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## ACCESS DISPUTE ADJUDICATION

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### Determination in respect of dispute reference ADA07 (following a hearing held at 1 Eversholt Street, London on 8 August 2011)

#### The appointed Adjudication Panel ("Panel")

Peter Barber	Hearing Chair
Andrew Cope	Industry Advisor
Bill McGregor	Industry Advisor

#### The Dispute Parties

##### For Southern Railway Ltd ("Southern")

Raj Kalirai	Access Contracts Manager
Howard Reed	Strategic Planning Manager (Rail)
Richard Collins	Dickinson Dees, solicitors

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

Ruth Clifton	Senior Sponsor (Southern Power Supply Enhancements)
Richard Taylor	Customer Relationship Executive (Southern)
Dan Kayne	Legal Advisor
Dickon Court	Eversheds, solicitors
Andrew Durrant	Commercial Analyst
Jack Holding	Legal Advisor (observing)

#### In attendance:

Tony Skilton	Committee Secretary
Kathy Couldridge	Assistant Secretary

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## 1 Introduction, Substance of Dispute and Jurisdiction

- 1.1 This dispute arises out of a project proposed by NR to enhance the existing electrical traction power supply on the Branch line between South Croydon and East Grinstead (the "Project"), and the consequent assertion by Southern that the Project should have been classified by NR as Network Change as defined in Part G of the Network Code, and should have been dealt with in accordance with the processes consequent upon such a classification.
- 1.2 Notice of Dispute was served by Southern on 14 March 2011.
- 1.3 Following discussions and correspondence between the parties, an Allocation Hearing took place on 21 June 2011, leading to a Procedure Agreement dated 23 June 2011 in which the parties agreed to proceed to Access Dispute Adjudication ("ADA"), with any appeal against the determination to be taken to arbitration. This was in accordance with the Access Dispute Resolution Rules (the "Rules").
- 1.4 Following receipt of the Dispute Parties' submissions and in accordance with Rule G10(c), I considered whether there were any relevant issues of law raised by the dispute.
  - 1.4.1 I concluded that the submissions did not give rise to any overriding issues of law needing to be considered independently of the facts and matters in dispute.
  - 1.4.2 However, I also concluded at that time that the dispute did raise an issue of contractual interpretation, requiring consideration of the powers as conferred by the Dispute Parties' track access contract (incorporating both the Network Code and the Rules) upon the ADA to make orders requested or otherwise considered necessary to resolve the dispute. This issue arose out of the decision expressly sought by Southern in its Statement of Claim that, if the ADA's determination were to classify the Project as Network Change, "Network Rail may nevertheless be permitted to proceed with the Project, albeit that the Project will be subject to the requirements of the Network Change regime". I questioned whether the ADA had the power to make a determination granting such a permission to NR, because this appeared contradictory and would amount in practice to determining a suspension or waiver of the mandated requirements of the Network Change regime.
  - 1.4.3 These conclusions were conveyed to the Industry Advisors and the Dispute Parties on 5 August 2011.
- 1.5 The ADA hearing took place on 8 August 2011. The Dispute Parties provided written and oral opening statements and were then questioned by the Panel. After an adjournment, I indicated my decision in principle that the Project did constitute Network Change. The Panel then heard further submissions by the Dispute Parties regarding the consequential determination requested by Southern expressly permitting NR to proceed with the Project notwithstanding that it constituted Network Change. A timescale was set for Southern to confirm if it wished to proceed with settling a limited form of consent order binding on Southern and NR only, which I indicated was the only basis on which this request might be implemented. On 10 August 2011 Southern notified the Secretariat that they would not be pursuing this course of action.
- 1.6 In its consideration of the parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in Rule A5, it should "reach its determination on the basis of the

legal entitlements of the Dispute Parties and upon no other basis".

- 1.7 The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

## 2 Documents submitted and evidence

- 2.1 In summary, the written material and evidence provided over the course of this dispute process is as follows:

- 2.1.1 Statement of Claim submitted on 8 July 2011 by Southern
- 2.1.2 Statement of Defence submitted on 25 July 2011 by NR
- 2.1.3 Statement of Reply submitted on 1 August 2011 by Southern
- 2.1.4 Opening statements (written and oral), responses to questions and closing remarks to the hearing on 8 August 2011, by Southern and NR.

- 2.2 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to me and the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarised later in this Determination.

## 3 Relevant provisions of the Network Code

- 3.1 The provisions of the Network Code in issue in this dispute reference are, principally, the definition of Network Change at Part G of the Network Code. The processes to be followed for Network Change under Part G are referred to but not in detail.

The definition of Network Change reads as follows:

- "Network Change" means, in relation to an Access Beneficiary:
- (a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:
    - (i) the Network; or
    - (ii) trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; or
  - (b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:
    - (i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and
    - (ii) has lasted or is likely to last for more than six months,
- including

- (x) a temporary speed restriction;
  - (y) a material change to the location of any of the specified points referred to in Condition B1.1 (a); or
  - (z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or
- (c) any material variation to an established Network Change, other than an authorised variation,
- but does not include a closure (as defined in the Railways Act 2005) or a change made under the Systems Code

## **4 Submissions made and outcomes sought by Dispute Parties**

### **4.1 Southern's principal submissions were as follows:-**

- 4.1.1 Southern intended to explain the reasons why it believed the Project should be classified as a Network Change with the consequences set out in Part G of the Network Code, but wished first to explain its motivation in bringing the claim.
- 4.1.2 The claim was not driven by a desire on Southern's part to obtain financial compensation, although that might be one consequence if the claim were successful. The key motivation was that Southern, like every other TOC, must be provided with adequate information about the consequences of proposed changes to the Network to allow it to properly plan its business. The Network Change process was the method the industry had devised to ensure an appropriate information flow and to ensure that Network Rail properly and robustly engages with concerns raised by TOCs. It should have been followed in this instance and it was quite unclear to Southern as to why it was not.
- 4.1.3 The dispute related to the proposed power supply enhancement Project on the East Grinstead Branch line. The original proposal had been to install a 33kv feeder cable from East Grinstead to South Croydon with track paralleling hut conversions to sub-stations at several points along the line in addition to the building of a new sub-station. However, the Project had been de-scoped and the proposal now was to enhance the existing 11kv system, which would require fewer conversions.
- 4.1.4 Southern wished to introduce, and was expressly committed to introducing, 12-car trains on this line from December 2011. The Project had to happen before those trains could be introduced.
- 4.1.5 At the heart of this dispute was Southern's concern that, because the Network Change process had been disregarded by NR, Southern had been provided with insufficient and inadequate information regarding the technical feasibility of the Project. Southern noted that it was yet to receive the results of load monitoring tests carried out over a month ago. Southern maintained that it was unreasonably reliant on NR's discretion regarding information flow and that, given the mandatory requirements of Part G, these issues would have been avoided had the Network Change process been followed.

- 4.1.6 Turning to the definition of Network Change, Southern noted that NR had accepted that the Project satisfied the first condition of limb (a) of the definition, namely that it was a "change in or to any part of the Network (including its layout, configuration or condition)". Under limb (a) of the definition, therefore, the only remaining issue for resolution was whether the Project was a change "*which is likely materially to affect the operation of (i) the Network; or (ii) trains operated by...th[e] Access Beneficiary*". Southern understood NR to be saying that the changes would have no material impact on Southern and that the operation of trains by Southern would not be materially affected. Southern disagreed. Southern said that the effect of the Project would be to materially affect the operation of its trains for the following reasons:
- 4.1.6.1 The Project would allow Southern to run 12-car trains on the East Grinstead line. If the Project were not to be undertaken, Southern would not be able to run 12-car trains on this line. The completion of the Project was, therefore, an essential pre-requisite to the operation of longer trains by Southern. This was a simple and incontrovertible fact.
- 4.1.6.2 The existing Network Rail Acceptance Panel ("NRAP") certificate prevented the operation of longer trains on this line in its present condition. The constraints currently in place would be lifted as a direct result of the Project, permitting the operation of longer trains. This was further good evidence that the changes to be made by the Project were real, substantial and material.
- 4.1.6.3 The operation of longer trains meant, in practical terms, the enlargement of capacity. The guidance offered by the explanatory note to Part G of the Network Code expressly recognised that "*the definition of Network Changes includes changes which will generally be seen in a positive light (e.g. enlargement of capacity on a stretch of track)*". Southern understood that NR did not dispute this.
- 4.1.6.4 Driver behaviour and train dispatch arrangements would change as a direct result of the introduction of longer and heavier trains. It would be necessary to test the enhanced electrical system thoroughly to ensure that it would be capable of sustaining the increase in capacity. NR had to demonstrate that the system would be capable of giving effect to the new timetable. Southern considered the need for this testing to be another indication that the changes to be made to the Network, as well as to the operation of trains, were themselves material and would have a material effect.
- 4.1.7 Southern had made clear all along to NR in the course of discussions regarding the Project that it expected the changes to be made to materially affect the operation of trains. Southern had also raised technical concerns once it became clear that the Project was to be de-scoped. These concerns related to, in particular, the capability and capacity of the new and enhanced electrical system. Southern needed to understand whether the system would be able to meet the requirements of the new timetable to be operated from December 2011, including the operation of a significant number of peak 12-car train services. Southern also needed to assess the extent to which the system would cope with various perturbation scenarios. In addition, and for business planning purposes, it was very important that Southern understood the likely capacity of the enhanced system to allow for future growth in rail traffic.

- 4.1.8 Southern did not yet know the results of the load monitoring tests carried out on 4 July 2011. This was unacceptable. These results were critical to Southern's understanding of the technical feasibility and suitability of the Project, and would determine whether Southern was in a position to operate the 12-car services it was committed to operating from December 2011.
- 4.1.8 Southern noted that NR had accepted at the outset that the Project was to be brought forward by way of the Network Change process, stating in its letter of 27 May 2010 that "*additional power supply upgrades...will be the subject of separate Network Change consultation*". NR had subsequently sought to distance itself from this acceptance by arguing that it was made before "*...any internal or external consideration of Network Change had been performed*". This was not credible. NR had made a clear and unambiguous statement in its 27 May 2010 letter which confirmed, accurately, that the Project was a Network Change.
- 4.1.10 Southern maintained that NR's position was inconsistent and hard to follow. NR relied on drawing false distinctions between the Network Changes in respect of, on the one hand, the other East Grinstead branch line projects regarding platform lengthening and Station Access, and on the other hand the Project. These distinctions were unsustainable for the reasons given in Southern's Statement of Reply, principally that the other two projects did not by themselves allow 12-car trains to run any more than the electrical enhancement Project did by itself.
- 4.1.11 Southern noted that NR had never explained why two of the three sets of changes that were fundamental to the introduction of longer trains were Network Changes yet one was not. Nor had NR explained why it believed that the Project would have no material effect on the operation of trains or on the Network when it accepted that the platform lengthening and station access schemes would.
- 4.1.12 Southern asserted that NR's position in relation to the effect of the Project was not even clearly and consistently stated in its Statement of Defence. In that document it stated that it "*does not accept*" that the effect of the Project is to allow the running of 12-car trains. Later it states that the running of 12-car trains is "*not solely facilitated*" by the Project and that the "*Project does not of itself allow 12 car trains to run*". Even these statements were later diluted so that NR argued that "*when seen in context it is apparent that the changes made do not have the direct effect of allowing 12 car trains to run*". NR's position therefore appeared to be both that the Project did not allow 12-car trains to run, whilst at the same time conceding that the Project was, at an absolute minimum, a factor in allowing 12-car trains to run.
- 4.1.13 Southern had sought to take a collaborative approach to the Project. Southern valued its working relationship with NR. Southern therefore remained of the view that the Project should be implemented irrespective of the outcome of this reference. However, this did nothing to change the fact that the Project should have been, and should now be, classified as a Network Change with the effect that a Network Change process should be instigated in respect of the Project immediately following this hearing. Southern said it had noted the jurisdictional issue raised by me as communicated on 5 August 2011. For the avoidance of doubt, Southern confirmed it was not attempting to waive or suspend in any way the mandated requirements of the Network Change regime. Southern's position was that the Network Change process should now be followed,

including therefore the consultative and compensatory aspects of that process. It was for this reason that the second decision sought by Southern from this ADA stated expressly that, in the event of succeeding on the first, the Project should be implemented “*subject to the requirements of the Network Change regime*”. Southern apologised for any confusion this might have caused.

4.1.14 Southern’s written Statement of Claim stated that it sought the following decisions:

4.2.6.1 That the Project be defined as a Network Change, with the consequences set out at Part G of the Network Code; and

4.2.6.2 In the event that the above decision is made, that NR might nevertheless be permitted to proceed with the Project, albeit that the Project would be subject to the requirements of the Network Change regime.

4.2 NR’s principal submissions were as follows:

4.2.1 NR observed that it routinely handled and coordinated a large number of Network Change matters. In order to allow the changes to the Network to happen in the most efficient, timely and cost-effective way, NR considered it had an obligation to the industry to make decisions, using its reasonable judgement and experience, about whether a particular change required it to adopt the Network Change process or whether a different process was more appropriate.

4.2.2 NR believed that, in the circumstances before the Panel, the issue involved was narrow. The Project involved enhancement of existing DC traction power on a branch line to East Grinstead; it enlarged and strengthened the substations which fed this part of the electrification network to increase the current, and therefore the power, available to trains on the line. NR confirmed that the work would enable Southern and First Capital Connect (“Thameslink”) to operate 12-car trains on the line.

4.2.3 NR had considered the extent of the Project and had taken an informed decision, based on the nature and extent of works involved, that this change did not constitute a Network Change. When classifying Projects, NR applied the definition of Network Change as set out in the Network Code. In this instance, NR did not classify the Project as a Network Change because it did not meet the requirements of that definition.

4.2.4 The changes being made as part of the Project arose as a result of an industry consultative process involving the Department for Transport, NR and Southern’s franchise predecessor. However, NR understood that Southern’s commitment to providing 12-car trains was a key part of its franchise proposal. The implementation of the Project was of mutual benefit to both NR and Southern.

4.2.5 NR had put in place a consultation and development programme to plan and progress the Project. It had issued a ‘No Material Change’ letter on 2 November 2010; this was a standard practice across the industry (and analogous to the processes in the Network Code), recognised by all parties, including Southern. The letter triggered a process which allowed for debate and discussion at a level which would have satisfied the majority of any Network Change consultation requirements had they been relevant.

- 4.2.6 The consultation process for the Project included review meetings and discussion. Southern had been given ample opportunity to comment on the capability of the Project and consequently had had sufficient time to plan its business properly. The fact that Southern consented to the Project proceeding (notwithstanding its reservation of its position in relation to the classification of it), was sufficient in NR's view to demonstrate that Southern was able properly to understand and assess the Project and consider what, if any, impact it might have on its business.
- 4.2.7 NR did not accept that the changes made by the Project were likely materially to affect either the operation of the Network or trains operated by Southern. NR noted that the ORR had previously (in ADP 40) stated that to be material, any change needed to be interpreted in context and required such changes materially to affect trains operated by a particular operator. NR believed that such an assessment involved consideration of the extent of the impact of a change on the operation of those trains affected by that change, in the wider context of the trains or service operated by that operator.
- 4.2.8 NR confirmed that it did not dispute that the Project would constitute a 'change' to the Network itself, so that it would satisfy the first part of limb (a) of the definition of Network Change. However, the mere existence of a change was not on its own sufficient to meet the definition, which included a consideration of materiality and the likelihood of affecting the operation of trains.
- 4.2.9 In NR's view the Project did not affect trains other than to increase the power available to them. There were no changes in train routes, journey times, signalling or stopping points. There were also no significant Health & Safety implications. These changes would not have any impact on driver behaviour and drivers would not need any briefing, training or information relating to the change. The changes would be invisible to passengers. None of the operators using the line would need to change their procedures or operation as a result of the Project. For these reasons, NR did not believe that the changes met the required threshold (of limb (a) of the definition of Network Change) of being likely materially to affect the operation of the Network or of trains.
- 4.2.10 NR noted that Southern and NR both had commitments involving the running of 12-car trains on this line after the December 2011 Timetable change. In order to allow the operation of 12-car trains on this line, NR had undertaken a number of schemes including a platform lengthening scheme; a station area scheme at East Grinstead; and the power supply enhancement Project that was the subject of this dispute. Southern had argued that the Project was likely materially to affect its trains as its effect was to allow the running of 12-car trains. NR's position was that, whilst the Project was a component in the overriding plan to allow the running of 12-car trains, it could not be the case that it was a Network Change purely for this reason. Before 12-car trains could run, the two other schemes had to be completed and Southern had to obtain relevant certification in relation to vehicle acceptance on the route.
- 4.2.11 Thus, the power enhancement provided by the Project was just one factor in allowing 12-car trains to run and it was not capable of having that effect by itself. If Southern's argument was carried through to its logical conclusion it would suggest that any smaller projects that contributed to a larger, material overriding plan would need to be classified as Network Change. Such a result would, in NR's view, be a distortion of the intended effect of the Network Change process.



- 4.2.12 NR believed that each change must be defined as a Network Change (or not) on its own merits. In this case the effect of the Project was simply to increase the power available to trains. It was only after all of the other changes had been completed and, critically, after a decision had been taken by Southern itself to increase the number of units on its trains, that the Project would contribute to the eventual running of 12-car trains.
- 4.2.13 NR also considered that industry practice supported its understanding of the definition of Network Change. All parties other than Southern had endorsed (whether tacitly or positively) the definition of the Project in this case as not having a material enough effect to constitute Network Change. In its reply, Southern sought to minimise the significance of this, describing others' responses as irrelevant. NR disagreed and considered it was entirely relevant how other industry parties responded to a proposed change.
- 4.2.14 NR noted also that a very similar project had been started in April 2011 in relation to the Windsor & Eton Riverside branch line. No industry parties had challenged NR's conclusion that the Windsor project did not meet the definition of Network Change. The parties consulted had included Southern.
- 4.2.15 NR acknowledged Southern's request that the Project be allowed to proceed regardless of whether its view on Network Change was upheld. However, NR considered this position to be entirely inconsistent with the concerns raised by Southern in its submissions, that it had insufficient information to make safe conclusions as to the viability of the Project. Throughout this dispute, Southern's motives for issuing a Notice of Dispute in this matter had been unclear to NR. Initially Southern had informed NR that they required the Project to be classified as a Network Change to ensure NRAP approval and because such classification facilitated the valuation of maintenance charges for Control Period 5. NR had explained, and Southern had accepted, that these issues were not influenced by the categorisation of the change.
- 4.2.16 It now seemed to NR that the main driver for Southern pursuing this dispute was to confirm that NR's treatment of the Project was wrong and hope that in similar circumstances in the future, NR would apply Part G of the Network Code correctly. NR's case was that it had acted entirely properly in its treatment of this Project and would continue to treat each case on its own merits according to the definition and guidance set out in the Network Code.
- 4.2.17 NR was concerned that, if a new Network Change proposal had now to be made and sent for approval to industry parties including the ORR, it would have the potential to cause confusion, queries and delay (though NR would, in such circumstances attempt to avoid any kind of delay). Should any extra cost or time be required to deal with a re-classification of the Project, all parties would lose and possibly passengers as well. For this possibility to arise, simply because Southern wanted to demonstrate that NR was wrong, was not in NR's view an appropriate use of time, money or industry resources.
- 4.2.17 NR noted that Southern in its submissions had sought to raise a number of issues relating to the technical specification, testing and viability of the Project. Whilst these issues were important, they were not in NR's view questions that were to be resolved by this determination. The issue raised by Southern in its Notice of Dispute was whether the Project constituted Network Change, not whether the Project should be altered, whether more testing should occur or whether NR had met its CP4 commitments.

4.2.18 In summary therefore, it was NR's position that the East Grinstead power supply enhancement Project should not be classified as a Network Change under Part G of the Network Code. NR's assertion was that the works making up the Project did not satisfy the definition of Network Change (under limb (a)) as they did not make changes which were likely materially to affect the operation of the Network or affect Southern's trains using the Network. NR believed that a finding by the Panel in its favour would enable the Project to be completed on time and on budget, which was in both Parties' as well as the industry's and passengers' best interests.

4.2.19 NR's written Statement of Defence stated that it sought the following decisions:

- (a) matters of principle
  - (i) that the works occasioned by the Project did not constitute a Network Change as defined in Chapter G of the Network Code.
- (b) specific conclusions deriving from those matters of principle
  - (i) that NR was not obliged to follow the provisions of Chapter G in relation to the Project; and
  - (ii) that NR was not obliged to make any payment to Southern in relation to the Project.

## 5 Oral exchanges at the Hearing

5.1 After considering the written submissions and statements of the Dispute Parties as listed in paragraph 2.1 above, and having heard the parties' further oral submissions in their opening statements, I and the Panel questioned the parties' representatives to clarify a number of points either arising out of their submissions or otherwise relevant to the issues in dispute. In line with the practice adopted at previous ADA hearings, although the individuals' answers to questions were not taken as sworn evidence (in common with the parties' written submissions, statements and further information provided), I consider that we are entitled and indeed (in the absence of any indication to the contrary) bound to accept them as true and accurate statements. Accordingly I have taken them into account in reaching this Determination.

5.2 In view of the sequential nature of the decisions sought by Southern, I considered that the most efficient programme for questioning and seeking further information would be first to seek to reach a conclusion on the issues regarding application of the Network Change definition, particularly the points regarding what constituted a 'material effect' on the operation of trains, and then to explore the 'what happens if' situation as appropriate. Although the Parties' submissions had concentrated mainly on the application of limb (a) of the definition, premised on a change to the Network itself (which had been conceded as a fact by NR), I thought the Panel should consider also limb (b), premised on a change to the operation of the Network – the effect of the change on the operation of trains being relevant under both limbs.

As regards the Network Change definition, therefore, I proposed that the Panel should explore and clarify the issues and arguments raised by the Parties regarding, first, the materiality of the effect of the Project on the operation of trains, as a matter of abstract logic (limbs (a)(ii) and (b)(i)); secondly, the materiality of the effect of the Project on the operation of the Network, also

as a matter of abstract logic (limb (a)(i)); and thirdly, some supplementary factual assertions made as to the probable physical and practical consequences of the Project for the operation of trains and of the Network. In summarising the oral exchanges below I have grouped them as much as possible by reference to those issues and arguments raised, though the actual questions and answers at the time did not necessarily follow this pattern precisely.

The matters dealt with and clarified accordingly were as follows.

### Material effect on the operation of trains

- 5.3 We first explored the extent to which the Parties considered that, in order properly to be regarded as having a material effect on the operation of trains, a change project must be either necessary or sufficient, or both, to bring about that effect:
- 5.3.1 Southern confirmed that enhancing the power was a necessary, indeed essential, task to enable 12-car trains to run, but was not sufficient on its own for that purpose. Southern confirmed its position as being that, as a matter of abstract logic, something which enabled the operation of trains in a particular changed manner – and in this case which was an essential factor in the operation of 12-car trains – had to be regarded as material in achieving that changed effect, and therefore satisfied the definition of Network Change.
- 5.3.2 NR declined to be drawn on whether it contended that, in order to have a material effect in enabling running 12-car trains, the power supply enhancement would need to be not merely necessary but sufficient of itself to achieve that result. NR would only say, first, that in order to have a material effect a change needed to be of sufficient materiality, which did not advance the argument very far.
- 5.3.3 NR then sought to explain its view of the distinction between the three separate projects necessary in this case for 12-car trains to run on full power, as outlined in its submissions: the platform lengthening scheme, the station area scheme at East Grinstead and the power enhancement Project. NR confirmed that it had taken the decisions which resulted in separating the overall 12-car running scheme into these three different projects, each of which was necessary but not sufficient to enable the scheme as a whole. It had turned out that these projects were subject to three separate change processes. NR acknowledged that if it had proposed the scheme as one overall change then there would not have been the need for this hearing, the implication being that the three projects together would undoubtedly have constituted Network Change.
- 5.3.4 However, NR said, the power enhancement Project on its own had simply been deemed not material, and it remained its contention that the power enhancement by itself had no material effect on the operation of trains. NR noted that it had been normal procedure during renewals to change the capacity of transformers to improve by 20% and this activity had not been treated as Network Change.
- 5.3.5 NR was then asked to explain why a project enabling the running of a 12-car train instead of an 8-car train was not deemed material in its own right, and why the change to the power supply had been considered different, when each of the other two change projects had similarly been necessary but not sufficient for the overall scheme but had been classed as Network Change. NR replied that a power enhancement did not

materially affect the train and it was not visible to an operator or the train driver – all they would see would be a cable connected to the track.

- 5.3.6 Asked if this meant that visibility was a necessary specific ingredient of Network Change, and therefore the ingredient differentiating the power enhancement from the other two projects, NR declined to contend this. Noting simply that the line had to be drawn somewhere, NR would only say that the power enhancement Project on its own was not sufficiently material and that, by contrast, where platforms were lengthened or crossovers moved, there was clearly material change.
- 5.3.7 NR then repeated that in the case of the physical work of a platform extension, there was clear Network Change within the visible alterations to the network. Asked if, irrespective of being physical changes, the changes had to have some other element of materiality to constitute Network Change, NR would say only that every project must have a physical effect or an enabling effect. This project to improve the power supply was for the benefit of Southern to enable them to run 12-car trains, although in due course it would also benefit the Thameslink scheme. NR repeated that the other enabling components – the station area changes and platform extensions – were visible items.
- 5.3.8 Noting that the discussion seemed to be becoming somewhat circular, I summed up this aspect of NR's argument as appearing to be that a change merely enabling the operation of 12-car trains was not of itself a sufficient effect to be classed as "material", but that it could loosely be described as requiring something additional that was indefinable but probably involved something physical or visible. NR did not dissent from this proposition.
- 5.4 We also explored another aspect of NR's argument, which was in substance that, irrespective of the nature of the change, the Project could not be classed as having a material effect on the operation of trains because the actual effect in question – enabling the running of 12-car instead of 8-car trains – was already intended and planned by Southern in order to satisfy its Franchise Agreement obligation.
- 5.4.1 In rejecting Southern's contention that something which was an essential factor in enabling the operation of 12-car trains was by definition material, NR had previously asserted that a decision regarding making use of this enabling change was a matter for Southern, who could decide to run 12-car trains or not. Southern had responded that this applied equally to, for example, platform extensions.
- 5.4.2 NR now noted that there had been a consultative process for the 12-car scheme as a whole including the Project, that Southern had bought into it through their Franchise Agreement, and that the reality was that NR was doing the Project and it was a collaborative process. Southern rejected the suggestion that any sort of previous consultation process somehow made it clear cut that it was unnecessary to classify the Project as Network Change, pointing out that Southern had still been having discussions with NR as recently as June and September 2010 at which they were still being asked by NR whether they thought it was Network Change or No Material Effect, whereas NR had already announced in a letter of May 2010 that it was Network Change. NR acknowledged that they had initially referred to it as Network Change in their invitation to consult but after informal consultation, including with Southern, had concluded it could be classed as 'No Material Effect'. NR emphasised that they had consulted on this

Project, having previously been criticised for not consulting enough. Southern noted that their criticism here was as to lack of information rather than lack of consultation.

- 5.4.3 Returning to the issue of materiality, in the context of an 'enabling' change, NR again declined to identify anything specific, beyond being something physical or visible, as indicative of materiality, preferring to say only that the change, whether enabling or sufficient, must be significant. Asked if that meant the fact of a project facilitating something already wanted by the operator could of itself exclude its classification as Network Change, notwithstanding that this could lead to everything done on the network being incapable of being Network Change, NR confirmed this was part of its overall position.
- 5.4.4 At that stage I noted that it was difficult to sustain an argument suggesting that the bare fact that something had been done in order to meet an existing need or plan of an operator, of itself could take it outside the possibility of being considered to have a material effect. Southern similarly maintained that NR's function was to provide information and to enable operators to plan for their services, so that discharging this function by informing their business planning processes was hardly likely to negate Network Change.
- 5.4.5 NR observed that the power supply upgrade Project came out of the HLOS process and that NR's Control Period 4 funding was specifically to support operators to fulfil their business decisions. The output of the Project was to meet Southern's aspirations to run longer trains; however that was not to say that Network Change would not be applicable elsewhere. Asked if this meant NR contended specifically that regardless of scope or size, such industry planning would take a planned project out of the scope of Network Change, NR noted only that whereas matters such as platform extensions could affect train driver behaviours of other operators, this Project was to help Southern to fulfill their business plan.
- 5.4.6 NR nevertheless rejected Southern's suggestion that it had declined to classify the Project as Network Change because it was something Southern had already committed to and funding had been made available, and because Network Change would cause NR to incur costs. NR maintained strongly that it was not a matter of money, but simply that if NR's experienced Network Change Co-ordinators took the view that an item of work did not of itself qualify as Network Change, then that was so.
- 5.4.7 NR agreed with Southern that Network Change had to be looked at in the context of other work around it, but noted that part of the context to be taken into account was that Southern wanted the work undertaken. NR was not saying the fact that Southern planned to run 12-car trains as a franchise commitment or for some other business reason was on its own the remaining factor in determining lack of materiality, but still maintained that it was relevant.
- 5.5 In their submissions on the issue of material effect on the operation of trains, both Southern and NR had referred to the Access Disputes Panel determination of reference ADP40 and ORR's subsequent appeal determination, but had drawn different conclusions. Invited to give further explanation, they were reminded that that determination did not apply to the entire definition of Network Change but only to limb (b) regarding a change to the operation of the Network.

- 5.5.1 Southern agreed with NR that ADP40 was about the application of the definition, including the need for materiality, according to the facts of each particular situation; but it noted that here, the situation was that if the power supply enhancement did not go ahead, 12-car trains could not be operated, so in Southern's view this of itself made it material. NR's view also was that it was necessary to consider each situation on its own; but it drew the conclusion that even if the end effect looked like Network Change, it was not possible to have the process of all the Network Change paperwork for every failure to mend a broken piece of track.
- 5.5.2 Reminded that the ADP40 appeal determination made it clear that routine maintenance was not material for Network Change purposes, NR asserted that this applied to extraordinary maintenance also, repeating that this was why they maintained that every change and every project needed to be considered in relation to its effect. This also meant that defining the extra element required for materiality would include such matters as driver behaviour. For that reason, NR had acknowledged that if the whole Branch line scheme had been put forward, it would have been Network Change; but when separated out, each aspect needed to be considered independently on its own merits.
- 5.6 NR was asked, accordingly, what constraint was there to stop it packaging up all the aspects into one Network Change proposal, or conversely, what was there to stop it slicing into separate parts a scheme that in its own right should be treated as a Network Change, purely in order to avoid going through the Network Change process.
- 5.6.1 NR said it simply sought to set out the work plans into a series of packages and then consider if each was a Network Change; it denied ever having engaged in salami-slicing projects in a deliberate attempt to avoid Network Change; and it noted that even if salami-slicing had been undertaken by NR, it would still have been open to Southern to have proposed Network Change itself if it felt it necessary.
- 5.6.2 Southern noted that it was precisely the effect of dividing the scheme into three workstreams that allowed NR to bring forward the arguments in this dispute as to whether it was merely facilitating or enabling previously planned changes. Had all three elements of the whole scheme been put forward as a global change, Southern would have pursued its concerns differently and not through an ADA. Southern maintained that for practical purposes, the ADA was now taking place mainly because of dissatisfaction with the level of information flowing from NR to enable Southern to be satisfied.
- 5.7 NR was asked if it went through the Network Change process in relation to Route Availability.
- 5.7.1 NR responded that the NRAP process did not engage with Network Change as it was only checking the capability for allowing intended train formations. By contrast, if NR were changing information in the Sectional Appendix regarding capability of the network, then it would use the Network Change process. The Sectional Appendix for this route would specify the types of vehicles allowed on the route but not train lengths; Southern's Track Access Agreement did not specify train lengths for this route either (which Southern confirmed).
- 5.7.2 NR was asked if this meant it was again indicating that there needed to be something else regarding the operation of trains – whether physical or operational – to constitute materiality, and if this something else could be the fact that the change resulted in

amending the Sectional Appendix. NR responded simply that everyone's comments were taken on board before making a decision as to whether it was a material change.

- 5.8 The parties were then questioned as to the nature and content of the actual change to the operation of trains as regards the configuration of the way the enhanced power would get to the line and its physical effects.
- 5.8.1 NR confirmed there would be more components in the new system, in a small way, and Southern confirmed its understanding that there would be an extra substation and enhancement of TP huts.
- 5.8.2 It was noted that NR had indicated that the Project would provide a 20% improvement in the power supply. NR was asked if it had done any work to confirm that the power supply would be reliable, or if the reliability experienced with the existing equipment would change.
- 5.8.3 NR responded that if one piece of equipment were switched off, trains could still operate. This was the same principle as what it called "N - 1" capability on the Southern and Thameslink routes (and other electrified lines): if one feed was cut out, trains could still operate. One feed being out could have an effect for a train driver if NR applied a restriction. However the end user would really see no difference, because NR was providing resilience generally and also specifically to the signalling system. Nor was the effect of this sort of matter a concern for drivers, as it was not physical or visible.
- 5.8.4 Asked what would be the effect be on reliability, NR noted its understanding that the configuration would provide more reliability as the present equipment was 50 years old. However NR declined to accept this enhanced reliability as constituting a change on its own, even though it was beneficial, because it had not been raised with NR as a matter of materiality.
- 5.8.5 Southern noted it still did not have information from the July test train load monitoring to give assurance of future reliability. Its consent to the work going ahead (in its letter of 17 February 2011) had been given subject to satisfactory running of test trains. The test trains were not run due to concerns expressed by the NR engineers; load monitoring was carried out instead but Southern had hoped to receive the results by now. Southern also asserted that it had not been provided with all necessary information, since capability and capacity results had not been made available.
- 5.8.6 NR was asked if regenerative braking, not mentioned in the parties' submissions, occurred on the East Grinstead route. It confirmed that the new equipment would be satisfactory for regenerative braking with 12-car trains, whereas the present equipment was for 8-car running only.
- 5.9 Finally with regard to the part of Panel's questioning concentrating on the effect of the Project on the operation of trains, and therefore on limbs (a)(ii) and (b)(i) of the Network Change definition, NR was asked about the last part of the definition, (b)(ii), whether it was accepted in any event that the change would last for more than 6 months. NR responded that this was not an issue as it was accepted to be a long term change.

## Material effect on the operation of the Network

- 5.10 The next area of exploration was with regard to limb (a)(i) of the definition of Network Change, to consider the effect of the change on the operation of the Network itself and the materiality of that. By way of clarification, as regards the opening part of limb (a) of the definition which qualified both its parts, I noted that all parties appeared from their statements to have agreed that the power upgrade was in the first place a 'change' to the Network, as the Network included all the equipment attached to the tracks, including the electricity supply equipment. There was no dissent from this proposition.
- 5.10.1 Asked if it was accepted that the equipment which provided the power, and therefore the levels of current and voltage, constituted part of the Network, NR said it made a distinction between what was visible to an Access Beneficiary and what was not, so what was behind the visible equipment was not within the Network Code definition of the Network. There was a distinction between the definition in the Railways Act and the definition in the Network Code, which related to what was owned by Network Rail. NR acknowledged that the Network included transformers and substations.
- 5.10.2 NR accordingly agreed, somewhat reluctantly, that its view of the definition of the Network included the equipment that affected the voltage, and that it operated this equipment as part of the Network. However, NR wanted to be clear that limb (b) of the definition was about material effect on the operation of trains of a particular Beneficiary whereas limb (a)(i) of the definition was "free-standing". A change to the power supply was indeed a change to the operation of the Network as per limb (a)(i), but it still also needed to have a material effect on the operation of the Network. NR maintained that it did not.
- 5.11 NR also contended that, for the purposes of limb (a)(i), a change to the operation of the Network still needed to be material in relation to a particular Access Beneficiary, because of the very opening words of the definition, which commenced "means, in relation to an Access Beneficiary".
- 5.11.1 NR believed that this change to the power supply was a change in the operation of the Network which did not have an effect on Southern. Turning up the power did not necessarily affect Southern's services whereas, for example, changing a signal would. Southern needed to demonstrate that upgrading the power supply made a change to its usage. If NR were changing switches and crossings, that would be physical and visible.
- 5.11.2 Southern responded that upgrading the power supply did indeed make a change to its usage – it meant that on completion of the project Southern could use the Network in ways it could not previously have done. NR reverted to its previous contention, that Southern could choose whether or not to make use of the change. Otherwise, said NR, just changing a wire could be deemed Network Change. Southern countered that this change was not just changing a wire – it would materially affect Southern's business in that Southern would know it could run 12-car trains. Routine maintenance should not be compared to this Project.
- 5.11.3 I suggested that even if we accepted NR's hypothesis that the opening words of the definition of Network Change, "in relation to an Access Beneficiary", meant that there must be a relationship of the change with the particular Access Beneficiary involved in the dispute, then in the context solely of the application of limb (a)(i), this meant that it still only required some general connection between that Beneficiary and the particular



part of the Network affected by the change, not necessarily a relationship with that Beneficiary's operation of trains – because otherwise the effect of the introductory words would be to duplicate limb (a)(ii).

- 5.11.4 NR responded simply that those words in this instance clearly applied to Southern and must be there for a purpose, but agreed in principle with my suggestion that they could be taken as providing some threshold test of relevance of the affected part of the Network to a specific operator. Southern maintained that the words were just an introductory provision which enabled an operator to make use of the Network Change definition.
- 5.12 The Panel moved on to consider the actual nature of the change to the Network constituted by the change in power supply, and the degree of its potential effect on the operation of the Network.
- 5.12.1 NR explained that an 8-car Class 377 train had a maximum current capability of 3,000 amps, whereas a 12-car Class 377 train had a maximum capability of 4,000 amps, though they would not necessarily draw that level of current at all times. NR maintained that this particular change in the amps capable of being drawn would need other matters to take place beside it in order to make it material. For example, it was possible to change from 3,000 amps to over 6,000 amps without affecting other things.
- 5.12.2 Southern noted that its trains were configured, namely restrained through the software, for 3,000 and 4,000 amps as appropriate. If more power was available from the Network Southern would configure them differently and this would give better acceleration and so accelerate the timings.
- 5.12.3 NR denied that the change from 3,000 amps to 4,000 amps was something that made any difference at all to the operation of the Network. Once the changed equipment was installed, NR's staff would do nothing with it, simply leave it alone. Asked how it would deal with a need for load shedding, for example how it would manage a perturbation in service such as more 12-car trains in a section than anticipated, NR said it was not exactly sure but was confident that management of feeder stations was happening currently. If NR's Electrical Control Rooms had concern about sufficiency of power in any given situation, they might apply restrictions.
- 5.12.4 Asked if it had run tests regarding the effect of this change upon Southern, NR confirmed it had modelled and was satisfied that there was no material effect upon Southern. NR were waiting to run test trains at some later stage but whilst this would be useful, it was not essential.
- 5.12.5 Southern noted that NR had written on 1 February 2011 acknowledging that running test trains on the route would provide better understanding, but notwithstanding that, Southern still had not had any sight of the information resulting from the modelling exercise.
- 5.13 NR noted that the issue had not been raised in any detail, as an issue of Southern's claim in this ADA, that the power upgrade was a change to the operation of the Network. The Panel requested to be given details to be able to understand, in any case, what the Project did involve in relation to the operation of the Network.

- 5.13.1 NR said it involved primarily a new 11kV substation and TP huts. Such abstract changes were happening all the time across the country and the East Grinstead line was not considered material. This was not a substantial change, it was a de minimis situation. That was why NR had Network Change Co-ordinators, who were experts at determining what is Network Change and what is not. The relevant Electrical Control Room Operator would be monitoring a few more monitoring points as a result of the change but in this instance it was a very small increase; they monitored hundreds anyway so this would make little difference. Even aspects of the traction power work in relation to the Crossrail project were not considered material, such as in the Abbey Wood area; these are extremes. However, if NR changed the voltage on a route then that could affect systems on trains and NR might consider that relevant as Network Change.
- 5.13.2 NR was asked to explain, in the context of rail operations generally, the relationship between voltage and current, and how was relevant materiality defined in relation to those two distinct aspects of power supply. NR appeared to be saying that not all traction power changes were necessarily material, because increasing voltage could be a material change but not increasing the current.
- 5.13.3 NR responded that a change from DC to AC would be material. At the moment Kent, Sussex and Wessex DC areas away from London used 750v and the Inner areas used 650v. Then looking at overhead lines, there was 25000v moving to 33,000v. There was less voltage drop with higher voltages. Trains were configured for specific voltage settings and some older ones could not be used when NR increased voltage. The ability to utilise regenerative braking could be dependant on the voltage provided, both on DC and AC lines.
- 5.13.4 NR acknowledged that where operators or NR staff would need to change their procedures because of a change, the change could be deemed material. NR thought this was in line with the test for materiality indicated by ADP40. NR noted that in relation to this Project and the similar Windsor power upgrade, some 30 industry parties had regarded the change as not being material – so it maintained this was industry practice.
- 5.13.5 Southern contended that it was not reasonable to assess industry practice on the responses to the Windsor proposal. The issue here was that the Project the subject of this ADA gave Southern the ability to do something different. There was no intrinsic test of materiality by reference to the voltage and current aspects - materiality could be judged by reference to the consequences.
- 5.13.6 Southern were unsure whether 8-car trains would be able to draw more power and therefore improve their performance, because 8-car trains would continue to be set as now. A 12-car train could run at 3,000 amps, but would run slower than at 4,000 amps and would not meet Sectional Running Times.
- 5.14 NR was asked if it could give any clearer indication, evidence or benchmark to support its assertion that the changed power effect on the operation of the Network would be de minimis – for example, whether it was taking it as a proportion of the whole Network or just a part of it.
- 5.14.1 NR explained that within the area supervised by the Brighton Electrical Control Room, the change of monitoring was only three locations among many. NR demonstrated this by reference to the Electrical Control Room diagram, demonstrating the East Grinstead

line to be a very small proportion of the whole area and number of monitored locations covered by the same Electrical Control Room.

5.14.2 NR noted that there were no other Branch Lines with the 11kV restriction in the Brighton Electrical Control area. Southern noted that it did nevertheless have some routes in the area over which it was restricted to 8-car operation.

5.14.3 NR noted finally, in considering materiality in relation to the effect on the operation of the Network, that it had considered whether it would need to employ more people when this Project was implemented and the answer was "no".

#### Supplementary matters relating to the definition of Network Change

5.15 The Panel turned to explore supplementary matters relating to the definition of Network Change, including further aspects of the physical and technical effects of the change raised by the Parties' submissions.

5.16 An aspect previously touched on in the course of argument had been whether or not it could be said that there was a physical effect of the power upgrade due to matters such as the requirement for driver training, with NR apparently saying there would be no such effect but Southern saying there would be. Further explanation was invited.

5.16.1 Southern had dealt with this in para. 27 of its Statement of Reply. There were key changes which would flow from the outcome of the Project in relation to the operation of trains; there would be longer and heavier trains so braking characteristics would change accordingly. Train despatch arrangements would also be different for 12-car trains. This would require driver training; briefing packs would be issued to drivers and they would receive verbal briefings. Briefing would aim to ensure awareness of techniques, etc required for driving the longer trains and would be adequate – rather than using a simulator, for example. Southern hoped that if the Project work was finished early, it would have the opportunity to give drivers practical handling experience with 12-car trains over the route, but it was not essential if they were well briefed.

5.16.2 NR wished to distinguish the traction power impact of what Southern was saying from the general effect of running 12-car trains. It was an obvious consequence, where there was a longer platform and 12-car trains were run, that there would be a need for an additional train despatch person but NR maintained strongly that this was not related to the traction power enhancement. Other matters such as stopping marks were the ones which would require alteration to driving patterns – but this was a function of the layout of the land rather than the change to traction power. NR confirmed its view that the training involved in enabling 12-car trains to run did not get over the hurdle that there must be something else physical or visible to be material.

5.16 Southern continued to rely on its wider point as to the relevance and materiality, by itself, of enabling the running of 12-car trains.

5.17 Asked if the voltage drops as the current flowed through the track would be better or worse than previously, NR considered they were satisfactory at present but would be better; there were currently some bad voltage drops at Woldingham.

- 5.17.1 NR confirmed that the Project would affect electricity charges in that there would be electricity cost savings and a benefit to Southern in terms of EC4T (Electricity for Traction Current) charges but it would only be a portion of Southern's overall traction current use. In considering scale and materiality, NR's Electrical Engineers would not look specifically at the charges relating to this line on its own.
- 5.17.2 Southern noted that it had not considered the potential impact on its EC4T bill. NR said if it had thought it would be material then it would have discussed it with its customer.
- 5.18 Asked if it would have considered the original 33kV scheme to have been Network Change, NR said it did not know, but in any case that had been intended for the Thameslink scheme. NR thought it would have been instructed to deliver 33kV for that Franchise Agreement but it was not in the budget adopted for this Project. Southern noted that this did not explain the 27 May 2010 letter. NR responded that at that time the platform lengthening work was already proceeding and it was not at that stage considering power supply. Southern said the first advice from NR regarding a de-scoped scheme was on 24 June 2010.
- 5.19 Turning to the April 2011 letter about the Windsor & Eton analogous change, NR was asked if it felt it was an illustration of a general industry approach to these matters, and if it maintained that Southern, having acceded to that change, was bound by it in relation to this Project.
- 5.19.1 NR said the relevance of that letter was to demonstrate the industry approach to materiality, not to assert that it was a binding response from Southern. It gave a barometer of how the industry viewed such matters, using the experience of people doing the relevant jobs. It was an example to assist the Panel to understand how matters work in practice.
- 5.19.2 Southern maintained that a letter regarding a part of the Network over which Southern did not operate had been used for presentational purposes when Southern's policy was not to reply regarding a matter when not involved. NR's process demanded a reply from everyone on the distribution list and Southern was on the Wessex list as it went to some parts of the Wessex area, but not Windsor. Southern did not consider that any weight could be put on it as it was simply an administrative advice.
- 5.19.3 Southern further rejected NR's assertion that its Network Change Co-ordinators had the knowledge or experience to exercise final judgement as to what was or was not Network Change.
- 5.19.4 NR observed that the Network Change Co-ordinators were 'gate-keepers' – they were advised internally then issued the relevant correspondence. All decisions taken were as a result of relevant project managers having collaborated.
- 5.20 The Panel invited further explanation to understand NR's position on the elusive additional factor necessary in determining materiality for the purposes of Network Change – beyond just saying, in effect, as appeared to be NR's position, "we and the industry know it when we see it in practice, and here are some examples of that practice".
- 5.20.1 NR noted that in both cases, the Project and the Windsor change, it was dealing with power supply upgrade and other similar changes. South West Trains had not thought it was Network Change. NR felt that this showed the industry approach to these matters.

NR's position was that it believed there was no material change at Windsor and nobody objected. To NR, this gave an indication of industry feeling and thus was useful.

- 5.20.2 Southern contended that the scheme at Windsor was of no relevance to it and did not take account of the possibility that South West Trains was wrong or of what conversations etc might have taken place so that South West Trains was satisfied and felt adequately consulted by NR.
- 5.21 The Panel had gained the impression that part of the background was that NR normally operated some sort of informal consultation process in addition to the process mandated in the Network Code, and this took place before NR decided whether to propose a Network Change. The decision following such informal consultation seemed to be a matter which NR thought was in its gift.
- 5.21.1 NR explained that the Network Code mandated a process and in this case NR had accepted that it was for NR to propose. There was a fairly extensive discussion and in this case it led to the No Material Effect letter, which was not a contractual requirement but was a good practice as it left all parties clear as to the outcome. The information in the No Material Effect letter was very much the same as would have been provided in a Network Change proposal.
- 5.21.2 Asked if it wished to maintain the suggestion in its submission that as much discussion had taken place as would have been the case if Network Change had been proposed, NR said it had just responded to accusations that it had not consulted Southern and given it any information. NR was not saying that the informal process affected the practical result as to whether it proposed Network Change or not.
- 5.21.3 However, despite the informal process having taken place, Southern was still saying that it considered it to be Network Change and wanted more information. Southern noted that the formal process gave the operator the sanction of withholding its permission until adequate information was provided. It was now 8 August and Southern was still 'flying blind'. Had the Network Change process been adopted, by now Southern would have known its future ability to enhance services, etc. There was no suggestion that NR had provided nothing at all, but the information received had been unsatisfactory. Southern had had to make excessive efforts to chase for information such as the results of tests.
- 5.21.4 NR said it was frustrated to learn this and would check if the test results were yet available. It had misunderstood Southern's wish for the results and would seek to provide them. Southern had asked it to give information regarding future capability of the Network and NR was currently unable to provide information regarding headways and growth opportunities, etc. NR did not know what else it could be expected to provide under the Network Change process.
- 5.21.5 Southern said it still did not know whether it would be able to run the required trains in December 2011. NR noted that its letter of 2 February 2011 confirmed that the desired trains could be operated but said that the running of test trains would be undertaken to check the modelling. Southern confirmed it would want to review the testing outputs to make the assessment for itself, as it was nervous about the scheme having been de-scoped.

- 5.21.6 Asked if that was information it would expect to share with Southern, NR noted that Southern had already indicated satisfaction with the information provided. Southern confirmed it had been content with the 33kV project but wanted to see that the 11kV scheme would be satisfactory. NR noted that its letter of 1 February 2011 to Southern had been replied to by Southern on 17 February 2011 indicating it was OK subject to the satisfactory operation of the test trains. Southern said it was just seeking to work collaboratively with NR.
- 5.21.7 NR contended that Southern could have expressed its concern more firmly than just by applying the caveat "subject to ..." in its reply. Southern felt it had reserved the right to particularise, had reasonably used the caveat "subject to ..." and had clearly indicated that it was referring the matter to dispute. NR thought the detail in its 1 February 2011 letter had provided sufficient information and to the extent expected under Part G of the Network Code. Southern maintained that if NR had applied the Network Change process, its issues would have been pursued properly. Southern would have had 30 days to comment and the Network Change would not have been established otherwise than with its agreement.
- 5.22 The Panel concluded by asking if NR was sure that the information made available to Southern had amounted to an unequivocal assurance that Southern could run its 12-car trains from December 2011 and that if NR failed in enabling the provision of this service it would be failing as a competent operator of railway assets and therefore liable to a breach claim under the Track Access Agreement.
- 5.22.1 NR confirmed that this was so. It noted that there would also be a breach of the HLOS and it would be pursued by ORR accordingly. Southern, however, felt that pursuing a breach claim would be "jam tomorrow", and would wish to have the full information before running the trains, rather than merely NR's actionable assurance and commitment.
- 5.22.2 The Panel asked if NR wished to maintain its apparent assertion that the No Material Effect consultation was as good as the full Network Change process and that it had provided as much information as Southern might need or reasonably expect under the Network Change process. NR would not go this far; it conceded that there had been previous letters of No Material Effect where Access Dispute Panels had found there to be material effect. However NR noted that in this case, failure to deliver could put it in breach of its Licence. NR would just say that the No Material Effect letter process had come about within the industry over and above Part G of the Network Code, and if someone were to come back to a No Material Effect letter saying that there was a material effect, NR would deal with it accordingly.
- 5.22.3 NR declined to assert expressly that ultimately it was NR's decision whether a matter was Network Change or not. NR would only say that the way it worked was that if NR said No Material Effect and someone said otherwise, NR would either issue the Network Change documentation or let the matter go to dispute.
- 5.22.4 Asked what purpose, in the context of this dispute, did the No Material Effect letter go to serve, NR replied that it was to counter suggestions regarding failure to have consulted and so to protect the name of NR.

- 5.23 At the conclusion of the oral exchanges both Parties made closing statements which reflected and summarised their previous submissions and answers to questions.

## 6 Analysis and consideration of issues and submissions

- 6.1 In the preceding section of this determination I have set out at some length the substance of the oral exchanges at the Hearing. This is partly because these contain the detail of the Parties' respective arguments at a level which supplements considerably their submissions, and partly because they demonstrate quite graphically the complexity of, in particular, the issues arising in attempting to apply the various limbs of the definition of 'Network Change' from Part G of the Network Code. They also illustrate the temptation to lapse into circularity of argument when faced with such complexity, born possibly also out of a confusion as to which limb of the definition is being discussed at any one time.
- 6.2 The language of the Part G definition of Network Change is indeed somewhat confusing, because it uses the same concepts in a different logical sequence in the two limbs and their sub-parts. Thus in limb (a), the operative cause required is a change in or to the Network, which is likely materially to affect (which normally means producing a change of some sort) either the operation of the Network or the operation of trains. In limb (b) however, a change to the operation of the Network is the operative cause required, which is likely materially to affect the operation of trains (only) and will last more than six months. Moreover the sub-parts of the two limbs work differently; limbs (a)(i) and (a)(ii) are alternatives, whereas limbs (b)(i) and (b)(ii) are cumulative.
- 6.3 I note the above confusion mainly because it was evident from some of the arguments of the Parties in this ADA that there was sometimes a lack of clarity as to which parts of the definition were being relied on or referred to at any one time. In particular there was occasionally a certain looseness as to whether the 'materiality' being discussed as the central issue related to an effect on the operation of trains or of the Network, or both, or the materiality of a particular type of change. Incidentally I should mention that in both the Parties' submissions and the oral exchanges at the hearing the expressions "materially affects" and "has a material effect on" were used somewhat interchangeably. I do not think that matters; the logic is the same whether the verbal or the substantive formulation is used. "Materiality" is referred to accordingly in both senses, both in the oral exchanges and in this analysis.
- 6.4 At all events, the central issue was 'materiality' and what this concept actually meant. It was effectively agreed on all sides that the principal matter in dispute was whether the Project constituted Network Change within the meaning of one or more limbs of the definition, and it was agreed in the submissions that the operative cause, or precondition, required for limb (a) to apply was clearly satisfied here – a change to the Network. Though not expressly referred to in the submissions it emerged in the oral exchanges that there was also no real dispute that the precondition for limb (b) was regarded as satisfied – a change to the operation of the Network. The points outstanding were therefore whether the agreed change to the Network was likely materially to affect either the operation of the Network (limb (a)(i)) or the operation of trains by Southern (limb (a)(ii)); or whether the agreed change (whether or not itself material) to the operation of the Network was likely materially to affect the operation of trains by Southern (limb (b)(i)), and would last more than 6 months ((limb (b)(ii)), which all agreed it would.
- 6.5 The parties were agreed that the whole object of the power enhancement exercise was to enable the running of 12-car trains by Southern on the East Grinstead Branch line from the December

2011 timetable. This was in order to replace the running of 8-car trains. It appeared to be accepted on all sides that achieving the objective of changing from running 8-car to 12-car trains, producing a 50% increase in capacity, would amount in its own right to a material change to the operation both of trains and of the Network. However the key point of disagreement was as to the nature of the chain of causation leading up to that change. The polarising issue became whether something – a series of events, or a project – which enabled such a change might itself be regarded as having a material effect in bringing it about, and therefore as being "likely materially to affect" the operation of trains and/or the Network.

- 6.6 For the purpose of analysing what 'enabling' meant, as a matter of causation, at the outset of the oral exchanges I noted to the Parties the importance of identifying and distinguishing the concepts of 'necessary' and 'sufficient' enablers. The Parties agreed that the power enhancement Project the subject of the dispute and its associated projects sponsored by NR, the platform extensions and station access, were each necessary to enable the 12-car running scheme, but that none of them was sufficient in its own right to do so.
- 6.7 Southern's case regarding the effect on the operation of trains is, in essence, that the occurrence of something which is 'necessary' to enable a particular result is enough to make that thing a cause of that result, even if it is not the only cause, and the necessary thing therefore must properly be said "materially to affect" the operation that brings about the result. In the words of Southern's Statement of Reply, "The completion of the Project is an essential pre-requisite to the operation of longer trains and it therefore follows that the operation of trains will be materially affected by the Project".
- 6.8 I am persuaded by this argument, which I will refer to as the 'necessary enabler' argument. It seems to me to work both as a matter of abstract logic and as a matter of common sense. If doing A is necessary to enable B to occur, then the doing of A is a (even if not the) cause of the occurrence of B, and it must therefore be considered materially to affect the operation that produces B. Or to put it another way, if A were not done, then irrespective of anything else done, B would not occur; so doing A must be regarded as having a material effect on the operation that produces B. On this basis I have concluded that implementing a power enhancement Project which is necessary, even though not sufficient on its own, to enable Southern to change from running 8-car to running 12-car trains on the East Grinstead Branch line, is likely – indeed, certain – materially to affect the operation of trains by Southern on the Network. Given the uncontested satisfaction of the preconditions referred to in paragraph 6.4 above, the Project therefore satisfies the requirements of limbs (a)(ii) and (b) of the definition, and accordingly constitutes Network Change.
- 6.9 Southern also advanced a number of other points regarding the effect on the operation of trains but they were mainly to refute NR's various counters to the 'necessary enabler' argument, which I will deal with below.
- 6.10 NR's case regarding the effect on the operation of trains was that a thing's being merely 'necessary' for a result was not enough, there had to be something else to justify the accolade of "materiality" in producing that result. I consider that it failed to make out that case, though given every opportunity to do so. NR advanced several different arguments to support its proposition; some of these arguments overlapped or were inconsistent and it was sometimes difficult to identify whether a new argument was being started or an offshoot of a previous one (as may be evident from both its written submissions and my account of the oral exchanges above). Nonetheless I have attempted to distinguish NR's main lines of argument and I summarise these below, in roughly descending order of cogency.



- 6.11 NR's first argument was that the power enhancement Project, though necessary for 12-car train running, was not sufficient on its own. Viewed on its own the power enhancement was really only incidental when compared with the other projects that were necessary for the overall 12-car scheme, namely the platform extensions and the station area improvements. NR acknowledged this meant treating the power Project differently from the other two (because, though also necessary but not sufficient, each had been treated as Network Change), but just felt that these had extra attributes which the Project did not (see further below). Moreover, said NR, if we treat every change operation that is merely necessary for running the railway as Network Change, then we will have to go out to consultation every time we mend a broken rail.
- 6.12 I consider that the 'not sufficient' argument does not work, first, because it contradicts the logic of the 'necessary enabler' argument described above. As a matter of logic it cannot be the case that having a material effect in producing a result equates to having the only effect in producing that result – or that, to be material, the matter in question must be not just a cause but the cause. Then the argument fails also for precisely the reason acknowledged by NR, that it treats the other two relevant projects inconsistently. And as for the broken rail point, that is dealt with by the decision in ADP40 (referred to in the submissions) which among other things makes it clear that acts of routine maintenance are not to be treated as outside the normal day to day operation of the railway and are therefore not Network Change, unless they form part of an altogether wider change project.
- 6.13 NR's next line of argument regarding the effect on the operation of trains derived from the need to explain its inconsistent treatment, as I have noted above, of the three constituent projects of the overall 12-car running scheme. NR sought to distinguish the platform extension and station area projects, which had been classed as Network Change, from the power enhancement Project, which had not. In the course of its submissions, and as can be seen from the oral exchanges, NR variously described several different characteristics or qualities, some general and some specific, which it believed might amount to the necessary extra and distinguishing attribute of materiality. These included:
- being visible, to operators or drivers;
  - being physical;
  - being significant;
  - requiring a change in driver behaviour;
  - requiring driver training;
  - causing a change in voltage but not a change in current (specific to the power context);
  - being classified as Network Change by NR's experienced Network Change Coordinators;
  - being of concern to other interested Industry parties;
  - and not being intended to implement a pre-existing plan or commitment such as a Franchise obligation.

- 6.14 I do not think it necessary to deal with the detailed points for and against each of these proposed extra attributes of materiality; I believe that emerges from the record of the oral exchanges. It is sufficient to note that each proposed attribute was disqualified by a major element of doubt:
- Some of the attributes were absent in common from the Project and from the other two projects which NR sought to distinguish – implementing existing plans, change in voltage.
  - Some, though initially raised by NR, were denied by it at the point of being asked to say yes or no – being visible, being physical, affecting driver behaviour or requiring training.
  - Some just begged the question or were simply too vague to be meaningful – being significant, classified by NR's people, of concern to the industry.
- 6.15 Of the above, however, I should mention NR's particular line of argument regarding implementing pre-existing plans or commitments. This was expressed in a number of different ways in NR's written and oral submissions, one of which (in the Statement of Defence) was as follows: "The reasoning... includes... Network Rail's understanding that Southern and the DFT had proposed the changes contained in the Project and had accepted them previously". As I observed at the hearing, again as a matter of logic it is impossible to see how the doing of something that meets an existing need or plan of an operator, of itself could take it outside the possibility of being considered to have a material effect on the operation of trains and therefore of being Network Change. If this were the case, then, as Southern maintained, NR would be unable to discharge its function of providing information and enabling operators to plan for their services, and ultimately nothing would be capable of being Network Change unless planned exclusively by NR.
- 6.16 In substance, all Network Rail's arguments as to what constitutes a material effect on the operation of trains never really amounted to more than "you know it when you see it", or rather, "we know it when we see it, because we/NR are more experienced at applying the definition than anyone else in the Industry". NR consistently declined the Panel's invitation to identify any one or more of the various proposed possible attributes as being the distinguishing feature of materiality in its view. And when asked what there was in theory, in the absence of any such distinguishing feature, to prevent it from disaggregating projects artificially so as to avoid their classification as Network Change, NR had no answer but could only assert that in practice it just would not do so.
- 6.17 I entirely accept NR's statement that it does not purposefully engage in the business of salami-slicing change projects with the sole or indeed any purpose of excluding some of the slices from the Network Change process. However, if its practice in dividing up big projects into smaller ones disregards that process at the outset and is based only on temporary expediency and its own practical ad hoc operating requirements, and if it only comes to consider Network Change as an afterthought after the practical division has been made and is a fait accompli, then that practice seems to be perverse. If the outcome of this decision is to cause NR to revisit its approach to project scoping and planning accordingly, then I believe that will be a positive outcome.
- 6.18 I should record that NR raised other even less cogent arguments for not treating the Project as materially affecting the operation of trains and therefore not as Network Change:
- that its informal 'No Material Effect' consultation process was to all intents and purposes as engaging and informative as the formal Network Change process would have been;

- that other Industry parties' apparent acquiescence in the Project, under the informal consultation, supported not treating it formally;

- that a comparison with other projects that had or had not been deemed by NR to be Network Change, respectively WCML and Windsor & Eton Riverside, somehow illustrated the missing attribute of materiality;

- that Southern's motives for pursuing the dispute were somehow unconstructive or improper;

- and that the effect of an ADA decision classifying the Project as Network Change would delay NR in pursuing various projects which it already had under way or in the pipeline.

- 6.19 I am not sure whether NR actually intended these to stand as specific arguments against such a decision or just hoped that somehow in the aggregate they would weigh in favour of a policy decision not to rock the boat. At all events, as noted at the outset, I am required to reach my determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis. I therefore confirm that I consider all these other arguments to be irrelevant and not proper to take into account on the issue of whether the Project is likely materially to affect the operation of trains and therefore constitutes Network Change within the terms of the Network Code Part G definition.
- 6.20 Finally I should return to distinguishing the positions under the different limbs of the definition of Network Change. The preceding analysis addressed the 'necessary enabler' argument in relation to enabling the running of 12-car trains and therefore materially affecting the operation of trains, which engages limbs (a)(ii) and (b) of the definition. As recorded in the oral exchanges at the hearing, the Panel also heard from the Parties at some length on the issue of materially affecting the operation of the Network, which engages limb (a)(i) of the definition.
- 6.21 NR accepted that the proposed change to the power supply constituted a change to the operation of the Network, but maintained that this still did not materially affect the operation of the Network as required by limb (a)(i). There was some doubt as to whether the very opening words of the definition, "means, in relation to an Access Beneficiary", signified the need for a connection between the claimant Beneficiary and the relevant effect on the operation of the Network. This doubt was resolved in favour of requiring some sort of general connection at least, which we considered to be satisfied in the instant case.
- 6.22 However, after some considerable debate as to the technicalities involved in operating the Network both generally and in the relevant geographical areas, and therefore as to the nature of the effects of a power enhancement on such operation, NR was able to demonstrate to the Panel's satisfaction, by reference to the relevant Electrical Control Room diagram (for Brighton), that the East Grinstead Branch line represented a very small proportion of the whole area and number of monitored locations covered by the same Electrical Control Room. I have therefore concluded that the effect of the power enhancement Project on the operation of the Network (as distinct from the operation of trains) is not material, and that it therefore does not constitute Network Change at least under limb (a)(i) of the definition.
- 6.23 Having stated my conclusion in principle that the power enhancement Project constituted Network Change, I indicated that it was necessary to consider the consequences as raised by the Parties in their submissions. First, there was the contention by NR in its Statement of Defence that, if the Project were held to be Network Change, NR reserved the right to argue that it was a

Beneficiary proposed Network Change. NR stated that as a determination on this point had not been formally sought in the Statement of Defence, NR would not pursue it now but would reserve its position to pursue the equivalent point in some future case if necessary. The priority in this case was now for a Network Change notice to be issued, as there was a need to get things moving quickly. NR accepted that, irrespective of Southern's second remedy sought in paragraph 7.2 of the Statement of Claim, the project was now deemed to be Network Change and it was for NR to proceed accordingly.

- 6.24 Secondly, as previously noted, prior to the hearing I had concluded that an issue of contractual interpretation was raised by the decision expressly sought by Southern in its Statement of Claim that, if the ADA's determination were to classify the Project as Network Change, "Network Rail may nevertheless be permitted to proceed with the Project, albeit that the Project will be subject to the requirements of the Network Change regime". I had noted that this would require consideration of the powers as conferred by the Parties' track access contract (incorporating both the Network Code and the Rules) upon the ADA to make orders requested or otherwise considered necessary to resolve the dispute.
- 6.25 I also questioned whether the ADA would have the power to make a determination granting such a permission to NR (a) at all, in principle, or (b) in the specific terms sought, which appeared to be mutually contradictory. To grant such a permission in either respect would amount in practice to determining a suspension or waiver of the mandated requirements of the Network Change regime. Although as between the parties to any one track access agreement those requirements are accepted as a matter of contract, and therefore in principle are subject to waiver by mutual agreement, the Network Code including the Network Change regime is mandated into the contract by regulatory intervention, pursuant to the statutory powers of the ORR. The purpose of such intervention is to enable each individual track access contract to complement all others, as part of the integral multilateral scheme governing access to the Network by all interested parties. A particular waiver of any of the constituent parts of that scheme could therefore be seen as disrupting the integrity of the scheme as a whole.
- 6.26 I recognised that the ADR Rules gave ostensibly wide powers to an ADA to make any orders necessary to resolve the dispute, including (G48(b)) an order that "one Dispute Party should take or not take specified action". Nevertheless I questioned whether that was to be interpreted as extending to empowering an order as between two dispute parties waiving the observance of specific operative provisions of the Network Code, without taking into account the potential interests of others who were entitled to rely on the operation of the Network Code by virtue of its incorporation in their respective track access agreements. I recognise that Southern is currently the only operator of electric multiple unit trains on the East Grinstead Branch line but consider that a general principle has to be applied and that a localized solution should not be adopted for convenience.
- 6.27 Accordingly, having indicated my decision in principle that the Project did constitute Network Change at least under some parts of the definition, I required further submissions by the Parties at the hearing regarding Southern's request for an express permission for NR to proceed with the Project notwithstanding that it constituted Network Change. I concluded that the only basis on which this request might be implemented would be to issue a limited form of consent order binding on Southern and NR only. Whilst this could not protect NR from the risk of pursuit by other Parties if it chose not to implement the Network Change process for the Project, it could at least, by consent, remove the risk of further pursuit by Southern. It would then be a matter for NR's judgement, in the light of its knowledge of the Network, as to the likelihood of any other parties being sufficiently interested in the Project to follow it up.

- 6.28 A timescale was therefore set for Southern first to confirm if it wished to proceed with seeking such a consent order and thereafter to settle an agreed form of it with NR. It was noted that the form of order would have to determine with some precision both the period of time and the precise scope and specification of the Project covered by it. However on 10 August 2011 Southern notified the ADC Secretariat that it would not be proceeding further with seeking such an order.
- 6.29 At the conclusion of the hearing I invited the Parties to make any submissions regarding their costs of preparing for and conducting the hearing.
- 6.29.1 Southern commented that its position had been consistent over a period of time and was now proved correct. Southern thought NR should have realised that there was substance in Southern's stance and brought forward a Network Change proposal. Southern submitted that NR should be responsible for Southern's costs.
- 6.29.2 NR reminded the hearing that it had sought to resolve the dispute by mediation or some other process but Southern had not wished to do so. NR referred to Rule G55 and submitted that (a) there was no conduct issue, and (b) the fact that the Panel had considered extensive submissions, and indicated that NR had 'won' on at least one of the four limbs of the definition, indicated that the defence of the claim did have some merit. NR therefore submitted that no order for costs should be made.
- 6.29.3 Southern confirmed that there was no cause for criticism of NR's conduct in regard to the hearing. However, as to the Hearing Chair's discretion to award costs on the 'no merit' basis of Rule G55, Southern maintained that, if looked at objectively, it could not be considered reasonable that the dispute had needed to be brought. With regard to conduct at the Allocation hearing, Southern believed there was a degree of frustration on both sides regarding the slow progress towards resolution but in keeping with that it was Southern's view that these dispute procedures existed to safeguard industry processes, and that Access Dispute Adjudication was the most reasonably available determinative dispute forum.
- 6.29.4 NR noted that Rule G55 on costs set a criterion of being "so lacking in merit". NR contended that there was every reason to defend the claim because the spade was already in the ground and it would not want regulatory or other imported risk. The bar was too high as there was little precedent from ORR or other ADAs. NR had acted similarly in previous matters so it was appropriate to have defended its actions in this case. As it was, NR would have to consult internally to change its definitions for matters of Network Change.
- 6.30 Having considered the Parties' submissions I indicated that having regard to Rule G55 and the Parties' respective arguments, I would not be making any order as to costs.

## **7 Determination**

Having considered carefully the submissions and evidence as set out in sections 2, 4 and 5, and based on my analysis of the issues and submissions and my conclusions thereon set out in section 6,

### **I DETERMINE as follows:**

- 7.1 The Project proposed by NR and described by the Parties as an upgrade or enhancement to the existing electrical traction power supply on the Branch line between South Croydon and East Grinstead constitutes Network Change within the meaning of paragraphs (a)(ii) and (b) of the definition of that term, and accordingly has the consequences, set out in Part G of the Network Code, but does not constitute Network Change within the meaning of paragraph (a)(i) of that definition.
- 7.2 I make no order in response to the request in paragraph 7.2 of Southern's Statement of Claim that NR may nevertheless be permitted to proceed with the Project.
- 7.3 I make no order as to costs.
- 7.4 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**

**27 September 2011**