

Heathrow Airport Limited: response to MTR Sole Reference Submission in the timetable dispute: HAL/TTP003

Date: 6 October 2021

Prepared by: Heathrow Airport Limited

Status: FINAL

1 DETAILS OF PARTIES

The names and addresses of the parties to the reference are as follows:

- (a) MTR Corporation (Crossrail) Limited whose Registered Office is at Providence House, Providence Place, London, N1 0NT, ("**MTR**" or the "**Claimant**");
- (b) Heathrow Airport Limited whose Registered Office is at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("**HAL**" or the "**Defendant**");
- (c) Heathrow Express Operating Company Limited whose Registered Office is at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("**HEOC**"); and
- (d) Network Rail Infrastructure Limited whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("**Network Rail**").

2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant's Sole Reference includes:

- (a) confirmation, or qualification in paragraph 3.2 below, that the subject matter of the dispute is as set out by the Claimant in its sole reference dated 29 September 2021 (the "**Sole Reference**"), cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with;
- (b) a detailed explanation of the Defendant's arguments in support of its position on those issues where it disagrees with the Claimant, including references to documents, correspondence, determinations or contractual provisions not dealt with in the Claimant's Sole Reference;
- (c) any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute;
- (d) the decisions of principle sought from the Panel in respect of:
 - (i) legal entitlement, and
 - (ii) remedies; and
- (e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

- 3.1 The substance of the dispute is broadly as set out in the Sole Reference, and relates to the New Working Timetable for December 2021 (the "**New Working Timetable**") for the routes between London Paddington mainline station ("**London Paddington**") and the station at Terminal 5 of Heathrow Airport ("**Terminal 5**").
- 3.2 In relation to the subject matter of the claims brought by MTR in paragraph 4 of the Sole Reference, HAL's position is set out below:
 - (a) paragraphs 4.1 and 4.2 are agreed, except that HAL does not accept the characterisation by MTR in paragraph 4.2 that HAL decided 'not to honour MTR's Firm Rights [to] Terminal 5';

- (b) paragraph 4.3 is not agreed. HAL has made clear to MTR and HEOC through the notification of the published New Working Timetable by Network Rail (see Appendix 5 of the Sole Reference) and HAL's notification of the assessment issued by HAL to MTR and HEOC on 9 September 2021 (the "**HAL Assessment**"), that HAL has:
 - (i) followed the requirements of Condition D4.2 of Part D of the HAL Network Code (the "**Network Code**") in the development of the timetable; and
 - (ii) varied MTR's Firm Rights to Terminal 5 by correctly applying the Decision Criteria in accordance with Condition D4.6 (see Appendix 9 of the Sole Reference);
- (c) paragraphs 4.4.1 to 4.4.4 are agreed, except it is not agreed in paragraph 4.4.2, that the impact of the 'Future Timetable Change Strategy – Intervention Windows process' (the "**Change Strategy**") on the Network Code was communicated to operators in an unclear way, and that neither HAL nor Network Rail appear to be clear between themselves on that issue;
- (d) paragraph 4.4.5 is agreed as a high level description of MTR's request for access, but HAL would point the ADC Panel to paragraph 6.2 of the HAL Assessment as a summary of the substantive timing differences between MTR's 5 March 2021 and 9 July 2021 submissions;
- (e) paragraph 4.4.6 is agreed in relation to the description of the situation at Heathrow Terminal 4 ("**Terminal 4**"), but, HAL is unclear what the Change Strategy process referred to therein is said by MTR to be subsequent to, and it is not agreed that HAL was party to the discussion referred to therein (see Appendix 8 of the Sole Response). HAL was not invited;
- (f) paragraph 4.4.7 is agreed, except that HAL did not agree during the discussions identified in paragraph 4.4.6 as suggested, for the reason referred to in paragraph 3.2(e)(ii) above:
 - (i) to the termination/and start (cut back) of two tph between London Paddington and Terminal 4 at Hayes & Harlington (the "**Hayes & Harlington Decision**"); or
 - (ii) that there would be any protection of MTR's capacity in the meantime;
- (g) paragraph 4.4.8 is agreed, except HAL did not offer the capacity referred to in paragraph 4.4.8(a) thereof as the infrastructure that capacity refers to, is not part of the HAL infrastructure. That offer was made by Network Rail in accordance with the Hayes & Harlington Decision;
- (h) paragraph 4.4.9 is agreed, except that, HAL does not agree that it failed to honour MTR's Firm Rights to Terminal 5 during weekdays before 20:00. It is incorrect to say those rights were diverted instead to Terminal 4. From HAL's perspective, the Firm Rights to Terminal 4 that MTR wished to Exercise, comprising two services per hour, were duly included in the New Working Timetable, as confirmed by paragraph 4.4.8(c) of the Sole Reference. MTR did not Exercise the remaining Firm Rights it possessed of a further two services per hour to Terminal 4, because it took the Hayes & Harlington Decision;
- (i) paragraph 4.4.10 is agreed, except the last two sentences thereof regarding the sharing of information during the timetable development process, and HAL's application of the Decision Criteria and the sharing of capacity; and
- (j) paragraph 4.4.11 and the documents referred to therein, are noted.

4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE

Whether or not the timing in the Change Strategy or the Network Code applied

- 4.1 MTR states in paragraph 5.1.1 of the Sole Reference, that such was its uncertainty as to whether the timings in the Network Code had been formally amended by the Change Strategy, it submitted a proposal on the D-40 Priority Date as a precaution. This, despite being directly involved with Network Rail and other industry participants in the discussions around the Change Strategy – see the Network Rail emails to MTR's train planning representatives, among other industry participants (Appendices 1 and 2).
- 4.2 Despite MTR's apparent uncertainty at the time it submitted the D-40 proposal, it concludes in paragraph 5.3 of the Sole Reference, that Part D of the Network Code should be considered in light of the Change Strategy and the parties' adherence to the timings it introduced, and not the timings in the Network Code. MTR seems to reach this opinion simply because, it asserts, to do otherwise would be '*inconsistent with the parties' actions*' and produces '*an illogical outcome*'. Yet MTR offers no explanation for the inherent inconsistency of reaching that conclusion with the fact that MTR also chose to act in accordance with the timings in the Network Code, or the fact that the Network Code was not formally changed.
- 4.3 Despite originally believing that all relevant parties would be working to the alternative timings introduced by the Change Strategy, once (i) each Timetable Participant followed different timings for seeking access to the HAL infrastructure, and (ii) it became apparent that HAL could not accommodate both of their proposals in relation to Terminal 5 or find a way to resolve the capacity constraints at London Paddington and so Terminal 5, HAL concluded that, in the interests of fairness, it needed to consider whether or not the timings in Part D of the Network Code had in fact been changed, and what the consequences were.
- 4.4 HAL remains of the view that, on balance, the Network Code had not been formally amended and that consequently, the timings in the Network Code continued to apply, having regard to:
- (a) the process for establishing the New Working Timetable set out in Part D of the Network Code, which the ORR confirmed must be followed in paragraph 137 of the ORR appeal decision in respect of TTP1331 and TTP1376 (see Appendix 3);
 - (b) the fact that the requirements of clause 18.2.1 of the Track Access Agreements between HAL and MTR and HAL and HEOC and of Part C (Modifications to the HAL Network Code) of the Network Code (see Appendix 11 of the Sole Reference) were not followed in adopting the timings in the Change Strategy;
 - (c) the views of the Timetabling Panel in the prior dispute between the parties (TTP002) (the "**November 2020 Determination**") (see Appendix 4), particularly those in paragraphs 55 to 57 thereof regarding the focus on the legal entitlement of the parties alone; and
 - (d) the reinforcement of the Panel's view by the Secretary to the Access Disputes Committee in email to all Resolution Service Parties on 13 April 2021 (see Appendix 5).
- 4.5 HAL does not therefore agree with MTR's statement in paragraph 5.1.3 of the Sole Reference, that it was HAL's belief MTR's D-40 submission should be disregarded for the purpose of this dispute. Paragraphs 4.1 and 4.2.1(a) of the HAL Assessment actually said that HAL should

- disregard any timetable submissions that pre-dated the revised Priority Date introduced pursuant to the Change Strategy, only if the timings in the Network Code had been discarded in favour of those in the Change Strategy. Given HAL's belief that, on balance, the timings in the Network Code continued to apply, it would follow that HAL actually concluded that it should do precisely the opposite.
- 4.6 Regardless of the ultimate findings in this dispute, HAL considers the question as to whether the timings in the Change Strategy or the Network Code applied, to be an important reference point for future engagement with Timetable Participants. HAL therefore invites the ADC Panel to also deliberate on the question having regard to its precedent value, in keeping with the sentiment set out in paragraphs 95(d) and (e) of the ORR appeal decision on TTP1331 and TTP1376 (see Appendix 3):
- 4.7 In paragraph 5.2.2 of the Sole Reference, MTR states that applying the timings in the Network Code to the timetable development, would produce an illogical outcome. HAL does not agree that an illogical outcome results from applying those timings.
- 4.8 First, MTR claims in paragraph 5.2.2(a) of the Sole Reference, that that illogicality is shown by HEOC's failure to submit an Access Proposal at D-40. HAL sees no illogicality in this. Whatever the reasons for HEOC not submitting an Access Proposal at D-40, the Network Code provides for the Exercise of Firm Rights by way of a Rolled Over Access Proposal.
- 4.9 Second, while MTR appears to agree with HAL that if the timings in the Network Code applied, the 9 July submissions by MTR and HEOC must be treated as Train Operator Variation Requests (each a **"TOVR"**), given the New Working Timetable was not published at D-26, it goes on to say that those 9 July proposals cannot in fact be treated as TOVRs because Condition D3 assumes that the New Working Timetable is published at D-26. HAL agrees with MTR in the sense that, in the ordinary course, a TOVR would most likely be issued in response to a published New Working Timetable, and that there is a requirement to publish the New Working Timetable at D-26 (Condition D2.7.1).
- 4.10 However, the wording in Part D appears to contemplate the possibility during the relevant timetable period, of a TOVR being issued before any timetable publication. The New Working Timetable is not defined in Condition D.2.1.6 by reference to D-26. It is the timetable that applies throughout the relevant timetable development period, including before it is published.
- 4.11 Insofar as it is relevant to this dispute, a Train Operator Variation is a wish to vary the New Working Timetable in one or more of the ways set out in Condition D3.1.1. Condition D3.1.1 provides that a Train Operator Variation can be made from D-26 and during the relevant Timetable Period, but it does not specify whether the relevant New Working Timetable has been published or not. Condition D3.3.1 establishes that a TOVR is a written expression of a Train Operator Variation.
- 4.12 Condition D3.3.3 suggests that a Timetable Participant can submit a TOVR at any point from D-26, regardless of whether the New Working Timetable has been published. This was affirmed in paragraph 62 of the November 2020 Determination (see Appendix 4). Such affirmation was given in circumstances where the New Working Timetable had also not been published at D-26.
- 4.13 Issues in reaching a conclusion that MTR and HEOC both submitted TOVRs on 9 July, are acknowledged in paragraph 6.4 of the HAL Assessment. Condition D3.3.7 does not contemplate,

as is the case in this dispute, the possibility of deemed acceptance of two contemporaneous yet conflicting TOVRs, despite the New Working Timetable not being published. HAL recognises that this creates a practical difficulty of the kind contemplated by the Timetabling Panel in paragraph 67 of the November 2020 Determination (see Appendix 4).

- 4.14 HAL agrees with the Timetabling Panel that this area of the Network Code must be looked at, as well as the propensity for late publication of New Working Timetables (paragraph 33 of the November 2020 Determination (see Appendix 4) and paragraph 134 of TTP1331 and TTP1376 (see Appendix 3) refer)). But in this context, each of HAL, Network Rail and the Timetable Participants knew from previous timetable development discussions (confirmed in the HAL letters to them of 8 August 2021 (copied to Network Rail) (see Appendix 3 of the Sole Reference and Appendix 6)), that it was not possible for HAL to accommodate both Timetable Participant's Firm Rights to Terminal 5 in the prevailing capacity-constrained circumstances.
- 4.15 HAL therefore considers that the logic of the limitation in Condition D3.3.7(a), which prevents deemed acceptance where conflict arises with the published New Working Timetable, must be extended to the unpublished version. Rather than being illogical, this appears to HAL to be the only logical outcome once it is established that the Network Code timings applied and so MTR and HEOC submitted TOVRs on 9 July.
- 4.16 Despite not articulating this in the HAL Assessment, in light of the uncertainties the Change Strategy, MTR's D-40 submission, and the interpretative challenges referred to in paragraph 4.3 above that that submission gave HAL, also considered whether it should properly treat MTR's and HEOC's 9 July submissions as Timetable Variations by Consent under Condition D3.6.1. After consideration, HAL took the view that this was not the case, for the reasons set out below.
- 4.17 It might be said that the 9 July submissions are Timetable Variations by Consent because they were made and received pursuant to the Change Strategy and so outside the process under Condition D3. In so doing, each of MTR, HEOC and HAL effectively consented to the variations contained in those submissions. But Condition D3.6.1 appears to require the written consent of HAL and all affected Timetable Participants to the Timetable Variations contained in any Timetable Variation by Consent. Since each 9 July submission clearly impacted on the 9 July submission of the other Timetable Participant, both Timetable Participants could be said to be affected, and therefore their consent would be needed to each other's proposals.
- 4.18 The responses to HAL's letters of 8 August (see Appendix 3 of the Sole Reference and Appendix 6 respectively) from MTR of 13 August 2021 (see Appendix 4 of the Sole Reference) and HEOC of 12 August 2021 (see Appendix 7), made plain that if HAL had asked each Timetable Participant to consent to the 9 July submission of the other, that consent would not have been forthcoming. HAL therefore discounted the notion that the 9 July submissions could be said to be Timetable Variations by Consent.

The taking and notification of HAL's decision in respect of the New Working Timetable

- 4.19 MTR asserts at paragraph 5.6.1 of the Sole Reference, that HAL failed to achieve the Objective specified in Condition 4.6.1, and at paragraph 5.6.2, that capacity to Terminal 5 has not been shared at all and appears to be exclusively reserved for HEOC. The inference when read together,

is that HAL has failed to achieve the Objective because capacity to Terminal 5 has not been shared in the way that MTR wishes.

- 4.20 HAL rejects that characterisation. The Objective, as stated in Condition D4.6.1, is to share capacity on the HAL infrastructure, not just Terminal 5. As HAL has granted MTR access to the HAL infrastructure so that its services can continue to call at the CTA Station (given the current suspension of use by rail passengers of Terminal 4), as a simple matter of fact, HAL has met the Objective insofar as it concerns the question of sharing capacity on the HAL infrastructure.
- 4.21 MTR states in paragraph 5.6.2 of the Sole Reference, that it believes there is sufficient capacity to allow for a shared set of services to Terminal 5, and that this is borne out by the HAL Network Statement. The Framework Capacity Statement (see Appendix 8), referenced in the HAL Network Statement, describes the capacity of the HAL infrastructure in ordinary circumstances to inform potential access beneficiaries about its capability. It does not specify that capacity in the context of the current situation at Terminal 5, or in relation to any other restriction for that matter, such as a Restriction of Use. If HAL had taken its decision by reference to the capacity in the Framework Capacity Statement and the timetables both Timetable Participants wished to operate on that infrastructure, the resulting timetable would not be deliverable. In short, HAL could not ignore the capacity constraint at Terminal 5 in making its decision for the New Working Timetable, so HAL is unclear as to the value of referencing the HAL Network Statement.
- 4.22 MTR refers in paragraph 5.7.1 of the Sole Reference, to the fact that the HAL Assessment was not provided prior to publication of the New Working Timetable or during the timetable decision making-process for the December 2021 New Working Timetable. It goes on to argue in paragraph 5.8.1 of the Sole Reference, that the timetabling process HAL has followed does not meet the contractual and regulatory standard of conduct reasonably expected of it.
- 4.23 HAL rejects that contention. While HAL accepts that the New Working Timetable was not published in accordance with the timing requirements specified in the Network Code, it was published in accordance with the timing requirements established by the Change Strategy, something HAL understands MTR agreed at the time to go along with, and, as per paragraph 5.3 of its Sole Reference, apparently believes all concerned should be held to.
- 4.24 HAL began documenting its thinking in relation to the December 2021 New Working Timetable before that timetable was published by Network Rail on HAL's behalf, but unfortunately HAL was unable to publish that thinking by the time Network Rail published that timetable. This was a function of the following:
- (a) as expressed in paragraph 3.2.1 of the HAL Assessment, the considerable challenges presented to HAL, of MTR submitting two separate proposals by reference to two separate industry processes;
 - (b) in the interests of being fair to each Timetable Participant, the additional time required to evaluate and then articulate the evaluation of both MTR proposals and those of HEOC, their status and the way in which it was considered the Network Code applied to them;
 - (c) arising out of that evaluation, the dependency on Network Rail, which was embroiled in the publication of the timetable for the Wider UK Rail Network, to assess whether there

were any differences between MTREL's D-40 submission and its 9 July submission, and HEOC's Rolled Over Access Proposal and its 9 July submission; and

- (d) HAL's continued efforts to try and resolve the capacity issues at London Paddington, and in turn at Terminal 5. HAL understands from Network Rail, that the issue at London Paddington involves First Greater Western continuing to bid for its full timetable in order to retain paths into and out of London Paddington during COVID, then the resulting services, which are not advertised to the public, being cancelled. This, while understandable, is done to avoid the large task of having to revalidate the timetable. But, HAL would much prefer to not have its infrastructure constrained in the way it currently is for what is essentially an administrative convenience. HAL has therefore made more than one attempt to solve this problem with Network Rail both before and after publication of the New Working Timetable, considering that there was a decent prospect of achieving an amicable solution. For that reason, HAL waited until it had exhausted its efforts before publishing its justification for its decision.
- 4.25 However, despite publishing HAL's thinking after the publication of the New Working Timetable, its arguments in the HAL Assessment that apply the Decision Criteria, are well rehearsed with MTR, including in HAL's application of the Decision Criteria applied to the May 2021 Working Timetable, shared with MTR on 19 January 2021. See Appendix 9.

HAL's conduct

- 4.26 In paragraph 5.4.3 of the Sole Reference, MTR points to the duties and powers HAL has in Condition D4.2 and D4.6, as well as duties in the MTR Track Access Agreement that are akin to those in Network Rail's network licence. MTR makes various accusations as to HAL's conduct, including asserting in paragraph 5.8.1 of the Sole Reference, that HAL's conduct did not meet either the contractual or regulatory standard required of it.
- 4.27 MTR is not specific as to which of duties or powers, or standards of conduct HAL has allegedly fallen short of, beyond those that are perhaps inherent in Conditions D4.2 and D4.6. But Condition D4.2.2 requires HAL to endeavour wherever possible to comply with all Access Proposals submitted to it appropriately, and accommodate all Rolled Over Access Proposals, subject to certain principles. Which it did. The duty in clause 6.6 of the MTR Track Access Agreement, requires HAL to operate its infrastructure with the intention of satisfying service providers' and TfL's reasonable requirements. HAL has operated with that intention as it is in its interests to try to maximise the number of passenger services that run to the Airport, which its offer provides for. HAL believes it met its obligations under Condition D4.2.2 and clause 6.6 of the MTR Track Access Agreement by:
- (a) doing everything it could to accommodate both MTREL's and HEOC's proposals in relation to Terminal 5, including taking steps before and after the publication of the New Working Timetable to try and resolve the platform constraints at London Paddington, and in turn Terminal 5 (see paragraph 4.24(d) above);
 - (b) actively considering whether to designate Terminal 5 as Congested Infrastructure, as referred to in paragraph 4.4.5 of the Network Statement (see Appendix 20 of the Sole Reference); and

- (c) inviting each Timetable Participant to forego their conflicting access requests to Terminal 5 for the benefit of the other, in the hope of finding an amicable solution.
- 4.28 MTR reserves particular criticism of HAL's conduct, as being allegedly unfair and discriminatory, specifically, paragraphs 5.5.2, 5.5.8, 5.6.4, 5.7.3 and 5.8.1 of the Sole Reference.
- 4.29 None of MTR's arguments in the Sole Reference present any actual evidence of unfairness and discrimination. Rather, MTR appears to have characterised a decision that it does not like as having the appearance of being unfair and discriminatory. The argument seems primarily based on optics derived from what MTR characterises as the almost exclusive focus in the HAL Assessment on arguments that support HEOC's proposal. HAL's responses in that regard are set out in paragraphs 4.31 to 4.35 below.
- 4.30 Even if it is found that, in making its decision, HAL failed to achieve the Objective or it has incorrectly applied the Considerations or given undue weight to any of them, it does not automatically follow that the decision taken was unfair or discriminatory. The ORR affirmed in paragraph 40 of the appeal of TTP1064 (see Appendix 10) in relation to an accusation of '*serious procedural or other irregularity*', that such a conclusion is not automatic and the party claiming such a failing, must provide evidence to support the claim. HAL agrees with the ORR's sentiments, and contends in this dispute, given the seriousness of accusations of the kind made by MTR, a high evidential bar must be met, which MTR has fallen a long way short of.

The application of the Decision Criteria

- 4.31 MTR's allegations regarding unfairness and discrimination appear based on HAL's documentation of its application of the Decision Criteria, citing an apparent focus almost exclusively on arguments that are supportive of HEOC's case, not setting out arguments in favour of both proposals, lacking balance, and not including a proper consideration of sharing Terminal 5 capacity.
- 4.32 The HAL Assessment represents the distillation of HAL's conclusions in applying the Decision Criteria. In that regard, it sets out the conclusions that HAL considered determinative in reaching its decision. It found in its consideration that HEOC's proposal better met the Objective or better met the relevant Consideration, or MTR's proposal was merely abstractive, with any benefits MTR's proposal might bring, being offset or more than offset by the adverse impact to HEOC's proposal or other relevant consideration (such as operational performance or safety).
- 4.33 In doing so, HAL did not fail to consider the benefits associated with either proposal, as MTR suggests is the case. Those benefits are well understood. HAL has had discussions with MTR and TfL over a number of years about the merits of MTR operating services to the Airport, as the documents contained in Appendices 14 and 15 of the Sole Reference evidence. For this reason, HAL did not consider it necessary during the timetable development period for the New Working Timetable, to make further enquiry of MTR in order to identify those benefits. The same is true of HEOC and the benefits of its services operating to the Airport.
- 4.34 HAL did not consider it reasonable or necessary to document the minutiae of the pros and cons of the proposals. Instead, it confined itself to documenting only the determinative conclusions. To do otherwise, would be disproportionate and make the decision document unworkable. For example, MTR has included six documents (see Appendices 14 to 19 of the Sole Reference) which it claims supports its submission in applying the Decision Criteria. These total some 336 pages.

HAL believes it unlikely MTR considers all of the content to be specifically relevant. However, they are suggestive that MTR expects HAL to set out detail at scale. If such an approach was taken for one Timetable Participant, it must be taken for any other. This could result in the Decision Criteria document being of extraordinary length, which would be unworkable.

- 4.35 The sense that a degree of proportionality must play a part in the application of the Decision Criteria, is borne out in the conclusions set out in paragraph 34 of the Timetabling Panel's determination TTP1610 (see Appendix 11). This says that questions of proportionality arise in applying the Decision Criteria. HAL contends that questions of proportionality also arise in relation to documenting any decision HAL makes in the application of the Decision Criteria.
- 4.36 Appendix 12 sets out HAL's responses to the specific criticisms made by MTR in relation to HAL's application of the Decision Criteria.
- 4.37 MTR states in paragraph 5.7.5 of the Sole Reference, that it notes that HAL has not considered '*that there is any environmental impact and has therefore not applied this particular Consideration in any detail.*' MTR goes on to note that it believes this is wrong and considers that of great importance to MTR's argument. It points to Appendices 14 to 18 of the Sole Reference as providing evidence of the need for modal shift to rail and other forms of public transport. It asserts that there are strong environmental benefits associated with the MTR proposal.
- 4.38 HAL does not dispute that there are environmental benefits associated with the MTR proposal, but MTR appears to have misunderstood the basis on which HAL carried out its analysis. MTR appears to suggest that HAL did not have regard to this Consideration at all. That is incorrect. The question HAL asked itself in the context of the mitigative effects (if any) on the environment, was whether this Consideration was determinative as between the operation of (i) four HEOC express services to Terminal 5 or (ii) two HEOC express services to Terminal 5 and two MTR stopping services to Terminal 5. HAL found that it was not as there was no clear evidence that the MTR services would be any more or less mitigative than the HEOC ones they would replace. In other words, HAL found this Consideration to be neutral in making its decision.

The Hayes & Harlington Decision

- 4.39 While not the subject of this dispute, HAL feels the Hayes & Harlington Decision does run counter to much of the arguments MTR makes around the benefits of its proposed Terminal 5 services. It is not clear as to how it can be said that the Hayes & Harlington Decision was taken in the best interests of the rail industry as claimed. HAL is not aware of any operational benefits of doing so, and in fact it may come with some operational disbenefits for MTR.
- 4.40 The Hayes & Harlington Decision is contrary to HAL's preference for MTR to continue operating services to the CTA Station pending Terminal 4's reopening, thereby maximising the number of services to the Airport. And it cannot be in the best interests of passengers who wish to get to the Airport. It diminishes the integrated system of transport to and from the Airport and connectivity, discourages modal shift and reduces choice for passengers. All considerations that are indirectly adverse to the best interests of the rail industry, and so directly oppose the outcomes which MTR argues it is advocating for in seeking to include its Firm Rights to Terminal 5.

Why the arguments raised in this paragraph 4 taken together, favour the position of the Defendant

- 4.41 HAL accepts that its decision regarding the New Working Timetable resulted in MTR not being able to operate its desired services. However, HAL was required to make a decision because of capacity constraints at London Paddington, something over which it has no control.
- 4.42 HAL has taken all steps to ensure that its decision regarding the December 2021 Working Timetable was made in accordance with the Network Code, including taking that decision in an objective, fair and non-discriminatory manner. As such, MTR's challenge is unfounded.
- 4.43 HAL submits that there are no grounds to support a finding that its decision:
- (a) lacks balance, was unfair or discriminatory;
 - (b) gave consideration to irrelevant Considerations, failed to consider relevant Considerations, or gave undue weight to any it considered relevant; or
 - (c) failed to meet the contractual or regulatory standard of conduct reasonably expected of HAL, whether in relation to efficiency, timeliness, skill, fairness and non-discrimination.

5 DECISION SOUGHT FROM THE PANEL

HAL requests that the Panel:

- (a) does not direct HAL to accept MTR's request to exercise Firm Rights of two trains per hour to Terminal 5 in the New Working Timetable, as there is no capacity for this request to be accommodated during the December 2021 Working Timetable;
- (b) determines that HAL has followed the appropriate process under the provisions of the Network Code, or in the alternative, under the Network Code as amended by the Change Strategy, and in either case, directs in accordance with Condition D5.3.1(b) of the Network Code, that HAL's decision in relation to the New Working Timetable stands, also making a declaration in relation to the question described in paragraph 4.6 above; and
- (c) determines that HAL has acted fairly and in a non-discriminatory manner having correctly applied the Decision Criteria.

6 APPENDICES

The Defendant confirms that it has complied with Access Dispute Resolution Rule H21.

7 SIGNATURE

For and on behalf of

Heathrow Airport Limited

Signed



Print Name: *GAVIN PAYNE*

Position: *DIRECTOR OF ENGINEERING & BAGGAGE*

APPENDICES

- Appendix 1** Email from Network Rail dated 3 December 2020 to industry timetable planning teams, attaching Future Timetable Change Strategy and related documents
- Appendix 2** Email from Network Rail dated 19 April 2021 to industry timetable planning teams, updating certain dates in the Future Timetable Change Strategy
- Appendix 3** ORR Determination of TTP Determination TTP1331 and 1376
- Appendix 4** TTP Determination TTP002
- Appendix 5** Email from Access Disputes Committee Secretary dated 13 April 2021 to Resolution Service Parties
- Appendix 6** Letter from HAL to HEOC dated 8 August 2021 re New Working Timetable for December 2021
- Appendix 7** Letter from HEOC to HAL dated 12 August 2021 re New Working Timetable for December 2021
- Appendix 8** Framework Capacity Statement
- Appendix 9** Decision Criteria notified by HAL to MTR on 19 January 2021 re May 2021 New Working Timetable
- Appendix 10** ORR Determination of TTP Determination TTP1064
- Appendix 11** TTP Determination TTP1610
- Appendix 12** Application of Decision Criteria re New Working Timetable December 2021, incorporating MTR's Sole Reference comments and HAL's responses thereto
- Appendix 13** ORR RIG-20130-06 Policy Statement: CSM for Risk Evaluation and Assessment
- Appendix 14** Recent Performance Data on the HAL infrastructure