
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of disputes reference
TTP1065, TTP1066, TTP1068, TTP1069 and TTP1073
(following a hearing convened at 1 Eversholt Street, London on 20 April 2017
and reconvened on 27 April 2017 and 8 May 2017)

The Panel:

Clive Fletcher-Wood Hearing Chair

Members appointed from the Timetabling Pool

Shane Young	elected representative for Franchised Passenger Class, Band 2
David Langton	elected representative for Franchised Passenger Class, Band 3
Nigel Oatway	elected representative for Non-Passenger Class, Band 2
Toby Patrick-Bailey	appointed representative of Network Rail

The Dispute Parties:

Dispute TTP1065: DB Cargo (UK) Ltd

Stan Kitchin	Timetable Strategy Manager
Pawel Nowak	Rail Network Manager

Dispute TTP1066: First Greater Western Ltd

Robert Holder	Network Access Manager
Matthew Cambourne	Short Term Planning Manager

Dispute TTP1068: Transport for London

Paul Richardson	Service Delivery Manager, Crossrail
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Dispute TTP1069: GB Railfreight Ltd

Jason Bird	LTP Timetabling Manager
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Dispute TTP1073: XC Trains Ltd

David Fletcher	Timetable Strategy Manager
Richard Thackray	Head of Timetabling & Diagramming

Network Rail Infrastructure Ltd ("Network Rail")

Simon Henderson	Counsel
Luke Wygas	Counsel (part)
George Woods	Counsel (part)
Carlos Pires	Senior Associate, Eversheds Sutherland (International) LLP
James Shackleton	Legal Director, Eversheds Sutherland (International) LLP
Matthew Allen	Head of Timetable Production
Katherine McManus	Project Manager, Timetable Change
Fiona Dolman	Capacity Planning Director
Together with, as appropriate, supporting staff as listed in Annex "A"	

Dispute Parties which withdrew reference before hearing of their claim and the interested parties:

See Annex "A"

In attendance:

Tony Skilton Secretary, Access Disputes Committee ("Secretary")

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NOTE: As explained in this Determination, the Disputes with which it is dealing were originally joined with Dispute TTP1064, before that Dispute was formally severed to enable the Claimant in that Dispute to have an early appealable Determination. As the Disputes were conjoined until the end of the first hearing day (20 April 2017), much of this Determination of necessity repeats sections of the TTP1064 Determination, although some sections have been amended to record subsequent developments.

1 Introduction, history of this dispute process, documents submitted and jurisdiction

1.1 In connection with Network Rail's decisions regarding Version 2 of the Timetable Planning Rules (the "New TPRs") applicable to the New Working Timetable Publication for 2018 (in effect, the timetable for introduction in December 2017), 13 Timetable Participants served Notices of Dispute. The disputes were brought under Condition D2.2.8. of the Network Code as applicable at the time.

1.2 On the face of the Notices of Dispute, elements of commonality were observed between them, therefore, in the interests of efficiency, fairness and consistency the Secretary initiated arrangements for the Disputes to be heard by one Hearing Chair and the same four Timetabling Pool members over four days, being 20 April, 27 April, 8 May and 16 May 2017.

1.3 I was appointed as Hearing Chair on 14 March 2017 and the Dispute Parties were informed of the arrangements on 15 March 2017. The arrangements were duly indicated to parties which might wish to become involved in the dispute proceedings by means of the Website.

1.4 Defined terms in the Network Code and ADR Rules are used in this determination whilst the abbreviations used are as set out in the list of parties above and in this paragraph 1.4.

"ADR Rules" means the Access Disputes Resolution Rules

"ODA" means Observed Data Analytics

"ORR" means Office of Rail and Road

"PPM" means Public Performance Measure

"SLC" means Service Level Commitment

"SRT" means Sectional Running Time

"TPRs" means Timetable Planning Rules

"TRIP" means Timetable Rules Improvement Programme

"Website" means the website of the Access Disputes Committee

"WTT" means Working Timetable

1.5 At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide Sole Reference Documents. The requirement as initially advised to the Dispute Parties was for the Claimants' Sole Reference Documents to be served by 28 March 2017 and for Network Rail to provide in response by 12 April 2017 a single Defence document annotated against the Claimants' submissions.

1.6 On 21 March 2017 an e-mail was received from Burges Salmon LLP, acting for Abellio Scotrail Ltd ("ASR") whose dispute was registered as TTP1064, expressing some concern at the possible length of time that it would take for their client's case to be determined by the Panel. This was followed shortly by a letter from Eversheds Sutherland (International) LLP ("Eversheds"), acting for Network Rail, suggesting instead that more time was required in order for Network Rail to consider and respond to all cases and that Directions Hearings were necessary for case management purposes. Burges Salmon promptly made a further contribution that day, arguing that 20 April 2017 should be capable of being met for a Panel hearing. Eversheds responded on 22 March 2017 continuing to express concern that Network Rail could not anticipate responding fairly in the timescale which had been notified to the Parties. I provided guidance to the Secretary for a response sent later on 22 March 2017 in which I held firm to the timescales which had been set.

1.7 Correspondence was received from Eversheds on 29 March 2017 to which I responded by way of a Directions Letter on 31 March 2017. This correspondence is published on the Website.

In this Directions Letter I explained that I had reviewed the Notices of Dispute which had been received from all the Claimants and that I considered that the disputes could be divided into four Heads for the purpose of case management:

"A" - Issues of principle relating to the New TPRs.

"B" - Points of detail flowing from and dependent on the issues of principle under Head "A" above.

"C" - Detailed points relating to the New TPRs which were not related to the objections in principle under Head "A"

"D" - Other issues, including the Dispute (from DB Cargo and GBRf) relating to the alleged failure of Network Rail to comply with the Determination of an earlier Timetabling Panel and (from TfL) whether a Party can recover costs claimed to be abortive.

To assist the Parties a table was annexed indicating how I considered that the individual claims could be divided into these Heads.

- 1.8 In the light of my categorisation of the Claims into the Heads referred to above, my assumption that it would require at least two of the hearing days to determine the Claims falling under Heads "A" and "B", and the demands placed on Network Rail, I directed that Network Rail's Defence to the Claims falling under Heads "C" and "D" need not be served until 26 April 2017.
- 1.9 All parties remaining in dispute at the relevant dates complied regarding service of documents.
- 1.10 Eversheds wrote again on 4 April 2017 and I responded by way of a further Directions Letter the same day. This correspondence, which addressed points regarding validity of certain Notices of Dispute, is published on the Website.
- 1.11 I issued a further Directions Letter on 5 April 2017 (published on the Website) in which, given my assessment that so many of the claims on the substantive issue of non-consultation were so closely aligned, I suggested that once Network Rail had served its Defence it might be that the Claimants may decide between themselves to agree that one Claimant would lead in arguing points under Head "A" which were seemingly shared by so many of them. That letter also provided an amended table of matter allocated to the Heads in response to comments received from parties.
- 1.12 On 6 April 2017 (and having regard for correspondence received from the solicitors acting for ASR and Network Rail between 21 March 2017 and 4 April 2017, also my Directions Letters dated 21 March 2017, 4 April 2017 and 5 April 2017 with Annexes), the Allocation Chair made an order pursuant to ADR Rule B21 to confirm that the Disputes should be resolved together on the grounds that they concerned the same or similar subject matter and that it would be in the interests of efficient and fair resolution to do so. This order was qualified as being made without affecting the powers of the Hearing Chair to control case management and to determine questions concerning staged hearing of different aspects of the Disputes.
- 1.13 Eversheds wrote once more on 7 April 2017 and I provided comments to the Secretary for a letter which was sent on 11 April 2017. This correspondence is published on the Website.
- 1.14 On 13 April 2017 ARN (Dispute TTP1075) advised the Secretary that it had settled its concerns regarding route LN600 and that the Dispute was withdrawn. ARN had not set out its other concerns regarding route opening hours when submitting its Sole Reference Document - as discussions on the points involved were continuing with Network Rail - but it was realised that if not settled quickly these issues fell to be determined by the Panel. After due consideration, ARN was given leave to serve a Sole Reference Document regarding the route opening hours revisions desired for its December 2017 timetable on 5 May 2017 and Network Rail was required to serve a response on 11 May 2017. Network Rail made no objection. ARN's Sole Reference Document was duly served, but as Network Rail then decided to initiate new consultation regarding the route opening hours concerned, ARN finally withdrew Dispute TTP1075 on 10 May 2017.

- 1.15 Having carefully considered the considerable volume of material provided by the Dispute Parties, on 18 April 2017 I issued Directions indicating that I was now minded to hear each dispute separately. No Party objected.
- 1.16 In accordance with ADR Rule H18(c), following receipt of the Dispute Parties' submissions in respect of Heads "A" and "B" I reviewed them to identify any relevant issues of law raised by the Disputes. On 18 April 2017 the other members of the Panel and the Dispute Parties were provided with my list.

I interpret ADR Rule H18(c) as requiring me to identify such issues without prejudging whether they would actually have to be determined in each or any of the Disputes: I saw it as preferable to alert all Parties to such points and then for them to not actually need to be reviewed, rather than the reverse situation; in part I consider this to be important to ensure that statements of law made by any Party are not assumed to have been accepted by the Panel and so risking the possibility of their being regarded as having any authority.

The issues identified were:

- Q1 The extent of the power of a Timetabling Panel (in general terms).
- Q2 Within Q1 above: what amounts to 'exceptional circumstances' under Network Code Condition D5.3.1?
- Q3 Can a Timetabling Panel only decide that 'exceptional circumstances' exist if the Claimant has specified in its Sole Reference Document that it regards this as being the case?
- Q4 Was Network Rail submitting, in paragraph 59 of its general Defence document, that if a Timetabling Panel is faced with a binary decision it is not entitled to overturn Network Rail's decision in the absence of exceptional circumstances? If this is a correct interpretation of Network Rail's position, is it correct in law?
- Q5 Within Q1 above: can a Timetabling Panel make general declarations?
- Q6 Q5 above raises the question as a question of law; it is difficult to distinguish this question from one asking whether there is any practical value in making declarations that Parties must observe the provisions of the Network Code or the ADR Rules.
- Q7 Is it within the power of a Timetabling Panel to order that sums paid to Network Rail by an Access Beneficiary to carry out modelling work, which are now claimed to be abortive as a result of the 2018 TPRs, are to be repaid to the Access Beneficiary? Or, as an alternative, can the Timetabling Panel order that any future modelling work is to be carried out by Network Rail at no further charge?

The above list having been compiled in relation to previously identified Heads "A" and "B", it was indicated that I would provide a further list when Network Rail served its Defence under Heads "C" and "D".

- 1.17 The hearing of the disputes opened on 20 April 2017, by which date 5 of the original disputes had been withdrawn so 8 cases remained to be heard, being:-
TTP1064 from ASR
TTP1065 from DB Cargo (UK) Ltd
TTP1066 from First Greater Western Ltd
TTP1068 from Transport for London
TTP1069 from GB Railfreight Ltd
TTP1071 from East Coast Main Line Company Ltd
TTP1073 from XC Trains Ltd
TTP1075 from Arriva Rail North Ltd.

TTP1065 from DB Cargo contained two distinct issues which were identified as "Issue 1" and "Issue 2" for case management purposes during the proceedings.

TTP1069 from GBRf contained three distinct parts; GBRf helpfully provided its Sole Reference Document in three parts which set out the matters separately and these were referred to as "Part 1", "Part 2" and "Part 3" for case management purposes during the proceedings.

Representatives of the claimants attended as they deemed necessary and according to availability over the course of the hearing days (and when not themselves a Dispute Party, such claimants - except ASR, which exited the proceedings after the first hearing day - fell to be regarded as interested parties where applicable). 5 other operators had declared themselves to be interested parties and their representatives also attended as they deemed necessary and according to availability. The declared interested parties are listed in Annex "A".

- 1.18 Given the background to these Disputes, and the unprecedented volume of correspondence generated by the representatives of one of the Parties, I thought it appropriate to commence the hearing by offering some opening remarks at greater length than is my usual practice. These remarks appear in Annex "B"; after "house-keeping", the matters covered could be summarized broadly as:
- Role of the Panel
 - TPRs
 - Consultation
 - Constitution of the Panel.
- 1.19 ASR's case (Dispute TTP1064) was to be considered first. To meet ASR's request (made at the conclusion of its consideration on the first hearing day, 20 April 2017) that a final Determination should be available as soon as possible to permit ASR to appeal, if so advised, I ordered that Dispute TTP1064 should no longer be resolved within the group of Disputes conjoined by the Allocation Chair on 6 April 2017. The Determination of dispute TTP1064 was issued on 5 May 2017 and ASR submitted an appeal against this determination to ORR on 12 May 2017; the outcome of this appeal is awaited.
- 1.20 Late on 21 April 2017 Eversheds sent a further letter setting out points in relation to issues of law which had been identified both prior to the first hearing day and touched upon during its course; in particular, Eversheds wished to have placed on the Website its views regarding the powers of a Timetabling Panel. I provided guidance to the Secretary for a response which was sent to Parties on 24 April 2017; the correspondence is on the Website.
- 1.21 East Coast Main Line Company withdrew its dispute reference (TTP1071) on 26 April 2017, prior to its hearing by the Panel.
- 1.22 On 2 May 2017 I issued a Directions Letter (which may be found on the Website) relating to the matters to be considered under previously identified Heads "C" and "D". Issues of law which I had identified in relation to these remaining matters were interwoven with case management Directions.
- 1.23 Inter alios, my Directions Letter of 2 May 2017 required GBRf to confirm if it was accepted that Network Change had been established at South Tottenham East Junction (which would assist in addressing Paragraph 5.1 of GBRf's Part 3 Sole Reference Document). On 3 May 2017 GBRf confirmed that as far as it was concerned, the Network Change had, in fact, been established and accordingly withdrew this matter from dispute.
- 1.24 The Directions Letter of 2 May 2017 had also required GBRf to say whether agreement had been reached with Network Rail regarding new TPRs which changed the platform-end margins at London (Waterloo) - an issue set out in Paragraph 5.8 of GBRf's Part 3 Sole Reference Document. On 3 May 2017 GBRf responded that Network Rail had now progressed the matter in accordance with Network Code Condition D2.2.7 and GBRf accordingly withdrew this matter from dispute.
- 1.25 On 4 May 2017 I issued a Directions Letter (which may be found on the Website) which constituted an order confirming that ASR's Dispute TTP1064 had been determined separately and confirming further that the remaining cases would be heard and determined either separately, or with others, or in part, or in part with others.

- 1.26 On 8 May 2017 XC Trains informed the hearing that it had settled its issues with Network Rail regarding headways on route LN600, leaving the only outstanding matter in dispute TTP1073 as the headway issues to the West of Reading (see section 4.1 below).
- 1.27 In view of the potential complexity of exchanges during the hearing, I directed (as provided in ADR Rule H47) that a full transcript should be taken to assist the Panel's subsequent consideration of the issues. In the event, a transcript was only taken on 20 and 27 April 2017.
- In the absence of indication to the contrary within the ADR Rules, I regard the record or transcript of a hearing as being an aide memoire for the Panel in its consideration of the issues and not a document for issue to the Parties or for eventual publication.
- 1.28 I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.
- 1.29 In its consideration of the Parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in ADR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.30 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarized in the course of this determination.

2 Relevant provisions of the Network Code and other documents

- 2.1 The version of the Network Code Part D dated 13 July 2015 and the ADR Rules dated 23 September 2015 were applicable to matters to be determined in these dispute proceedings.

3 General submissions made by Network Rail

- 3.1 For completeness in relation to these Disputes TTP1065, TTP1066, TTP1068, TTP1069 and TTP1073, it is appropriate to repeat general submissions made by Network Rail on the first hearing day before dealing with detailed matters relating to ASR's dispute TTP1064. Detailed opening submissions by Network Rail are to be found in Annex "C"; opening submissions from the Claimants are summarised below as appropriate.
- 3.2 As I had requested Network Rail to provide a response which dealt with all the Disputes in general terms before responding to each Claimant in detail (which I had explained that the Panel had found very helpful), I indicated that Network Rail would not be restricted to the usual 10 minutes for its opening submissions.
- 3.3 In its response documentation, Network Rail had noted that some Claimants appeared to be seeking relief going far beyond what a Timetabling Panel had jurisdiction to grant under Network Code Condition D5.3.1 and therefore beyond what a Claimant was entitled to ask for. Network Rail's position was that all of its challenged decisions should stand.

4 Exchanges at the hearing; analysis and consideration of issues and submissions; and conclusions regarding the matters in dispute

- 4.1 In Disputes TTP1065 (Issue 2) from DB Cargo, TTP1066 from First Greater Western, TTP1068 from Transport for London and TTP1073 from XC Trains

These Disputes referred to revised headway values on Route GW103.

Following discussion between the Dispute Parties concerned and exercise of editorial rights

by me, the following form of words was considered by the Dispute Parties at the reconvened hearing on 27 April 2017 and agreed in correspondence subsequently, formally informing the Panel on 16 May 2017 and thereby disposing of Disputes TTP1065 (Issue 2), TTP1066, TTP1068 and TTP1073:-

Revised Headway Values on GW103 Paddington to Uffington

In relation to these Disputes between DB Cargo, GWR, TfL and XC Trains and Network Rail the Parties have agreed that the following actions should be taken and have requested that these terms should be recorded within the Determination as an agreement that the Parties undertake to perform the actions allocated to them:

- 1 Network Rail will provide suitable revised pathways to accommodate all DB Cargo trains bid for at D-40, Priority Notification Date, for the December 2017 timetable to be published in the New Working Timetable at D-26 (9 June 2017).
- 2 In order to safeguard capacity on the route, Network Rail will re-examine the proposed headway values to reflect a greater degree of granularity. In particular this review must include a specific value for a stopping passenger train to follow a Class 4, 6 or 7 freight train. It is recognised that this may require splitting the route section into a greater number of sub-sections than is currently the case.
- 3 This calculation of revised headways should be based on the configuration and performance characteristics of the passenger rolling stock to be used on the Relief Lines commencing in the 2018 timetable year, namely EMU Classes 387 and 345.
- 4 In addition to the above, the parties will work collaboratively to examine other Timetable Planning Rules that impact performance on the route, specifically the achievable speeds of entry and exit to yards, sidings, terminals and loops on the route. This work will require collation and analysis of the following information:
 - (a) Allowable movement speeds when any portion of the train is within the yard, terminal or siding area.
 - (b) Arrangements for acceptance and dispatch of trains to and from each yard, terminal or siding.
 - (c) Length of trains normally operating into each yard, terminal, siding or loop.
 - (d) Whether the trains concerned are planned on appropriate timing loads, namely Crossrail Class 345s and GWR Class 387s.
 - (e) Any other operational constraints (e.g. time taken to release brakes).
 - (f) Any measures that can be developed, either for immediate implementation or requiring some level of training or enhancement to improve the efficiency of working into and out of each yard, terminal, siding or loop.
 - (g) Junction margins at West Ealing.
- 5 The actions referred to in items 2 to 4 above to be completed by 30 June 2017 and published in Version 4 of the Timetable Planning Rules for the Subsidiary Timetable due to commence in May 2018. This timeframe permits Timetable Participants to review the output generated from items 2 to 4 above and make representations to Network Rail in respect of the changes once proposed by Network Rail. Network Rail will consider these representations as a Version 3 TPR response and follow the process outlined in Network Code Condition D2.2.5. If upon publication of Version 4 of the 2018 Timetable Planning Rules any Timetable Participant is dissatisfied with any decision of Network Rail in respect of those Rules, that Timetable Participant will be entitled to appeal against any Network Rail decision (or any part of it) as set out in Network Code Condition D2.2.8.

The Interested Parties listed below are aware of this agreement and none wishes to become a Dispute Party to oppose any of these terms:-

Interested parties: MTR Corporation (Crossrail) Ltd; GB Railfreight Ltd; Heathrow Express Operating Company Ltd.

- 4.1.1 The agreement recorded in paragraph 4.1 above is incorporated into this Determination and is binding on the Dispute Parties subscribing to it.

4.2 In Disputes TTP1065 (Issue 1) from DB Cargo and TTP1069 (Part 1) from GBRf: Stratford (East London) SRTs and Junction Margins

- 4.2.1 In its Sole Reference Document, DB Cargo expressed dissatisfaction regarding the decision on the part of Network Rail to revert to the current TPRs in the Stratford area in Version 2 of the TPRs for 2018 after having consulted in Version 1 using values previously proposed by Freightliner (the "FL Values") and endorsed for consultation in the Timetabling Panel's determination of Disputes TTP625, TTP685, TTP733 and TTP872 which was issued on 19 April 2016. DB Cargo asked the Panel in its determination to direct Network Rail to comply with the determination of Disputes TTP625/685/872 in respect of implementing for the 2018 Principal Timetable Change Date the values for revised SRTs and associated margins in the Stratford area as originally proposed by Network Rail in Version 1 of the TPRs published on 21 October 2016.
- 4.2.2 In its Sole Reference Document, GBRf asserted that Network Rail had not complied with previous determinations of the Timetabling Panel for Disputes TTP625/685/872 in respect of two matters, being the TPRs in the Stratford area and the inclusion of Network Services trains in the National TPRs.

GBRf and Network Rail had resolved the Network Services trains matter between themselves prior to commencement of this hearing (see 4.3 below); the issue regarding the Stratford area thus remained before the Panel. Concerning the TPRs in the Stratford area, in its Sole Reference Document GBRf requested the Panel to determine that Network Rail had failed to implement the previous determination and that Freightliner's counter-proposal should therefore be implemented in full in the December 2017 WTT, in the absence of any other proposal.

- 4.2.3 Introducing consideration of the TPRs at Stratford, I observed that this was the third time that the Stratford issue had been before a Panel; clearly there was discomfort within the freight community, which had still not been resolved.

Network Rail accepted that there was a binding Determination from previous Disputes TTP625/685/733/872, irrespective of any infelicities in the drafting of Eversheds in describing key terms of the previous Determination as being 'non-binding'.

I noted that the Stratford area was now going to be affected by plans being developed for the operation of Crossrail services. The Panel had now been told about the involvement of an Events Steering Group and had also noted that in its defence statement Network Rail had mentioned a further TPR Forum (para. 44). As indicated in Direction 1 of my Directions Letter of 2 May 2017, the Panel wished to understand the roles of the Events Steering Group and the TPR Forum.

Network Rail explained that the Events Steering Group considers major forthcoming events affecting the railway; in this instance it was looking at Anglia Re-franchising, Crossrail implementation and relevant infrastructure changes. Three operators – Abellio East Anglia, MTR Crossrail and Freightliner – had agreed that it was the appropriate place to discuss matters and monitor developments but DB Cargo and GBRf did not wish to participate.

Network Rail agreed that there was an issue regarding freight movements going across the Great Eastern Main Line between Forest Gate Junction and Stratford and two Events Steering Group meetings had looked at the matter. In the last week Network Rail had advised relevant parties that it would now be putting proposals to

the TPR Forum (which looks at TPR proposals in detail).

It was noted that the full introduction of Crossrail would see the present MTR Crossrail service to Shenfield increase by at least 2 trains per hour and Abellio East Anglia would also potentially be increasing its services by 2 trains per hour. There was also expected to be increased freight traffic on the Great Eastern Main Line including freight trains from London Gateway Port which need to cross the Great Eastern Main Line to access the North London Line.

Asked why they were not participating in the Events Steering Group, GBRf stated it was because it was attending the TPR Forum, whilst DB Cargo said that it had not been invited to go to the Events Steering Group. The Panel noted the disconnect in invitations from Network Rail.

Network Rail advised that the next TPR Forum meeting was planned for 19 May 2017.

- 4.2.4 DB Cargo made an opening statement saying that in the development of an efficient timetable, capable of operation with a consistent high level of performance, it was a fundamental requirement that the TPRs which support the activity are accurate and fit for purpose. It was imperative, however, that the introduction of new or revised values into the TPRs did not result in unnecessary loss of capacity, capability or operational flexibility on the Network.

DB Cargo was supportive of the Network Code mechanism governing the establishment and revision of TPRs; this Dispute was brought in accordance with the provisions of the Network Code.

As an open access rail freight operator, DB Cargo had a duty to ensure that the capacity and capability of the national railway network were suitable for its business, enabling reliable and consistent delivery to end customers. This, of necessity, meant that TPRs needed to be challenged where it appeared that they were not optimised to achieve this objective.

In working to improve the quality of the TPRs, both in content and usability, DB Cargo appreciated the initiatives taken by Network Rail to the benefit of the overall railway industry.

High levels of reliability in performance were sought by all users of the rail network, but in seeking to accomplish this it was also important to ensure that the TPRs remained sufficiently detailed and accurate to ensure that scarce track capacity was not unnecessarily denied to operators. This was particularly important as the network becomes increasingly busy with additional train services, and as a consequence the industry would seek through the timetable to make the best use of existing assets to avoid the necessity for investment in additional infrastructure.

It was, however, essential that concerns expressed by Timetable Participants in respect of the accuracy and quality of TPRs were addressed in a timely manner by Network Rail. It was this particular matter that had caused DB Cargo to bring the current issue before the Panel. Concerns regarding the TPRs in the Stratford area had been raised by freight operators during a number of past timetable development cycles, culminating in a previous dispute and subsequent Determination by a Timetabling Panel issued on 19 April 2016.

As documented elsewhere, Network Rail commenced the consultation of the 2018 TPRs with revised values applicable to Stratford, which were subsequently withdrawn on publication of Version 2. The December 2017 timetable development process currently underway accordingly was using Stratford area TPRs unaltered from those applicable to the May 2017 WTT.

Network Rail published timescales on 7 April 2017 for the development and

implementation of revised TPRs for the Stratford area. DB Cargo welcomed this proposal and would participate in this workstream with a view to the publication of any identified changes for application in the May 2018 timetable development process and this participation also applied to TPR Forums and Events Steering Group meetings going forward. This, nevertheless, did not resolve the issue of the TPRs applicable to the December 2017 WTT period. The development of the New WTT for this period was significantly advanced. Because of the mandated timescales, there was therefore a question as to the practicality in the time available of applying any different values prior to publication on 9 June 2017.

As a national rail freight operator, however, DB Cargo made significant use of the ability to make Train Operator Variation requests (known as "spot bids") for Train Slots following the publication of the New WTT at D-26. This process was essential to the operation of the rail freight business in responding to the changing needs of its customers. Any loss of flexibility as a consequence of inaccurate TPRs was potentially detrimental to both service provision and efficient resource utilisation. This was especially true at key points on the rail network such as Stratford, where the Network was used by a broad mix of both passenger and freight trains, with differing physical characteristics. DB Cargo therefore asked that the Panel instruct Network Rail to revert the relevant TPR values for the Stratford area to those published in Version 1 of the 2018 TPRs.

4.2.5 In its opening statement, GBRf did not have a lot to add to what had been said by DB Cargo except to say that up to February 2017 the previous Panel determination was being taken to mean what it said and that what had come to be known as the "FL Values" (Freightliner having proposed the values to the previous Panel) would be introduced for the December 2017 WTT. The FL Values were set out in Version 1 of the TPRs for 2018 when issued by Network Rail for consultation. However, at some point Network Rail had decided not to implement Version 1 and reverted to the current TPRs in Version 2 – the decision notice. Whilst recognising there had been opportunities for discussion at the Events Steering Group and the TPR Forum, GBRf suggested that Network Rail was simply 'kicking the Stratford problem into the long grass' and operators were now left with the anomalies demonstrated to a previous Panel. GBRf had not received any counter-proposal from Network Rail other than its decision to revert to the current TPRs. GBRf was asking this Panel to determine that the FL Values as were set out in Version 1 of the TPRs for 2018 should be implemented in the December 2017 WTT.

4.2.6 In its opening statement, Network Rail confirmed that it was appropriate for DB Cargo's TTP1065 (Issue 1) and GBRf's TTP1069 (Part 1) to be dealt with together as both claimed that Network Rail had failed to comply with the Determination of Disputes TTP626/685/733/872 dated 19 April 2016; the present issues only related to what was referred to as Items 1a and 2a in that previous Determination.

Regarding previous Determination Item 2a, Network Rail noted that the dispute had been brought jointly by Freightliner Ltd and Freightliner Heavy Haul Ltd (together, "Freightliner"), not by either DB Cargo or GBRf. Freightliner was now content with Network Rail's response to the previous determination and had not raised any associated appeal; indeed, Freightliner had itself objected to values consulted upon by Network Rail pursuant to the previous Determination, despite the fact that those values were the ones which Freightliner had originally argued for.

The Panel was invited to read paragraphs 6.1 to 6.4.3 of the previous Determination, where it would be seen that the Panel on that occasion carried out a careful analysis of the parties' respective positions but concluded that it did not have the tools available to decide which Dispute Party was right in respect of each individual SRT. The Panel concluded that Network Rail was to carry out further consultation for the next version of the TPRs using Freightliner's values as the basis for the consultation; and that Network Rail should adopt a standard 3½ minutes as the value for junction margins on which consultation would take place.

Network Rail was not now suggesting that the direction to commence consultation using those values was non-binding, and if there was any ambiguity in Network Rail's Response, Network Rail was happy to clear that up. Importantly, however, there was no binding *outcome* to that consultation process, and it was here that in Network Rail's view there appeared to be some confusion on the part of DB Cargo and GBRf. Network Rail did precisely what the previous Determination directed it to do: it carried out consultation using the values directed by the Panel. It did so in good faith and it properly considered the representations made to it. The Panel would note that, aside from one minor and admitted oversight, there was no complaint about the values put in place by Network Rail in Version 1 of the TPRs for 2018.

It was important to emphasise that Network Rail had no axe to grind about these values. Network Rail was simply seeking to arrive at an efficient WTT. If the Freightliner values could be demonstrated to work then Network Rail was content with that.

Network Rail had needed to keep an open mind in carrying out this consultation. If it had gone into it with a determination that the opening values would be retained come what may, that would not have been a proper consultation or proper exercise of the Decision Criteria.

The Freightliner Values were discussed at the TPR Forum on 6 January 2017; GBRf did not attend that Forum. Abellio East Anglia, MTR Crossrail and Freightliner itself (now represented by Dave Beadle, Jason Bird having moved to GBRf) challenged the Freightliner Values, i.e. affected operators said that the Freightliner Values should not be implemented.

The overall position faced by Network Rail was therefore that the ODA data suggested that the Freightliner proposals were not achievable in all cases, relevant operators were quite clear that the Freightliner Values were not correct and the Liverpool Street Signallers had expressed a concern with the Freightliner Values.

The Panel might be aware that an important element of this issue was that there was a handover at Stratford between the Liverpool Street Signallers and the Upminster ones. The Freightliner Values were only possible if signalling for freight trains for Stratford was to be taken out of the Automatic Route Setting signalling and dealt with manually, and GBRf apparently thought this would be acceptable. However, that gave rise to serious safety and process issues. It increased workload on Signallers and introduced greater performance risks overall. Once a train is taken out of Automatic Route Setting, the signalling system would not recognise that train and that gives rise to serious safety concerns.

The reality was that from a safety point of view, Network Rail was simply not prepared to take trains out of Automatic Route Setting here. That meant that if the Freightliner Values were imposed, the reality was they could not be met and the result was that inefficiency would be built in to the timetable – precisely the situation Network Rail sought to avoid.

Against this background Network Rail could not reasonably have acted in any other way. It continued to work on this area and had indicated that it will share further analysis at the TPR Forum on 19 May 2017. Network Rail was intent on arriving at the most accurate picture based on the best evidence available. It would continue to do so. It was quite clear that the Freightliner Values were not satisfactory. Network Rail accepted that there may be some finessing required to the actual values but its Version 2 values were the best available the present time.

It was highly relevant that other interested parties – including, significantly, Freightliner – had not taken issue with Network Rail's approach. There had also been reference made to the Events Steering Group, which was another forum for all Timetable Participants to meet at and was generally held every 4 weeks. It dealt

with wider issues than the TPR Forums – such as plans for the implementation of new timetables for major events – but also discussed more detailed timetabling issues. The Stratford issue was raised at the Events Steering Group meeting which took place on 3 February 2017 (which GBRf did not attend). Unusually, there was a longer gap between meetings on this occasion.

There had been no failure to follow the previous Determination and it followed that there should be no finding to that effect. Further – and even leaving aside for present purposes the question of the Panel's powers – this Panel was in no better position than the earlier one to substitute the Freightliner Values for Network Rail's values, and the Freightliner Values were in fact no longer Freightliner's values as Freightliner was not pursuing them. Accordingly, Network Rail submitted that its decision in Version 2 of the TPRs should stand.

The argument regarding Item 1a of the previous Determination was only being advanced by GBRf and there was a somewhat arcane academic debate to be had as to whether the agreement recorded at paragraph 4.4 of the previous Determination was strictly part of the Determination or not. On the one hand, it was clearly part of the material issued by the Panel, albeit by the consent of the parties; on the other hand the Panel expressed no views as to whether the agreement was the correct one, and it was possible for the parties to agree matters which would be beyond the Panel's powers to order. However, whatever the position in law, Network Rail accepted that any agreement recorded in a Determination was binding on it and that a failure to comply with the terms of such an agreement is to be treated in the same way as a failure to comply with a Determination of the Panel.

Network Rail relied on the matters set out in its Response paragraphs 41 to 47 which demonstrated that each of the matters set out in the agreement was complied with. The agreement as recorded in the previous Determination amounted to a series of agreements as to the sort of material Network Rail would share with Timetable Participants and the kind of approach Network Rail would take. Each of these steps had been taken by Network Rail. Based on exchanges between the parties in March of this year – 2017 – it seemed that in fact there was little if anything between the parties on this.

A specific issue was raised in paragraphs 5.21 to 5.23 of the GBRf Part 1 Sole Reference Document, namely, in relation to Network Measurement Trains "what constitutes a reasonable level of operation to justify inclusion in the WTT and what does not". It was unclear how this arose out of the agreement recorded in the previous Determination: there was no obligation under that agreement which required Network Rail to set out this information in the terms sought. In any event, this Panel did not have the information before it to determine the issue GBRf raised, which should remain a matter for consultation and review between Timetable Participants. It was therefore submitted that GBRf's claim in relation to Item 1a should be dismissed and that the relief sought could not properly be given by the Panel, nor should be.

- 4.2.7 The Panel noted that it seemed accepted that everyone was happy with the FL Values at the consultation - Version 1 – stage in October 2016 but that by January 2017 three key operators had turned against them. Asked to explain this, Network Rail said that it had presented the effects of the FL Values to the TPR Forum on 6 January 2017 and Freightliner – now represented by a new person – objected and switched position; Abellio East Anglia and MTR Crossrail then followed.
- 4.2.8 The finding of a previous Panel having been that Network Rail should consult the FL Values, the Panel accepted that Network Rail had commenced the consultation on this basis, but had then simply reverted to the current values. The Panel wished to explore the basis of the decision simply to revert to the original values. Asked what thought went into reverting to the current values and not issuing a decision which set out something different, such as including some revised values, Network Rail said that faced with three operators asking on 6 January 2017 for the FL Values

not to be implemented and having been told by Signallers that the proposed method of working could not be delivered, consideration of the Decision Criteria brought about the conclusion that the best way forward was to revert to present values for Version 2 but to then do a new piece of work to review the values in the Stratford area for the future.

- 4.2.9 Exploring further as to why Network Rail reverted to the current values as opposed to analysing the objections and using some of the consulted values, Network Rail appreciated how that action might appear but explained that ODA data had been obtained which suggested that the majority of the FL Values were not correct. Some ODA data fell between the FL Values and the Network Rail current values, whilst some were more and some were less. Network Rail had then sought to work with GBRf to explore the FL Values but GBRf simply said that the previous determination should be applied. Accordingly, Network Rail would say that GBRf did not engage to allow this approach. Network Rail assured the Panel that it had been neutral about the FL Values until hearing the comments from the other operators on 6 January 2017; Network Rail did not have any unhappiness about the FL Values from its own conclusions. The ODA data had not been shared with operators at the TPR Forum on 6 January 2017 but they had been made aware of Network Rail's assessment on the potential impact of the FL Values.
- 4.2.10 The Panel noted that safety concerns did not appear to have featured earlier in the TPR process and asked Network Rail why its operations staff had not been consulted about practical operational matters before issue of Version 1 of the TPRs. Network Rail replied that this was because it would have been in breach of the previous determination if the FL Values had not been consulted at Version 1.
- 4.2.11 Asked whether it thought the previous Timetabling Panel would have expected that the Version 1 consultation might have resulted in any adjustments thought necessary to the FL Values, Network Rail could only respond that the three interested parties said on 6 January 2017 that the FL Values would not work. These three operators had not made any observations in their written responses to Version 1, which had to be submitted for 23 November 2016; GBRf accordingly suggested that the three operators had in effect agreed with the Version 1 items at the formal consultation stage and Network Rail agreed that was the case.
- 4.2.12 The hearing explored the safety implications which Network Rail asserted would arise if freight trains did not operate through Stratford under Automatic Route Setting conditions, such being necessary to remove certain approach control constraints and avoid reduction in train speeds. After discussion of some quite detailed points, I observed that it was surprising that this was the third iteration of the Stratford issue before a Timetabling Panel and there were still indications that the signalling arrangements were not understood sufficiently by the Parties, as illustrated by Network Rail's inability to explain them to the Panel. In the light of this I considered that Network Rail really did need to meet with the freight operators to clarify the signalling arrangements.
- 4.2.13 The Panel noted that the determination of Dispute TTP625 and other related disputes was issued on 19 April 2016 and Version 1 of the TPRs for 2018 was issued in October 2016, proposing the FL Values. Network Rail was asked whether any work had been done between April 2016 and October 2016 to find out whether the FL Values would be acceptable to other operators. Network Rail explained that a TPR Forum had been held on 24 June 2016 at which the FL Values were shared, but there was minimal discussion. That TPR Forum was arranged at short notice and only GBRf attended; GBRf said that Network Rail should adhere to the determination. Not much more was done by Network Rail as the intention was to go forward with the FL Values. Pressed as to whether it therefore accepted the FL Values, Network Rail said that there had been specialist staff turnover at the time and the FL Values were accepted but Network Rail was not happy about them. Network Rail accepted that the eventual TPR outcome was likely to be a blend of the FL Values and the current values and also accepted that it was reasonable to

assume that this work should have been done in time for the December 2017 WTT.

- 4.2.14 It was put to Network Rail that it was its responsibility to take the initiative to examine TPR suggestions and not rely on an operator. Network Rail responded that any proposals or counter-proposals from operators would be expected to be backed up by evidence. The three operators' objections on 6 January 2017 were not, however, backed up with data; they wanted to see the data.
- 4.2.15 In its closing submission, DB Cargo reiterated its disappointment that the Stratford issue had dragged on for so long; it was the freight businesses which suffered if capacity was not available. Much as DB Cargo welcomed Network Rail saying it was willing to sort the issue out, it was a matter of 'jam tomorrow'.
- 4.2.16 Asked by the Panel whether, if it were within the Panel's powers, it would be practical to order Network Rail to revert to the Version 1 values for December 2017, DB Cargo considered that it would not.
- 4.2.17 Following an adjournment to establish whether an agreement could be reached, Network Rail brought forward a proposal to provide modelling outputs to the TPR Forum on 19 May 2017 and to provide raw ODA data to the Forum participants by 26 May 2017. Joint observations would then need to be arranged and completed by 16 June 2017 and thereafter Network Rail would develop planning proposals in conjunction with customers for issue in Version 4 of the TPRs on 7 July 2017 with a view to establishing that proposal by 14 July 2017. Network Rail noted that this activity would require full and proper engagement of Timetable Participants, who would need to comment on the proposals in a timely, reasoned and evidence-based way. Network Rail would advise this arrangement out to relevant industry parties quickly - and in advance of issue of this Panel's determination.
- 4.2.18 GBRf expressed concern that ODA data was to be the basis of the new work. I observed that ODA was only one of the inputs and that this needed to be made clear to all concerned.
- 4.2.19 After an adjournment, I informed the hearing that the Panel could not agree to grant the relief sought by DB Cargo or GBRf, but it was intended that there would be strong criticism in the determination that the Panel regarded the consultation undertaken as having been totally inadequate because of Network Rail not engaging or discussing matters fully with all concerned and not developing alternative possibilities to the FL Values or the current TPRs. The Panel would, however, add its weight to the need for all relevant Timetable Participants to engage with Network Rail to carry out the work explained above.
- 4.2.20 Following discussion between the Dispute Parties concerned and exercise of editorial rights by me, the following form of words was provided by Network Rail and accepted by the Panel as a Notification of Intent:

Stratford SRTs and Junction Margins

1. The Dispute Parties, together with any Timetable Participant who wishes to take part, will undertake a collaborative effort to review the Stratford SRTs and junction margins using multiple sources of information and with the intention of publishing revised TPRs in Version 4.0 of 2018 TPRs, following the consultation required by Part D of the Network Code;
2. As part of this collaborative effort Network Rail is to provide modelled data output from Railways to all affected Timetable Participants by 19 May 2017;
3. Network Rail is to provide raw ODA data to all affected Timetable Participants by 26 May 2017;
4. A joint observational exercise by Network Rail and any interested Timetable

Participants is to take place at Upminster and London Liverpool Street signalling centres to witness the actual running times of SRTs and junction margins. This is to be completed by 16 June 2017. The exercise is to be supported by operational subject matter experts such as Local Operations Managers and Signalling Shift Managers.

5. Thereafter, the collaborative exercise by Network Rail and any interested Timetable Participants is to develop and draft proposals to Stratford SRTs and junction margins for inclusion in Version 4.0 of 2018 TPRs to be circulated by 7 July 2017.
6. The Panel endorses the view that steps set out above require the full and proper engagement of all interested Timetable Participants. To the extent that any Timetable Participant submits objections, they must be relevant, timely, reasoned and evidenced based objections.
7. Network Rail intends to formalise changes to Stratford SRTs and junction margins through the publication of Version 4.0 of the 2018 TPRs by 14 July 2017.

4.2.21 Analysis

When the last Determination concerning Stratford was reached, in April 2016, the Panel expressed its lack of confidence in Network Rail's values, while not feeling sufficiently informed to impose the FL Values, especially without input from the other TOCs/FOCs operating through this key location. It was for that reason that the Panel determined that the next round of consultation should start on the basis of using the FL Values.

As has been made clear throughout the Determination of Dispute TTP1064 and in this Determination, consultation must be genuine, but cannot bind Network Rail to agreeing with every point made by a Timetable Participant. In the appropriate circumstances I anticipate that a Panel would be prepared to declare that a purported consultation was in fact a sham; this consultation came very close to being a sham.

Network Rail's evidence made it clear that FL's values were not challenged when Version 1 was under discussion (in October 2016) and the Panel regards them as having been accepted. By January 2017, however, following a change of personnel within Freightliner, Freightliner now took against the values originally submitted by it and the TOCs involved apparently followed suit. This complete volte face was not documented and Network Rail had difficulty in attempting to justify it to the Panel.

Instead of then examining the values individually, Network Rail simply reverted en bloc to the earlier values, regardless of the fact that these had not been regarded as justified in the earlier Dispute.

Throughout these hearings Network Rail has frequently (and often justifiably) criticised other Timetable Participants for failing to engage and for simply rejecting proposed amendments as a whole, without individual justification. In this instance Network Rail has done exactly what it has criticised other Timetable Participants for doing. The Panel is therefore critical of the way in which Network Rail conducted the consultation in this case.

Quite apart from any other consideration, in this instance Network Rail obviously failed to observe the requirements of paragraph 5.3.2(f) of the National TPRs (effective from 24 August 2016) which include the requirement for Network Rail to document responses and decisions taken, '*...so that each TPR entry has an audit trail*'. Decisions would be much more defensible at a Timetabling Panel if this requirement were to be observed.

Nor was the Panel impressed by what it saw as an attempt to play a 'safety card' in this Dispute. Although it was stated that the Liverpool Street Signallers would 'refuse' to take freight services out of Automatic Route Setting, as explained above, the picture painted by Network Rail of the signalling arrangements was so confused as to be entirely unconvincing.

Against this background the Panel therefore welcomed Network Rail's proposals for immediate, structured work to engage all relevant Timetable Participants in reviewing the values which should apply in the Stratford area and accepted these as a Notification of Intent which is set out above and incorporated into this Determination.

While one Panel's decisions are only persuasive authority in a later Dispute, should any further Dispute be registered in which it is successfully argued that a proper consultation relating to Stratford has still not been undertaken then I think it highly likely that the later Panel may decide that exceptional circumstances will have clearly arisen entitling it to impose its own decision.

4.2.22 Determination

I determine that although Network Rail did initially consult new TPRs for the Stratford area using the FL Values as the basis for that consultation, its subsequent decision to revert to the previous values on the basis of undocumented objections by other Timetable Participants was not satisfactory and does not amount to a proper consultation. Nonetheless, the position remains as it was in April 2016, with the Panel having insufficient information to impose the FL Values. The Panel therefore welcomed the very late emergence of a proposal from Network Rail to carry out urgently work that should have been completed already.

The Notification of Intent recorded in paragraph 4.2.20 above is incorporated into this Determination and is binding upon Network Rail to pursue in liaison with all relevant Timetable Participants.

4.3 In Dispute TTP1069 (Part 1) from GBRf: Network Services trains

- 4.3.1 This was another issue brought forward from an earlier dispute, in which GBRf claimed that Network Rail had failed to comply with an earlier agreement between Dispute Parties. Following discussion in this case between the Dispute Parties (GBRf and Network Rail) and exercise of editorial rights by me, I record the following agreement:

Network Rail will, from the commencement of the December 2017 WTT, show all Network Services trains (1Qxx, 1Zxx, 3Qxx, 3Zxx headcodes) as dated services for the actual dates of operation, as understood on the date of publication. The exact method of how this is achieved will be agreed between the Parties, but this will enable other Access Beneficiaries to bid to use the capacity on other dates in the WTT on an ongoing basis. The start dates for each service will be shown in the National TPRs and updated annually where Train Slots are rolled forward to the next year.

Network Rail will withdraw from the National TPRs and the WTT any Network Service that is planned to run with a frequency of less than every 13 weeks.

The rationale for any future changes to the National TPRs in respect of Network Services trains will be explained in commentary for the relevant version of the National TPRs following consultation as outlined in Part D of the Network Code.

- 4.3.2 The agreement recorded in paragraph 4.3.1 above is incorporated into this Determination and is binding on the Dispute Parties subscribing to it.

4.4 In Dispute TTP1069 (Part 2) from GBRf: Methodologies used by TRIP and the associated new TPRs

4.4.1 In its Sole Reference Document, GBRf asserted that ODA, being a primary methodology used by the TRIP project, was inappropriate and not capable of producing values for TPRs of any kind, whilst there appeared to have been flawed input data to SPA modelling and other modelling systems and this had produced inaccurate results. And whatever the methodology used by Network Rail, GBRf considered there to have been issues in the interpretation of the output.

The determination which GBRf sought from the Panel was:

- (a) That the ODA methodology is invalid due to the inconsistencies and inherent delay in it, and that it should not be used for TPR calculations;
- (b) That care should be taken to ensure that modelling work assumes the correct traction data and that any output be compared directly to other modelling work and actual performance before being used to determine TPR values; and
- (c) That all the TPR proposals contained in Version 2 of the 2018 TPRs be removed from the TPRs as their formulation is incorrect.

GBRf annexed (as Appendix "E" to its Sole Reference Document) a detailed list of TPRs which it sought to be removed. On examination this list included a number of items which were not directly linked to GBRf's objections to ODA. The Appendix "E" items are dealt with separately below.

4.4.2 Commencing the Panel's hearing of this aspect of GBRf's dispute, I noted preliminary indication from the Dispute Parties that a significant degree of agreement had in recent time been achieved between them in respect of a number of items in GBRf's Appendix "E" list and I asked GBRf if it was therefore still its wish to pursue relief (a). I suggested that there was a lack of logic in now asking the Panel to strike down the whole set of new TPRs nationally if GBRf and Network Rail had managed to reach agreement on a substantial number of detailed amendments; granting relief (a) would totally overturn agreements already made regarding many of the items in GBRf's Appendix "E" list and to which relief (c) applied.

GBRf sought to clarify that it was not asking the Panel to strike down nationally the whole of the TRIP amendments but just the use of ODA methodology. GBRf did not want the Panel to say that it should not be used; TPRs acceptable to GBRf did not feature in its Sole Reference Document so GBRf only wished the Panel to address those items in its Appendix "E" list which it had not yet settled with Network Rail.

I put it to GBRf that its relief (a) was effectively saying Network Rail should not rely on ODA. GBRf had been represented on 20 April 2017 and heard ASR's arguments, although they were, admittedly, geographically limited to Scotland. But the witness statement provided by Mr Allen of Network Rail covered the national situation and the points made by Network Rail which clearly were accepted by the Panel in respect to TRIP and ODA methodology in Dispute TTP1064 would obviously apply to any operator nationally. Concentrating therefore on GBRf's relief (c), I again asked GBRf if it still wished to pursue relief (a) in the light of the degree of agreement, other than those issues that are still in dispute in GBRf's Appendix "E" list. Whilst not pre-judging matters, I explained that I was struggling to understand what GBRf could expect the Panel to order Network Rail to do and how, against the background of matters explored and determined in dispute TTP1064, it could be thought that the Panel might be prepared to say that ODA should not be used. In relation to TTP1064 it was

intended that the determination would say that Network Rail should use all available resources in constructing TPRs.

GBRf apologised if its Sole Reference Document was insufficiently clear. GBRf did consider ODA to be a suitable tool to identify where issues might lie with TPRs but it did not tell the reasons for problems identified and it was incapable of providing answers to such problems. GBRf agreed that ODA was a source of data, but its point was that Network Rail should cease to place reliance on ODA as a source of answers to TPR problems. GBRf confirmed that it still wished to pursue its relief (a).

Turning to GBRf's relief (b), I asked Network Rail if there was any element which it would wish to oppose. Network Rail responded that the relief sought was in effect an observation and not appropriate in terms of a remedy being provided; relevant submissions had been made to the hearing on 20 April 2017. Whilst noting that the Panel may not necessarily agree with Network Rail's position on this point, Network Rail considered that relief (b) could not be part of a determination.

Network Rail understood GBRf's position to have become that of actively seeking an order that those remaining parts of Appendix "E" for which revisions had not yet been agreed should go GBRf's way rather than Network Rail's way. There were about 15 items left in contention and Network Rail thought GBRf was wrong on all of them. To the extent that the reasons GBRf wished to put forward in support of its case included criticisms of ODA or traction values then those were plainly matters that the Panel needed to consider, but Network Rail thought it would be extremely unusual and inappropriate if some order were to be given along the lines of relief (a).

Appreciating that the hearing needed to move on, Network Rail thought it would be helpful in relation to GBRf's relief (c) to signal that its position in the great majority of items would be that full explanation had been given to GBRf as to why Network Rail had arrived at a particular conclusion. Generally it was through use of the VISION modelling tool. The information had been fully explained and discussed with GBRf. Having given those explanations, Network Rail looked to GBRf to explain in detail any disagreements and provide supporting evidence, otherwise Network Rail could not really do any more.

- 4.4.3 Having dealt with necessary case management and after I had received confirmation from both Dispute Parties that they were adequately prepared for consideration of the matters in this Part 2 of GBRf's dispute, GBRf gave its prepared opening statement saying that this dispute had arisen due to the imposition of changes in TPRs that were based upon the work of the TRIP projects around the country and, in particular, ODA and SPA methodology. While it was right that Network Rail, in collaboration with TOCs and FOCs, should keep the TPRs under regular review to ensure that they are fit for purpose, the TPRs also needed to be reasonable and proportionate, bearing in mind the amendment to Access contracts that might apply as a consequence.

GBRf's expectation was that changes proposed by Network Rail would be adopted by consent, otherwise there was significant potential for disruption to the planning of the WTT for the next timetable period, although that in itself should not in GBRf's view preclude a Panel from making a determination that could have that effect. In these instances under notice, change had not been achieved by consent and the imposition of TPR changes that GBRf considered not to have been reasonably substantiated had brought about this part of the hearing.

GBRf challenged the methodology used by Network Rail as it represented, in the case of ODA, a system which was not transparent to GBRf in reaching the technical values for TPRs from which the planning values could be derived. The ODA methodology relied on bulk data collection and was not clear how the data had been cleansed, if at all, and there was something of an overemphasis on

sample size over quality. The use of a particular percentile to derive the TPR values also lacked transparency. Although Network Rail said that this was statistically sound, there had been no demonstration of that. In any case, it could readily be said that no one particular percentile could possibly be appropriate in all circumstances for any type of TPR. This seemed to be a case of overreliance on one particular kind of desktop exercise where it was GBRf's expectation that multiple methods should be considered, such as other types of modelling output or indeed actual observations of train movements. This activity should, GBRf said, be accompanied by detailed investigation into the real cause of delay where potential problems are identified.

The general assumption throughout the TRIP process had been that the timetable is automatically at fault rather than any other possible cause. GBRf remained of the opinion that ODA was a means of identifying issues but was inherently incapable of giving the reasons for those issues and was most certainly not able to provide the answers to them.

Challenged to a lesser extent, but challenged nevertheless, were proposals resulting from Signal Performance Assessment ("SPA") analysis. Those proposals had a sounder base in that it is a proper system that was being deployed, although there were clearly issues with the data that was used for traction characteristics, resulting in flawed output. There was the potential for this to be corrected by model calibration but this had yet to be investigated by Network Rail.

There were a number of proposals in the 2018 TPRs that resulted from one or other methodology and GBRf was seeking to have the specific changes listed in Appendix "E" to its Sole Reference Document withdrawn from the new TPRs as GBRf did not believe the changes to have a sound basis. Whilst there were offers gratefully received from Network Rail to review many of the items in contention for future versions of the TPRs, this did not solve the immediate issue of the TPRs applicable to the December 2017 timetable period. GBRf's business, in common with that of other freight operating companies, relied heavily on the ability to make Train Operator Variation Requests into the WTT post- D-26. Freight operators who were left with sub-standard TPRs for the duration of that WTT would therefore be left at a disadvantage in serving the needs of their customers and in their ability to use their assets in an efficient manner.

For the avoidance of doubt, GBRf considered that it would be better to revert to the TPR values in existence pre-TRIP. GBRf recognised the need for change but did not believe this to be the way to go about it.

- 4.4.4 Before proceeding, I asked GBRf to return to its point regarding sub-standard TPRs and freight operators' reliance on Train Operator Variation Requests. It seemed to me that if a TPR is defective by extending times and reducing capacity then it is sub-standard and could prevent a Train Operator Variation Request, but if it is defective the other way, then actually that is going to allow a Train Operator Variation Request. GBRf explained that its preference is to avoid any sub-standard TPRs as they could store up a problem for the future when a performance issue arises which is linked to the TPR; a review could conclude that the value is incorrect and needs to be changed, potentially resulting in a value which does not suit the service.

I also reminded GBRf that one of the points made at the hearing on 20 April 2017 as being one of the principles with which this Panel will approach a TPR dispute is that Network Rail does not need consent to amend TPRs. Network Rail is under a duty to consult. The Panel had made it clear, again solely as principle, that in circumstances in which a Panel is persuaded that consultation had failed, and it uses the term 'sham consultation,' that it believed it had a right to strike down revised TPRs as a legal issue. But I had also gone on to say that if there has been a genuine consultation Network Rail cannot be expected, in the process of consultation, to accept every point made to it, that it therefore has to make a

decision and that creates an appealable decision. The word 'granularity' had been used on 20 April and this hearing would be looking at specific, granular decisions in GBRf's Appendix "E".

In relation to the issue of consent GBRf referred to the requirement in the National TPRs for Timetable Participants to agree on the evidence to be used in amending TPRs (referred to elsewhere in this Determination), but agreed that this did not amount to a requirement that Network Rail must obtain consent from Timetable Participants for an amendment to TPRs.

- 4.4.5 Opening for Network Rail, Mr Henderson reiterated his opening submissions from 20 April 2017 then observed, firstly, that there was no allegation from GBRf of failure to consult in these Part 2 matters and, secondly, that there was no allegation relating to failure to apply the Decision Criteria. These two points should be absolutely fundamental to the Panel's deliberation. On the face of it, GBRf was making very wide-ranging allegations relating to ODA, describing it variously as inappropriate and not capable of producing values for TPRs of any kind, as a bogus methodology and as a fake science. It had really only been GBRf which had put forward this type of claim saying that ODA is intrinsically unreliable. ASR had put forward a high challenge but even that did not go quite so far as to say that ODA was itself wholly unreliable. GBRf had itself previously accepted ODA, albeit with some caveats, example being headway values contained in Version 1 of the 2018 TPRs. But GBRf seemed to have changed its position and it was not clear to Network Rail exactly why that was.

The Panel was aware of Network Rail's points regarding ODA methodology. ODA was itself a huge project, which allowed all Timetable Participants access to large amounts of data. Its aim was to reduce specification error, or flaws within timetabling. It had been accepted by nearly all Timetable Participants. The scale of the data collected meant that the effect of outlying data was effectively cancelled if there was a temporary restriction on the line. Similarly, and perhaps more importantly, the fact that the 25th percentile was used meant that outlying data was excluded. That went a huge way, Network Rail would say, to satisfying any concerns about the data. And Network Rail would say that the suggestion that stopwatch timings or, as it were, human observed data is somehow to be preferred is wrong. It was in reality almost absurd. That was simply another much simpler and less satisfactory way of observing data and that was what Observed Data Analytics is; observed data. There have been many opportunities at TPR Forums and the like for months, indeed years, for the methodology to be questioned.

Network Rail had never suggested ODA to be perfect. It did have potential limitations just like any other form of modelling tool but, crucially, Network Rail did not adopt the output of ODA slavishly - and that in itself, it was hoped, would answer many of GBRf's concerns. It was a tool which assisted the decision-making process. Its results were reviewed internally by Network Rail and extensively with operators through TPR Forums and the like. An example of this was given in Network Rail's response document where at paragraph 10.5 the ODA for Scotland suggested 224 SRT changes but after Network's review only 174 were made. In other words, there was cleansing of 50 recommendations as a result of people who understood the Network, understood the data and understood the potential for anomalies, looking at it and thinking about it. This was an absolutely central point and Network Rail had hoped that GBRf's concerns would have been assuaged.

The Panel had already seen how in recent weeks the ongoing process of consultation had worked with the vast majority of other Timetable Participants. Network Rail sets out its proposed revision and explains why it is making the change; if an operator then produces reasoned, detailed evidence as to why that proposed revision may be inaccurate, Network Rail will consider that and will respond appropriately. However if an operator simply sits back and says, 'I'm not happy with that,' then there is really nothing Network Rail can do because it has

gone through the material itself, arrived at its own views, explained those views and yet been given nothing in return. Regrettably, that had been the approach taken by GBRf in relation to many of its objections.

Network Rail wished to make the point that there was real disjunction between the points in GBRf's Sole Reference Document and its Appendix "E". Network Rail believed that what GBRf really wanted was for the particular revisions listed in Appendix "E" to be rolled back, but when the 'big picture' issues around ODA were applied to the facts of the issues in Appendix "E", it could be seen why the remaining requested revisions were unreliable. Network Rail regarded Appendix "E" as just a list of individual, localised matters.

4.4.6 I confirmed that when the Panel came to consider Appendix "E" and it heard an objection to an individual item based on TRIP or ODA, the Panel would then be weighing the individual item concerned in respect of evidence provided.

4.4.7 Network Rail then wished to address GBRf's criticisms of SPA reports. SPA reports were produced using VISION but none of the specific outputs referred to by GBRf in its Sole Reference Document had been used to propose revisions to the TPRs. Further, each output released for Kent, for which there were only four revisions listed in GBRf's Appendix "E", were all unrelated to the queried outputs - the SPA outputs did not flow into the Appendix "E" items.

Further in relation to SPA, Network Rail wished to comment on GBRf's concern about the use of traction data. Network Rail understood that to be a reference to a concern which was raised more specifically at a Sussex TPR Forum on 15 March 2017 about traction data used for Class 377 rolling stock operated by Govia Thameslink Railway (GTR). Network Rail has gone to GTR itself and GTR was content with Network Rail's approach and the traction data that had been used. It was unclear to Network Rail why GBRf would maintain an objection when GTR did not. Network Rail also advised that, the TRATIM tool mentioned by GBRf was significantly out of date as it could not be used with the newer forms of rolling stock; its results needed to be viewed with care.

4.4.8 Looking ahead to consideration of GBRf's Appendix "E", Network Rail tabled a summary of the position at close of business on 26 April 2017. Following agreements between the parties, there were now some 18 issues still in contention. (The list tabled by Network Rail was used during the remainder of the hearing to identify the item under discussion at any time.) Network Rail wanted to illustrate that whilst as a national operator GBRf had rights to traverse any part of the Network and could put in a Train Operator Variation Request to run a train, there were several places mentioned where GBRf did not actually currently have a train in the WTT. Network Rail wished to submit that Timetable Participants should only be giving consideration to matters through which their trains are immediately affected; it was no part of any Timetable Participant's role to assume a sort of roving brief over the entirety of the TPR revisions. Network Rail would say that none of the Timetable Participants had a standing to do that and should not assume the role of, to use a legal term, officious bystander. But perhaps more importantly, Network Rail considered that the Panel must be astute to ensure that any decision which it takes does not have an impact on another Timetable Participant which is content with the proposed revision, uses the relevant section of track more than GBRf does - or even might - and which had not lodged any objection at all.

4.4.9 The Panel asked Network Rail about its criteria for deciding which tool to use when contemplating an amendment to a TPR. Network Rail explained that in some areas where there had been considerable attrition of performance the whole suite of tools had been used, with VISION to do the analysis on headway margins and junction margins and ODA to help in terms of SRTs. Where looking mainly at headways and junction margins, VISION modelling tended to give a stronger set of data than ODA, which had lots of confidence around informing SRTs. It was a

matter of which methodology is right for that particular part of the Network.

- 4.4.10 Regarding its relief (a) and its view the ODA methodology was invalid, GBRf was asked to confirm whether there were changes to TPRs that it had actually agreed to and which had been derived using ODA data, other than one matter noted in its documentation. GBRf advised that there were many such items and that back in November 2016 its list of issues was substantially longer, with lots of ODA points of contention featured on it. However, a lot of those matters had since been withdrawn or amended by Network Rail; GBRf always took the practical view in TPR Forums and in assessing changes proposed, regardless of methodology, exercised professional judgment as to whether the output looked right. If it did look right or could be substantiated by some other means which produced a very similar answer then GBRf would let it go forward as acceptable. GBRf did not have the time to process every single change in the finest of detail given the numbers of TPRs involved.

Network Rail observed that there was an obligation for each Timetable Participant to have sufficient resources to review changes but recognised that such matters needed to be interpreted sensibly and commercially and that when confronted with thousands in one go it may be that a particular approach needs to be taken, particularly for a national operator.

- 4.4.11 Following an adjournment, I informed the hearing that after consideration the Panel found itself unable to grant GBRf's relief (a). Given that, the Panel did not consider it appropriate to put relief (b) into a determination, although the Panel noted that Network Rail took no exception to any of the words in GBRf's relief (b) and would very much hope that those words would be reflected in Network Rail's dealings.
- 4.4.12 Moving now to GBRf's relief (c), GBRf thought the way forward would be to explore the remaining issues in its Appendix "E" item by item. Appendix E covered a number of issues and they were dealt with over the second and third hearing days. This part of the Determination is summarising how the issues were decided, rather than setting out the way in which they were discussed, or the order in which they are taken.

By way of a broad opening statement, GBRf welcomed the areas in which an agreement had already been reached, but went on to explain that in the majority of the items still in dispute the underpinning data had been derived from VISION and as already indicated, GBRf did not believe that VISION was properly calibrated so the results that it had produced were effectively unnecessarily pessimistic, with inadequate input leading in each case to an incorrect and unduly pessimistic new value: so the basis of GBRf's challenge on all of those remaining items under this head was VISION-related. Because the VISION output had given a value and GBRf knew this to be incorrect, but did not actually know how wrong it was, GBRf considered the best course of action to be to revert to the pre-TRIP values and then review the values afresh; this was GBRf's counter-proposal.

- 4.4.13 The Dispute Parties agreed that the items already settled between them - many of which required Network Rail to pursue consultation under Network Code Condition D2.2.7 - should be recorded in the Panel's determination. The Dispute Parties undertook to provide the Panel with an agreed form of words for inclusion in the determination after any editorial attention by me. I now record the agreement as follows:-

In relation to this Dispute between GBRf and Network Rail, the Dispute Parties have agreed certain matters as set out below and where applicable, have agreed that the following actions should be taken and have requested that these actions be recorded within the Determination as an agreement that the parties undertake to perform the actions allocated to them:

Anglia - Headways EA1160/1210/1220 and Junction Margins EA1160/1200/1220

- A collaborative effort to review the EA1160/1210/1220 headway values and EA1200/1220 junction margins using multiple sources of information and with the intention of publishing revised TPRs in Version 4.0 of 2018 TPRs following consultation as required;
- The expectation is, and subject to the above mentioned review, consultation and exercise of the Decision Criteria, that Version 4.0 of the 2018 TPR's for EA1160/1210/1220 headway values and EA1200/1220 junction margin values will not contain largely the same headway and junction margin values as appear in Version 2.0, but rather different headway and junction margin values to take into account different train types and stopping patterns;
- EA1160 Bethnal Green to Clapton Junction headway values as published in Version 2.0 of the 2018 TPRs will remain as published, noting that Network Rail has already proposed further change in Version 3.0 of the 2018 TPRs which will also be reviewed and consulted on;
- EA1160 Clapton Junction to Bishop's Stortford headways as published in version 2.0 of the 2018 TPRs will be the subject of a Network Code Condition D2.2.7 proposal to change the headway in both directions to 3 minutes (vice 2½ currently in Version 2.0 for 2018). Subject to responses from the consultation, the change is done with the intention of maintaining the current 3 minute headway (that exists in May 2017) for the December 2017 WTT;
- EA1210 Broxbourne Junction to Hertford East headway values as published in Version 2.0 of the 2018 TPRs will remain as published. In addition the Parties will jointly undertake a review of the headway values (both stopping and non-stopping) for this section with the intention of consulting on and publishing revised headway values in Version 4.0 of the 2018 TPRs;
- EA1220 Stansted Branch headway values as published in Version 2.0 of the 2018 TPRs will remain as published. In addition the Parties will jointly undertake a review of the headway values for this section with the intention of consulting on and publishing revised headway values in Version 4.0 of the 2018 TPRs;
- EA1160 Broxbourne junction margins have been satisfactorily amended in Version 3.0 of the 2018 TPRs and this dispute is resolved;
- EA1200 Chingford junction margins as published in Version 2.0 of the 2018 TPRs will remain as published. In addition the Parties will jointly undertake a review of the junction margins for this section with the intention of consulting on and publishing revised junction margin values in Version 4.0 of the 2018 TPRs; and
- EA1220 Stansted Branch junction margins as published in Version 2.0 of the 2018 TPRs will remain as published. In addition the Parties will jointly undertake a review of the junction margins for this section with the intention of consulting on and publishing revised junction margin values in Version 4.0 of 2018 TPRs.

4.4.13.1 It was also confirmed on 16 May 2017 that the following matters were withdrawn from dispute by GBRf, Network Rail either having already amended the TPRs or being about to issue the necessary notice:-
MD301 - Birmingham (New Street)
GW103 - Reading West Junction
SW110 - Haslemere
SO310 - Greenhithe

4.4.14 I then explained that I did not think that the Panel was in a position to say that it would prefer a status quo decision solely on the complaint about VISION. The dispute parties had produced a considerable amount of associated material in a short space of time but there was still no evidence before the Panel to show why most of the new VISION-related values should be struck out. The Panel thought that some of GBRf's arguments put forward by way of example would be sustainable if supported by evidence which did not just say that values relying on VISION would be wrong. I concluded that in this current Dispute TTP1069 the Panel would accordingly have to find for Network Rail in respect of all of the matters which GBRf was saying were solely VISION-related. That left two matters to be considered, both Scotland issues.

4.4.15 Regarding headways between Carstairs and Law Junction, the issue in dispute concerned where a change in headways should be effective. Should such changes be shown as 'inclusive' or 'exclusive' at the timing point at which the headway changed?

4.4.15.1 GBRf explained that it had indicated in its response to Version 1 of the TPRs a willingness to accept the new values for use in the December 2017 WTT, but it had wished Network Rail to indicate by use of the words "exclusive" and "inclusive" what headway applied at the timing points referenced. Despite consideration of the request by Network Rail, the entries were unchanged in Version 2 and remained ambiguous. GBRf maintained that the information was not presented in a manner consistent with how it was done on other parts of the Network.

GBRf explained further to the Panel that it was content to accept the new headway values derived through TRIP because they were not greatly at variance from GBRf's expectations but that acceptance was qualified by concern that at the individual mandatory timing points where a change in headway occurred there was a need to know what number actually applied at that timing point location. The concern had been discussed at the TPR Forum but not settled.

4.4.15.2 Network Rail explained that there was a convention that the headway is always looking forward, but that convention was not set out anywhere. Network Rail could not say why the convention was not set out in any contractual document. Further, Network Rail explained that there was long standing practice that on some lines "exclusive" or "inclusive" was shown in the TPRs and on some lines this was not done; in Scotland it had never been done. Network Rail thought the matter - including a definition of 'headway' might be appropriate for encapsulation into the National TPRs. Following some quite detailed discussion I suggested to the hearing that there was consensus for consultation of headway practice in the next available TPRs and the outcome could be appealed if GBRf or any other operators had issue with the content.

4.4.15.3 Whilst leaving for Network Rail's separate consideration the matter of possible revision of the National TPRs to provide some definition of 'headway' and some procedural guidance regarding publication in the TPRs, the specific issue regarding Carstairs and Law Junction was adjourned to allow further discussions between the Dispute Parties.

4.4.15.4 On 23 May 2017 GBRf and Network Rail reported having reached agreement that this matter should be left for further discussions between them with a view to informing input to be proposed for the

next available version of the TPRs. I therefore record that this item of dispute was effectively withdrawn from Dispute TTP1069. I do record, however, that if this issue comes before any later Timetabling Panel it is likely to be influenced by the extent to which appropriate steps have been taken to resolve this issue.

- 4.4.16 In its Sole Reference Document, GBRf stated that changed values at Cambuslang could not be agreed because the proposed platform re-occupation time was of a higher value than the headway, which made no sense. GBRf had pointed this out in its response to the Version 1 consultation.
- 4.4.16.1 GBRf explained to the hearing that a newly introduced platform re-occupation time of 3 minutes was half a minute longer than one of the headways through the station.
- 4.4.16.2 The hearing became engaged in extremely detailed exploration of the situation at Cambuslang, seeking to clarify the current headway values for stopping and non-stopping trains and how the new TPR introducing a platform re-occupation time might be of any effect. Asked what problem was arising with not having a platform re-occupation time specified at the moment, Network Rail explained that sub-threshold delays were being experienced by ASR's stopping services in particular when two services followed closely through Cambuslang and this performance issue required to be addressed. The Panel found this standpoint not to be consistent with its examination of the service pattern in the current WTT.
- 4.4.16.3 The Panel recognized the complexity of the issue but also gathered that there had been insufficient focus on the detail between industry parties either prior to this matter becoming a Dispute or whilst GBRf and Network Rail were preparing for the hearing. I informed the hearing that as a result, the Panel could not yet find for GBRf, but nor could GBRf's case yet be dismissed. The hearing of this matter was therefore adjourned. To enable the Panel to consider the matter fully when reconvening, Network Rail was directed to provide a diagram of the area showing relevant signals and to set out clearly its proposed amendments to the TPRs with full justification and a view regarding impact on capacity (including explaining its application of the Decision Criteria). The Panel was not convinced that trains scheduled to stop at Cambuslang, or any station, needed to approach it on a green signal rather than on a restricted aspect and would appreciate an explanation. Before consideration at the reconvened Panel hearing, this information needed to be made available to all potentially interested parties, including ASR.
- 4.4.16.4 Following consideration of the situation, Network Rail agreed to withdraw the new TPR on 12 May 2017 and GBRf promptly withdrew this matter from dispute that same day. Network Rail confirmed its decision in a notice issued under Network Code Condition D2.2.7 on 19 May 2017.

4.4.17 Analysis

The discussion of individual items above, together with guidance and observations below, mean that no analysis of Appendix "E" items is required.

4.4.18 Determination

- 4.4.18.1 I determine that GBRf's requests in relation to the following matters are denied:-
MD105 - Hanslope Junction to Rugby via Northampton

MD301 - Coventry
MD301 - Soho North Junction
MD320 - Bescot Stadium
GW103 - Didcot East Junction
SW105 - Worting Junction
SW105 - Northam Junction
SW105 - Weymouth
SW110 - Guildford
SW110 - Portsmouth & Southsea
SW115 - Salisbury Tunnel Junction
SW115 - Salisbury
SO290 - North Kent East Junction
SO300 - Lewisham to Crayford Creek Junction
SO310 - Hither Green to Rochester Bridge Junction

4.4.18.2 The agreement recorded in paragraph 4.4.13 above is incorporated into this Determination and is binding on the Dispute Parties subscribing to it.

4.5 In Dispute TTP1069 (Part 3, Paragraph 5.2) from GBRf: Finnieston Junction to Hyndland East Junction

4.5.1 This item related to an objection from GBRf to the headway between Finnieston Junction to Hyndland East Junction being increased to 3 minutes.

4.5.2 Responding in its Sole Reference Document Network Rail undertook to withdraw the TPR change from the TPRs being introduced in December 2017. This undertaking is recorded here in this Determination and is binding upon Network Rail.

4.6 In Dispute TTP1069 (Part 3, Paragraph 5.3) from GBRf: Mossend North Junction

4.6.1 This item from GBRf objected to a new restriction being imposed at Mossend North Junction without prior consultation.

Opening, GBRf said that in Version 2 of the 2018 TPRs Network Rail had inserted the new restriction and the operators had only recently been provided with the reason behind that new TPR. Having now seen the underpinning signal box instruction, GBRf now understood the situation. However, GBRf had no visibility as to how long the signal box instruction had been in place and was concerned that a precedent might be set whereby a change in a signal box instruction leads to a TPR change which could actually be a Network Change. The issue for the Panel was whether the new TPR had been properly consulted.

Explaining the operational effect, GBRf advised that a passenger train is to be held back at signal 359 if the Signaller is unable to clear signal 325, which reduces capacity and will impact on performance. The signalling allowed a train to draw up to signal 325 on a restricted overlap but the signal box instruction did not allow this to be done for a passenger train. It was on a falling gradient.

GBRf asked that the Panel should order that this item is removed from the TPRs.

4.6.2 Opening, Network Rail explained that the arrangements related to flank protection requirements for a train approaching on the falling gradient from Holytown towards Mossend East Junction. Network Rail noted that there were actually no booked passenger trains over the chord from signal 359 to signal 325. Whilst perhaps not consulted upon, the Version 2 entry was bringing the TPRs into line with safety arrangements already in place. The need for the TPR was identified during migration of signalling arrangements and the introduction of Automatic Route Setting. Network Rail was willing to embark afresh on the consultation for this particular TPR.

- 4.6.3 Network Rail was asked why there was a flank protection issue for passenger trains but not for freight trains. Network Rail representatives in attendance explained that this was what they were being told internally but they did not know the reason for the signalling arrangements. They also did not know how long the signal box instruction had been in existence.

Asked if it was the case that signal box instructions are not normally shared with operators, Network Rail confirmed that to be so but did advise that signal box instructions are often shared to inform operators if the associated TPRs are a problem.

Network Rail did not think that a Network Change was involved in this instance. GBRf explained that it had not hitherto treated this matter as a potential Network Change situation because the signal box instruction had not been seen at the time of compiling the Sole Reference Document for this hearing.

Asked whether the information now provided by Network Rail influenced its position, GBRf said not. Presumably a risk assessment was undertaken at some time. GBRf wished to challenge whether it is appropriate for a signal box instruction to lead to a TPR change. There had been similar experience with a Southern situation recently where traction had moved on but the signal box instruction has not kept up with progress.

Network Rail accepted that it was perhaps missing the full reason for this particular signal box instruction existing but there was clearly a train planning constraint in place. There were other safety-related matters reflected in planning considerations across the Network. But if Network Rail were to consult this Mossend matter now, hopefully in time for inclusion in Version 4, what would be the value in the meantime?

The Panel observed that the current decision for Version 2 would stand pending any fresh decision following consultation; this particularly appropriate in recognition of the falling gradient and reduced overlap involved in this matter.

4.6.4 Analysis

The matter did not require analysis by the Panel as the facts spoke for themselves. I observed that I was confident that the new consultation activity would provide more information and be concluded in time for supporting the May 2018 WTT and informed the hearing what the determination would say.

4.6.5 Determination

I determine that GBRf's request is denied; the new TPR will remain in force on the basis that it will be consulted afresh by Network Rail for the May 2018 WTT.

4.7 In Dispute TTP1069 (Part 3, Paragraph 5.4) from GBRf: Coatbridge Central

- 4.7.1 This item referred to an increase in the approach control and deceleration allowance at Coatbridge Central.

In opening, GBRf explained that in Version 1 of the 2018 TPRs Network Rail had proposed a deceleration allowance at Coatbridge Central of 3 minutes and had explained this as being to reflect double approach control involving signals 238 and 254. However, the area was due to be resignalled in April 2018, which is during the period in which Version 2 would apply, and this resignalling would remove the double approach control and leave approach control applying only to signal 254. Very recent investigation by GBRf showed that trains were only arriving at Coatbridge Central one minute late so GBRf would wish associated values to be reduced.

- 4.7.2 In its opening remarks, Network Rail explained that the reason this increase in value had been published was that there was a need to do so in relation to the current signalling. To be clear, the relevant value for freight trains was already 3 minutes; the change was to extend the value for passenger trains from 2 minutes to 3 minutes. Only freight trains were actually involved with the routing concerned; there were no timetabled passenger services and no passenger train diversions were planned for before May 2018. Further, Network Rail did not think that ASR drivers - the local service operator - had the necessary route knowledge.
- 4.7.3 Responding, GBRf said that freight operators' drivers had conducted ASR's passenger train diversions during recent major works at Glasgow Queen Street. GBRf did have the possibility of both hauling or driving charter passenger trains and ad hoc rolling stock movements for ASR which might use this route.
- 4.7.4 Network Rail then said it had thought that GBRf was pleading that the resignalling was to take place this year (2017); now it was helpfully clarified that the resignalling is to take place in 2018 Network Rail was prepared to say that the TPR will in due course be reduced. Network Rail saw no basis on which this particular TPR for the December 2017 WTT could be struck down even though it would eventually become redundant.
- 4.7.5 Questioned by the Panel, Network Rail advised that no schedules would be affected by this TPR in the December 2017 WTT. Asked then why this TPR was worth introducing, Network Rail said that TPRs should be fit for purpose even for short term planning. Network Rail was happy to agree to put a note in the TPRs to indicate that this particular TPR will not apply after April 2018, but it would not in any event actually affect the WTT. It was Network Rail's intention to reduce some TPR values in the Coatbridge area following the April 2018 resignalling work. Being reminded that Version 3 of the TPRs - for May 2018 - had already been issued and operators' comments were submitted on 5 May 2017, Network Rail accepted that this piece of work should have been done already but it had been delayed for various reasons. Network Rail hoped to arrange a TPR Forum meeting as soon as possible but had not as yet managed to align the diaries of those who needed to be involved. Network Rail accepted that time was short but confirmed that it is necessary to recognise the post-resignalling situation in Version 4.
- 4.7.6 GBRf closed by reiterating that the new TPR for passenger trains was not necessary. Network Rail had nothing to add by way of closing remarks.

4.7.7 Analysis

I concluded that given the limited length of time that it would be in force, one really had to wonder why the TPR change was being introduced; however, as there were no planned passenger services before the resignalling, there seemed to be no practical purpose in over-turning Network Rail's decision.

4.7.8 Determination

Network Rail's decision shall stand.

4.8 In Dispute TTP1069 (Part 3, Paragraphs 5.5 and 5.6) from GBRf: Kenilworth area

- 4.8.1 These two items referred to TPRs consequent upon Network Change, including station working at Leamington Spa and other changes at Leamington Spa and on the line from there to Coventry. These two items were so closely related that they were dealt with together.

Opening, GBRf noted that a considerable number of infrastructure changes were intended in this area from 2016 to 2022. GBRf was not comfortable with the changes for December 2017 without having been provided with the reasoning for the changes. GBRf also noted that new TPRs in Version 2 related to part of the

Network (as defined) which had not yet been changed or yet even been proposed for change under the Network Change process.

- 4.8.2 Network Rail replied that there was to be a new station at Kenilworth and signalling changes on the line through the area but no additional track at this stage.

Network Rail confirmed that the new TPRs had been progressed for infrastructure which was not yet in existence; the 2018 Version 2 TPRs were for the intended train service once the Network Change had been introduced. The engineering possessions had been planned and the infrastructure proposals would be the subject of the Network Change process soon; they were currently undergoing internal consultation within Network Rail. If Network Rail found that it had not devised the Network Change proposals by D-26, then the new TPRs would be withdrawn. Network Rail did not think there would be any 'show-stopping' objection to the Network Change as it was intended to consult using the same material which had already been shared with operators.

- 4.8.3 The Panel noted that Section 5.3.1 of the Procedure for amending TPRs (see Annex "D") indicated that TPRs may be introduced on a timed basis and asked Network Rail whether that disposed of the apparent problem of ORR having said that there is no link between Parts D and G of the Network Code. Further, Network Rail was asked whether inserting an implementation date in the new TPRs for the Kenilworth area would avoid any need to withdraw them at D-26 if the Network Change process was not progressing.

Following an adjournment, Network Rail observed that in paragraph 45 its decision regarding an appeal against the Panel's determination of Disputes TTP807/808, the ORR had rejected any express link between Parts D and G of the Network Code and "all the implications of doing so". Network Rail also now wished to address the reference to ORR's paragraphs 49 and 50 mentioned in my Directions Letter of 2 May 2017. These points, Network Rail said, demonstrated that ORR was well aware of the practical and inevitable relationship between Parts D and G. Network Rail was prepared to go away and consider to what extent the suggestion about dated TPRs could be applied in the future but was convinced that at the very lowest level it would introduce a link between Parts D and G, but, narrowly in this particular dispute item, it had to be recognized that the Network Change was due to be implemented before the WTT comes into effect in December 2017.

- 4.8.4 Network Rail was unable to suggest how it was that the National TPRs were worded as they are. Network Rail was unable to reconcile its position with the words about TPR changes in the National TPRs and was reluctant to make a potentially far-reaching policy decision about the matter "on the hoof".

- 4.8.5 GBRf noted that ORR had said "established and implemented" in its appeal decision. GBRf then observed that there was a philosophical objection and then a practical objection with the new TPRs as issued. The problem philosophically was because on contractual terms the Network (as defined) would not have been changed. The practical argument was that GBRf and other operators had seen drafts (which had only been issued in the past week) about the intended Network Change - those being an overall scheme plan and scheme sketches for Leamington Spa and Kenilworth - but the operators did not know what the detail would be when Network Rail comes to issue the Network Change proposal formally. The sketch diagrams would be subject to signal sighting and similar practical matters, for which time was already tight. GBRf had already looked quickly at the new TPRs and identified two changes which would definitely be required; GBRf had also asked for the Network Change information.

Network Rail advised the Panel that the new TPRs were the best that could be modelled and had been put forward based on that information. Network Rail had now been through the values with GBRf and colleagues from one other freight operator and one passenger operator and agreement reached regarding some

reductions in values. The Leamington Spa values were also changed in response to points received from London & Birmingham Railway.

4.8.6 In closing remarks, Network Rail said that no case had been put regarding modelling for the TPRs but, rather, GBRf's complaint was based largely on the matter of Network Change. The case as put by GBRf was answered in ORR's Dispute TTP807/808 appeal decision and now was not the time to make a link between Parts D and G of the Network Code in the context of this dispute because the narrow point was adequately covered by ORR's decision. Network Rail would look at the other points raised but was at pains to emphasise that this intention should not form part of the Panel's determination.

4.8.7 Analysis

The initial view of the Panel, which I announced orally at this point in the hearing, was that because of the ORR's binding precedent, these new TPRs could not be struck down as had been sought by GBRf. GBRf's attempt to distinguish between "establish" and "implement" was admired but did not alter that position. Since the hearing, however, the Panel has considered the relationship between TPRs and Network Change at greater length. As discussed below, as guidance, the Panel has confirmed its view that it does not accept Network Rail's interpretation of the ORR's decision in Disputes TTP807/808. The Panel explains its view that as a matter of law the ORR's Determination does permit objections to be raised in a way which reflects the ORR's views. Further, the Panel explains why it considers that the recent introduction into National TPRs of an ability to introduce TPRs from a specified date should obviate the need for future disputes of this kind.

None of these subsequent thoughts change the decision announced orally, however, as the Panel's decision was reached because the necessary Network Change was confidently expected by Network Rail to be established and implemented before the start of the December 2017 WTT. Given this, there was clearly no point in striking down these TPRs.

4.8.8 Determination

Network Rail's decision shall stand.

4.9 In Dispute TTP1069 (Part 3, Paragraph 5.7) from GBRf: Pantyffynnon

4.9.1 This Dispute arose because GBRf had understood, reasonably on the information available to it, that the Route Opening Hours on this freight branch had been restricted by a TPR amendment to a much shorter period than shown in the published Route Opening Hours.

GBRf postulated the possibility of this restriction as amounting to Network Change, while clearly recognising that this Panel could not hear or determine a claim relating to Network Change. In this Dispute GBRf was asking that the change to the TPRs should be removed unless a Network Change was to be proposed.

Network Rail defended the position on a number of grounds, principally relying on the legal effect of the relevant Level Crossing Order (referring at that stage to only one such Order). In its Sole Reference Document on this point Network Rail quoted the Level Crossing Order as saying that the crossings [sic]:

'should normally only be used by trains between 09 30 and 15 00 hours Monday to Friday'.

My Directions arising from this statement are referred to below.

- 4.9.2 At the opening of the hearing I asked by way of clarification why, if the level crossing opening hours were set, were the route opening hours covering a period that trains do not operate over the line from Gwaun-Cae-Gurwen to Pantyffynnon?

GBRf believed it was because the route opening hours reflected the signal box opening hours at Pantyffynnon, at which I observed that my understanding is that the box at Pantyffynnon primarily exists to serve the Heart of Wales Line, not this branch.

Network Rail said this was something that was lost in time. At rail privatisation in 1994 route opening hours had been established to give protection for operators against the Infrastructure Controller changing route opening times to achieve economies but also to give the Infrastructure Controller protection against having to open signal boxes at its own cost to meet operators' future requirements. Over time, route opening times around the country had been adjusted to suit train services so the industry currently had two relevant documents, the route opening hours and the list of signal box opening times.

- 4.9.3 In a Directions Letter of 2 May 2017 (which may be found on the website) I had asked for the relevant Level Crossing Orders. Network Rail tabled these at the hearing; there were six in number, all issued in 2008 and being for the Ammanford Park Street, Glanamman, Gwaun-Cae-Gurwen, Gwaun-Cae-Gurwen Colliery, Cawdor and Garnant Branch Level Crossings individually. The latter two Orders contained the wording:

"The crossing shall normally only be used by trains between 09 30 hours and 15 00 hours Monday to Friday. Where, in exceptional circumstances, it is necessary for rail traffic to use the crossing at other times, such additional precautions as are necessary shall be taken to ensure the safety of crossing users. When it is necessary for the rail traffic to use the crossing other than during the hours of daylight, a record shall be maintained of the circumstances and precautions taken."

- 4.9.4 Network Rail said that the times in these Orders were reflected in the National Electronic Sectional Appendix. The new TPRs had been introduced because Train Planners do not necessarily look at the National Electronic Sectional Appendix so it was thought appropriate show the times in the TPRs marked with an asterisk. Network Rail tabled the relevant item; an asterisk against opening hours of 05 00 to 21 30 for both SX and for SO was shown as meaning "Local instructions for level crossings on this route stipulate that crossings 'must only be used between 09 30 and 15 00 Monday to Friday during daylight hours' ". The route was shown as closed on Sundays.
- 4.9.5 It was noted that the Level Crossing Orders issued in 2008 revoked previous Orders for Ammanford Park and Cawdor Level Crossings. Network Rail was not aware of there having been previous Level Crossing Orders at the other crossings and explained that the line was out of use for a period but it was thought that it was previously in use in 1994 hence operational times were shown in documentation at rail privatisation. A new seam of coal was later found and trains were restored, requiring new Level Crossing Orders to be produced. As there were previously no passenger services on the line there had been no question of "Parliamentary trains" operating during the period of closure.
- 4.9.6 In identified matters of law issued on 2 May 2017 I had raised the question as to how to interpret the word "normally" in relation to its use in the Level Crossing Orders, which had been mentioned by Network Rail in its Sole Reference Document but which had not at that time been produced. I told the hearing that I was satisfied that "normally" could now be explained by the "in exceptional circumstances" content of the Orders for Cawdor and Garnant Branch Level Crossings.

- 4.9.7 Noting that from 2008 some restrictions had been imposed on Network Rail by an external source and that the TPRs were now being changed to remind people of that restriction, GBRf was asked if that constituted a Network Change. GBRf thought it was because amendment was being made to opening times hitherto published and Network Rail also thought that, if anything, this was a Network Change matter.
- 4.9.8 I observed, having now read the 2008 Level Crossing Orders, that there was no reason in them as to why GBRf could not operate trains on the line at any time during the published opening hours between 05 30 and 21 30 Mondays to Saturdays, so long as the additional precautions required at two of the crossings were in place. Whilst not within the jurisdiction of a Timetabling Panel, I was of the view that this matter was clearly not a case of Network Change. On reflection, GBRf accepted this view.

Network Rail explained that my analysis of the position with the Level Crossing Orders was not the way Network Rail had been looking at the dispute, thinking instead that this was a case of Network Change. Network Rail also noted that it was not the Panel's task to decide whether or not this was a case of Network Change but whether the new TPR should be allowed.

By this point in the discussion the Panel and the Parties were concentrating on the Network Change question. In retrospect it is clear that we had all lost sight of the fact that GBRf's request for relief had actually been for the change to the TPRs to be removed unless there were to be a Network Change proposal.

GBRf then indicated willingness to withdraw this aspect of Dispute TTP1069 on the basis that its underlying complaint was that there was a case for Network Change. Noting this, there was a view within the Panel that pursuit of the Timetabling Dispute should not be ceased on the basis of Network Change not applying; instead, given that operators bid for Train Slots based on the TPRs, the inaccurate asterisk note should be corrected and the Panel should more properly determine that it should be made accurate.

Network Rail considered the matter of the asterisk to be a minor point; the pragmatic solution was understood and Network Rail was content to leave it as a matter for the Panel.

4.9.9 Analysis

The Panel concluded that words against the asterisk in the new TPRs do not quote accurately from the Level Crossing Orders, by suggesting that it is not possible to run trains outside the times specified in any circumstances. Whilst it is sensible for the TPRs to show the position regarding availability of the route, it is important to ensure that the position is then accurately recorded.

There is no need for the TPR to be removed, as requested by GBRf, so long as it is accurate.

4.9.10 Determination

I determine that Network Rail shall amend the published TPRs to give an accurate reflection of the Level Crossing Orders relating to this line of route.

5 Further analysis on general issues

5.1 Legal issues

Legal issues were to the fore in this Timetabling Panel hearing (and in Dispute TTP1064 which was originally linked with it) to a greater extent than in any previous Timetabling Panel hearings. This is illustrated by the fact that Network Rail raised challenges to a Panel's power that are not thought to have been raised in earlier Timetabling Panel hearings.

Some of the submissions by Network Rail were challenged in pre-hearing Directions and in notes circulated by the Secretary. Network Rail went so far as to submit that in a binary decision a Timetabling Panel cannot overturn Network Rail unless exceptional circumstances exist. Network Rail also claims that exceptional circumstances must be pleaded by the Claimant, and that if the Claimant does not do so the Panel is not entitled to determine that exceptional circumstances do exist.

For the reasons explained in the Determination reached in Dispute TTP1064 and in these Disputes, the Panel did not in the event reach any decision in an area in which its views on the Panel's powers clearly differed from Network Rail's views, so none of these issues can be tested in an appeal involving these points from TTP1064 or these Determinations.

The Panel had in any event felt that there was little point in entering into legal arguments which were not required by any decisions made, but clearly live issues remain which Network Rail may (or may not) pursue in future. The section of the Determination below, which is devoted to guidance and observations deals more fully with the some of the legal issues that remain in dispute.

One point emerging from these legal issues was referred to in my opening remarks; that whatever difficulties had been encountered in the period leading up to the hearing day, the Panel would not allow itself to be influenced by these issues and would reach its Determination solely on the basis of the Parties' legal entitlements.

5.2 TPRs in principle

The role of TPRs was one of the issues rehearsed by the Panel before the hearing and referred to in my opening remarks. The Panel regards TPRs as a key building block in constructing the WTT. They need to be as accurate as possible: if too optimistic, the timetable is unachievable; if too pessimistic, capacity is restricted unnecessarily.

As TPRs need to be as accurate as possible, those drafting and/or amending them need to use all available sources of information that will assist in achieving accuracy. The Panel accepts that professional judgment must be applied in assessing which inputs to the process are likely to be useful, which may vary from place to place, and in assessing how the outputs are to be applied.

The Panel is aware from its own expert knowledge that TRIP was created as a national initiative by the railway industry as a whole, but clearly being led (and funded) by Network Rail. The Panel is also aware of the fact that improved TPRs have been encouraged in earlier Timetabling Panel Determinations.

ODA is one of the inputs to TRIP, while clearly in Network Rail's evidence not being used on all routes of the Network. One main challenge (in this and other Timetabling Panels) is to the use of ODA, given perceived weaknesses in its output. Network Rail's point that only a minority of Timetable Participants were challenging TRIP/ODA was noted by the Panel.

In TTP1064 the Panel noted the point made by ASR that the ODA was captured during a period of poor performance. In that Dispute it regards this as a relevant important factor, but held that it could not be determinative in the light of all the other factors, including Network Rail's evidence as to how ODA data is handled.

A conceptual question arises as to whether it can be said that a new method of calculating TPRs can be regarded as either complying with the Decision Criteria, or of failing to do so. The aim of TRIP, to improve TPRs generally, was seen by the Panel as meeting the Objective set out in Network Code Condition D4.6.1 (to... *'share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services....'*). But the Panel felt that it is extremely difficult to see how a strategic concept such as this can engage the individual Considerations within the Decision Criteria.

The view of the Panel on this question is that it is only when individual TPR adjustments emerge from the process that it can be asked whether the Decision Criteria have been weighed appropriately in each case. Thus it was the Panel's view that in appealing any individual amendment (at the level which could be referred to as 'granular') it would be open to any Timetable Participant to point to reasons why the use of ODA data in that particular amendment had led to an incorrect application of the Decision Criteria, but that a challenge to the use of ODA as a whole could not be sustained by arguing that ODA, as a constituent part of the TRIP process (in some but not all instances), or the TRIP process as a whole, failed to comply with Decision Criteria.

The same applies to an objection in principle to any TPR changes solely because they are based on VISION. Further, the Panel had not heard any argument or seen any evidence challenging VISION.

5.3 Consultation and the process for amending TPRs

As flagged up in advance, and again in my opening remarks, any Panel determining a claim on these lines must examine the extent of Network Rail's consultation with Timetable Participants. It would be open to a Panel to conclude that Network Rail had not conducted a consultation in good faith, and therefore it amounted to a sham, in which event the appropriate remedy would probably be to determine that Network Rail should revert to an earlier version of TPRs.

If, however, a Timetable Participant ceases to engage with Network Rail at any stage of the development of new TPRs, it is difficult to imagine how a Panel can then determine that the consultation process has failed solely because of any lapse on Network Rail's part.

Another point of principle set out in my introductory remarks is that the Panel considers that the duty to consult placed on Network Rail does not require Network Rail to accept every point made by a Timetable Participant. To the extent that it does not, that creates an individual appealable decision on a specific point, which a Timetabling Panel is eminently well qualified to determine, but any Timetabling Panel is only likely to require Network Rail to revert wholesale to an earlier version of TPRs if it had reached very different conclusions to those reached by this Panel, both in TTP1064 and in the Disputes included within this Determination.

As discussed above, the National TPRs set out the procedure for amending TPRs clearly (in Section 5), including a specific requirement for the creation of an audit trail.

The Panel recommends that in any future Dispute involving amendments to TPRs the Hearing Chair should require Network Rail to provide evidence of the process used to propose the TPR amendment, including production of the audit trail required by the National TPRs.

5.4 Who has the right to challenge amended TPRs?

The Panel also noted that Network Rail seemed to question the right of GBRf to object to TPR amendments on a route over which it does not currently operate any services. The Panel does not consider it right for Network Rail to have made such comments because the whole point of freight operators having permission to use the entire network is so that they can respond to the ever changing requirements of their customers which could result in a freight operator operating at short notice over a route that it did not previously have a requirement to do so. Therefore, if freight operators consider that there are proposed changes that would adversely impact upon their ability to bid for services on any routes (whether currently used or not) then they should not be criticised by Network Rail for doing so. Also, the majority of freight operators operate Network Services (i.e. infrastructure trains) which can traverse any route. Such services are of course also subject to the TPRs.

5.5 When should a new method be challenged?

One common theme throughout these hearings, and TTP1064, was the challenge to the use of ODA within TRIP. The reasons for these challenges failing have been set out above, and in the determination of TTP1064. Nonetheless, the Panel thinks that it should comment on this issue in its guidance and observations. Had the document discussed in this section come to Panel's attention before reaching its Determination in TTP1064 it would also have included these comments in that Determination.

The Panel recognises the huge number of timetabling decisions, including amendments to TPRs, made on a daily basis. Nonetheless, it commends Section 5 of the National TPRs to the attention of the industry in the hope of reducing the number of disputes arising from TPR changes, and to make such disputes easier to decide if they are registered.

In particular it refers to the procedure for amending TPRs in clause 5.3. Clause 5.3.2(f) states that a proposal will include:

'Supporting evidence as agreed by Network Rail and affected parties' [my underlining].

So notwithstanding the Panel's view set out above that the duty of consultation does not require Network Rail to accept all comments and counter-proposals made by a Timetable Participant, the evidence to be used as an input to a TPR change must be agreed by the parties. It is here, therefore, that a Timetable Participant is able to raise objections to a process such as ODA being used to inform TPR changes where it is claimed that such inputs are not accurate or appropriate in any given circumstances.

In making this point the Panel recognises the sheer volume of work involved in TRIP, a project on a scale that may not be repeated for some time. Nonetheless the Panel hopes that these comments will provide useful guidance to the industry.

5.6 Capacity v Performance

Again as I hope was made clear before the first hearing day, like most Timetabling Panels this one was acutely aware of the balance – and tension – between capacity and performance. The Panel would have been unwilling to countenance any artificial increases in TPRs for which there was no justification, but had no evidence before it of any specific examples.

5.7 The response of Timetable Participants (can TPRs be challenged solely because of the effect on services?)

Another general point, which was relevant in Dispute TTP1064 but also applied in some of the other cases, is the conceptual basis on which a Timetable Participant can and should challenge revised TPRs.

Of course any Timetable Participant will wish to understand the effect on its existing (and planned, see below) services of any revision to TPRs, but the Panel recognises Network Rail's duty to apply the Considerations set out within the Decision Criteria in the light of the interests of all Timetable Participants. (The Panel notes in this context that it is accepted within Part D that the application of the Considerations can lead to conflicting results). The commercial interests of any Timetable Participant are included within the Considerations, all of which are given equal status in Network Code Condition D4.6.2.

When applying the Considerations in any particular case, Network Code Condition D4.6.3 requires Network Rail to identify those which it regards as relevant and apply those to achieve result which is fair and not unduly discriminatory. Only if two or more of the Considerations conflict will Network Rail then weigh the Considerations to identify the appropriate solution.

Having reminded itself of these factors, it is the Panel's view that an amendment to a TPR which is operationally necessary cannot be 'trumped' by any commercial interest. The fact that commercial interests are a consideration has been explained above, but once its weighting has been properly applied any consequential commercial issues, such as a failure to achieve franchise SLCs, are not seen as falling within a Part D Determination.

5.8 The extent to which TPRs should look forward

While it is clearly desirable to incorporate into any WTT planning function, including TPRs, plans or aspirations for future services to the extent which this is possible, a Timetabling Panel determining any challenge to TPRs is only dealing with the construction of one specific WTT. It cannot require Network Rail to include in the TPRs for that WTT any planned or proposed enhancements to services which will not be introduced during the currency of the WTT in question.

5.9 Guidance and recommendations regarding legal issues

- 5.9.1 There is a clear right for any party in any Access Dispute hearing to be represented by whomsoever it wishes. It is possible that the draftsman of the ADR Rules assumed that any external legal representatives instructed would understand the process of a Timetabling Panel and would both comprehend and be in sympathy with the Principles set out in Rules A5-A10; the need to reach a "Timely Determination" (Rule A15); and the requirements that a Timetabling Panel should provide expert knowledge, must endeavour to reach fair, rapid and inexpensive determinations of disputes and should, where appropriate, take the initiative in ascertaining the relevant facts and law (Rule H15).

Whether or not the solicitors instructed by Network Rail had any prior familiarity with the process, I regret that I find it necessary to observe that there was little apparent willingness to observe the Principles referred to above. Although this was denied, I can only conclude that this Dispute (and those initially listed with it) saw a high degree of procedural quibbling.

As I commented during the hearing, the Principles governing Timetabling Panel dispute hearings require us to reach timely and cost-effective decisions, based on the expert knowledge of the Panel. At various points in this Determination I have commented on our duty to reach decisions based on the legal entitlements of the Parties, and no other grounds. Nothing that I have said, or will say, undermines that duty, but as far as procedure is concerned I used the phrase that Timetabling Panels (and Access Dispute Adjudications) proceed on a basis that is 'legal, but not legalistic'. The Panel hopes that future Disputes will be conducted in this way.

While I am recommending that the Access Disputes Committee should review the format of Notices of Dispute and the procedures associated with them (and I understand that this recommendation has already been accepted), there is, in my view, no other way of describing a claim well into a Timetabling Panel process that rights were reserved as to whether some or all of the relevant Notices of Dispute were, '... valid... in various other respects', which was the position at one point. Nor, as I said in my Directions letter of 4 April 2017, is there the luxury of time within this process for a Dispute Party to 'reflect' on whether to take such procedural points.

- 5.9.2 It should also be noted that in a process which is required to reach a timely determination, case management decisions have to be made on the basis of initial impressions, with the obvious possibility of amending them as the matter unfolds (as happened in relation to all these Disputes which were originally conjoined with TTP1064). It is a misunderstanding to describe this process as pre-judging any point.

The background, which is understood by Timetable Participants, is that of the large number of decisions in constructing a WTT only a few lead to a referral being registered by the Secretary. Then, only a very small proportion of these lead to a Timetabling Panel hearing being convened, many of which are settled either before the hearing date or during the hearing itself. By the time that a hearing is listed both Network Rail and the TOC/FOC making the appeal will understand the issues at stake. Given this, it is difficult to understand how Network Rail could be prejudiced by not knowing the issue(s) at stake and therefore the case that it has to address in any Timetabling Panel hearing. In any event, in all Timetabling Panels which I have chaired, I have ordered that Sole Reference Documents should be served sequentially, so that Network Rail will also be replying to the case being advanced by the Claimant. (It is also my practice to seek clarification of any point in a Claimant's Sole Reference Documents which is not clear, not least to assist Network Rail in drafting its response).

Regardless of this, the time to raise any objection to a Notice of Dispute is before a Timetabling Panel has been convened. In my Directions of 4 April 2017 I suggested that any such challenge should be raised during the period in which the Secretary asks Network Rail whether it has any objection to a Dispute being registered as a Timetabling Dispute. Once again my recommendations to the Access Dispute Committee are intended to address this point.

- 5.9.3 Although I have observed that the rules about Costs do not require a party against whom such an order is to be made to be given a warning, in a jurisdiction in which costs have only just started to be awarded I think it good practice to give such a warning. I nearly did so at least twice in the period before the first hearing day; in the event of any future conduct of this kind, by any party, I shall have no hesitation in giving such a costs warning and ordering that unnecessary costs incurred by the Access Disputes Committee, and any Dispute Party if relevant, shall be paid by the party with responsibility for such behaviour.

I do wish to record, however, that the conduct of Network Rail's case on the hearing days was in stark contrast to that criticised above and was beyond reproach.

- 5.9.4 It will be clear from previous sections that the Panel did not accept a number of Network Rail's submissions on legal issues, particularly in relation to the extent of the powers of a Timetabling Panel. In some of these Disputes the determination is to allow Network Rail's decision to stand, and not to grant any of the other remedies sought by the relevant Claimant(s). The Panel, therefore, has clearly not gone beyond Network Rail's interpretation of the powers of a Timetabling Panel. Nonetheless, I do wish to record my disagreement with a number of the points made by Network Rail. The simplest way of doing so is by adopting – gratefully – ASR's submissions in response to the note on Issues of Law which I provided as required by ADR Rule H18(c). These appear in Annex "D" to the Determination of Dispute TTP1064.

- 5.9.5 The instructions given to any Party's legal representatives are, of course, protected by legal professional privilege. Without any wish to breach privilege a Panel is entitled to reach an opinion on whether a Party's approach to Dispute(s) complies with the principles set out in the ADR Rules. By the end of the third hearing day the Panel still felt unable to decide whether Network Rail's approach to these Disputes represented a coherent attempt – on instructions – to challenge the commonly understood view of the powers of a Timetabling Panel, or whether what we saw was the effect of instructing a legal team without previous experience in this field which

thought that raising repeated procedural challenges was acting in its client's best interests.

- 5.9.6 If Network Rail is seeking to challenge the powers of a Timetabling Panel as a point of principle then this Panel thinks that it would be preferable to do so by following the appropriate processes through the Access Disputes Committee or Class Representative Committee (as may be thought applicable) and then seeking approval from the ORR for any agreed amendments. Quite apart from anything else, this would be a much more satisfactory way of resolving this issue with the agreement of the whole industry, rather than hoping for a decision – which may only be on one disputed point of many – which can be appealed to the ORR to obtain a binding decision.

5.10 Guidance and recommendations on operational issues - TPRs and Network Change

A number of the items in dispute returned to the question of when TPRs which arise solely because of a Network Change should be introduced.

The Panel recognised throughout that unless and until there are any relevant changes to the Network Code, it, like any Timetabling Panel, is now bound by the Determination reached by the ORR in Disputes TTP570/571, which was expanded on by the ORR in its Determination of the appeal against Disputes TTP807/808. Paragraph 45 of the latter Determination reads:

'...ORR remains satisfied that there is no explicit link in the Network Code between Part D and Part G which requires that a TPRs change related solely to a Network Change should not be implemented if the associated Network Change has not been established and implemented. ORR further remains satisfied that it would not be appropriate to introduce such a link without thoroughly considering all the implications of doing so'.

In paragraphs 13 and 14 of Network Rail's Response to the 3rd GBRf Sole reference document, Network Rail quoted from the ORR's Appeal Determinations on Disputes TTPs570/571 and TTPs807/808, going on in paragraph 15 to say:

'The effect of these ORR Determinations is that a TPR change which relates (or is alleged to relate) solely to a Network Change may be implemented even if the associated Network Change has not been established and implemented. There may be a relationship between the two changes, but NR may consider and propose timetabling changes separately from Network Changes. A Timetable Participant may not object to a TPR change simply on the grounds that any associated change has not yet been made'.

In my Directions of 2 May 2017, which also set out the issues of law arising from Heads "C" and "D", I raised as an issue of law the question as to whether Network Rail's interpretation set out above was correct in law.

Although the ORR's binding opinion that there is no explicit link in the Network Code between Part D and Part G was mentioned on a large number of occasions during the second and third hearing days, the opportunity did not arise to test the question as to whether Network Rail's interpretation is correct.

The Panel's concern that this risked being an over-interpretation of the ORR's position arose from the apparent lack of recognition in Network Rail's interpretation of the effect of paragraphs 49 and 50 of the Determination relating to TTPs807/808, to which I drew attention in my Directions of 2 May 2017, and which Counsel for Network Rail read out at the third hearing day.

These paragraphs read:

'49. It is clear from this definition that TPRs relate to the Network. This will either be the Network pre-Network Change, or the Network post-Network Change. TPRs have to be in place so that the timetable that is supported by the post-Network Change Network can be prepared before the Network Change takes place. This enables the new timetable to take effect immediately after the implementation of the Network Change.

50. TPRs which relate to the post-Network Change Network in practice do not take effect until the Network Change has been implemented, because they apply to the post-Network Change Network. If for any reason the Network Change was delayed, then a timetable capable of operating on the pre-Network Change Network would be required. In all probability, the old timetable would continue to operate in this event and as a result it is unlikely that any practical difficulties would arise.'

The Panel interprets these paragraphs as drawing a distinction between the fact that there is no explicit contractual link between Part D and Part G and recognition by ORR of the fact that there must necessarily be an operational link between TPRs solely arising because of Network Change and that Network Change, to avoid the situation either pre- or post-Network Change in which Network Rail and TOCs/FOCs are trying to operate a timetable in which the TPRs in force relate to the opposite situation.

We are reinforced in this view by the ORR itself, as paragraph 51 reads:

51. It is important to note however that the practical consideration above still does not mean that there is an express link between Part D and Part G contained within the Network Code.....'

The second point which the Panel regarded as relevant in this context is that in Section 5.3 of the National TPRs (in the version - see Annex "D" - which came into effect on 14 May 2017, while this Determination was being drafted) it states that:

5.3.1 When producing TPR change proposals, Network Rail and/or the Timetable Participant will set out why the change is proposed, and the planned date for implementation' [my underlining].

It seemed to the Panel, therefore, that without in any way suggesting that there is an express link between Part D and Part G, the practical reality of the need to align TPRs changes to the actual date of the physical change to the Network on the date that the Network Change is introduced is reflected accurately and adequately in Section 5.3 of the National TPRs.

Therefore the Panel concludes that Network Rail is not correct in saying that a Timetable Participant may not object to a TPR change simply on the grounds that any associated change has not been made: in our interpretation the ORR clearly recognises the practical reality that TPRs associated with Network Change can only take effect when the Network Change becomes a reality on the Network, and that the National TPRs reflect this because of the recently introduced ability of Network Rail to propose a changed TPR which will only come into effect from a given date.

The Panel recognises that delays often occur in projects, but as guidance it suggests that any delay in effecting a Network Change will be known to any operator using that part of the Network.

In the event, however, two of the issues in dispute in which this question was relevant were Issues 5.5 and 5.6 in Part 3 of the Dispute brought by GBRf (dealing with the Network Change required for the revised infrastructure on the Kenilworth line). Here the Panel was faced with the apparently bizarre situation in which Network Rail confidently assured the Panel that the Network Change in question will be in place by the start of the December 2017 WTT, even though the consultation required under Part G has not yet commenced. (For the avoidance of doubt, the Panel clearly understood that this was not itself a matter before the Panel and that in any event a Timetabling

Panel has no jurisdiction in relation to Network Change matters).

In the light of this assurance from Network Rail, the Panel clearly could not grant the relief sought by GBRf in relation to this Network Change. As part of its role to provide guidance and observations, however, the Panel concluded that any appeal by a Timetable Participant against the introduction of new TPRs related solely to a Network Change on the basis that there is an explicit link between Part D and Part G of the Network Code is bound to fail. But an appeal against post-Network Change TPRs on the grounds that they would be introduced on the pre-Network Change Network (using the ORR's wording in its Appeal award of TTPs807/808) cannot be dismissed as breaching the binding authority set out in that Appeal award of TTPs807/808, as it appears to the Panel to reflect the reality of the operational situation as explained by the ORR and reflecting the ORR's understanding of the need to align the pre- and post-Network Change timetables with the reality of the infrastructure on the ground at any particular time.

Further, however, the Panel was not sure why it would ever be necessary for such a situation to arise in future, given the express authority now conferred on Network Rail to introduce TPRs on a timed basis. It seemed logical to the Panel that when a post-Network Change TPR has to be introduced during the currency of any WTT, that the date for its implementation - which will of course be the date on which the relevant Network Change comes into effect - should be indicated.

The wording of section 5.3.1 of the current National TPRs quoted above was issued as a decision on 15 July 2016, coming into effect on 14 May 2017. The Panel recognises that Timetable Participants may not yet have had time to appreciate fully the significance of this new rule, but it seems to the Panel that a wider understanding of its utility, and the fact that it is clearly aligned with the ORR's expectations, would in all probability avoid any future appeals on these grounds if the rule is applied in the way that the Panel understands to have been intended.

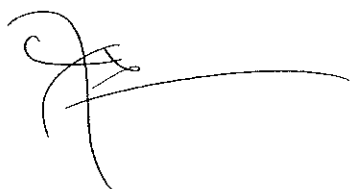
The Panel observes that many infrastructure changes (affecting not only the track but also new stations) are brought into operational use during the life of any WTT and that where such change affects passenger services these are shown as "dated" in the public timetable. The dating of relevant changes in the TPRs which underpin the associated WTT would therefore be entirely consistent with this.

Although Network Rail dissented from this proposition at the third hearing day, in particular during that part of the hearing devoted to the Kenilworth line, for reasons which were not clear, the Panel saw no reason why the date specified for a post-Network Change TPR change should not be shown as conditional upon the Network Change taking place on the date estimated when the WTT is issued. In the event of any delay in effecting the Network Change, any TOC/FOC operating over the area of the Network concerned would normally be aware of the delay, and that the date specified for changing the TPRs would be adjusted accordingly.

If Network Rail were to follow this policy there should be no need for any future Disputes to be registered concerning the introduction of post-Network Change TPRs. If Network Rail chose for whatever reason not to follow this policy, the decision of this Panel is only of persuasive authority to any later Panel; but it is the view of this Panel that a Timetable Participant is able to appeal a post-Network Change TPR on the basis that it would be introducing a post-Network Change timetable on to the pre-Network Change Network, contrary to the expectation of the ORR.

6 Determination

- 6.1
 - 6.1.1 I determine matters in Disputes TTP1065 and TTP1069 as set out at paragraphs 4.2.22, 4.4.18.1, 4.6.5, 4.7.8, 4.8.8 and 4.9.10 above.
 - 6.1.2 The agreements reached variously in relation to Disputes TTP1065, TTP1066, TTP1068, TTP1069 and TTP1073, as set out at paragraphs 4.1, 4.3.1 and 4.4.13 above, are incorporated into this Determination and are binding on the Parties subscribing to them.
 - 6.1.3 The Notification of Intent given by Network Rail in relation to Disputes TTP1065 and TTP1069 and recorded at paragraph 4.2.20 is incorporated into this Determination and is binding.
 - 6.1.4 The undertaking given by Network Rail in relation to Dispute TTP1069 and recorded at paragraph 4.5.2 is incorporated into this Determination and is binding.
- 6.2 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.



**Clive Fletcher-Wood
Hearing Chair**

26 May 2017

Annex "A"

Additional Network Rail representatives. Dispute Parties which attended but withdrew dispute before hearing of their claim and interested parties (and whether represented at the hearing)

Representatives attended as available/deemed necessary

Additional Network Rail representatives

Andrew Bray	Timetable Production Manager (Scotland)
Laura Freeman	Operational Planning Specialist (Western & Wales)
Maria Lee	Timetable Production Manager (Wessex)
Hannah Linford	Timetable Production Manager (LNW)
Mark Sleet	Timetable Production Manager (Anglia)
Dave Walgate	Timetable Production Manager (LNE & E Midlands)
Tim Woodall	Timetable Production Manager (Western & Wales)

Dispute Parties which attended but withdrew dispute before hearing of their claim

Dispute TTP1071: East Coast Main Line Company Ltd

Phil Dawson	Regulation & Track Access Manager
Andrew Long	Timetable Development & Planning Manager

Dispute TTP1075: Arriva Rail North Ltd

Georgia Ehrmann	Track Access Manager
Leon Foster	Service Development Manager

Interested parties

Arriva Rail London Ltd

Andy Roberts	Senior Train Planning Manager
Mike Clutton	Timetable Development Specialist

First Transpennine Express Ltd

Not represented

Govia Thameslink Railway Ltd

Robert McCarthy	Head of Train Planning
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MTR Corporation (Crossrail) Ltd

Not represented

Stagecoach South Western Trains Ltd

Joanna Davey	Train Planning Manager
Richard Hall	Permanent Train Service Manager
Andrew Pennington	Head of Planning

**Annex "B" to Timetabling Panel determination of references
TTP1065, TTP1066, TTP1068, TTP1069 and TTP1073**

THE HEARING CHAIR'S OPENING REMARKS TO THE HEARING

One of the reasons for longer opening remarks than usual is we have representatives who I don't think have appeared in front of this Panel before. And indeed, against a background that I have been appealed by Network Rail previously, unsuccessfully, for not asking a question that it was believed had been fully understood by everybody, Mr Henderson [Counsel for Network Rail], are you making a submission to ask me to recuse myself? [Mr Henderson indicated that this was not the case.]

What is somewhat unusual in the experience of this Panel is the degree of correspondence there was before the hearing. I've reminded Panel members, although I don't necessarily think they needed reminding, that none of that will influence our decisions. We are here today to determine these disputes on the basis of the legal entitlements of the Parties and no other grounds.

As I trust you all know, today we're concentrating on Heads "A" and "B"; if we have new people in on the later hearings I may have to repeat myself. The points I'm making, I want to emphasise, are general points of principle that are likely to influence the Panel. They do not bear on any individual dispute. One of the benefits of Timetabling Panels, in my view, is that we have a facilitative role. And although, of course, we are here to determine disputes about regulated contracts, experience over the last few years has proved that case management can identify issues which leads to settlement, which has to be a good thing for everybody.

We have even ended up in this room dealing with a dispute when the Parties agree across a table that actually they can agree on the issues, although occasionally they then ask us to record that agreement in the determination. And, indeed, we're going to come back to that in the later Heads. This of course can only function with mutual respect. I don't want to sound too dramatic, but I just want to mention the rule of law because in the later hearings we're coming on to a claim by one party that Network Rail has failed to observe the outcome of a previous determination.

And as most of you probably will know, there is a current arbitration on foot over an Access Dispute Adjudication that was specifically dealing with a failure of Network Rail to observe a previous adjudication. And I'm talking about Clay Cross, of course. And of course what is relevant is whatever one thinks of government policy, if external funds are to be brought into the industry it has to be on the basis that contracts will be observed. And that of course is one of our jobs.

And this is why I have already raised the question, which, again, is not for today but for Heads "C" and "D," as to whether if – and of course it's a big if – the Panel were persuaded that Network Rail had failed to observe a previous determination, does that amount to exceptional circumstances under D5.3.1?

Let's talk about TPRs. That's what we're all here for. They're critically important. They're critically important in assisting in the continual effort to obtain the optimum balance between capacity and performance.

We as a Panel appreciate the difficulties of both operators and Network Rail in seeking to achieve that balance. They have to be as accurate as possible. If TPRs are too optimistic in any respect then performance suffers. If TPRs are too pessimistic, capacity will be reduced. And I've sat on a number of Timetabling Panels where I have always been assiduous to ensure that whether inadvertently or not we do not squeeze capacity unnecessarily.

Now, you go onto the concourse at a station and talk to a passenger and say, 'Half a minute difference in a TPR can have significant effect down the line', and they'll look at you as if you're completely mad. But of course we all understand the importance of the detail. But can it be correct to approach a proposed revision to TPRs by saying the decision to support or propose one should be based solely on the effect on the WTT?

There is also a question that we will have to come to deal with as to how far ahead TPRs should look. And however helpful it might be to develop TPRs to take account of known changes to the Network, to T&RS or whatever, we as a Panel of course are only dealing with a set of TPRs linked with one specific Timetable. We recognise the risk, for obvious reasons, of any TPR decision fossilising the TPRs, because it could have been a point at issue two and a half years ago and then bluntly everybody forgets it. That is a risk, but I'm afraid because we are only looking at one set of TPRs for one Timetable we have to take that risk.

Back to capacity against performance. Again, I'm re-emphasising we haven't prejudged anything; we're talking about general principles that are likely to influence us. And you're all familiar with the conflicted nature of the Decision Criteria, which is why we have to examine the weight placed by Network Rail on individual criteria in the decision-making process, and whether in our collective judgment this was correct. And this will depend on a case-by-case examination by reference to the Decision Criteria as to the effect of TPR proposals by Network Rail on a Timetable Participant's rights, because we cannot be blind to those either.

Any Timetable Participant's rights are subject to the TPRs and the Engineering Access Statement. If TPRs are properly changed through the formal process within Part D then those changes can trump anybody's rights, for obvious reasons. Because TPRs lead to the construction of the WTT: it's not the other way around. Sometimes a Panel may be in a position to decide by reference to the Decision Criteria whether the benefit of proposed changes outweigh hurt to a Timetable Participant, but I'm emphasising it's "*may*". For example, if a proposed TPR would result in a Timetable Participant either not being offered a train slot for the duration of the Timetable, or offered a train slot well outside its own rights, then the Panel might be inclined to lean towards keeping the status quo. But that is only in the cases where flexibility exists.

Consultation: any Panel is required to look at the degree of consultation, and were a Panel to decide the consultation was a sham then it would be forced to conclude that there hadn't been proper consultation and the duty of consultation had failed. Again, I'm emphasising I'm discussing principles, not specific cases. But if a Panel is satisfied that there has been a genuine consultation, then we proceed on the assumption that Network Rail can't be expected to agree to everything put up by every operator, not least because operators' suggestions may conflict with each other. Network Rail has to make a decision. That is then of course an appealable decision.

We also have a feeling that by the time you get to that level of development of TPRs you are going to have enough management effort concentrated on it that people will really have the Decision Criteria in mind, as opposed to the hundreds of thousands of decisions made every year by people of a level where, yes, they know what the Decision Criteria are, but they're doing it on gut instinct, and that gut instinct will often be right. And it's only the very, very, very odd case that ever gets into this room, and I think it's useful for a Panel sometimes to remember that.

Just a word about the Panel. A key task in these Disputes is to bring the collective skills and judgement of the Panel to decide whether the right balance has been struck. The spread of Panel members represents the industry, and as – well, in case people are not into the arcane nature of the way this Panel is made up, Network Rail appoints some Timetabling Panel members. The other Timetabling Panel members are elected to represent the different classes within the industry, but none of them is here for their own company or their own part of the industry. And I can say with absolute confidence that from my experience of Timetable Panels the Panel members leave their employer outside the door, but of course their experience and expertise is immensely helpful.

**Annex “C” to Timetabling Panel determination of references
TTP1065, TTP1066, TTP1068, TTP1069 and TTP1073**

NETWORK RAIL’S GENERAL OPENING SUBMISSIONS TO THE HEARING
(See Section 3 of the Determination)

1. Introducing the opening statement for Network Rail, Mr Henderson hoped to make Network Rail’s position clear in a way that would be of assistance to all of the complaints. Mr Henderson noted that the Hearing Chair saw the Panel’s role as partly facilitative and this was something very strongly encouraged by Network Rail. Network Rail was hoping that resolution could be achieved and not necessarily through the formal dispute resolution process whereby judgement would be handed down from up high.

Network Rail’s opening submissions would be under seven headings. First of all, to briefly introduce Network Rail’s response documents. Secondly, to touch upon the background to TRIP and to ODA. Thirdly, to touch on the scope and scale of the disputes before the Panel. Fourthly, to consider the extent to which there are common issues of principle. Fifthly, to talk about the consultation process; sixthly, the Decision Criteria; and finally the relief available to Claimants, including the power of the Panel to grant such relief. And in doing all of this it was hoped to touch upon some of the legal issues that the Hearing Chair had identified under Rule H18(c).

Network Rail was relying on various materials, some of which were relevant to all of the Claimants and some of which were specific to individual Claimants. The Network Rail response document introduced the various materials relied on by Network Rail, and set out some of the key arguments which Network Rail said were applicable to all of these claims. In particular, Network Rail was making clear why it said care needs to be taken with treating the Claimants’ claims as giving rise to common issues of principle, with the need, as Network Rail saw it, to ensure that each claim is treated individually, and that one party’s complaints are not treated as being, as it were, bleeding into another party’s complaints. Further, the relief being sought was, in Network Rail’s view, not permissible generally under Part D of the Network Code.

Appendix 1 to the Network Rail response was an important witness statement prepared by Matt Allen, Head of Timetable Production within the Capacity Planning team at Network Rail and he was present and available for questions and to assist the Panel in any way he might. The statement contained evidence relevant to all of the claims and explained the background to TRIP and ODA, the consultation process followed by Network Rail, and the Decisions Criteria as applied by Network Rail. The other appendices set out Network Rail’s detailed responses to the substantive parts of the Claimant’s claims.

It would be apparent from the content of that material and from the letters that had passed between Eversheds and the Panel that Network Rail took these claims extremely seriously indeed and the fact that there was such a legal team appearing in force for Network Rail was testament to that fact. Network Rail was facing an unprecedented number of claims, and the fact that they were being heard concurrently had meant that an enormous amount of work had to be done in a short timescale. Network Rail was prepared to deal with the claims, obviously, and was happy to do that.

In passing, Mr Henderson thought that there was likely to be a further response to the latest letter from the Panel, simply as a matter of record, to deal with certain aspects that were raised about the powers of the Panel and so forth; this was just to ensure that Network Rail’s position was explained and put on the record. That letter was in the process of being finalised but it was suggested that it would not in any way touch upon the proceedings on this hearing day

2. Interjecting, in this context the Hearing Chair explained that as with any new system, it takes time to bed in and he thought everybody had learnt lessons since the most recent major revision of the ADR Rules so the time may well have come that some things have to be aired. Mr Henderson welcomed that indication, saying that there were certain matters or observations in the most recent letter to the Parties regarding which Network Rail would wish to make

observations. Network Rail did not see any need to engage on these points in this hearing but wished to put a marker down.

3. Continuing, Mr Henderson explained that a very important message from Network Rail today was that Network Rail was not prepared to countenance any suggestion that the overall TRIP programme or large sections of it, whether in relation to Scotland only or elsewhere, should simply be set aside without further thought in a wholesale way. Leaving aside the question of whether the Panel has power to grant any such relief, Network Rail would say that on analysis the scale and nature of the specific criticisms made by the Claimants collectively and individually was actually much less extensive - much less widespread - than some of the, what one might say, more grandiose language put in some of the Sole Reference Documents perhaps suggested. That was not true for all of the complaints but it was true for some of them. It was true for the ASR complaint, which pitched it in a very high way and suggested, put colloquially, that the baby should be thrown out with the bathwater; and Network Rail strenuously resisted any suggestion to that effect.

Regarding the background to TRIP and ODA, it would be seen from Mr Allen's statement that TRIP is part of a major long-term project within the whole rail industry to improve efficiency. It dated from 2014. It was first developed under the auspices of the National Task Force. It had support from every interested party in the rail industry, including all Timetable Participants, the Office of Rail and Road and the Department for Transport. And TRIP was in fact Stage 2 of the Performance Planning Reform Programme commenced in 2012.

Stage 1 of the Programme involved a uniform framework for performance improvement planning, which included PPM – the attrition tool. And "PPM attrition" was the term used for any reduction in performance from 100% PPM. The current Moving Annual Average for national PPM in the year to 31 March 2017 was 87.6%.

The TRIP project had identified six causes of delay, of which the most significant was the so-called specification error, that being delay associated with the way the timetable is created and then operated. That suggested in itself that despite the best efforts of all those concerned with drawing up and implementing the timetable, there was a significant - and in Network Rail's submission unacceptable - error of margin built into it, which the whole of this programme was aiming to improve.

At their heart the revisions which had been proposed by Network Rail – very, very few of which were actually being challenged – represented the attempt by Network Rail, supported in the main by the vast majority of Timetable Participants (the vast majority of whom were not at this hearing because they did not challenge the revisions) to reduce that margin of error and eventually to produce a zero error timetable.

TRIP had always envisaged the use and application of both theoretical, i.e. modelled data, and real world data sourced from the operational rail network itself. The real world data derived from ODA. This was an enormous project in its own right, and represented a significant amount of investment on the part of the whole industry. Again, this was about the whole industry. It had enabled huge quantities of real time actual data from the operational network to be gathered and analysed. The quantities of data involved were far, far greater than were involved in previous more manually based approaches. The data gathered suggested that changes were required to 1,487 Timetable Planning Rules, which was about 20% of the overall number of 7,700 rules that were reviewed. Approximately 70% of the recommendations were for increases to the previous planned timings. Network Rail submitted that that conclusion should not be a source of surprise.

It was clear that the previous rules had significant limitations. The existence and level of specification error spoke for itself and was evidence that the previous rules must have contained several inaccuracies. The emphasis in this approach was real world data. Some complaint was now being made that in gathering this data Network Rail was occasionally measuring things which were not properly to be measured, such as speed restrictions or the like. There were at least two answers to this. First, the sheer amount of data gathered meant that the impact of any individual measurement was likely to be very small indeed. Secondly, and perhaps more fundamentally, the whole point of the ODA approach was to measure how the network actually works in practice. And in practice, things do not always run as smoothly as perhaps they could

or should. So it was important that a realistic view be taken of how the network and any particular line is likely in the real world actually to operate and this, Network Rail would say, was a significant advantage of ODA. It was also important to recognise that the data sources within the ODA were not just extensive: they were already in widespread and accepted use for other purposes across the industry, which the Timetable Participants accepted and benefited from. In particular, measurements relating to performance and compensation payments already relied on ODA data. So any suggestion that ODA was somehow unproven or unreliable should, in Network Rail's opinion, be viewed very sceptically.

ODA was not perfect - like any other method of analysis it had its limitations. But Network Rail would say that it is undoubtedly an improvement on what has gone before, providing a level of detail and insight into the actual workings of the network which had not been possible until now.

Furthermore, and this was extremely important as Network Rail had made clear in its extensive evidence, it did not simply take the data derived from the ODA exercise and apply it slavishly without regard to other sources of information. It examined the data. It used it to better inform its views about how the network actually operates. Where ODA threw up an anomalous result, Network Rail made every effort to pick that up through its own internal analysis or by considering detailed points raised by Timetable Participants. And Network Rail was openly prepared to continue doing that.

There is some attempt on the part of a minority of Claimants who, as already indicated, were themselves a small minority of Timetable Participants to undermine the whole TRIP and ODA project. As already said, it Network Rail submitted that the Panel should be very slow to accept any such wholesale criticism, still less to make any order which would have such widespread effect. The reality was that this was a programme which had had a huge amount of support from all Timetable Participants as well as the industry as a whole: the Panel should be astute to that level of support and, as said, not be tempted to throw the baby out with the bathwater.

There was a very serious concern on Network Rail's part that in many of the Claimant's cases there were in fact a relatively small number of real concrete complaints but decision had been taken, perhaps for tactical reasons, to dress up these minor complaints as though there was some fundamental concern with the TRIP and ODA projects. As could be seen from Network Rail's evidence, and particularly from the appendices responding to particular Claimant's concerns, there had in fact been extensive consultation concerning TRIP and ODA generally. Network Rail thought it inconceivable that the sorts of concerns which were now being expressed by some of the Claimants would, if true, not have been forcefully put by interested parties months if not years before. Network Rail rejected the suggestion that the fact of a consultation going back many years was in some way irrelevant; it was highly relevant, Network Rail submitted, to the overall picture that emerges of careful, detailed consultation in accordance with Part D.

The Panel would be asked to look, in due course, at the individual complaints, but not, Network Rail would say, to consider any suggestion that the overall programme should be challenged. The impact of any such draconian approach could have a potentially devastating effect on the overall efficiency of the network, and also the very many Timetable Participants who were entirely content with the revision of the rules that under consideration at this hearing but who would be affected by any such widespread order. Any finding by the Panel that any part of the TRIP or ODA project was inherently unreliable would have far reaching consequences for other players in the rail industry and would cause a level of disruption and expense wholly out of proportion to the minor dissatisfactions described by the Claimants. It was also, Network Rail would suggest, very doubtful that anyone in the industry would expect that a Timetabling Panel decision would have any such far reaching effects on those not before it. Looking at the powers of the Panel, Network Rail would submit that the Panel's powers were understandably much more limited than some of the Claimants seem to have supposed.

Moving now to the scopes and scale of the disputes before the Panel, Network Rail considered it very important for the Panel to have a proper account in its mind of the scale and scope of the disputes. There were three important features to point to. First, there were only a small number of Timetable Participants who maintained any objection. Secondly, the number of detailed objections when one drilled into the Sole Reference Documents and got away from the higher

level criticisms, was low. Thirdly, the picture that emerged was one of progressive agreement and the narrowing of disputes, a process that Network Rail hoped could continue today and throughout this dispute process.

Expanding briefly on each of these points, only seven out of 36 Timetable Participants were appearing before this Panel. The other 29 were content with the revisions. Some of them had raised no complaint, others had continued to engage with Network Rail and their differences had been resolved, but as of the here and now the vast majority of Timetable Participants had no complaint.

It was also important to take a realistic view of the actual proportion of the TPRs being challenged. In total there was something like 6,600 revisions proposed in Version 1 of the TPRs. Following a period of detailed and careful consultation that number was reduced to something like 6,200. It should be noted in passing that that in itself demonstrated the thoroughness and conscientiousness with which Network Rail approached the issue of consultation.

Of the 6,200 rules it is only a very small proportion – Network Rail estimated approximately 4% at most – that were challenged in any way by these appeals. Again, therefore, the Panel was reminded that it would not be just wrong but also potentially deeply damaging to make any findings which had the effect of fundamentally challenging or undermining the overall shape or validity of the rules in any far reaching way.

Finally, the picture that emerged was one of increasing consensus. The statistics spoke for themselves. 13 Timetable Participants issued Notices of Dispute. Only 10 of them issued Sole Reference Documents: three did not proceed beyond the Notice of Dispute. Of those 10 a further three had now withdrawn, having reached agreements with Network Rail, leaving only seven Claimants, many of whom, on analysis, had actually only made narrow and limited complaints. Network Rail was pleased to have been able to resolve matters in this way and was prepared to continue sensible consultations with all of the Claimants - and was confident that similar engagement on the part of the Claimants could lead to a significant reduction of the issues remaining in dispute.

As to the extent to which there were common issues of principle, Network Rail had explained in its response that its view was that on proper analysis there were not really any such common issues of principle. Network Rail welcomed the Chair's direction that individual cases would now be dealt with separately.

Network Rail did not wish to suggest that there was not some commonality between the sorts of complaints advanced by individual Claimants. For example, it was clear that a number of the Claimants were saying that they did not have sufficient information or knowledge to make an assessment about a particular revision. But in order to determine whether that particular criticism was justified, the Panel needed to look at individual circumstances pertaining to that Claimant and that particular revision.

The Panel could not deal with these matters on a broad brush basis because the evidence demonstrated and illustrated that the overall consultation had been thorough and entirely in accordance with Part D of the Network Code. The only issue for determination was whether a particular line of detailed consultation was taken as far as it needed to be under the provisions of the Network Code.

It was also important to bear in mind that this was a two way process. If Network Rail was provided with proper and sufficient evidence of a particular concern, or a specific question in relation to an identified revision, it could of course respond to that. But Network Rail could not reasonably be expected to deal with vague expressions of dissatisfaction or blanket failures to approve or to engage properly and co-operatively within the consultation process. So each specific instance of so-called failure to consult needed to be looked at separately and for that reason Network Rail was saying that the Panel should not treat matters which related to one Claimant as though they related to all the Claimants.

So, for example, it would be perfectly possible – not accepted by Network Rail – but perfectly possible that there may have been some minor failure to notify a particular Claimant of some

matter relevant to its interests. But that did not mean, and should not be held to mean, that there had been a widespread failure of the consultation as a whole, or that other criticisms in relation to consultation are well founded.

Turning to the consultation process itself, Mr Allen's witness statement dealt with the very extensive consultations that had taken place. Network Rail was fully aware of its obligations under Part D of the Network Code and of the need to consider representations and objections. The Panel would have seen paragraphs 60 to 78 of Mr Allen's witness statement and was invited to look at those again as well as the sections in each appendix where the details of consultation with particular Claimants were set out.

In summary, each geographical area or Route was led by a Timetable Production Manager, who is responsible for maintaining an effective relationship with operators within his/her route. Subject to some individuals being on leave, those managers were available if the Panel wished to hear from any of them. They were not in the room just for space constraints, but they were elsewhere in the building and available. They had the detailed knowledge of this process and they were ready to deal with these things.

An ongoing priority for those managers was to avoid operators being surprised by the new WTT when it is published at D-26. In order to achieve that, Network Rail encouraged active participation from Timetable Participants throughout the process. If that process had not worked then there would have been 36 parties sitting at this hearing, not seven.

Network Rail carried out extensive work to familiarise Timetable Participants with ODA and the aims and methods of TRIP generally. Timetable Participants were introduced to the ODA itself through so-called first peek sessions in July 2015. There had been regular TPR forums for all users which explained the ODA tool and its proposed use. Familiarisation sessions were adapted for each TPR forum – presentations followed by discussion at the forum.

It was right to say that levels of engagement had varied between Timetable Participants, but in many cases queries, comments and feedback were provided prior to any form of consultation process under Part D, which included comparisons with other sources of data where available.

Version 1 of the draft TPRs was published at D-59, 21 October 2016 and formal consultation with the 30 passenger operators and six freight operators followed at TPR forums and individual meetings. This was a line by line review of proposed changes and individual values proposed. In many cases, as the Claimants know, this led to a change being varied, cancelled or agreed. And then Version 2, was published on 3 February 2017, and the consultation process was continuing.

By and large there was an extremely good relationship between Network Rail and each of the individual Claimants - a relationship which is highly valued - and an enormous amount of information exchange and explanation takes place before and outside the formal requirements of Part D. It was difficult to see how such an enormous undertaking could probably be completed without that type of information exchange. The reality was that in general it worked extremely well, so Network Rail was very concerned and strenuously resisted any suggestion that there had been any wholesale failure to comply with the requirements of Part D of the Network Code, or to provide information in time or give individual Timetable Participants the opportunity to make representations as they saw fit. The general structure and thoroughness of the consultation process could not in serious doubt, and there was ample evidence of the many TRIP TPR forums, delivery of proposed revisions and detailed exchanges between the parties. The majority of the Claimants did not make any fundamental criticism of Network Rail's approach to consultation and Network Rail wished to rely on that as well as clear evidence of its adequacy, to say that the Panel should resist the suggestion made by one or two of the Claimants that there has been some wholesale failure.

Network Rail was not suggesting that in each and every case, each and every detail of any particular consultation was necessarily perfect. Given the sheer scale of the task facing everyone, it was hardly surprising that some matters might be overlooked or perhaps not gone into in as much detail as in an ideal world they might be. It was for that reason that Network Rail treated its consultation obligations as ongoing ones and continued to engage in fruitful dialogue

with many of the Claimants. Network Rail had approached this hearing with an open mind, and was fully prepared to continue its discussions with individual Claimants where they had genuine concerns about particular identified revisions and the reasons for them. And in particular, if any of the Claimants wished to bring forward evidence, even if perhaps they should have put it forward before now, that they want Network Rail to look at, that could perhaps be done in the context of these appeals.

As for the Decision Criteria, again it was suggested that great care needed to be taken with making any wholesale criticism of Network Rail. It was clear from the evidence that Network Rail was fully aware of the Objective and the Considerations set out in Condition D4.6 and that it took obligations to consider these matters very seriously. The whole structure of the decision making process was geared around ensuring that the Considerations are given their proper due; the fact that proposed revisions were discussed so extensively with operators also meant that there was ample opportunity to challenge Network Rail if there was a serious question about the approach being taken by Network Rail. Network Rail submitted that no criticism could properly be made of Network Rail in relation to this.

The whole point of the industry sponsored TRIP project, which ODA fed into, was to improve the efficiency of the network. That being something in everyone's interests to achieve, Network Rail suggested that it would be wholly artificial to go through each of the Considerations and wonder how it might have been applied differently when one is considering the primary obligation of ensuring that the network runs more efficiently and delays are reduced. The - slightly strange - suggestion that Network Rail had its own agenda, being that it wanted to implement TRIP at the expense of everything else - was simply not understood. What Network Rail wanted to do was to improve the efficacy of the network, and the hearing was asked if that did not sit with the Decision Criteria, then what did? Network Rail therefore said that the challenge to the Decision Criteria was wholly misconceived.

Network Rail identified that there was a further, fundamental point to consider, when the Chair had touched upon, but which the Claimants had failed to address, this being Network Rail's obligation to consider the overall interest of current and prospective users of the network. The phrase came from Condition D4.6.1. It was not Network Rail's job simply to consider whether a particular revision to a particular rule might cause a degree of inconvenience and potentially some loss of income to a Timetable Participant; Network Rail's obligations were much wider than that. Network Rail had to balance a whole series of interests. That was not to say that individual Timetable Participants did not matter - they did because they were users of the network and they were specifically referred to as part of the Considerations - but their commercial interests did not automatically prevail over all other interests, and they did not have a trump card to play.

Stepping back, what Network Rail was trying to achieve generally - and it had to be said, with an enormous amount of support from all of the Timetable Participants, including all of the claimants - was an improved network where specification error is reduced or, in an ideal world, eliminated. The fact that some individual revisions to TPRs may be unwelcome to a particular Claimant could not be made to prevail over that fundamental requirement. And it was right to say that none of the Claimants had really attempted to bring this wider perspective to bear in their Sole Reference Documents, so they gave little to no assistance on how the Considerations should be applied when the perspective that Network Rail is obliged to take was brought to bear. When balancing competing interests of multiple users, it was hardly surprising that some elements did not suit everyone. If it was of any comfort to the Claimants, they could rest assured that the same applied to Network Rail as its own interests did not necessarily prevail otherwise. But that fact said nothing about any failure on Network Rail's part.

Mr Henderson wanted to finish by saying a few words about the relief available to the Claimants and the power of the Panel to grant such relief, because, in Network Rail's submission, this was an issue which the Claimants had not properly wrestled with in their Sole Reference Documents. The Panel was referred to paragraphs 54 to 70 of Network Rail's central response document. For the reasons set out in that response, Network Rail submitted that it is essential when considering whether any of the Claimants might be entitled to relief - and if so, what relief - that the Panel considers each Claimant and its claim separately and individually - this is, considers only the relief sort by the individual Claimant and does not grant relief sought by one Claimant to

another Claimant. Most importantly the Panel should bear in mind the limits of its own powers as set out in Condition D5.3.1.

In order to determine the Claimants' various complaints, the Panel would plainly and properly and quite rightly need to look at parts of the Network Code and ascertain and conclude what the parties' respective obligations were under them. That was a different matter from the powers of the Panel to make orders, and that was an important distinction. Having looked at previous decisions of the Panel, in particular one that would be talked about under the Chair's Heads "C" and "D", it was clear to Network Rail that the Panel had a very clear distinction in its own mind, which it had properly applied in the past, regarding the distinction between discursive background and the order that is granted at the end of the day.

There were three available orders under Condition D5.3.1. Option (b), which was the one favoured by Network Rail, was simply to direct that each of Network Rail's decisions stand, and in effect that was to dismiss the complaints. So that is what Network Rail was seeking.

Option (c) was only applicable in exceptional circumstances, and this was the option whereby the Panel substitutes its own decision for the decision of Network Rail. Network Rail suggested that there were good reasons why this would only be exercisable in exceptional circumstances. The Panel did not have and does not claim to have the full range of material and expertise available to it, which Network Rail has, in order to arrive at its own decision as to which TPRs should actually apply. Further, the Panel cannot know, without extensive consultation, which it was not in the position to carry out, how a change of rule might affect other Timetable Participants, most of whom were not engaging in this dispute process and the great majority of whom had declared themselves content with Network Rail's approach and were doubtless preparing themselves for that approach in due course. As such, and unsurprisingly, the Network Code required that the Panel should be slow ever to substitute its own decision for that of Network Rail.

Further, and very importantly, none of the Claimants apart from ASR – and then, Network Rail suggested, even that in a very half-hearted and unconvincing way – was suggesting that there were exceptional circumstances. That was quite right since Network Rail would submit that it was perfectly obvious that there were no such exceptional circumstances; what we had here was the ordinary situation whereby a number of TPRs had been suggested – more perhaps than at other times, but there was nothing to prevent that – in a timely way, in accordance with the timetable set out in the Network Code. It needed to be considered whether there were any particular concerns arising out of the challenges made to a very small number of those proposed revisions. That was not an exceptional circumstance.

The Panel had specifically raised a number of issues about the question of exceptional circumstances, so what were exceptional circumstances? We did not get any guidance about that from the Network Code itself. In Network Rail's submission, you needed to be careful going outside of the Code for these sorts of things, because the Code was a self-contained code and guide. As the Hearing Chair had already indicated, it may well be that there are ways in which the Network Code might be improved, but Network Rail thought that it may well be deliberate since it is difficult to define what is exceptional, or predict circumstances that are out of the ordinary because they are indeed out of the ordinary. So it is very difficult to predict them – they are so unusual.

So Network Rail submitted that the Panel should resist seeking to define or demarcate what exceptional circumstances are or might be, and that needed to be determined on a case-by-case basis. But were a Panel ever were to legitimately exercise this power, it must be right, Network Rail would say, that the Panel be in a position where as a result of those exceptional circumstances it felt fully confident that it had full knowledge of and insight into a particular issue, such that its own determination of that issue was clearly to be preferred to that of Network Rail's. In other words that it had better insight and better information available to it than Network Rail: and that would only very rarely occur and was likely, Network Rail suggested, to depend on the Panel being presented with a very wide range of evidence from all relevant parties as to the matter in issue. That is not the position here.

The Panel had also raised the question of whether it can only decide that exceptional

circumstances exist if a Claimant has specified that in its Sole Reference Document. Network Rail's submission was that the answer to that question is, 'Yes, it can only be determined that there are exceptional circumstances if that has been alleged.' First, it would be extraordinary, Network Rail thought, if the Panel were to find that exceptional circumstances existed when a Claimant had not made that allegation. The Claimant would be uniquely placed to set out the facts and matters which it says amounts to exceptional circumstances; if it does not make that allegation, then the Panel should not, Network Rail submitted, properly consider whether or not there really are exceptional circumstances.

Secondly, Network Rail asserted that the Panel must determine the dispute as presented, and Network Rail must be given a full opportunity to consider and respond to that dispute as presented. Where there is no allegation that exceptional circumstances exist, there is no case to answer on the point and, therefore, no need for Network Rail to respond to it. The issue is essentially not then before the Panel.

The Panel had also raised the question of whether Network Rail's position, which it set out in paragraph 59 of its response, is that when the Panel is faced with what has been referred to as a binary position it is not entitled to overturn Network Rail's decision in the absence of exceptional circumstances. That was confirmed as being position. Once a decision has been made by Network Rail following the consultation process, then that decision is binding on Timetable Participants: the substitution of that decision by an alternative decision of the Panel, Network Rail would say, can only be made in exceptional circumstances. Reverting to the previous position would itself be a substitution of an alternative decision.

That left the power under option (a). This was an important, albeit limited, power whereby the Panel is empowered to give general directions that a particular result is to be achieved but not the means by which it is to be achieved – so an important distinction was drawn there. But, for example, it would seem right to Network Rail that if the Panel concluded in relation to a particular identified proposed revision that some additional consultation should be taking place in relation to it, it could so order.

When one looked at the relief sought by each of the Claimants it seemed that what Network Rail would call tripartite distinction has not been at the forefront of the Claimants' minds. They were seeking variously all manner of declarations – the setting aside of rules, reverting to previous rules and associated suggestions, which was - Network Rail contended - simply not in the Panel's power to provide and which would be hugely disruptive were they to be provided.

First, Network Rail thought that if the Panel were to start providing declarations of the sort contended for, the reality would be that it would find itself in the position of rewriting the TPRs, and in fact probably rewriting the Network Code in a significant but piecemeal way – and piecemeal because it would just be responsive to individual complaints. That is not the proper function of a rapid resolution appeals process, which has as its central aim the sorting out of practical, detailed timetabling issues in a timely and efficient way. So Network Rail submitted that the Panel did not have the power to make these sorts of general declarations and should be very careful about granting them, because they are dangerous to give these things. The Network Code is the code, and it should not be amplified in a piecemeal way. The effect of it may well be that the very careful demarcation of the Panel's important powers set out in Condition D5.3.1 would be circumvented. Yet the parties' rights and obligations derive from the Network Code. If there are problems with the Code – if it is incomplete or deficient – then Network Rail considered that the Code should be amended.

Network Rail considered that it was not appropriate or within the Panel's power to interpret the Network Code in such a way that its terms are varied. Of course the Panel could make observations about the need to observe provisions of the Network Code although, as the Hearing Chair had observed provisionally, it may be that such observations are of little practical value since they simply echo the Code. But, nevertheless, that was, in Network Rail's view, a perfectly valid exercise.

In concluding general points for Network Rail, Mr Henderson hoped that it would be clear from all the material that Network Rail was relying upon and from his opening remarks that Network Rail was taking these appeals extremely seriously. It was a measure of that concern that there

had been a number of detailed exchanges regarding Directions and the like before this first hearing day. Network Rail was committed to arriving, if we possibly could, at sensible, pragmatic solutions to the points of detail which had been raised by the claimants, but Network Rail was concerned that for some of the Claimants, and some only, attempts were being made to undermine what had been a huge investment on the part of the whole industry, with widespread support from nearly all Timetable Participants, simply in order that some short-term commercial agenda can be fulfilled. Network Rail wished to submit that the Panel should not allow itself to be pulled into that agenda but should concentrate on resolving detailed points which had been raised regarding particular revisions. Network Rail also wished the Claimants to be clear that Network Rail would use all of the procedures at its disposal to ensure that this major project, which promises to deliver significant improvements to all users of the rail network, is not frustrated.

**Annex "D" to Timetabling Panel determination of references
TTP1065, TTP1066, TTP1068, TTP1069 and TTP1073**

EXTRACT FROM THE NETWORK CODE, PART D (13 July 2015)

4.6 The Decision Criteria

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective").
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the "Considerations") in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
 - (b) that the spread of services reflects demand;
 - (c) maintaining and improving train service performance;
 - (d) that journey times are as short as reasonably possible;
 - (e) maintaining and improving an integrated system of transport for passengers and goods;
 - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
 - (g) seeking consistency with any relevant Route Utilisation Strategy;
 - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
 - (i) mitigating the effect on the environment;
 - (j) enabling operators of trains to utilise their assets efficiently; and
 - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in the light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.

**Annex “E” to Timetabling Panel determination of references
TTP1065, TTP1066, TTP1068, TTP1069 and TTP1073**

**PROCEDURE FOR AMENDING TPRs
(Timetable Planning Rules for 2017, Version 4 - Section 5.3)**

- 5.3.1 When producing TPR change proposals, Network Rail and/or the Timetable Participant will set out why the change is proposed, and the planned date for implementation.

- 5.3.2 The proposal will consist of:
 - (a) A proposal number, provided by the appropriate Network Rail TPR Forum
 - (b) Source data and assumptions for both infrastructure and rolling stock
 - (c) Supporting evidence as agreed by Network Rail and affected parties
 - (d) Outputs from the simulation model or other methodology, Technical values, planning values, and any rounding applied expressed in seconds and/or %age uplift
 - (e) Network Rail will consult in accordance with the Network Code
 - (f) Network Rail will document responses and decisions taken on implementation or otherwise, so that each TPR entry has an audit trail