

Heathrow Airport Limited: response to Hearing Chair's Directions of 8 October 2021 in the timetable dispute: HAL/TTP003

Date: 11 October 2021

Prepared by: Heathrow Airport Limited

Status: Final

1 RESPONSE TO THE DIRECTIONS

- 1.1 HAL welcomes the opportunity to respond to the Hearing Chair's preliminary view in relation to Part D of the Network Code, set out in the Directions and Rule H18(c) Note of 8 October 2021 (the "**Directions**"). References are to paragraphs in the Directions unless otherwise stated.
- 1.2 HAL agrees, that ultimately, the Panel's focus should be on the application of the Decision Criteria in this matter, but HAL does feel that the process that led to that application is important, both in the context of this dispute, and in HAL's determinations of future timetables. To that end, HAL does not share all of the conclusions in paragraph 9 and wishes to record its disagreement as described in this response.

2 HAL'S COMMENTS ON THE CONCLUSIONS IN PARAGRAPH 9 OF THE DIRECTIONS

When HAL made decisions about the proposals made to it

- 2.1 HAL takes issue with the factual conclusion drawn in paragraph 9's first sentence. This appears to be concerned with the position at D-40, given the second sentence. If correct, that first sentence suggests that HAL made decisions about the New Working Timetable in accordance with Condition D2.2, which were contemporaneous with those D-40 submissions.
- 2.2 HAL wonders if the reference to D2.2 should be to D2.4, but in any event, HAL did not make any decisions about the New Working Timetable when MTR submitted its D-40 Access Proposal and HEOC's Rolled Over Access Proposal ("**ROAP**") was made. HAL (or rather Network Rail on its behalf) did not, at the time, progress MTR's D-40 submission or HEOC's ROAP, because HAL (or Network Rail on its behalf) was expecting and working toward the receipt of submissions on 9 July in accordance with the industry agreed Change Strategy. HAL did consider the D-40 submissions later for comparative purposes against the respective 9 July submissions once those were received.

What HAL made decisions in respect of

- 2.3 Further, all decisions HAL actually made about the New Working Timetable, were in reference to the submissions the Timetable Participants made in July 2021, since those were ultimately the services they wished to operate from December 2021. As explained in paragraphs 6.2 and 6.3 of the HAL Assessment, those 9 July submissions were not, to differing degrees, the same as the D-40 equivalents.

Consideration of the entire Part D process and all proposals made

- 2.4 The third sentence of paragraph 9 appears to suggest that, even if it cannot be said that the Timetable Participants submitted Access Proposals of equal priority at D-40, then, in any event, they submitted bids of equal priority and similar status on 9 July. On that basis, as paragraph 10 says, the Panel's focus should then be on HAL's application of the Decision Criteria. HAL finds the consequences of this conclusion problematic. If, as paragraph 6 provides, the Panel must necessarily determine whether HAL has followed the Part D process, then HAL would respectfully suggest that that duty extends to all relevant parts of that process, including the process before the Decision Criteria is applied.

The D-40 submissions

- 2.5 As a lead-in to paragraph 9, HAL agrees with the conclusions reached in paragraph 8. HAL agrees, as stated in paragraph 9, that the Timetable Participants' proposals at D-40 had equal priority, and that Access Proposals that Exercise a Firm Right and so require an element of proactivity, do not 'trump' ROAPs which do not require such proactivity. If the Timetable Participants made no further submissions to HAL in the timetable development period, HAL would agree that the focus should immediately turn to the

application of the Decision Criteria. But further submissions were made, and HAL believes they cannot be ignored. Equally, whether or not the conclusion drawn in the second sentence of paragraph 9 is correct, HAL does not believe the D-40 submissions can be ignored either.

- 2.6 If correct that no submissions can be ignored, the question then is what the Network Code considers them to be. For HAL, the answer to that question starts with what they were not. First, although ROAPs can have the same status as Access Proposals, they cannot be Access Proposals, so two different submissions were effectively made to HAL at D-40, albeit of equal status. Second, Condition D2.4.3 makes clear that Access Proposals can be submitted, or revised at any point up to D-26, whereas ROAPs can only be made at D-40. That means that a proposal submitted after D-26 cannot be either a ROAP or an Access Proposal. For this reason, as D-26 fell on 13 June 2021 in relation to the New Working Timetable, HAL believes that MTR's and HEOC's 9 July submissions cannot then be either Access Proposals or ROAPs.

The 9 July submissions

- 2.7 If HAL cannot ignore timetable submissions made to it under the terms of the Network Code, and the 9 July submissions can neither be ROAPs, nor Access Proposals given the D-26 cut off for the making of them, HAL believes the Network Code must give them another status. In HAL's opinion, the only other possibility that the 9 July submissions can be, is Train Operator Variation Requests, assuming they cannot qualify as Timetable Variations by Consent.
- 2.8 HAL therefore takes a different view as to what a Train Operator Variation Request might vary from what the last sentence of paragraph 9 concludes. Both Timetable Participants submitted proposals on 9 July in full knowledge that the New Working Timetable had not yet been published and would not be published until D-15 under the Change Strategy. HAL accepts that HEOC may not have shared the following thought process because it may not have appreciated at D-40 that it had made a ROAP, but in the case of MTR, HAL presumes, that MTR was fully aware that its own 9 July submission changed certain aspects of its D-40 one, without the New Working Timetable being published, or indeed what the unpublished one might already contain. HAL suggests then, that MTR must have submitted its 9 July submission in order to vary the Train Slots in its D-40 submission and not the New Working Timetable. If correct, it follows when a Timetable Participant makes a Train Operator Variation Request, that such a request can be in respect of the Train Slots in a prior related Access Proposal, or indeed ROAP, whether or not yet reflected in an unpublished New Working Timetable, never mind a published one.

Conclusion

- 2.9 The Panel may feel that the issues in HAL's Response, and in this note, about the status of the submissions HAL received, are secondary to the question of HAL's application of the Decision Criteria, because that application ultimately decided the outcome in this matter. However, for HAL, the situation that arose in relation to the development of the New Working Timetable, which preceded that application, is likely to recur, and it does not have the resources available to it to deliberate the complex issues that may arise as a result each time. HAL would therefore very much welcome the Panel providing some clarity on the correct status under the Network Code of the submissions HAL received, as a guide for future reference.
- 2.10 In conclusion, HAL effectively received two submissions at D-40 and received two on 9 July. All four were duly submitted in accordance with the terms of the Network Code, even if they were not necessarily knowingly submitted in accordance with those terms in each case. The Directions do not touch on how it might be possible for HAL to disregard any submission made to it in accordance with the terms of the

Network Code, but HAL believes each of the four submissions had a status as far as the Network Code is concerned, and it therefore does not think any of them can be disregarded.

- 2.11 On HAL's reading of the Network Code, the 9 July submissions cannot be anything other than Train Operator Variation Requests because: (i) they varied Train Slots in the Timetable Participants' earlier submissions, and (ii) they were submitted after D-26, and the Network Code defines such requests only by reference to that date and variations they give effect to. If that interpretation throws up practical difficulties in the management of two conflicting Train Operator Variation Requests (as is the case in this dispute), then HAL respectfully submits that that is when a common sense view must be taken.

3 HAL'S RESPONSE TO THE QUESTIONS FROM THE PANEL

- 3.1 This paragraph 3 sets out HAL's response to the Chair's questions in the Directions, which required answering by 1700 on Monday 11 October 2021.

Paragraph 11:

"I would ask that HAL confirm by no later than 1700 on Monday 11 October which timetable was considered the Prior Working Timetable and within that timetable how many tph HEOC and HAL ran into Heathrow T5."

- 3.2 The Prior Working Timetable was the May 2021 Working Timetable.
- 3.3 HAL and HEOC are separate entities. Whilst HEOC is a subsidiary of HAL, there is functional separation between HAL, which is the Infrastructure Manager, and HEOC, which is a TOC. HAL does not operate any train services and so did not operate into Heathrow T5 under the Prior Working Timetable.
- 3.4 Under the Prior Working Timetable, HEOC operated 4tph to Heathrow T5 throughout the day, seven days a week.

Paragraph 12:

"I would also ask HAL to confirm by no later than 1700 on Monday 11 October that its Appendix 1 to HAL/TTP002 remains correct."

- 3.5 Yes, HEOC's access rights remain the same as set out in the extract from HEOC's TAA, included at Appendix 1 to HAL TTP/002.

Paragraph 13:

"If the Parties do not accept that the position is as I have set out, it would assist the Panel if any Party which does not agree would provide the Panel with succinct written submissions on this point by no later than 1700 on Monday 11 October."

- 3.6 HAL's submissions on the Panel's conclusions are set out in Sections 1 and 2 above.

Paragraph 25:

"In addition, by no later than 1700 on Monday 11 October the Panel wishes to see the most recent available data (current, rather than pre-Covid) which shows the breakdown of the proportion of rail passengers travelling to and from Heathrow Airport as a stopping service as distinct from a direct service, by origin and destination station if available. If it is available the

Panel wishes to have the most recent available data (current, rather than pre-Covid) which shows the number and proportion of passengers who travelled by train to work at Heathrow Airport (rather than for business-related travel)."

- 3.7 HAL does not hold the information broken down by reference to the data requested, and it does not survey passengers as to the purpose of their journey. HAL does have data that shows HEOC's services to the Airport have a higher modal share than MTR's, although this is incomplete data, because not all journeys are picked up by ticket machines or gates. But given Rule 56 of the ADR Rules, HAL does not believe it is its place to disclose that data, since it primarily concerns the HEOC and MTR businesses, without an agreement from all parties in accordance with Rule 55 of the ADR Rules, to keep what is commercially sensitive passenger data confidential and to not publish it on the ADR website. Alternatively, we respectfully suggest that the Panel may wish to request that MTR and HEOC provide their passenger information.

Paragraph 29:

"The Hearing Chair understands that at the request of Heathrow Airport Limited a meeting between the Parties and the Industry Timetable Assurance Programme Management Office (PMO) is likely to take place during the day on Friday 8 October. The Parties are reminded of their obligation to conduct themselves in good faith with the objective of resolving the dispute. Without making any concession to the PMO's formal lack of standing in this process, should the Parties have any update which they wish to submit in connection with this meeting they are asked to provide it by no later than 1700 on Monday 11 October."

- 3.8 The parties met on 8 October 2021 on a without prejudice basis, with the PMO, Network Rail, First Greater Western and the Department for Transport, to discuss their respective positions and to consider any possible resolutions. The PMO took notes of the meeting, which both HAL and MTR would be willing to release to the Panel, subject to the agreement of the other attendees. That agreement has been sought, and if it is forthcoming before the Panel hearing on 13 October, HAL will provide copies, failing that, as soon as possible thereafter.

**Heathrow Airport Limited
11 October 2021**