficient.

NR countered that they had concluded that this Criterion should be afforded greater weight because of the additional capacity provided to passengers by the introduction of the Southern Services on the Brighton Main Line.

Before I indicate my conclusion in relation to the application of Criterion (a), it is right that I also review the submissions of the parties in respect of Decision Criterion (d).

6.5.2 Decision Criterion (d) “*maintaining and improving the levels of service reliability;*”

Under this head, FCC argued strongly that the Offer to Southern represented a genuine risk to train service reliability and pointed out that Network Rail had considered it a sufficiently serious threat to commission a review of the present and proposed Timetables.

NR countered that they did fully recognise the potential impact on performance of the introduction of additional services and had provided an assessment of the impact of the proposed Southern train paths on the overall performance of the 2011 Principal Timetable on the Brighton Main Line. They concluded that whilst performance may worsen in certain circumstances, the overall impact was not so significant as to warrant not including the train paths simply on the basis of Decision Criterion (d).

The weight to be accorded to, respectively, Decision Criteria (a) and (d) is clearly significant in this dispute and I have weighed very carefully the submissions of the parties and the evidence available. I have noted that FCC's own services are preserved. I accept Southern's evidence that the reason the additional Train Slots have been Bid for is with a view to improving the attractiveness of the London to Brighton market by having more frequent trains not by increasing train lengths. I also accept NR's evidence that the potential impact on performance can be mitigated to acceptable levels for each operator. Taking all those matters into account, I prefer the arguments of NR and Southern and conclude that, in my judgment, NR correctly gave greater weight to Decision Criterion (a).

6.5.3 *Decision Criterion (c) "enabling a Bidder to comply with any contract to which it is party (including any contracts with their customers and, in the case of a Bidder who is a franchisee or franchise operator, including the franchise agreement to which it is a party), in each case to the extent that Network Rail is aware or has been informed of such contracts"*

FCC referred to Southern's proposals against their Service Level Commitment ("SLC") for December 2010 as detailed in SLC 2A - Part 2 which currently formed part of the Franchise Agreement between Southern and the Department of Transport. FCC appended an extract from that SLC at Appendix M to their original submission dated 3 August 2010 and commented, quite correctly, that the SLC was not specific about the additional hourly off-peak Train Slots between London Victoria and Brighton. FCC further contended that Southern had insufficient Firm Rights

to support the full extent of the Train Slots Bid and offered and referred in particular to Condition D3.2.1.

NR countered that, if reference is made to Condition D3.2.1(d), those provisions do not require an operator to have Firm Rights prior to submitting their Bid. NR accepted that Rights needed to be properly established prior to the operation of services on the Network.

Southern made the same point in their opening statement at the hearing.

Doing the best I can, bearing in mind that NR gave no evidence as to what particular weight, if any, they gave to this Criterion (c), I take the view that, in the context of these two disputes, it should be given no particular weight when applying the Decision Criteria overall.

6.5.4 Decision Criterion (o) - “taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing”

FCC submitted that material changes to Timetable patterns on routes where there was more than one franchised passenger operator, would inevitably generate movements in the allocation of revenue. They said their initial assessment showed the proposal would have a significant revenue impact on FCC due to the services being abstractive in nature. No figures were put forward by FCC. NR made no specific submissions in relation to the application of this Criterion.

Southern submitted that whilst FCC had not particularised what the commercial effect on them would be, as far as Southern were concerned, the additional Brighton service was assumed within their Bid for the Southern franchise and their revenue and franchise payment profile

assumed the additional service would be operated. Accordingly, in their submission, NR had not misapplied this Criterion (o).

Against that background, the position as I see it is this. FCC have produced no specific evidence of any adverse affect on their commercial interests as an existing operator. NR have not produced any evidence of the extent to which, if at all, they gave any weight to this Criterion (o). In those circumstances, in my judgment, the right approach is to mark it neutral in the application of the Decision Criteria overall.

It follows that, when applying the Decision Criteria, NR were, in my judgment, correct to focus principally on Decision Criteria (a) and (d). Given the analysis which I have carried out in respect of the application of those Criteria (a) and (d) by NR at paragraphs 6.5.1 and 6.5.2 above, I take the view that NR applied those Criteria correctly and, on the evidence, correctly gave greater weight to Decision Criterion (a).

6.5.5 Before I proceed to my determination, it is appropriate that I comment on the conduct of the parties, in particular the conduct of NR and of FCC. As regards NR, they have themselves acknowledged that they handled the consideration of the Bids and the application of the Decision Criteria in a clumsy manner and indeed revisited the initial decision to refuse Southern's weekday Bids and ultimately accepted them by way of acceptance of Southern's Spot Bids. That conduct was unfortunate and they have apologised. The real question remains whether, when ultimately applying the relevant Decision Criteria, namely (a) and (d), they applied those criteria correctly. In my judgment, they did.

As to FCC, it seems to me that whilst their response dated 20 August was helpful in that it particularised their arguments in some detail, it is to be regretted that they did not provide that level of detail in their original submission dated 3 August 2010. Had they done so, those particulars would have been of assistance to Network Rail in preparing their written response in advance of the hearing and indeed might have resulted in the production of more detailed evidence e.g. in relation to financial impact, at the hearing.

That said, all the parties conducted themselves in a constructive and helpful manner at the hearing itself and Panel members and I have done the best we can on the basis of the evidence available.

7 DETERMINATION

Having considered carefully the submissions and evidence as set out in paragraphs 4 and 5 and based on my analysis of the legal issues as set out in paragraph 6

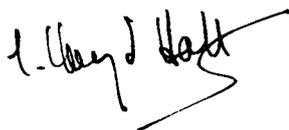
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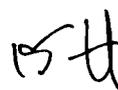
- (i) NR's Offer to Southern for a Train Slot for an 08:13 Brighton to London Victoria service was correct;
- (ii) NR's Offer to Southern of Saturday Train Slots between Brighton and London Victoria was correct;
- (iii) NR's acceptance of Southern's Spot Bid for additional Train Slots on weekdays on the Brighton Main Line was correct.

I confirm that, so far as I am aware, this determination is legally sound and appropriate in form.

Suzanne Lloyd Holt

Hearing Chair

A handwritten signature in black ink, appearing to read "Suzanne Lloyd Holt", with a long horizontal stroke extending to the right.

 September 2010

APPENDIX 1

D3.2.2 Compilation of the First Working Timetable

Network Rail, in consultation with Bidders, will compile a Working Timetable which is in accordance with the following provisions of this Condition D3.2 and which:

- (a) in Network Rail's opinion is capable of being brought into operation;
- (b) takes account of the need to achieve optimal balance between the notified aspirations of each Bidder and the aspirations of Network Rail as expressed in the applicable Rules of the Route and the applicable Rules of the Plan; and
- (c) includes, in respect of the relevant Timetable Period, the Train Slots shown in the Base Timetable, together with the additions, amendments and deletions requested by Bidders in accordance with Condition D3.2.1 so far as reasonably practicable taking into account the complexity of those changes, including any reasonably foreseeable consequential impact on the Working Timetable, and the available time before the end of the Finalisation Period, and having due regard to the Decision Criteria.

D3.2.7 Offer of the First Working Timetable

Network Rail shall, on or before the last day of the Finalisation Period, provide to each Bidder, and to each Qualified Person who has (or on whose behalf another person has) first agreed to pay the reasonable costs of Network Rail in providing that information:

- (a) the Working Timetable which shall show:
 - (i) in respect of Principal Change Date, those Train Slots which Network Rail has decided to include in the Working Timetable commencing on that Principal Change Date; and
 - (ii) in respect of a Subsidiary Change Date, those Train Slots which Network Rail has decided to include in the Working Timetable commencing on that Subsidiary Change Date; and
- (b) details of those Train Slots which Network Rail has decided not to include in the Working Timetable.

D.3.2.8 Acceptance of the First Working Timetable

A Bidder shall, in respect of

- (a) the Working Timetable notified in accordance with Condition D.3.2.7(a); or

- (b) the Train Slots notified in accordance with Condition 3.3.7(b) and any other Train Slots which the Bidder believes should have been notified in accordance with Condition D3.2.7.

within 10 Working Days of receipt of the notification advise Network Rail of any Train Slots which it disputes and will be the subject of a reference to the relevant ADRR Panel. Network Rail's decisions in respect of those Train Slots not so advised by the Bidder shall be deemed to have been accepted by the Bidder and may not be the subject of a reference to the relevant ADRR Panel or the Office of Rail Regulation pursuant to Condition D5.

CONDITION D6 - DECISION CRITERIA

The Decision Criteria consist of the necessity or desirability of the following (none of which necessarily has priority over any other):

- (a) sharing the capacity, and securing the development of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network;
- (b) seeking consistency with any current Route Utilisation Strategy which is either (i) published by the Strategic Rail Authority or the Department for Transport before 31 May 2006, or (ii) established by Network Rail in accordance with its Network Licence;
- (c) enabling a Bidder to comply with any contract to which it is party (including any contracts with their customers and, in the case of a Bidder who is a franchisee or franchise operator, including the franchise agreement to which it is a party), in each case to the extent that Network Rail is aware or has been informed of such contracts;
- (d) maintaining and improving the levels of service reliability;
- (e) maintaining, renewing and carrying out other necessary work on or in relation to the Network;
- (f) maintaining and improving connections between railway passenger services;
- (g) avoiding material deterioration of the service patterns of operators of trains (namely train departure and arrival frequencies, stopping patterns, intervals between departures and journey times) which those operators possess at the time of the application of these criteria;
- (h) ensuring that, where the demand of passengers to travel between two points is evenly spread over a given period, the overall pattern of rail services should be similarly spread over that period;
- (i) ensuring that where practicable appropriate provision is made for reservation of capacity to meet the needs of Bidders whose businesses require short term flexibility where there is a reasonable likelihood that this capacity will be utilised during the currency of the Timetable in question:

- (j) enabling operators of trains to utilise their railway assets efficiently and avoiding having to increase the numbers of railway assets which the operators require to maintain their service patterns;
- (k) facilitating new commercial opportunities, including promoting competition in final markets and ensuring reasonable access to the Network by new operators of trains;
- (l) avoiding wherever practicable frequent Timetable changes, in particular for railway passenger services;
- (m) encouraging the efficient use of capacity by considering a Bidder's previous level of utilisation of Train Slots;
- (n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Rules of the Plan; and
- (o) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.

In its consideration of paragraph (d) of this Condition D6, Network Rail shall not be entitled to determine that its Restrictions of Use of any part of the Network shall be as contemplated by any relevant maintenance contract by reason only of the terms and conditions of that contract. In this paragraph, "relevant maintenance contract" is a contract which Network Rail shall have entered into, or shall intend to enter into, with any person for the maintenance, renewal or the carrying out of any other work on or in relation to the Network.