

THE OFFICE OF RAIL REGULATION'S DETERMINATION OF THE APPEAL BY FIRST CAPITAL CONNECT LIMITED ("FCC") AGAINST DETERMINATION "ADP21" OF THE ACCESS DISPUTES PANEL IN RESPECT OF A JOINT REFERENCE BROUGHT BY FCC AND NETWORK RAIL INFRASTRUCTURE LIMITED ("NR") REGARDING WORKS ON THE EAST COAST MAIN LINE

DETERMINATION: *The Office of Rail Regulation determines that FCC's appeal is upheld in respect of the definition of a "Major Project" in the Network Code but that determination of any rights of FCC to compensation and quantum should properly be referred to arbitration, for the reasons given below.*

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I Introduction

1. This is the determination of the Office of Rail Regulation (“ORR”) of the appeal, brought by FCC on 15 December 2006. The Notice of Appeal challenges the determination “ADP21” (“the Determination”) published on 8 December 2006 by the Access Disputes Panel (“the Panel”).
2. On 13 October 2006, NR and FCC made a joint reference to the Panel under Condition D 2.2.4 of Part D of the Network Code (“the Code”) and paragraph 8.4 of Part 3 of Schedule 4 to the Track Access Agreement (“the TAA”) between the parties. The Panel was asked to consider, in particular:
 - (a) whether certain overhead rewiring works (the “Rewiring Works”) on the East Coast Main Line (“ECML”) constituted a “Major Project” for the purposes of Part D of the Code;
 - (b) whether NR should have issued a Major Projects Notice (“MPN”) or a Possessions Strategy Notice (“PSN”) in relation to the Rewiring Works under the relevant version of the Code at the material time;
 - (c) in the event of NR’s failure to issue a MPN or PSN, which method of compensation was available to FCC under the relevant provisions of the TAA.
3. In the Determination, the Panel could not reach an unanimous conclusion as to whether the Rewiring Works constituted a Major Project. The Chairman determined the reference in favour of Network Rail, concluding that NR was entitled to make the decision whether or not the Rewiring Works could be implemented with or without either a PSN and/or a MPN, subject to challenge in accordance with D.2.2.4. The Chairman went on to conclude that FCC had not discharged its burden of proof in respect of its challenge. Accordingly, the Chairman did not accept that the direct costs compensation regime in paragraph 2.6 of Part 3 of Schedule 4 of the TAA was invoked.

II Facts

4. On 14 September 2004, NR attended a meeting with representatives of Great North Eastern Railway Limited (“GNER”) and West Anglia Great Northern Railway Limited (“WAGN”), the affected train operators at that time, where it outlined its access requirements for the Rewiring Works over a period between 2005 and 2007. The Rewiring Works consisted of a renewal of the overhead line equipment and support structure on part of the ECML. The renewals included replacement of span wires, droppers and catenary wires and the replacement of aluminium contact wire with copper contact wire.

5. The Rewiring Works were scheduled for the period between May 2005 and December 2007. FCC’s claim relates only to the period from 1 April 2006¹ and involved a total of 74 possessions, which were incorporated into the Rules of the Route in accordance with Part D of the Code, which were scheduled for:
 - 5.1. every weekend in 2006 between Saturday 1 April 2006 and Saturday 9 December 2006;
 - 5.2. every weekend in 2007 between Saturday 3 February 2007 and Saturday 19 May 2007;
 - 5.3. every weekend in 2007 between Saturday 15 September 2007 and Saturday 8 December 2007; and
 - 5.4. on the four bank holidays in 2006 and the Easter, Spring and August bank holidays in 2007.

6. Of those possessions:
 - 6.1. 48 lasted for less than 10 hours affecting only services during the first hours of Sunday;
 - 6.2. 19 (including 2 of the bank holidays) lasted over 50 hours affecting services throughout Saturday, Sunday and some of Monday; and

¹ The date that FCC succeeded as the Thameslink Great Northern franchisee

6.3. the other bank holidays had 3 possessions of 30 hours (Sunday to Monday morning); 35 hours (late Saturday to Monday morning) and 45 hours (Saturday afternoon to Monday morning).

7. At the meeting on 14 September 2004, NR indicated that it would issue a MPN in respect of the Rewiring Works. However, the proposal to issue a notice was subsequently countermanded by NR. It is common ground between the parties that no form of notice qualifying as a MPN or a PSN was issued in respect of the possessions.
8. In or around March/April 2005, WAGN sought compensation from NR on the basis that the Rewiring Works constituted a Major Project (notwithstanding that no MPN or PSN had been issued) and claimed that WAGN was entitled to compensation for its additional direct costs under paragraph 2.6 of Part 3 of Schedule 4 ("Direct Costs Compensation"), as opposed to limited compensation for its loss of revenue under paragraph 3.1 of Part 3 of Schedule 4 ("Revenue Compensation"). On 11 May 2005, NR agreed, on a confidential basis and with no admission of liability, to pay WAGN compensation on a bespoke basis until the end of its franchise period on 31 March 2006.
9. In December 2005, FCC was awarded the Thameslink Great Northern franchise, which includes the Great Northern routes previously operated by WAGN. FCC was made aware, during the due diligence arrangements as part of the transfer process, of the Rewiring Works, the fact that NR and WAGN had disputed their characterisation as a Major Project and that WAGN had accepted compensation from NR for the costs it had incurred up until the end of its franchise. For the period from 1 April 2006 to 10 June 2006, FCC benefited from certain property, rights and liabilities arising from the TAA previously held by WAGN, through a statutory transfer scheme published by the Secretary of State for Transport. With effect from 11 June 2006 until 9 December 2007², FCC operates its services in accordance with a new TAA, which retains Schedule 4 in identical terms to those previously held by WAGN.

²This date has subsequently been extended to December 2011.

10. Between January 2006 and August 2006, FCC and NR held discussions and engaged in correspondence concerning the Rewiring Works and the associated possessions. FCC sent a letter dated 17 May 2006 which stated that the Rewiring Works were a Major Project and that NR's failure to issue a MPN meant that FCC could not recover Direct Costs Compensation. FCC sought an indemnity for all "Relevant Losses" suffered as a result of the possessions, as opposed to being limited to Revenue Compensation. NR responded to FCC's letter of 17 May 2006 with a holding letter on 16 June 2006 stating that the Major Project definition might apply. It responded substantively on 29 June 2006, stating that the Rewiring Works did not amount to a "Project" and were therefore not a "Major Project" with the effect that only Revenue Compensation was payable.
11. Between August 2006 and October 2006, FCC and NR prepared a joint reference to the Panel. The dispute was referred to the panel on 13 October 2006. A hearing took place on 16 November 2006. The Panel's decision was published on 8 December 2006.

III Relevant Provisions of the Code and the TAA

12. Two versions of Part D of the Code are relevant to the present dispute, because certain provisions were amended during the course of the events giving rise to the dispute:

The Pink Pages

13. The first version of Part D of the Code, known as the "Pink Pages", was in effect until 4 May 2005. Those provisions set out a notification and consultation process, which was relevant if NR wished to implement a Major Project (the "MPN Process"). Broadly this process comprised of the issuing of a notice of the proposed Major Project, consultation on the proposed method of implementation and the issuing of a notice of proposed method of implementation. The final notice of proposed method

of implementation (see D.2.2.3 of the Code below) is referred to in this determination as a “MPN”.

14. The relevant definitions in the Pink Pages are:

“Major Project” means any engineering, maintenance or renewal project which requires a possession or series of possessions of one or more sections of track extending over:

(a) a period of more than one year; or

(b) a period which contains two or more Passenger Change Dates;

“Bidder” means each Train Operator, each Access Option Holder and each other person who has been allowed to participate in the procedure set out in this Part D pursuant to Condition D1.2;

15. The relevant provisions of the Pink Pages are:

2.2 Major Projects

2.2.1 Notice of proposed Major Project

Network Rail shall, if it wishes to implement a Major Project, give notice of its proposal to each Bidder that may be affected by the project together with such particulars of the proposed method of implementation of the project as are reasonably necessary to enable each such Bidder to evaluate the effect of the proposed project on its Services or the operation of its trains. In this Condition D.2.2 the expression "method of implementation" means a statement containing a programme of possessions or other restrictions on the use of the track which would be required in order to carry out the proposed project in question.

2.2.2 Consultation on proposed method of implementation

Network Rail shall invite the submission of comments from each Bidder to which it has given notice under Condition D.2.2.1 within such period as is reasonable in the circumstances having due regard to the likely effect of the proposed project on those Bidders and shall consult with them concerning the method of implementation for the proposed project.

2.2.3 Notice of proposed method of implementation

Subject to having complied with the foregoing provisions of this Condition D.2.2, Network Rail shall notify each Bidder to which it gave notice under Condition D.2.2.1 of its proposed method of implementation for the proposed project, provided that:

(a) in deciding such proposed method of implementation, Network Rail shall have had due regard to the Decision Criteria; and

(b) it shall have taken into account any comments submitted to it pursuant to Condition D.2.2.2.

2.2.4 Right of appeal

If any Bidder is dissatisfied as to:

(a) any matter concerning the operation of the procedure in this Condition D.2.2; or

(b) the method of implementation of the proposed Major Project as notified by Network Rail pursuant to Condition D.2.2.3 and, in particular, the application by Network Rail of the Decision Criteria,

it may, at any time prior to the date 30 days after the date on which it was notified pursuant to Condition D.2.2.3 of the proposed method of implementation, refer the matter to the Industry Committee for determination.

5.1 Right of appeal to relevant ADRR panel

5.1.1 Grounds for making an appeal

Without prejudice to Conditions D.4.6.2, D4.7.1 and D4.8.6, if any Bidder is dissatisfied with any decision of Network Rail made under this Part D, other than in the circumstances prescribed in Conditions D2.2.4, including:

[...]

it may refer the matter to the relevant ADRR panel for determination.

The Yellow Pages

16. The second version of Part D of the Code, known as the “Yellow Pages”, came into effect from 4 May 2005. The definition of “Bidder” was unchanged and the term “Restriction of Use” has the meaning set out in Schedule 4 to the TAA (see below). In particular, the Yellow Pages state that if NR, at any time, proposes implementing works of certain types, it may, at its discretion, give notice of its proposed works and, following consultation, issue a PSN setting out its intended method of implementation. Additionally, according to Note 5(c) of the Yellow Pages, NR shall issue a PSN in the event that it wishes to implement a “Major Project” and mark that notice as one relating to a “Major Project”.

17. The relevant provisions of the Yellow Pages are as follows:

2.2 Possessions Strategy Notice

2.2.1 Notice of proposed possessions strategy

If Network Rail at any time proposes implementing works which require a programme of coordinated Restrictions of Use extending over:

(a) a period of more than one year; or

(b) a period which contains two or more Passenger Change Dates,

it may at its discretion give notice of its proposal to each Bidder that may be affected by the proposed works together with

(i) such particulars of the proposed method of implementation of the works as are currently available to enable each such Bidder to understand the likely effect of the proposed works on its Services or the operation of its trains; and

(ii) an explanation of Network Rail's reasons for the proposed method of implementation.

In this Condition D.2.2 the expression "method of implementation" means a statement containing a programme of Restrictions of Use which would be required in order to carry out the proposed works.

2.2.2 Consultation on proposed method of implementation

Network Rail shall invite the submission of comments from each Bidder to which it has given notice under Condition D.2.2.1 within such period as is reasonable in the circumstances having due regard to the likely effect of the proposed works on those Bidders and shall consult with them concerning the method of implementation for the proposed works.

2.2.3 Notice of intended method of implementation

Subject to having complied with the foregoing provisions of this Condition D.2.2, Network Rail shall issue to each Bidder to which it gave notice under Condition D.2.2.1 a notice of its intended method of implementation for the proposed works ('Possessions Strategy Notice'), provided that:

(a) in deciding such intended method of implementation, Network Rail shall have had due regard to the Decision Criteria; and

(b) it shall have taken into account any comments submitted to it pursuant to Condition D.2.2.2.

2.2.4 Right of appeal

If any Bidder is dissatisfied as to:

(a) any matter concerning the operation of the procedure in this Condition D.2.2; or

(b) the intended method of implementation of the proposed works as notified by Network Rail pursuant to Condition D.2.2.3 and, in particular, the application by Network Rail of the Decision Criteria

it may, at any time prior to the date 30 days after the date on which it was notified pursuant to Condition D.2.2.3 of the intended method of implementation, refer the matter to the relevant ADRR panel for determination.

Note 5(c) to Part D:

In the event that Network Rail wishes to implement a Major Project, it shall issue a Possessions Strategy Notice in respect thereof in accordance with Condition D.2.2 and identify that notice as one relating to a Major Project (and for these purposes Major Project shall have the same definition as in the Preceding Code), provided that such obligation of Network Rail shall cease to apply if the term "Major Project Notice" is no longer used in defining a Significant Restriction of Use under any Access Agreement.

5.1 Right of appeal to relevant ADRR panel

5.1.1 Grounds for making an appeal

Without prejudice to Conditions D.4.6.2, D4.7.1 and D4.8.6, if any Bidder is dissatisfied with any decision of Network Rail made under this Part D, including:

[...]

(d) any decision of Network Rail which may be referred to the relevant ADRR Panel under Condition ...D2.2.4 or...

it may refer the matter to the relevant ADRR panel for determination.

5.1.2 Timescales for making an appeal to the relevant ADRR panel

[...]

(c) to the relevant ADRR panel pursuant to Condition D.2.2.4 shall be made within 30 days of receipt of the notification referred to in Condition D.2.2.3.

Relevant provisions of the TAA

18. Part 3 of Schedule 4 of the TAA deals with compensation for Restrictions of Use ("ROU"). In particular, Direct Costs Compensation arrangements can be agreed between NR and a train operator where there is a

“Significant Restriction of Use” (“SROU”), the definition of which includes the situation where a “MPN” has been issued.

19. The relevant definitions in the TAA for present purposes are:

“Network Rail Restriction of Use” means any Restriction of Use other than an Operator Restriction of Use, a Competent Authority Restriction of Use, a CTRL Possession or, if applicable, a Thameslink Possession;

“Restriction of Use” means, in respect of any day, any restriction of use of all or any part of the Routes (other than one caused by a Recovery Allowance which was contained in the applicable Rules of the Plan relevant to that day notified to each Bidder on or before the end of the Drafting Period under Part D) which results in:

(a) a difference between the Applicable Timetable on that day as compared with the First Working Timetable in respect of that day; and/or

(b) a difference between the First Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day;

20. Clause 8.2 of the TAA, headed “Compensation in relation to breach” provides as follows:

“In relation to any breach of this contract, the party in breach shall indemnify the Innocent Party against all Relevant Losses.

“Relevant Losses” means in relation to:

(a) a breach of this contract;...

all costs, losses (including loss of profit and loss of revenue), expenses, payments, damages, liabilities, interest and the amounts by which rights or entitlements to amounts have been reduced, in each case incurred or occasioned as a result of or by such breach;

21. The relevant provisions of Part 3 of Schedule 4 of the TAA for present purposes are:

“2.4 Network Rail payments

Subject to paragraph 2.3, Network Rail shall make payments to the Train Operator (in accordance with the procedure in paragraph 8) in respect of Restrictions of Use calculated on the following basis:

- (a) for each Network Rail Restriction of Use, in accordance with paragraph 3;*
- (b) for each Competent Authority Restriction of Use, in accordance with paragraph 7; and*
- (c) for each CTRL Possession and Thameslink Possession, in accordance with Part 4A or Part 4B (as the case may be).*

2.6 Presumption of approval of specific bespoke arrangements

Network Rail shall use its best endeavours to agree with any train operator bespoke arrangements in relation to compensation to take effect in the following circumstances:

- (a) where there is a Significant Restriction of Use as defined in paragraph 2.7;*
- (b) (i) all affected train operators have been consulted and are content with the approach which will be adopted in terms of the Restriction of Use location, time and duration;*
 - (ii) the compensation agreed is based on a detailed and transparent estimate of full amount of the Direct Costs to the train operator and shall be in addition to any compensation which is payable for that Restriction of Use under paragraph 3; and*
 - (iii) the compensation is agreed between each train operator and Network Rail and has been agreed within 56 days of the Restriction of Use being notified by Network Rail, and there will be a presumption that ORR shall approve such arrangements which have been agreed; and*
- (c) in default of agreement in relation to the level of compensation the mechanism and procedure for dispute resolution set out at paragraphs 8.3, 8.4 and 8.5 shall apply.*

2.7 Significant Restriction of Use

A Significant Restriction of Use is any Restriction of Use which is:

- (a) (i) in connection with a Major Project Notice, other than one where compensation is payable under Part G of the Network Code; or*
 - (ii) taken for a duration of 60 hours or longer and no part of the Restriction of Use occurs on a public holiday; or*

(iii) taken for a duration of 84 hours or longer where the Restriction of Use occurs over one weekend and one public holiday; or

(iv) taken for a duration of 108 hours or longer where the Restriction of Use occurs over one weekend and two public holidays; and

(b) results in a Service being cancelled, diverted off the Route over which it was scheduled to run in the Corresponding Day Timetable, or starting or finishing short in comparison with the Service as timetabled in the Corresponding Day Timetable; and

(c) estimated by the Train Operator to cause the Train Operator to incur Direct Costs of not less than £10,000.

8. Payment procedures

8.1 Network Rail Restrictions of Use

(a) Within 14 days after the end of each Period, Network Rail shall provide to the Train Operator a statement showing:

(i) all Network Rail Restrictions of Use taken during that Period;

(ii) all Competent Authority Restrictions of Use taken during that Period; and

(iii) any compensation payable in respect of the Network Rail Restrictions of Use identified,

in sufficient detail to enable the Train Operator to make an informed assessment thereof.

(b) The aggregate liabilities of Network Rail and the Train Operator, in respect of any and all compensation for which either is liable to the other under this Part 3 and under Part 5 in respect of each Period shall, to the extent that such compensation is not under dispute, be set off against each other and the balance (if any) shall be payable by Network Rail or the Train Operator, as the case may be, within 35 days after the end of that Period.

[...]

8.3 Disputes

(a) Within 10 days of receipt of a statement from Network Rail under paragraphs ... 8.1 ..., the Train Operator shall notify Network Rail of any aspects of the statement which it disputes, giving reasons for any dispute. Save to the extent that disputes are so notified, the Train Operator shall be deemed to have agreed the contents of the statement...

[...]

8.4 Dispute resolution

The procedure for resolving disputes notified under paragraph 8.3 shall be as follows:

(a) within 7 days of service of any notice under paragraph 8.3, the parties shall meet to discuss the disputed aspects of the statement with a view to resolving all disputes in good faith;

(b) if, within 7 days of that meeting (the "first meeting"), the parties are for any reason still unable to agree the disputed aspects of the statement, each party shall promptly (and in any event within 7 days) prepare a written summary of the disputed aspects of the statement and the reasons for each such dispute and shall submit the summaries to the senior officer of each party;

(c) within 28 days of the first meeting, the senior officers shall meet with a view to resolving all disputes;

(d) if no resolution results within 14 days of that meeting, either party may require that the matter be resolved by the ADRR Panel; and

(e) if either party is dissatisfied with the decision of the ADRR Panel or the ruling of the Disputes Chairman (as the case may be) such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that paragraph C1.26 to C1.31 of the Access Dispute Resolution Rules shall not apply).

8.5 Payments in the event of a dispute

Where any amount under paragraphs 8.1 or 8.2 is in dispute:

(a) the undisputed amount shall be paid in accordance with paragraphs 8.1 or 8.2 as the case may be;

(b) the disputed amount shall be paid within 28 days after the dispute is resolved or determined to the extent that the amount in dispute is adjudged or resolved to be payable; and

(c) the disputed amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the date on which such amount would but for such dispute have been due to be paid until the date of payment.

IV Summary of the Panel's Determination subject to this Appeal

22. The Determination was published on 8 December 2006. In brief, the Panel found that at the time of preparation of the timetable in force when FCC took over the franchise, the operative Part D was the Yellow Pages.

The Panel found that Note 5(c) in the Yellow Pages was clear that the requirement to issue a PSN was predicated on an act of will of NR. Note 5(c) imposed an obligation on NR, where it had decided that works fulfil the definition of a Major Project, to progress those works under the cover of a PSN marked to relate to a Major Project. The decision by NR as to whether works constitute a Major Project was liable to challenge.

23. The Panel considered and applied the interpretation of the term Major Project in Determination NV53, relating to the repainting of the Forth Bridge, but the Panel members were unable to decide upon its meaning. The Panel did not reach a unanimous decision as to whether NR had acted correctly. Panel Members Boon and Leadbetter found in favour of NR. Panel Members Hortin and McGregor found in favour of FCC.

24. In such circumstances, the Chairman made a determination in accordance with ADRR A1.70³. The Chairman found, in particular, that:

- 24.1. The detailed nature of the tasks was not inconsistent with other forms of renewal and maintenance carried out across the network year in year out. The replacement of aluminium with copper in the contact wire could and should be categorised as modern equivalent replacement, and there was no evidence of a change of capability.
- 24.2. The possessions would mostly last less than 10 hours and occupy the “normal” early hours of Sunday. They did not amount to SROUs on the basis of their duration.
- 24.3. The failure to issue a MPN by NR was not appealed by the previous franchisee WAGN. There was no evidence that Direct Costs Compensation arrangements had been agreed between

³ This rule sets out that where the Panel is not able to reach a unanimous decision the Panel Chairman shall make a determination

NR and WAGN and no bespoke compensation arrangements had been transferred to FCC from WAGN.

- 24.4. The key element affecting the case was whether the circumstances of the Rewiring Works fulfilled the definition of Major Project in the “Pink Pages” However, the definition of Major Project was not clear-cut. The Chairman referred to a finding of ORR in a previous case and sought to interpret the Code in the context of what its provisions were intended to achieve.
- 24.5. A key to understanding the concept of a Major Project depends on considering the benefits that accrue to either party where a Major Project occurs – for NR, security and certainty that the ROUs could not be appealed and for FCC, that the ROUs would qualify as SROUs irrespective of the duration of the possessions with Direct Costs Compensation.
- 24.6. The key practical difference between the Pink and Yellow Pages is that under the Pink Pages, NR could only secure the necessary ROUs by declaring the works to be a Major Project. Under the Yellow Pages, NR could issue a PSN without triggering the provisions of Schedule 4, Part 3, paragraphs 2.6 and 2.7. However, Note 5(c) in the Yellow Pages preserves the status of a MPN in particular circumstances.
- 24.7. Under the Yellow Pages, a PSN might relate to a Major Project or a project which was not a major project. The two are differentiated by the qualitative component of “engineering, maintenance or renewal” that warrants the use of the contractually undefined term “project”. This is a function of a reasoned and if necessary defended judgment by NR as to the content of the task in hand, and the number of tasks or scale of disruption. There is no obligation on NR to declare a Major

Project solely to make itself liable for higher levels of compensation.

24.8. If FCC wishes to argue the possible status of the Rewiring Works as a Major Project, it has to rely solely upon the force of its own analysis of the nature of the Rewiring Works.

24.9. NR is entitled to decide whether to issue a MPN or PSN, subject to challenge under D.2.2.4.

24.10. FCC did not discharge its burden of proof that the nature and circumstances of the Rewiring Works should be categorised as a Major Project requiring a PSN relating to a Major Project – it had not demonstrated that the works differed in kind (as opposed to volume) from the routine task of renewing and maintaining the network.

24.11. As a result, the mechanism for the payment of Direct Costs Compensation was not engaged.

V The Conduct of the Appeal before ORR

25. On 15 December 2006, FCC appealed the Panel's determination to ORR under Condition D.5.2 of the Code and paragraph 8.4 of Part 3 of Schedule 4 of the TAA. On 12 January 2007, ORR decided that it should proceed to hear the appeal. NR responded to the Notice of Appeal on 31 January 2007 and FCC submitted its Reply on 16 March 2007. On 3 April 2007, ORR determined that the appeal should proceed by way of rehearing and, on 25 April 2007, circulated a draft Report for the Hearing to the parties for comments and well as several written questions. NR provided replies to the specific questions addressed to it by letter of 11 May 2007.

26. On 18 May 2007, following receipt of the parties' comments, ORR issued a final version of the Report for the Hearing ("the Report"). The parties submitted written representations on the list of issues identified in the Report on 1 June 2007 and submitted further materials on 8 June 2007. On 11 June 2007, the parties attended the oral hearing ("the Hearing") before a panel of ORR representatives, David Robertson, Head of Track Access, Juliet Lazarus, Director of Legal Services and chaired by Michael Beswick, Executive Director of Rail Policy.
27. In the light of the documentary materials submitted by the parties on 8 June and at the Hearing, the Panel invited the parties to make limited post-hearing representations, which were filed by FCC and NR on 19 June 2007 and 29 June 2007 respectively.

VI The Grounds of Appeal and Relief sought

28. In the notice of appeal dated 15 December 2006, FCC raises the following two principal grounds of appeal:
- (a) The Panel erred in its interpretation of the definition of "Major Project" and wrongly concluded that the Code grants NR a subjective discretion to decide whether works fulfil that definition;
 - (b) The Panel took account of irrelevant considerations and acted unfairly by taking account of matters that had not been referred to them for determination, such as the conduct of the previous franchisee, the Appellant's knowledge prior to the transfer of the franchise and the purpose of the draftsman of the Code. The Panel committed a serious procedural irregularity by failing to give the parties an opportunity to respond to its different formulation of the case and by asserting incorrectly that certain submissions and evidence had not been put before the Panel.

29. FCC asks that the determination in ADP21 be set aside and replaced with a ruling that:

- (a) the Rewiring Works constitute a Major Project; and either
- (b) NR use its best endeavours to agree with FCC Direct Costs Compensation in respect of the Rewiring Works after 1 April 2006, with the parties permitted to refer back to the Panel any failure to agree those arrangements within 30 days after determination; or
- (c) NR pay compensation to FCC by way of the damages suffered by FCC as a result of NR's failure to issue a MPN in respect of the Rewiring Works a sum equal to its direct costs as a result of the ROUs in respect of the Rewiring Works taken after 1 April 2006.

30. In its Respondent's Notice dated 31 January 2007, NR opposed the appeal on the following basis:

- (a) The Panel did not have jurisdiction under Condition D.2.2.4 of the Code as the issue of a MPN or PSN is a matter governed by paragraph 8 of Part 3 of Schedule 4 to the TAA;
- (b) the Panel was correct in finding that NR was not obliged to issue a MPN or PSN since NR was entitled to exercise its discretion not to do so;
- (c) the Panel did not commit any procedural irregularity as the additional considerations were either raised by the parties in their submissions or were matters that the Panel was entitled to review or were not determinative of the appeal.

31. NR asks ORR to determine that:

- (a) FCC's claim should be rejected (and should have been rejected by the Panel) on the basis that its claim lies under paragraph 8 of Part 3 of Schedule 4, and that claim is not available as FCC has not complied with the procedural requirements in paragraph 8(3);
- (b) FCC is not entitled to require service of a MPN part way through completion of those works.
- (c) the Panel's decision should be upheld.
- (d) The allegations of procedural irregularity are unfounded and should be specifically rejected.

32. ORR is asked to determine the question of when NR should issue MPNs and PSNs in any event as that matter is of wider interest to the industry as a whole.

VII ORR's consideration of the appeal

33. This complex appeal raises important issues of principle concerning whether NR was required, or alternatively had a discretion, to issue a notice to train operators in respect of the Rewiring Works on the ECML. The scope of NR's obligation is dependent on whether the works fulfil the substantive requirements to constitute a "Major Project", although there is considerable contention as to what those requirements comprise. The appeal also touches upon the remedies and other consequences that follow from an alleged failure to issue a MPN. The analysis is complicated by the fact that the Code was updated and the relevant franchise was transferred during the course of events leading to the appeal.

34. Aside from the substantive issues, there is a debate as to the extent of ORR's jurisdiction in a case such as the present. Although ORR is entitled to determine appeals under Part D of the Code, it does not ordinarily have

jurisdiction in relation to compensation claims under the TAA. ORR understands that FCC has also appealed the Panel's decision under paragraph 8(4)(e) of Part 3 of Schedule 4 of the TAA by a reference to arbitration, but that such arbitration proceedings have been stayed pending resolution of this appeal.

35. In the Report, ORR identified six relevant issues for the appeal. With the benefit of the parties' submissions at the Hearing, those issues can be consolidated and simplified. ORR proceeds to deal with the issues raised by this appeal in the following order:

- A. **Procedural unfairness:** Did the Panel act in a way that was procedurally unfair? What are the consequences of any unfairness?
- B. **“Major Project”:** What is the correct interpretation of “Major Project” and how does it apply in the context of the Rewiring Works?
- C. **Applicable provisions and Jurisdiction:** What are NR's obligations under the Code and the TAA and has it complied with them? What are the consequences of any failure to comply? In what circumstances does ORR have jurisdiction to hear disputes regarding a failure to comply with Part D of the Code and/or Schedule 4 of the TAA?

Issue A Procedural unfairness

Summary of the parties' submissions

36. FCC has alleged that the Panel committed various procedural errors by taking account of a number of issues that did not form part of the dispute process and which were not properly put to the parties for comment. Such issues included applying a purposive interpretation to Condition D.2.2.4, taking account of the settlement negotiations between NR and WAGN prior to 1 April 2006 and the extent of FCC's knowledge of the works before it took over the franchise. Moreover, the Panel applied an unfair

burden of proof for the first time in the Determination, holding that FCC had not discharged its evidential burden when it had not been given an adequate opportunity to respond to the matters raised for the first time at the hearing before the Panel. At the Hearing FCC submitted that, despite these issues being over-taken because the appeal was being conducted by way of a re-hearing, in its view they were still important background to assist an understanding of the merits of the case. FCC asked ORR to provide commentary in its determination on the first stage process before the Panel, if it considered it appropriate to do so and/or some guidance on such procedural issues generally which might assist in any future cases.

37. FCC's contentions are disputed by NR, whose position is that the parties raised the issues themselves or else that the Panel was entitled to determine such matters in any event.

ORR's analysis

38. Given the extent of the dispute between the parties and the complexity and importance of the issues raised for the industry in general, ORR has considered it necessary, in the interests of justice, to conduct a re-hearing in this case rather than a more limited review of the Determination. As a re-hearing has permitted the parties to make full representations to ORR in writing and orally on the issues considered in the Determination, ORR considers that this process would also remedy any procedural defects that may have been committed by the Panel. Accordingly, ORR does not consider it necessary to determine whether FCC's allegations of procedural unfairness are founded or not.

ORR Conclusion

39. In light of the above analysis, ORR does not consider it appropriate to provide any commentary on the Panel's process. However, given that FCC indicated that some observations on the treatment of new issues that arise during the course of an appeal might be of assistance in future cases

ORR considers that it might be helpful to provide some general guidance. These comments should not be taken to imply any criticism of the Panel's conduct of this case.

40. ORR would observe that, if certain new issues are raised by parties themselves during an appeal, consideration of them by a panel could be no more than an anticipated development of the case. In any event, there is nothing to stop a panel from raising issues of its own motion that appear to be relevant to the case before it. Clearly, as a matter of general procedural fairness, if new issues do happen to arise, a panel should rule on them only after it has put such issues to the parties and has given them an adequate opportunity to respond both to the panel's position and to their opponent's submissions including, if necessary, via post-hearing submissions.

Issue B "Major Project"

Summary of the parties' submissions

41. FCC submits that the Rewiring Works meet each limb of the Part D definition of a "Major Project" as they involve a maintenance and renewal project requiring a series of possessions extending over a period of two years. In its view, the works are a "project", as the word is referred to in common English usage, and the works were described as a "project" by NR itself. The Panel erred in applying the additional criteria of "novelty" or innovation and took account of irrelevant considerations such as the conduct of the previous franchise-holder, the knowledge of FCC prior to assuming the franchise and the purpose of the compensation provisions in the TAA.

42. NR agrees that, subject to the meaning of the word "project", the Rewiring Works otherwise meet the requirements of Part D. In its view, the term "Major Project" should be interpreted in line with the definition in the Code

with additional guidance from the definition of “project” given by the Association of Project Management (“the APM definition”), namely:

“A unique set of co-ordinated activities, with definite starting and finishing points, undertaken by an individual or organisation to meet specific objectives within defined, time, cost and performance parameters”

43. NR drew attention to the fact that the Yellow Pages envisage two types of PSN; a mandatory PSN for Major Projects and a discretionary PSN for other works requiring a programme of co-ordinated restrictions of use. Since both types of PSN can be issued in relation to coordinated possessions extending over a year, the length and coordination of the works cannot be the decisive factors which differentiate the two types of PSN. NR submits that whether or not the works contemplated can be defined as a “project” and therefore require a MPN must be to do with the nature and scope of the works, in the sense of them being in some way out of the ordinary or exceptional in their nature. NR submits that this is the key criterion it adopts when considering whether a MPN/PSN should be issued.
44. NR submits that the Rewiring Works merely amount to routine renewal of electrical equipment without the replacement of the entire electrical supply system. The changes do not enhance the network’s operation or capacity in any significant respect or result in substantive operational changes. The Rewiring Works are procured as a coordinated series of discrete and independent packages which can generally be completed through standard possessions within the Rules of the Route. They are “run of the mill” and do not require a change to NR’s engineering/maintenance policy.
45. NR raised concerns about the implications for its costs and efficiency if the term “Major Project”, with the accompanying Direct Costs Compensation, is construed to cover a large part of its general maintenance and renewals activity.

46. Both parties relied on the previous determination of the Network and Vehicle Change Committee (“the Committee”) in relation to the painting arrangements for the Forth Bridge (“NV53”). In that case the Committee ruled that NR should have designated the Forth Bridge repainting project as a Major Project since *“the introduction of changed painting methods for the Forth Bridge involve the commitment of specifically contracted resources, over a period of seven years, during the whole course of which there was a potential requirement for possessions, all to achieve the finite goal that future maintenance would be on a different system.”*

ORR’s analysis

47. Whether or not a particular set of works constitutes a “Major Project” for the purpose of the Code and a TAA requires an objective assessment, which is independent of the parties’ identity, subjective views, knowledge or intentions. Once the substantive requirements for a “Major Project” have been settled as a matter of law, the fulfilment of them in a given case is a question of fact that must be determined in the light of the individual circumstances of the case.

48. The starting point for such analysis is the definition in the Pink Pages of the Code, which has been incorporated into the Yellow Pages by Note 5(c) (“the Part D Definition”), as follows:

“Major Project” means any engineering, maintenance or renewal project which requires a possession or series of possessions of one or more sections of track extending over:

(a) a period of more than one year; or

(b) a period which contains two or more Passenger Change Dates;

49. As the Committee held in NV53⁴, that definition lays down a series of basic requirements which must be satisfied before a set of works can be classified as a Major Project:

- (a) The works constitute a “project”;
- (b) The project involves engineering, maintenance or renewal works;
- (c) The works must require a possession or series of possessions;
- (d) The possessions must involve one or more sections of track; and
- (e) The possession or series of possessions must last for more than one year or for a period which contains two or more Passenger Change Dates.

50. Given that the Part D definition expressly covers maintenance or renewals works, fulfilment of conditions (b) to (e) are not in issue in the present case. Accordingly, the dispute between the parties centres on the definition of “project”.

51. NR has presented concerns that the meaning of “project” referred to in the definition of “Major Project” should carry a meaning to differentiate it from the word “project” commonly used, otherwise it will undermine its ability to plan and invest effectively and efficiently in the maintenance and renewal of the network. Whilst ORR accepts this as a valid concern, the SROU regime is designed to ensure that train operators do not bear unreasonable additional costs generated by a major disruption to their services from planned possessions and thus to incentivise NR to act in a way that promotes the efficiency of the industry as a whole.

52. In this respect, it is important that the term “Major Project” serves two separate purposes:

- (a) The definition was originally used in D.2.2.1 of the Code to give NR flexibility and certainty in securing the possessions that it needed to carry out proposed works and to enable affected Bidders to evaluate

⁴ NV53, para 9.2

the effect of the project and its proposed method of implementation on their services and train operations. For that purpose, the term “Major Project” was given a broad definition so that NR could give notice of its works and train operators could adjust their operations to accommodate the necessary restrictions of use; and

- (b) Subsequently, the Part D definition was incorporated into the compensation mechanisms in the TAAs between NR and the train operators. Schedule 4 of the TAA provides a mechanism for NR and the train operator concerned to agree “bespoke arrangements” for Direct Costs Compensation where there is a SROU, the definition of which cross-refers to restrictions of use “in connection with a Major Project Notice”. In that context, compensation is to be paid on an enhanced basis where the notified possessions cause significant disruption to particular train operators and their services.

53. ORR agrees with the parties that, in the absence of any specific definition in the Code for the word “project”, it should be interpreted by reference to its ordinary meaning, taking into account the context in which it is used. ORR considers that the definition of “project” in most dictionaries is not sufficiently detailed for this purpose and so it has considered the APM definition considered in representations by both parties. ORR considers that this definition is an explanation of the word’s ordinary meaning in a project management context. ORR makes the following observations in connection with the use of the APM definition⁵ in the specific context of Part D of the Code and Schedule 4 of the TAA:

- (a) By “set of coordinated activities”, the project entails a package of interdependent activities that are planned and managed as a discrete piece of work with one or more unified objective(s);

⁵ Cited at paragraph 42 above

- (b) The individual activities will be programmed so that they are completed on a sequential and continuous basis within a proposed timeframe. However, contrary to NR's contentions, the precise sequence in which the individual elements are undertaken as part of the critical path is not determinative;
- (c) The word "unique" in the APM definition should not be read as referring to the use of novel or innovative processes. Instead, in this context, the term refers to works which, are of unusual nature and scope and/or are coordinated and implemented in an unusual way. The works are therefore different from ordinary "run-of the-mill" maintenance or renewal works; and
- (d) Although the project will require the commitment of identified resources and costs, there must be sufficient flexibility to allow for the works to evolve in scope, time and cost as part of the ongoing management of the project.

54. ORR therefore considers that a programme of works will constitute a "Major Project", for the purposes of Condition D.2.2 of the Code and Schedule 4 of the TAA, where it fulfils the following four cumulative conditions:

- (a) the works constitute a "project", in the sense of a discrete set of co-ordinated activities, with definite starting and finishing points. The activities are undertaken by an organisation to meet specific objectives within defined time, cost and performance parameters and are "unique" in the sense that they are of unusual nature and scope and/or are coordinated and implemented in an unusual way; and
- (b) the works involve engineering, maintenance or renewal activities; and
- (c) the works require a possession or series of possessions over one or more sections of track; and
- (d) the works last for more than one year or for a period which contains two or more Passenger Change Dates.

ORR's conclusion on the facts of the present case

55. In the present case, conditions (b), (c) and (d) of the test summarised above are clearly established on the facts. In relation to condition (a) the Rewiring Works clearly involve a set of co-ordinated activities undertaken by NR to meet the specific objective of renewing the overhead line equipment on the ECML within defined, time, cost and performance parameters. The possessions, which cover one or more sections of track, were planned to take place between May 2005 and December 2007 – a period of more than one year. The debate between the parties therefore centres on whether the Rewiring Works are of unusual nature and scope and/or are coordinated and implemented in an unusual way.

56. ORR considers that, in the particular circumstances of the present case, the following considerations are material:

- (a) FCC gave evidence, which was not contested by NR, that the Rewiring Works replace a large proportion of the overhead line equipment, including its support construction, which had not been wholly renewed or replaced for over 30 years. Even NR, in its letter of 11 May 2005, recognised that the nature of the works was “unique”. The nature of the works therefore extends beyond ordinary or “run-of the mill” maintenance or ad hoc renewals;
- (b) the Rewiring Works have affected the whole of the operational route covering a substantial length of track⁶. They have resulted in complete closure of the ECML from Saturday until Monday on more than 20 occasions and on Sunday morning on 48 occasions in less than 2 years. On numerous other occasions, there has been a severely restricted service over prolonged periods at weekends and

⁶ At the hearing, FCC gave evidence, which was not contested by NR, that the Rewiring Works affected approximately 280 track miles.

on bank holidays. The scope of the Rewiring Works is therefore unusual; and

- (c) NR decided to “package” a number of renewal works together so as to coordinate the necessary possessions in a timely and cost-effective manner and to minimise the disruption to passengers and end-users of the railway. The way in which NR decided to implement the works meant that it required more concentrated possessions than it would otherwise have done. The way in which the works were coordinated and/or implemented is therefore unusual.

57. In the light of the above considerations, ORR considers that the Rewiring Works constitute a “Major Project” because they fulfil all four substantive requirements, as set out at paragraph 54 above including the fact that they are unusual in their nature and scope and in the way in which they are coordinated and implemented.

Issue C Applicable provisions and Jurisdiction

58. Having determined that the Rewiring Works constitute a Major Project for the purpose of the Code, it is then necessary to determine which version of the Code applies to the facts of the present case, the scope of NR’s duties and the potential remedies available to a train operator that wishes to challenge an alleged failure to comply with the notice provisions in the Code.

(a) Relevant provisions

Parties’ submissions

59. FCC takes the view that both the Pink Pages and the Yellow Pages of the Code are relevant as NR was subject to a continuing obligation which commenced when the Rewiring Works were first in contemplation. After the expiry of the Pink Pages in May 2005, Note 5(c) of the Yellow

Pages applies, with the effect that a PSN should have been served after that date.

60. NR contends that the relevant time for determining the application of the provisions is the date of the challenge. If WAGN had wanted to challenge the failure, the Pink Pages would have applied. As FCC has brought the claim post May 2005, the Yellow Pages apply.

61. At the Hearing, both parties conceded that, as Note 5(c) in the Yellow Pages incorporates from the Pink Pages the notice requirements that apply to Major Projects, there is in practice little substantive difference between the two versions.

ORR's analysis

62. ORR is not convinced by FCC's analysis that NR was subject to a continuing obligation under the Code which persisted at all times while the Rewiring Works were being carried out. First, there is no support for such an obligation in the terms of the Code itself, which as NR has correctly pointed out, deals with "proposed works" and not works that have already commenced. Secondly, it would mean that projects and the programmed possessions could be unravelled months or years down the line, long after the works have been commenced. Such a position would create considerable instability for the industry, not just NR, to the disadvantage of all concerned.

63. The better view is to regard NR's duties as crystallising at a particular point in time. In the Determination, the Panel concluded that the material time for assessing the applicable version of the Code was the time when FCC took over the franchise in April 2006. In ORR's view, the transfer of the franchise has no bearing on the substance of NR's duties under the Code and should not have been determinative. The material time for determining the application of the Code is the time when any notice should have been served (if there was indeed an obligation to serve one). That period may

span from the time when the works were first in contemplation until the project started to be implemented.

ORR's conclusion

64. In the present case, and based on the facts before us, NR was contemplating the works at least from September 2004 and commenced the Rewiring Works in May 2005. Accordingly, NR's duties under the Code in respect of giving notice of the Rewiring Works should be assessed by reference to the Pink Pages, which were in force at that time.

(b) The scope of NR's duties

65. Condition D.2.2.1 of the Pink Pages sets out, in mandatory terms, that NR "shall" give notice of its proposal to implement a Major Project to each Bidder that may be affected by the project⁷. It therefore imposes a clear obligation on NR to notify affected operators and access parties in advance and, pursuant to Condition D.2.2.2 to 2.2.3, consult with them regarding the method of implementation before it proceeds to start the project in question.

66. At paragraph 57 above, ORR found that the Rewiring Works constitute a "Major Project" yet it is accepted that no MPN has ever been served in respect of the Rewiring Works. NR has therefore breached its obligations in Condition D.2.2.1 to 2.2.3 of the Code as it has commenced the Rewiring Works without following the MPN Process.

(c) Potential remedies available

Parties' submissions

67. The parties are in dispute as to which remedies are available for a breach of Part D of the Code. While FCC contends that it can bring its claim under

⁷ As explained above, a similar duty arises in respect of "Major Projects" after 4 May 2005 by virtue of Note 5(c) of the Yellow Pages.

Condition D.2.2.4 of the Code, NR contends that Part D of the Code was not intended to cover the situation where a MPN should have been issued but was not. In NR's view, the right of appeal provided in Condition D.2.2.4 extends only to dissatisfaction with the intended method of implementation of the works. Extending Condition D.2.2.4 to cover the failure to issue a MPN would require implied terms and would be inconsistent with Clause 18.3.2 of the TAA which provides that the remedies under the TAA are to be the sole remedies available.

68. NR accepted that there had to be some contractual mechanism for a dissatisfied train operator to challenge non-issue of a MPN. In NR's view, paragraph 8 of Part 3 of Schedule 4 of the TAA provides an adequate mechanism for an appeal as to whether a MPN should have been issued, provided the time limits set out in that paragraph are respected.

69. At the Hearing, NR accepted that Condition D.5.1 might be available to resolve a dispute concerning the failure to issue a notice but that, in any event, FCC had not complied with the 7 day time limit provided.

ORR's analysis

70. Given the wide-spread confusion about the way in which the provisions of the Code and TAA operate and interact, ORR considers it worthwhile to devote some time to explaining the general framework in place for dealing with a situation where NR has failed to comply with the MPN Process and the works are already in progress. ORR will then apply that framework to the particular facts of this case.

(i) Part D of the Code

71. Starting with Part D of the Code, Condition 2.2.4, headed "Right of Appeal" provides:

If any Bidder is dissatisfied as to:

(a) any matter concerning the operation of the procedure in this Condition D.2.2; or

(b) the method of implementation of the proposed Major Project as notified by Network Rail pursuant to Condition D.2.2.3 and, in particular, the application by Network Rail of the Decision Criteria,

it may, at any time prior to the date 30 days after the date on which it was notified pursuant to Condition D.2.2.3 of the proposed method of implementation, refer the matter to the Industry Committee for determination.

72. ORR does not accept NR's contention that the wording of Condition D.2.2.4 is not intended to deal with a situation where NR has failed to serve a MPN. Indeed, as the Committee held in NV53, the words "*any matter concerning the operation of the procedure in this Condition D.2.2*" in sub-paragraph (a) should reasonably be deemed to embrace any failure to operate that procedure. That includes a failure to serve the preliminary notice required by D2.2.1 and/or a failure to carry out the subsequent consultation and notice procedures in advance of commencing the works, as required by Conditions D.2.2.2 and D.2.2.3. That conclusion flows from the ordinary wording of Condition D.2.2.4 and ORR sees no good reason for reading any limitation into that right.

73. Accordingly, Condition D.2.2.4 of the Code provides a clear right of appeal for challenging an alleged failure to issue the relevant notices or conduct the consultation procedures. In the light of that conclusion, ORR does not consider that it is necessary to consider other provisions of the Code or the TAA, including D.5.1 and paragraph 8 of Part 3 of Schedule 4 of the TAA, to see whether they can provide a mechanism to challenge non-issue of a MPN.

74. In bringing an appeal under Condition D.2.2.4, a Bidder must however comply with all applicable procedural requirements, including any relevant time limits. The last sub-paragraph of Condition D.2.2.4 is unfortunately worded, being drafted on the assumption that the MPN will have been properly served. It operates to apply a "longstop date" for bringing an

appeal of 30 days after a Bidder's receipt of the MPN. That sub-paragraph is silent as to the time limits that apply when no notice has been served. It is self evident that, where no MPN has been served, that longstop date will never be reached. However, the mere lack of a procedural time limit for the exercise of the right of appeal cannot undermine the existence of the substantive right in the first place.

75. In the circumstances of where the MPN Process has not been complied with, ORR considers it necessary to imply a reasonable time limit for bringing an appeal. In practice a Bidder may not have received any notice but will be aware of the proposed works and the possessions scheduled. Before the works commence, the Bidder can seek to persuade NR to go through the MPN Process and failing that, commence an appeal under the Code to secure its notification and consultation rights. ORR considers that such an appeal should be made within a reasonable time from the Bidder becoming aware that NR does not intend to follow the MPN Process. However, once the works have started, the procedures set out in Conditions D.2.2.1 to D.2.2.3 can no longer be complied with and there is no sense in holding up the works in order to go through the MPN Process as a matter of formality.

ORR's conclusion

76. In the light of the above considerations, ORR considers that a Bidder is entitled to bring an appeal under Condition D.2.2.4 in respect of a failure to follow the MPN Process at any time prior to the works commencing and must bring that appeal within a reasonable time of becoming aware that NR does not intend to follow the MPN Process.

77. Once the works have commenced, however, the appeal procedure under Condition D.2.2.4 is no longer appropriate. As a result of the incorporation of the Code into the TAA⁸, the breach of the notification and consultation requirements in Conditions D.2.2.1 to D2.2.3 of the Code will in any event

⁸ See Clause 2.1 of the TAA.

constitute a breach of the TAA. Once the works have commenced, the Bidder's remedy in this respect is a claim for damages for breach of the TAA, in accordance with all the provisions of the TAA agreed between the parties.

(ii) The TAA compensation provisions

Summary of the parties' submissions

78. In relation to the TAA and the relevant compensation provisions, in its written pleadings, FCC advanced a general allegation that it is entitled to Direct Costs Compensation under the TAA and/or damages for breach of contract.

79. NR disputes that FCC has any right to claim compensation in respect of its failure to serve a MPN. In NR's view FCC has no entitlement to Direct Costs Compensation under Schedule 4, as the relevant TAA at the time of the breach was the agreement in place between NR and WAGN. FCC was not privy to that contract. Further, Clause 19(1)(c) of the TAA prevents the transfer of any rights from WAGN to FCC as WAGN had waived its rights in the settlement agreement negotiated in May 2005. In the alternative, even if FCC had some entitlement to claim damages under its own TAA, it has not complied with the strict time limits in paragraph 8.3 of Schedule 4 and is precluded by Clause 11.3 of the TAA from claiming Relevant Losses that result from delays or cancellations of trains.

ORR's analysis

80. It is important that, although ORR has jurisdiction in respect of appeals brought under Condition D.2.2.4 of the Code, it does not have jurisdiction to assess any right to and the quantum of compensation under the TAA. Although the parties indicated that they were content to agree between themselves that ORR could assume jurisdiction over all aspects of the

appeal, they could not point to any specific provision which conferred such jurisdiction on ORR.

81. ORR does not consider that mutual agreement of the parties is sufficient to require ORR to accept jurisdiction over a dispute that would otherwise be referred to arbitration under the TAA. Instead, ORR has a discretion whether or not to accept such jurisdiction and that decision will be governed by ORR's general duties under section 4 of the Railways Act 1993, as amended ("the Act").

82. Section 4 of the Act sets out a number of duties ("section 4 duties"). There is no statutory order of priority and it is for ORR to balance them and give each appropriate weight in the circumstances of an individual case. In this case ORR needs to consider the interests of the parties in achieving prompt and effective resolution of their dispute and the wider public interest in the use of ORR's resources for this purpose, particularly in light of the elements of the dispute already determined by ORR in this case. In particular, ORR considers that its section 4 duties of exercising its functions in the manner it considers to be best calculated to promote efficiency and economy on the part of persons providing railway services and to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance, are relevant in this case⁹.

83. ORR is not convinced that it is the most appropriate forum to deal with disputed issues of fact, contractual interpretation and quantum that are incidents of a bilateral relationship between NR and FCC without any wider regulatory significance for the industry as a whole. In this context it should be noted that the access regime, as embodied in track access agreements and the Code, contains a clear distinction between matters that affect multilateral relations with industry wide significance (over which ORR has an appeal function) and contractual matters usually of relevance only to the immediate parties to a particular track access agreement

⁹ Section 4(1)(c) and (g) of the Act

(for which arbitration is provided in the TAA). Before accepting jurisdiction over matters that would usually go to arbitration, ORR would need to be satisfied that there was a good reason in the particular case to do so.

84. In these proceedings, FCC has not clearly particularised the obligation in respect of which it claims NR has breached the TAA nor has it clarified the basis on which it seeks compensation. Its position has changed throughout the case¹⁰. Similarly, FCC has not clearly established its standing to bring the claim, given that WAGN, the previous franchisee, was the relevant contractual counterparty at the time of the breach and appears to have compromised its rights.

85. In the present case, there is a number of issues which have been canvassed by the parties during the course of the re-hearing but which remain contested. Some of those issues were addressed for the first time at the Hearing and in post-hearing submissions. They need to be further particularised and developed in argument by both parties before a determination could be reached as to the parties' legal entitlements. Such outstanding issues include:

- (a) identification of the obligation that NR is alleged to have breached and clarification of its nature as a past or continuing breach;
- (b) particulars as to the basis for FCC's right of action under WAGN's and/or its own TAA;
- (c) a detailed explanation as to the transfer or assignment of any accrued right of action from WAGN to FCC, whether under the statutory transfer scheme and/or Clause 19 of the TAA;

¹⁰ In its Notice of Appeal, it relied on paras 2.6 and 2.7 of the TAA. In its Reply, it invoked the failure to serve a notice under the Code as an ongoing breach triggering the remedy of compensation under Schedule 4 but without explaining the exact way in which it did so. In its Written Submissions, it submitted that the ORR could determine the basis of calculation of compensation under Condition D.2.2.4 of the Code. At the hearing, FCC claimed that the breach was twofold: a primary and continuing breach to serve the notice and a consequential failure by NR to recognise the possessions as SROUs and pay FCC Direct Costs Compensation under Schedule 4 of the TAA. In its post-hearing submissions, it claimed NR was liable under both Part D and Clause 8.2 of the TAA.

- (d) whether the settlement agreement entered into by WAGN and NR in May 2005 compromised, or left intact, any right of action in respect of Relevant Losses suffered after 1 April 2006;
- (e) the effect (if any) on the parties' legal entitlements of the notification and mitigation provisions in Clause 11 and the non waiver provisions of Clause 18 of the TAA;
- (f) FCC's compliance with the procedural requirements imposed by the TAA and, in particular, paragraph 8.3 of Part 3 to Schedule 4 and the relevance of any estoppel arguments¹¹; and
- (g) the application of the mechanisms provided in Schedule 4 for calculating the quantum of compensation.

86. ORR considers that the nature and extent of these outstanding factual and contractual matters are such that it would not be appropriate for ORR to determine them when such determination will not further the interests of the industry as a whole. Such matters are, in ORR's view, more effectively resolved through arbitration, as provided in the TAA, than through the process of appeal to ORR.

ORR's conclusion

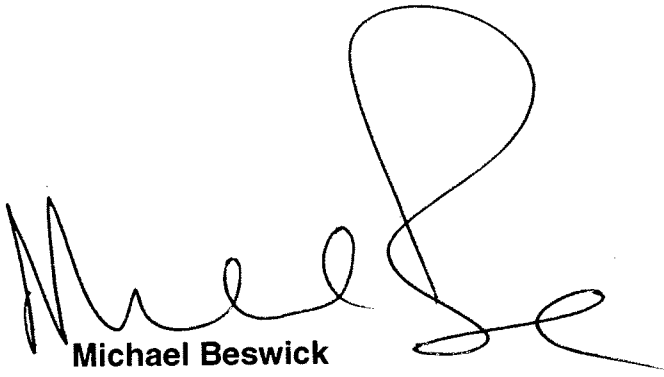
87. In the circumstances of this case, ORR considers that the balance of its section 4 duties and, in particular those under section 4(1)(c) and 4(1)(g) of the Act, mean that it should not accept jurisdiction over the TAA compensation issues and it should direct the parties to resume the arbitration proceedings that have been stayed pending this appeal, in order to determine their legal entitlements (if any) in relation to compensation.

¹¹ At the Hearing, FCC reserved its position as to whether the conduct and representations of NR in its dealings with FCC before the submission of the joint reference to the Panel prevented NR from relying on the strict time limits contained in paragraph 8.3 under the equitable doctrine of estoppel.

VIII Conclusion

88. For the above reasons, ORR makes the following determination:

- (a) ORR allows the appeal in respect of the definition of "Major Project" in the Code and sets aside the Determination in that respect;
- (b) ORR declares that the Rewiring Works, undertaken on the ECML between May 2005 and December 2007, constitute a "Major Project" for the purposes of Part D of the Code;
- (c) NR should have served a MPN on WAGN and engaged in the MPN Process in accordance with Conditions D.2.2.1 to D2.2.3 of the Code;
- (d) The failure by Network Rail to serve such notice and to engage in the MPN Process could have been challenged by WAGN under Condition D.2.2.4 of the Code up until the time when the project was implemented;
- (e) Once the works commenced, the remedy in respect of a failure to comply with Conditions D2.2.1 to D2.2.3 of the Code was a claim for damages for breach of the TAA in accordance with all the relevant provisions of the TAA;
- (f) The determination of FCC's rights (if any) to compensation and the quantum of such compensation, is a matter that should be referred to arbitration pursuant to Clause 13 of the TAA; and
- (g) In the light of the complex legal and regulatory issues that have required clarification and in the absence of any request from either of the parties, the parties' costs should lie where they fall.



Michael Beswick

**Executive Director
Duly Authorised by the Office of Rail Regulation**

27 July 2007