
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP2207 (following a hearing held at Mimet House, on 10 May 2023 2023)

The Panel:

Paul Stevenson Hearing Chair

Members appointed from the Timetabling Pool

Andy Roberts elected representative for Franchised Passenger Class, Band 1
Richard Parsons appointed representative of Network Rail

The Dispute Parties:

Heathrow Express Operating Company Ltd. ("HEOC")

Paul Fowler Project Manager, Planning & Operations
Harsha Gautam Train Services Manager
Jyoti Chander Planning & Performance Manager
Andrew Darbyshire HS2 & Rail Stakeholder Lead

Network Rail Infrastructure Limited ("NR")

Alan Muggleton Operational Planning Manager
Tony Worgan Access Planning Manager
Adam Hodgson Policy Advisor
Darren Broderick Customer Relationship Executive
Susan Evans Head of Passenger Strategy

Interested parties:

Interested Parties - expected in person

Heathrow Airport Ltd. Mike Bradley
MTR (Crossrail) Corporation Ltd. Paul Breese

Interested Parties - attended virtually

First Greater Western Ltd. Rob Holder
GB Railfreight Ltd. Ian Kapur

Observers (professional development)

Ryan Underwood (MTR)

In attendance:

Tamzin Cloke Committee Secretary ("Secretary")

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A Background and Jurisdiction

1. Dispute TTP2207 was raised by HEOC by service of a Notice of Dispute on 06 April 2023 in respect of NR's decisions in relation to the timetable offer for Week 11. The dispute was initially brought on the basis that HEOC alleged NR was in breach of the Track Access Agreement dated 16th August 1993 between Heathrow Express Operating Company and NR, in particular section 2.1 of schedule 2. HEOC concurrently requested that the hearing be expedited owing to the proximity of the timetable. The dispute was subsequently clarified in response to the Hearing Chair's directions and in oral submissions (see paras 13 and 14).
2. I was appointed as Hearing Chair on 18 April 2023 and I satisfied myself that the matters in dispute included grounds of appeal which may 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. In this regard I set out my provisional view in my Second Directions, with which the Parties agreed, and which should be read with this determination.
3. In its consideration of the Parties' submissions and its hearing of the Disputes, 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'.
4. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 4 and as otherwise defined in this determination document:
 - "2TT" means two-track timetable
 - "ADR Rules" mean the Access Dispute Resolution Rules and "Rule" is construed accordingly
 - "AML" means Acton Main Line station
 - "CCOS" means Crossrail Central Operating Section
 - "CPPP" means Confirmed Period Possession Plan
 - "CTP" means Concept Train Plan
 - "Decision Criteria" means Network Code Condition D4.6 and "Consideration" has the meaning given at Condition D4.6.2
 - "DPPP" means Draft Period Possession Plan
 - "EAS" mean Engineering Access Statement
 - "GWML" means Great Western Mainline
 - "LTP" or "WTT" means Long Term Plan or Working Timetable
 - "Part D" means Part D of the Network Code
 - "tph" means trains per hour
 - "TPRs" means "Timetable Planning Rules"
 - "TTP" means Timetabling Panel
 - "TTPs" means Timetable Participants
 - "STP" means Short Term Plan

B History of this dispute process and documents submitted

5. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide Sole Reference Documents ("SRDs"). The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential interested parties by the Dispute Parties.
6. On 26 April 2023 HEOC served its Sole Reference Document, in accordance with the dispute timetable as issued by the Secretary. HEOC initially served its Sole Reference

Document jointly with Heathrow Airport Limited, but as a result of preliminary observations in my Second Directions re-served its SRD in its sole name.

7. On 04 May 2023 NR served its Sole Reference Document in accordance with the amended dispute timetable as issued by the Secretary.
8. First Greater Western Ltd., GB Railfreight Ltd., Heathrow Airport Ltd. (“HAL”) and MTR (Crossrail) Corporation Ltd. declared themselves to be interested parties. All were represented at the hearing.
9. On 09 May 2023 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that so far as there were any relevant issues of law, for the most part the issues to be determined by the Panel concerned, initially, whether NR’s Decision amounted to a NR Variation for the purposes of Conditions D3.4 and whether, as a result of the HS2 Supplemental Agreement, HEOC had agreed that relevant provisions of the Network Code apply to the Disputes Parties in connection with the management of such a variation, and any appeal. If the Decision was a NR Variation, the issues remaining were: whether NR, as a contractual fact-finder, acted reasonably in making the Decision and undertook adequate/sufficient consultation; whether, and to what extent, NR took into account the Objective, as defined in Condition D4.6.1, in making its Decision; whether the remedies the Parties sought were available to the Panel under Condition D5.3.1 and Rule H50 of the ADRR.
10. The hearing took place on 10 May 2023. The Dispute Parties made opening statements, responded to questions from the Panel concerning various points and were given the opportunity to make closing statements. The interested parties were given the opportunity to raise points of concern.
11. I confirm that the Panel had read all of the papers submitted by the Dispute Parties and I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such materials are specifically referred to or summarised in the course of this determination.

C Outcomes sought by the Dispute Parties

12. In its sole reference document, HEOC asked me to determine that NR had not acted in accordance with the relevant provisions of the Network Code, nor the HS2 Supplemental Agreement and therefore, the timetable offer should be withdrawn. Further, that HEOC had the right to operate a four-train service on Sunday 11 June 2023, in accordance with rights in its Track Access Agreement.
13. By the time the hearing took place, and following several directions letters to the Parties (and, in particular, the Second Directions) HEOC had amended its request. In its opening statement to the Panel it requested that I issue a decision in respect of the dispute which permitted HEOC to operate 4tph on 11 June.
14. Following further discussions during the hearing, in particular to clarify whether HEOC was seeking a determination made using Condition D5.3.1(c), HEOC confirmed in its closing submission that it did not feel that exceptional circumstances applied and would prefer me instead to direct NR to “relook at the timetable offer, in regard to utilisation of available capacity within it”, using my powers under Condition D5.3.1(a).

15. NR asked me to determine that it had complied correctly with the process as set out within Part D of the Network Code, including consultation requirements and the application of the Decision Criteria. Consequently, NR requested that the Panel uphold its decision. NR reiterated this request in response to both HEOC's opening and closing statements.

D Relevant provisions of the Network Code and other documents

16. The versions of the Network Code Part D and the ADR Rules dated 13 March 2023 were applicable to these dispute proceedings.
17. Conditions D2.2, D3.4, D4.4.1 and D4.6 were particularly relevant and are appended in Annex B.

E Submissions by the Dispute Parties

HEOC

18. HEOC contends that it has a right to bring this reference on the basis of an agreement supplemental to its track access agreement made between NR and HAL dated 16 August 1993, which was entered into by NR, HAL, and HEOC dated 21 December 2017 ("the HS2 Supplemental Agreement") to which I will turn further below. In summary the HS2 Supplemental Agreement makes certain provisions in connection with the operation of the Heathrow Express Service ("HEX Service") in connection with "HS2 Works". HEOC contends that the HS2 Supplemental Agreement incorporates certain material provisions of the Network Code, particularly Part D.
19. HEOC submits that this is a Timetabling Dispute which falls within the scope of the HS2 Supplemental Agreement, such that Part D and the ADRR apply.
20. HEOC confirms that the Dispute relates to NR's proposed timetable offer in relation to the 2TT for Week 11, Sunday 11 June 2023 ("the Offer"). HEOC's objections are summarised as follows:
 - (1) HEOC states that it has a contractual right to operate the HEX Service four times each hour in each direction.
 - (2) HEOC acknowledges that NR requires the proposed works to be carried out.
 - (3) The relevant possession forms part of the 2023 EAS and that this agreed statement did not specify that a reduction in its service would be required from 4tph to 2tph on Sunday 11 June 2023.
 - (4) NR has subsequently sought to rely on the 2024 EAS and the 2024 CTP (as opposed to those for 2023) to justify the reduction in service in relation to a 2023 possession which is said to be a "neither satisfactory nor a compliant" approach.
 - (5) HEOC says that it was not given the opportunity to provide any comments or to participate in a consultation regarding the Offer because the Offer was provided after the date for timetable bids to be submitted. HEOC accepts that it raised objections to the Offer during the capacity allocation process but says that it has not been satisfied with the response.

- (6) HEOC says that the HS2 Supplemental Agreement does not give NR the right to disregard its contractual rights but says that it must facilitate a “mutual co-existence” of the HEx Service alongside HS2 Works.
- (7) HEOC says that the Offer does not make effective use of the capacity available on the Network and it unfairly impacts the HEx service compared with other operators.
- (8) HEOC accepts that it was correct for NR to apply the Decision Criteria, limited to the Considerations specified at D4.6.3 (a), (b), (c), (f), and (j).
- (9) HEOC’s fundamental position is that running 2tph rather than 4tph means that (1) it is not able to utilise its assets effectively, (2) the Offer does not adequately consider HEOC’s commercial interests; (3) the reduction in service negatively impacts the reputation of the HEx Service; and (4) has significant practical implications from a journey time and reliability perspective. HEOC relied on “other factors” in its written submissions which were explored at the hearing (see para 165), HEOC contends that making changes to alternative train services would have a less detrimental impact on passengers, and that the Offer disproportionately impacts the HEx Service.
- (10) HEOC also says that NR has not carried out a sufficient assessment of the capacity allocation across the Network to ensure that train operators are able to use their assets efficiently and that passenger disruption is minimised.

NR

21. NR accepts that this Dispute is validly brought and does not dispute HEOC’s right to bring this Dispute under the Network Code. It confirms that this is a dispute regarding a timetable offer
22. NR agrees that HEOC has the contractual right to operate the HEx Service four times every hour in each direction.
23. NR says that this possession (reference 3462100) formed part of the 2023 EAS and that NR has followed the steps required by Part D including discussions with operators regarding the impact and severity of the possession through the application of the Access Impact Matrix, which led to a capacity study.
24. NR says that when operators submitted their revised Access Proposals it applied the Decision Criteria.
25. NR says that it is not aware of evidence which supports HEOC’s argument that the use of the 2024 CTP for a 2023 possession is not satisfactory or compliant or does not follow the necessary procedure. NR adds that It submits that neither the CTP nor its capacity study are “binding in nature” (I assume that it is meant here that they don’t have contractual effect because they do not have the status of a decision under the Network Code).
26. NR says that this possession was included within the 2023 EAS, Versions 2, 3 and 4 as a Section 7 possession (i.e. a one-off disruptive possession) which was also included within the DPPP and CPPP.

27. NR accepts that the relevant possession is a disruptive possession and that it follows that there will be an impact on customer service levels.
28. NR refutes the suggestion that HEOC was not given the opportunity to provide comments or participate in consultation in relation to the Offer. It provided a summary of key dates with its SRD. In summary NR says that HEOC had multiple opportunities to participate and provide comment in relation to the DPPP, CPPP, the CTP, the capacity study, and the Offer itself. NR says that it has considered all the material provided by HEOC and says that it has developed its position regarding capacity allocation through the process, including feedback from all operators such as HEOC.
29. On footfall NR says that it has used the footfall numbers provided by operators to reach its decision regarding capacity allocation. It submits that the footfall numbers show that the HEx Service does not have the footfall numbers to justify 4tph under a 2TT at the expense of other operators' services who are servicing higher passenger demand. It is submitted that the decision made by NR is both justified and proportionate.
30. To the challenge that the Offer does not make effective use of the capacity available, with insufficient assessment of capacity, NR says that HEOC has not identified or provided evidence of why the Offer is not "effective" or "sufficient". NR says that it has produced a CTP and capacity study which was supported by its published assessment of the Decision Criteria (dated 07 February 2023), which was used to inform the Offer. NR submits that this is a sufficient assessment.
31. To the challenge that the Offer unfairly impacts HEOC, NR says that it has engaged with all TTPs since 04 February 2022 and developed a capacity study to inform its application of the Decision Criteria. NR points to Condition D4.6 and states that Part D does not stipulate that capacity must be shared equally in all circumstances. NR says that it was required to reach a decision that is not "unduly discriminatory" and says that its decision is fair based on the data provided by TTPs.
32. NR says that HEOC has been consulted throughout the process and has not provided any detailed breakdown which would show how a different interpretation of the data presented should lead to HEOC's desired outcome of 4tph. NR says that historically when implementing a 2TT for this area of the Network, the allocation has been based on 6 (GWR)/ 4 (MTR)/ 4 (HEx) tph. But, NR says, this does not take into consideration the fact that the Elizabeth Line is now fully open, with services running West to East through the CCOS from May 2023. This is an important new factor that has been assessed as part of its application of the Decision Criteria for Week 11.
33. NR says that it has not disregarded HEOC's contractual rights but has considered them within the application of Part D. HEOC submits that this is justified by the application of Condition D4.6. NR says that it is permitted to make a variation to the Working Timetable provided it complies with D3.4.2(a) and (b).
34. NR summarised its application of the Decision Criteria in a document (provided along with the annexes to HEOC's SRD). NR assessed the following Considerations as relevant and gave the weight set out in brackets, for the following reasons in summary:

Consideration (weight)	Summary of evidence
(a) relevant (low)	Timetable based on a future demand forecast, providing services to meet

	<p>customer demand across destinations. The rationale for providing a 2 track operational railway is two fold:</p> <ol style="list-style-type: none"> 1. To allow for yearly maintenance on the GWML to maintain infrastructure reliability in parallel to; 2. To enable the HS2 Old Oak Common station railway systems built under NR's delivery scope.
(b) relevant (high)	<p>All three impacted TOCs have been included within the demand forecast data analysis. The forecast is developed up to and includes 2026 demand. 2026 has been chosen as this is to the midpoint of the HS2 OOC construction. Whilst the CTP considers HS2 OOC access requirements, Wales and Western (W&W) Region are aware of the volume of access requests likely to be put forward to Grand Union.</p>
(c) relevant (high)	<p>Historically a 14.5tph timetable delivers a compliant timetable which also usually meets the Industry set PPM. However, past performance data demonstrates that 14.5tph has not achieved the Industry target in certain scenarios and this too will remain the case with the new proposed CTP.</p>
(d) relevant (medium)	<p>The CTP is based on the May 2023 timetable. Any increases in journey times have been kept to a minimum by working through constraints and compromises with the TOCs to understand the impact and severity to the operation of services beyond Paddington to the East and Reading to the West where applicable. Where there are contractual committed journey times, every effort has been made to get as close as possible to these durations.</p> <p>Delivery of a timetable containing 14½ paths per hour is the optimum for the industry based on historic data for acceptable performance, resilience, and the ability to recover. Compromises in terms of journey times and stopping patterns have been made to reach the best overall result.</p>
(e) relevant (low)	<p>Freight paths proposed in the May 2023 timetable are not impacted through any</p>

	<p>reduction of quantum. There is no direct impact on the pathing of freight services.</p> <p>The same number of passengers shall be served under this proposal. For relief line closures, other transport modes are available for those passengers.</p>
(f) relevant (medium)	<p>Predefined Schedule 4 costs shall be applied or applicable contractual compensation in track access agreements which sit outside of Schedule 4 to affected TOCs.</p> <p>NR has considered the existing known commercial interests of impacted TOCs. This has been done by asking for impacted passenger numbers from the operators. NR also considered when applying this Consideration that in the event that a TTP could show changes to the information available regarding passenger volumes, NR would work with operators to find a solution which better supports both the NR and the Timetable Participant requirements.</p>
(g) not relevant	
(h) not relevant	
(i) relevant (low)	<p>The CTP reduces the number of tph against a 4 track Sunday timetabled service. The capacity allocation is to meet future demand growth. The allocation of services does not foresee the requirement for road rail replacement bus services.</p> <p>Overall the emissions output are being reduced not increased under this proposed plan.</p>
(j) relevant (medium)	<p>Possessions were originally published in the 2024 EAS showing the access in Period Blocks, which would have enabled operators to plan driver diagrams and unit diagrams as far ahead as possible.</p> <p>A timetable to support the proposed CTP between the hours of 05.00 to 13.00 has been produced. The timetable has been</p>

	shared with TOCs and comments have been received back.
(k) nor relevant	
(l) not relevant	

35. NR submits that it has applied any Consideration which it assessed to be relevant.
36. I will turn to the Parties' submissions on the Decision Criteria later.
37. As to the application of the Decision Criteria as set out in HEOC's submission, in response NR said that:
- (1) Utilising assets efficiently (D4.6.2(j)): NR said that, at the date of its SRD, HEOC had provided no evidence to substantiate its claim. As detailed within the published Decision Criteria, NR said that it has published the possession itself within the 2023 EAS and provided both a CTP and capacity study, based on similar possessions within the 2024 EAS, to allow collaboration with TTPs to try and maximise the efficiency of the timetable (see para 69). On the basis that this timetable is to facilitate a disruptive possession, NR accepts that a reduction in services for all TTPs may mean less efficient utilisation of their assets for the duration of the possession. Between 05:00 and 09:00 NR said that HEOC are running the maximum 4tph on both the main and relief line (i.e. a full quantum of services).
 - (2) Commercial Interests (D4.6.2(f)): NR said that it asked for relevant information at the outset of this process, which HEOC provided. NR said that it considered the information provided as part of its decision made for Week 11. NR said that HEOC had not specified or provided evidence to support what, if any, commercial information NR had failed to take into account, or why this would result in a different outcome. NR said that it utilised HEOC's own datasets and commercial forecasting as part of the decision process, which resulted in an increase in HEOC's service offering at the start of the day, as described above.
 - (3) Negative impact on the reputation of HEOC: NR said that HEOC had provided no explanation or evidence to support this claim. NR also said that this is not a consideration factor under D4.6.
 - (4) Significant impact in passengers re Journey Times (4.6.2(d)): NR stated its Decision Criteria document evidences how it has accounted for this consideration. It said that HEOC had provided no specific information or evidence to support HEOC's claim.
 - (5) Significant impact on passengers re reliability (4.6.2(c)): NR assumed that this related to "performance" under D4.6.2. NR referred again to its Decision Criteria document, which it says shows how it has accounted for this consideration. It says that HEOC had provided no specific information or evidence to support its claim. NR said that importance of performance of the timetable in this instance is reflected by the fact that it has assigned a 'high' weighting to this consideration factor.
 - (6) Significant impact on passengers re: "other factors": NR said that HEOC had provided no indication to NR as to what "other factors" consisted of and, as such, considered that it cannot respond to this submission.

(7) NR refuted HEOC's contention that making changes to alternative train services (i.e. other operators) would not have such a detrimental impact on passengers. In reaching this decision, NR said it had assigned a 'high' weighting to Consideration D4.6.2(b) – that the spread of services reflects demand. As an example of how it approached this factor, NR said it utilised data provided by operators in relation to "demand by hour" for the busiest hour of the Sunday in dispute. NR, however, said that it is mindful of sharing information from TTPs that is commercially sensitive in relation to their passenger footfall numbers. With that in mind, NR says that both the 2019 demand numbers show that demand for MTR services is twice that of the HEx Service, and that demand for GWR services is a little over five times that of the HEx Service. NR says that using 2026 forecast data, it can extrapolate these figures to show demand for both GWR and MTR services being approximately four times larger than demand for the HEx Service. NR says that the Offer also reflects the provision of a reasonable spread of services available to all passengers at various price points.

(8) NR considered that two other matters were relevant to my decision:

(1) NR submitted that the capacity study was utilised to reach the decision made in relation to the Offer. It said that the CTP was not a blanket indicator for all 2TTs on the GWML, but rather a starting position from which it fed any updated information into its assessment of the Decision Criteria. It said that the Access Impact Matrix required that NR produce a capacity study but that it went further and produced a CTP to make best use of the data available, even though this is not a requirement under Part D. NR said that it took into account feedback from HEOC, which is demonstrated by amendments to the timetable offer which increased the number of services for HEOC from 2tph back up to 4tph (up to 09:00) as detailed within the decision.

(2) Historically, NR said that HEOC has regularly challenged NR on the poor performance of the two-track timetable on this section of the Network when their "Right Time" measure has been less than 50%. NR said that the data available to it demonstrated that the Offer represents the best allocation of capacity and that adding additional services into the timetable would result in reduced/poor performance, as has historically been the case.

38. In summary, NR submitted that its decision was informed and reasonable, i.e. neither arbitrary nor capricious.

39. GWR also made some submissions in writing. GWR accompanied its submissions with screenshots of the 2023 EAS, Versions 2 and 3. GWR's representative commented that from Version 3 to Version 4 of the EAS the all-day Ladbroke Grove mainline Restrictions of Use became Southall East, vice Acton West. NR's chronology shows that this was reduced back to Acton on 13 March 2023. No traffic remarks regarding the number of services either globally or per operator / destination were shown in Section 7 of Version 3 or Version 4, nor any capacity allocation. GWR added that the TPRs expressly require a capacity study with an output that includes the number of paths per operator, when a two-track possession affects more than one user.

F Oral evidence at the hearing

40. At the outset of the hearing I confirmed that those individuals who were participating remotely could hear, and be heard. They all confirmed that they could. I made the same checks, and received the same confirmation, after every break in proceedings.
41. At the outset of the hearing the Panel members identified matters which might lead to a conflict of interest or an appearance of bias. Mr Parsons indicated that he had line managed Adam Hodgson until May 2023, but confirmed that both have had no contact on this issue. Mr Roberts works for SWR, partially owned by FirstGroup and MTR (both own interested parties). In my view neither matter gives rise to grounds for apparent bias. An informed observer would know that I am the sole decision maker in connection with this reference and I have no connection to either Dispute Party. I allowed any party to make observations on this view, and none did.
42. The Parties each made opening statements, reflecting texts which had been circulated in advance.
43. In its opening statement, HEOC concentrated on what it said were the necessary processes, then turned to its criticisms of NR's application of the Decision Criteria.
44. As to the former, HEOC repeated the contention made in its SRD that NR relied (by implication impermissibly) on the 2024 EAS and CTP to justify a reduction in services for possession number 3462100, which forms part of the 2023 EAS. HEOC said that this was inconsistent with Condition D2.2.1 which, in shorthand, stipulates that both the TPRs and the EAS are revised on a bi-annual basis, with each revised version being in operation for the same timetable period as the WTT to which they pertain. The headline point is that the Rules that NR applied related to 2024 but were relied upon in relation to the timetable for 2023. HEOC said it was not aware of an exception which allows NR to apply the Rules to a different timetable period from the WTT, especially after the CPPP was finalised.
45. HEOC contended that the 2023 EAS did not specify that a reduction in service from 4tph to 2tph would be required in Week 11, which it said was "*not usual*" in HEOC's experience. It said that if it had been informed that the relevant possession number required a reduction in the HEx Service it would have challenged the 2023 EAS in respect of the point.
46. HEOC said that in practice within the rail industry, CTPs are "*heavily relied*" on in respect of timetabling decisions. It said that the importance and value of the CTP is "*clear and should not be diminished*".
47. HEOC also made submissions in relation to a reduction in the possession footprint and NR's declining to rework capacity study. In summary, HEOC says that the original capacity allocation for the possession was based on a geographic possession limit of Ladbroke Grove to Southall East, which was subsequently shortened to Ladbroke Grove to Acton West, which is 3 miles and 62 chains shorter and two intermediate stations fewer which, HEOC contended, increases the available Network capacity per hour. HEOC said that a fresh capacity study should have been carried out.
48. HEOC also challenged whether NR satisfied the relevant consultation requirements on the basis that it was only provided with the Decision Criteria on 07 February 2023. The Decision Criteria document was issued as part of Version 2 of the 2024 EAS, twelve weeks after the

CPPP was published for Week 11 and TTPs were informed it would also apply for possessions in the May 2023 WTT.

49. As a result HEOC says that NR did not provide a sufficient consultation period and “has not engaged” with HEOC to address its concerns and objections to a sufficient extent.
50. Turning to NR’s application of the Decision Criteria, HEOC submitted that NR failed to satisfy “the Objective” under D4.6.1 and did not apply the Considerations “as required”.
51. In reference to Condition D4.6.2(c) regarding “maintaining and improving train service performance”, HEOC submitted that the Offer did not account for the fact that HEOC passengers rely on a constant and regular HEOC service for onward travel, in particular, to arrive in adequate time for scheduled flights. A lack of service could, HEOC said, result in passengers missing flights and cause significant airport disruption. In the event that passengers cannot rely on the HEOC service for such travel, they have to organise an alternative journey (for example by taxi) which may be more expensive and increase journey time. Further to this, if passengers are not able to rely on the regularity of the HEx Service, which HEOC said is the service that provides the most efficient route to Heathrow Airport, then this ultimately has a negative commercial and reputational impact on the service.
52. HEOC said that it had invested time and money into maintaining the reputation and high levels of customer satisfaction of the HEx Service since the start of the HEx Service and this was threatened by NR requiring a reduction in service. HEOC also argued that the CTP which relates to this possession would not be performance modelled until June 2023. HEOC said that it is not clear how NR could have concluded that reducing HEOC to 2tph allowed for efficient use of the Network or maintained train service performance when it did not have the necessary information to make that judgement.
53. In reference to Condition D4.6.2(f) regarding “the commercial interests of NR ... or any Timetable Participant ...”, HEOC maintained that its commercial interests had not been fairly balanced against those of other train operators, in respect of the Offer.
54. HEOC said that its view was largely based on the fact that it felt omitting the AML call from MTR’s services , instead of reducing the HEx Service by 2tph, would make more commercial and operational sense. This, HEOC submitted, was because fewer MTR passengers would be affected by this service change than HEOC passengers, and MTR would not experience such a significant financial impact as HEOC. HEOC said MTR passengers could use another nearby station, whereas HEOC passengers rely on the HEx Service, which provides trains that are specifically designed for international travellers.
55. HEOC also submitted that the data NR relied upon (and referred to in its SRD) in relation to this Consideration differed in nature between rail operators. HEOC said that it provided NR with actual passenger numbers, whereas MTR provided forecast passenger numbers, and the datasets cannot therefore be viewed on a like-for-like basis. On several occasions HEOC said it challenged these datasets, both in respect of the demand figures and the figures which correlate to loading of the relevant services. HEOC said that NR compared the figures of two entirely different rail services, and submitted that NR failed to factor such differences into its decision.

56. In reference to Condition D4.6.2(j) regarding “enabling operators of trains to utilise their assets efficiently”, HEOC submitted that operating 2tph rather than 4tph does not allow it to utilise its assets efficiently.
57. HEOC accepted that disruptive possessions can impact efficient use of assets, but submitted that other operators would not be impacted in relation to this possession. It suggested that if MTR did not stop at AML, then it would still be able to operate the same number of trains, but would need to miss one stop on the route. In contrast, HEOC said it would still be required to pay a fixed cost for (unused) train drivers, and it would only be able to run three circuits, therefore reducing the ability of the HEx Service to recover from infrastructure and fleet failures.
58. HEOC stated that previously the 2TT for this area of the Network had included four HEOC tph, but accepted that NR now had to consider the full operation of the Elizabeth Line in respect of its timetabling decisions. HEOC submitted that NR had prioritised MTR’s calling pattern over HEOC’s services and, as such, had not reached a satisfactory conclusion with respect to Consideration (j). HEOC says that this was further supported by the fact that during a recent 2TT possession from February 2023, throughout which MTR was operating, NR permitted four HEOC tph. HEOC said it was not clear why a different decision had been reached by NR in respect of Week 11. HEOC also stated that during 2TT involving the closure of the relief lines, MTR services cannot call at AML. HEOC felt that having a consistent 2TT for both main- and relief line closures (i.e. MTR not calling at AML, HEOC running 4tph) would send a consistent message to passengers who board MTR services at AML and avoid HEOC passengers experiencing significant and unexpected disruption, compared to previous possessions.
59. In its opening, NR submitted that some of the claims made by HEOC were vague in nature.
60. NR stated that it accepted my Second Directions, with respect to my observations regarding TTP1331 and TTP1376, i.e. that Part D sets out a mandatory process for the development of the timetable which is intended to provide “stability and certainty for the industry”. It submitted that there are “no other viable or legal options” available to NR to create a timetable.
61. NR submitted that this Dispute rests on the application of Condition D4.6. NR says that in a letter dated 27 April 2022 it made it clear that it would be applying Part D, and specifically D4.6 and requested data to assist with a review of capacity for a reduced timetable to enable engineering works.
62. NR said that HEOC had, at no time, provided any explanation, reasons, or supporting evidence outside of a “*repeated assertion*” that the Offer was in breach of HEOC’s contractual rights under its TAA. NR accepted that TTPs may appeal under Part D but contends that there is a duty on a Party which appeals to do more than simply state “we disagree”, or “we don’t like the decision”. NR said that Week 11 was a disruptive possession which, by default, meant that not all services with contracted rights could be accommodated .
63. NR submitted that it had followed due process in reaching and issuing the decision in dispute. It said that it considered the Considerations and applied any that it considered relevant. It said that it reached a reasonable decision, justified against Part D and that a reasonable decision is not necessarily one which requires the agreement of all parties concerned. NR noted that in the post COVID era, and taking into account the operation of

the Elizabeth Line, passengers have been provided with more flexible options as to where they will board services in order to get to Heathrow.

64. Following NR's statement, and before turning to the application of the Decision Criteria, the Panel sought to clarify certain preliminary points:
- (1) HEOC confirmed that it accepted the accuracy of the chronology annexed to NR's SRD.
 - (2) Both Parties accepted that the requirements of Condition D3.4 had not been followed entirely to the timescales set out, but the Parties accepted that the steps taken by both were intended to be contractually valid steps.
 - (3) HEOC accepted the position which I set out in my Second Directions, such that where there is any inconsistency between the requirements of its TAA and the requirements of the Network Code for the purposes of HS2 Works (it is common ground that such works are in view here) that the provisions of the HS2 Supplemental Agreement take priority.
65. The Panel also sought clarification regarding the Parties' position in respect of Condition D2.2. HEOC's representative argued that a 2024 EAS which is part of the TPRs cannot be used to justify a NR variation that takes effect in 2023. He said that this was his position if it had been part of the 2023 EAS, DPPP and CPPP.
66. Without deciding that point, the Panel decided to hear full argument and submissions from the Parties.

Timetable Planning Rules

67. Given HEOC's submissions in its SRD and in opening, the Panel explored the development of the 2023 and 2024 EAS, the development of the CTP, and discussions between the Parties.
68. NR's representative confirmed that during the 2023 EAS there are a number of weeks with a 2TT possession on either the relief or mainlines. He said that there are more in the 2024 timetable year, but all based on the same principle and similar possession footprint. He said that NR always publishes general, rather than specific (i.e. direct capacity allocation), traffic remarks. He said that this had been the practice in the 15-odd years of his involvement in EAS development. The specific capacity allocation details are never given in the EAS, but form part of the capacity study later on. He said that the Week 11 possession went into Version 2 of the 2023 EAS and was referred to in all versions since.
69. NR's representative said that NR had written a letter to all affected TTPs in April 2022 noting that significant works for HS2 would take place from May 23 onwards. He confirmed that this was sent to Sophie Chapman ("New document 1") at HEOC on 27 April 2023. Having first shown the letter to HEOC's representative, a copy of this letter was handed to the Panel for reference. He said that a similar letter went to all operators, explaining that, due to the base timetable changing in May 2023, NR would need to revisit the standard 2TT arrangements, and reapply the Decision Criteria, from May 2023 onwards. He confirmed that all of the access required for HS2 had been published in the 2023 and 2024 EAS. In the same way, he said that, following challenges, NR had slightly shortened access in 2023 and 2024 as detailed in both SRDs.

70. Responding to a question about the principles on which the CTP was developed, NR's representative said that he did not believe that there were any factors that were significantly different between 2023 and 2024 which would need to be factored into the CTP.
71. The Panel asked HEOC what it contended to be the impact of its argument that NR had applied 2024 principles to the 2023 subsidiary WTT. HEOC's representative said that HEOC's dispute was "solely around timescales for notification". He said that had HEOC known the capacity allocations proposed for May 2023 onwards, its response to the 2023 EAS would have been different, particularly because June is a summer month and it would not have wished to reduce the HEx Service by half. HEOC's representative did not identify any material differences between the 2023 EAS (certainly from Version 2), and the 2024 EAS in relation to the Week 11 possession.
72. The Panel asked NR to confirm (see para 48) when it told affected parties that the 2024 principles would apply in May 2023. NR's representative confirmed that this was in April 2022 (see New document 1).
73. In response, HEOC's representative said that HEOC acceded to the request to provide information, passenger numbers and various other details, and said that throughout HEOC had been quite clear that it didn't accept the way the capacity study was carried out and the terms of it were not acceptable to HEOC. He said that HEOC was involved in the process but said it was "*never really made clear*" that the proposed capacity allocation was going to take effect before the 2024 EAS.
74. In light of New document 1, HEOC's representative said that "*reading it now and knowing how things have moved perhaps [it may have been identified as the proposal] but at the time...it was something that seemed to be under the HS2 discussions rather than specifically... I guess we may have missed that*". I gave HEOC's representative the opportunity to re-read the letter over the lunch break in case he wished to make further submission as to HEOC's present position, but he made no further observations.
75. Over the lunch break, the Panel asked the Parties for further information about the development of the CTP going back to 2022 and what assumptions had been made.
76. NR's representative repeated points already made, that Week 11 was published in the 2023 EAS with numerous identical possessions published within the 2024 EAS. He confirmed that NR had completed one CTP, the development of which applies for 2023 and 2024 possessions. He said that this had been communicated to HEOC on 14 February 2023 in response to questions raised at that time. NR confirmed that it distinguishes between an EAS, which is part of the TPRs, and the CTP, which is not. The material document for these purposes is the CTP, NR's representative said that insofar as required, the same information is stated in the 2023 EAS as in the 2024 EAS.
77. HEOC's representative accepted that there is a similar possession footprint but repeated his point that he said that there was no communication through the 2023 EAS consultation that there would be any requirement to reduce the train service. He said that possessions for many years had not reduced it "*...so our assumption was it would be the same as previously.*"
78. The Panel pointed out that some of the timescales for responding to the EAS would have fallen after the receipt of New document 1. Knowing that NR had written to HEOC in 2022,

the Panel asked whether HEOC's EAS response requested any particular capacity study. HEOC's representative could not say whether HEOC had done so within its EAS response. He said that it would normally request capacity studies at the DPPP point, adding that HEOC usually requests a capacity study if there is not an existing one. He said that the established practice is that the capacity study tends to roll forward; it is not normal practice to get a capacity study each week that there is a 2TT.

79. NR's representative pointed to the agreed chronology which he said showed that HEOC had made no comment at any point in relation to any version of the EAS. HEOC made its first comment at DPPP stage (consistent with HEOC's submission).
80. At this stage it was confirmed that HEOC had not entered a dispute against the 2023 EAS. It had disputed Version 2 of the 2024 EAS, but this was withdrawn when the possession limits had changed, and the dispute had not mentioned capacity allocation as an issue.
81. The Panel asked HEOC what steps it had taken proactively to engage with NR. HEOC's representative confirmed that the parties had many meetings with the project team about the development of the CTP, in which HEOC had made it clear that it wanted 4tph and didn't support the passenger numbers used to devise the capacity allocation. He said that at one point HEOC was told that it would have 0tph, which then changed to 2tph and at times 4tph. He described matters as having "*flipped and flopped*" until February 2023.
82. The evidence broadened into consultation on the NR Variation. The Panel suggested that on one interpretation there had been a genuine process of discussion and dialogue, with which HEOC's representative agreed.
83. As to the changes which NR had made to the CTP, namely introducing more HEOC services (4tph) between 05:00 and 09:00, and (3tph) 09:00 to 10:00, HEOC's representative, whilst accepting that the changes demonstrated its representations had been taken into account, said that the former period was irrelevant because the WTT at that time is a 2TT with 4 HEOC tph. HEOC's representative stated he did not understand why HEOC had been offered 3tph in the morning when its passenger numbers are higher between 16:00 and 17:00. NR observed that all TOCs had a similar peak in passenger numbers in the late afternoon, and that it had treated all TOCs proportionately, providing extra paths to HEOC where possible.

Available capacity

84. The Panel explored capacity options. The Panel noted that HEOC had argued in its opening submissions that it made more commercial and operational sense to omit AML from MTR's route. Linked to that, HEOC suggested that previous TTs had been developed on the basis that these intermediate stops would not be made. HEOC's query was, if those stops were taken out, following the approach in the pre-May 2023 2TT, would that allow capacity for additional HEOC services to operate.
85. The Panel noted that the key result of NR's analysis is that 14.5tph can be accommodated for both relief and mainline blocks but NR had not set out what else was tested. The Panel probed NR's confidence that 14.5tph is a reasonable ceiling.
86. The Panel sought to clarify whether HEOC's submissions regarding AML calls and MTR's services had been put to NR, so that they were able to test that option. NR said that the option had been put to NR after both the Offer and the Week 11 publication. NR's

representative said that “NR did look at that and consult with other TTPs but at that late stage...which is after the timetable has been published...it’s too late to look at alternative options for a timetable that was already published elsewhere and in downstream systems to passengers”. NR’s representative suggested that the relevant email was dated 20 April 2023. HEOC did not challenge that date.

87. NR’s representative confirmed that NR had explored the options and had had a timetable specialist look at the option. NR said that it presented “a significant risk” to performance. He also said that implementing such an option at this stage would require an agreement from other TTPs to make changes to their services (for example to change their stopping patterns), which he said other TTPs were not willing to accept. NR’s representative confirmed that other operators had been approached, but that available evidence of discussions was limited as the majority of interactions had taken place within train planning software.
88. NR’s representative said that the industry had tried to run more trains before. He gave an example of a “particularly bad weekend” of performance in August 2022. He said that on the weekend in question HEOC’s Right Time performance was 47%. He said that although it was “technically possible” to run more trains, from the perspective of passenger delivery, 47% was “disastrous”.
89. The Panel sought further information about the quantum on the August 2022 weekend along with the limits of the block and whether the right time figures given were accepted. In the event an answer was not provided because HEOC could not confirm without looking into the detail. Further detail was provided after the hearing (see New document 2), with agreement from both Parties.
90. HEOC’s representative did not accept that 14.5tph was a rational ceiling. He said that capacity hinged on the possession footprint, and submitted that in Week 11 16tph was a more acceptable quantum.
91. HEOC’s representative confirmed that HEOC was seeking to increase the quantum of trains in the possession footprint without impacting performance. The Panel challenged this as a change of position (its SRD did not suggest an increase in quantum). Its SRD suggests making alterations to other services, rather than adding overall capacity.
92. I repeated the question which I had posed in my Fifth Directions: how would HEOC have reacted differently when faced with the Week 11 disruption? I asked what train slots should be amended. HEOC’s representative indicated that HEOC hadn’t spelled that out but was looking for a change to increase quantum and reduce the possession impact. HEOC’s representative repeated the point that he considered that taking MTR’s AML stop out would allow for a further HEx service to run, because MTR was, in effect, running in the path in which the HEx Service would have run.
93. The Panel queried whether HEx could operate 3tph in a meaningful or efficient way. HEOC’s representative said that HEOC had been asked and had looked at it. He said that it was possible but “obviously less efficient than running 2tph” as HEOC would need to keep all five circuits in operation all day “and have them sitting around at one end for an hour until their respective back workings”.
94. The Panel explored how HEOC would manage this, and HEOC’s representative said that it would consider running at 20 minute intervals but said that for Week 11 this “would mean a

recast of the entire timetable. Running 3tph would lead to an inefficiency of a 30 minute gap". Challenged as to whether 2tph or 4tph would be best, HEOC confirmed that it had not considered the point in great detail and said *"it's not efficient"*.

95. To the Panel's question about how the Offer would compare with a TOC affected by a standard Section 7 possession, HEOC's representative answered that HEOC is not usually affected by Section 7. He added *"it's only for an HS2 disruptive possession that we would reduce"*.
96. To HEOC's statement that it had not had performance data which would show Right Time figures for both 14.5tph and 16tph, NR's representative confirmed that Week 11 performance modelling would be available in June, of which HEOC is aware. NR said that when performance modelling is done of the May 2023 2TT NR may adjust the quantum if the evidence justifies it. This modelling will be on the CTP rather than the actual Offer of 16tph (see para 110 below). NR's representative accepted that it might make more sense to model both, but confirmed that it would also be monitoring other matters such as platform crowding.
97. The Panel sought to further probe the Parties' views on overall service quantum. HEOC referred to February 2023 (where the previous 2TT did not include an intermediate stop at AML, with the same possession footprint). In response to further questioning, HEOC's representative accepted that the February 2023 timetable was based on December 2022, not May 2023 (and subsequent increase in MTR service).
98. The Panel further explored NR's contentions about risk to performance. NR said that the CTP still presents a bottleneck at Ladbroke Grove, which HEOC's proposals add a performance risk to. NR added that introducing more services reduces the time between trains, which then presents more risk at the crossovers (albeit whilst remaining TPR compliant).
99. HEOC's representative disagreed with NR's analysis. He accepted that HEOC's proposal was given to NR on 20 April 2023 but said that he did not think that HEOC could have made alternative proposals until it had received the Offer and the timetable had been uploaded so that it could see where the potential capacity was. He argued that HEOC would not be able to understand where the flex might be without seeing the offer to other TTPs.
100. The essence of HEOC's submission is that it had not been provided with modelling from NR or any evidence showing HEOC's proposal could not be made to work.
101. The Panel identified a suggestion from HEOC that in February 2023 NR had permitted four extra tph for a 2TT, which appeared to be inconsistent with its approach to this possession. NR's representative indicated that at that time the MTR was not fully open and running through the CCOS, which enabled the 2TT to accommodate that level. NR submitted that the scenario is different for Week 11, following the May 2023 timetable change.
102. HEOC's representative did not accept that this factor would reasonably impact on the TT, on the basis that the CCOS was open on 23 February 2023.
103. NR's representative accepted that CCOS was open but said that there had been a significant change in the timetable from May 2023, involving MTR changing and uplifting its

service. NR contended that the application of the Decision Criteria for the May 2023 possession is necessarily different, due to an uplift in service levels and passengers.

104. At my invitation, MTR's representative gave details of those changes. He said that the current timetable operates 4tph, 2 to each terminal, all from Abbey Wood. From May the provision increases to 6tph, with all four existing services to Heathrow T4 and two extending from Shenfield to T5. (I understood that he was only talking about Airport services here, not the ones to Reading in addition).
105. HEOC's representative said that he was "*not sure*" whether this information changed his view. He accepted that the pattern of trains is "*slightly different*" as a result of the May 2023 changes. He accepted that, reasonably, this might justify NR's decision.
106. NR's representative said that the train service on the GWML is "*materially different*". He said that previously there was no expectation of passengers at AML on Sundays at all, but now there is a full expectation of a seven-day service with an increase in leisure traffic for all TOCs. In summary, and as stated earlier, because the data and traffic had changed, the application of the Decision Criteria had changed. He added that even if 15 or 16tph were available it would not necessarily follow that more paths would be allocated to HEOC. He confirmed that NR would need to rerun the data if more paths were available.
107. The Panel explored whether HEOC had raised those issues when the CTP was initially issued. HEOC's representative said that he did not consider that the Week 11 timetable matches the CTP. NR did not accept that.
108. Following some confusion, the Panel asked for clarification around the sequence of events. NR confirmed that there is a two week response window and that this Offer was made under STP timescales rather than LTP timescales. NR's representative said that it offered Week 11 timetable on 31 March, and published the timetable on 14 April 2023. He said that within those two weeks NR would expect TTPs to respond to the offer, and it had no response from HEOC other than the Notice of Dispute, and no alternative suggestions from HEOC until after the timetable had been published.
109. The Panel said that HEOC had said that they intended to dispute it prior to the Offer. NR's representative accepted that HEOC had previously indicated that they were going to dispute it, and disputed it the week before it was published but had not presented NR with a response to the Offer to allow NR to address HEOC's concerns. HEOC raised its points six days after the timetable was published, on 20 April 2023. HEOC accepted the accuracy of this overview and the timescales, however went on to reiterate at several points that HEOC needs the time following timetable publication to investigate and offer alternatives to NR, following all TTPs services being made visible in industry systems.
110. At this stage there was some further disagreement between the Parties as to the content of the Offer (for all TOCs). It was eventually common ground that the Offer did not match the CTP. HEOC agreed that in most hours (save for pre-10:00 as described earlier) it had been offered 2tph. NR agreed with HEOC's assertion that in some hours GWR had been offered 8tph, in breach of the CTP.
111. In response to questions about the GWR offer, NR's representative said that despite the quantum (14.5tph) which was outlined in the capacity study and which formed the basis of the application of the Decision Criteria, GWR had bid in excess of that quantum limit on three occasions where they had bid 8tph (clearly in excess of 6.5). NR said that this bid had

proceeded through the validation process, leading to an incorrect offer and publication NR's representative said that those trains "*should have been rejected*". He said that NR had used a validation process called ATTUne which had not flagged any TPR conflicts for those services. NR's representative said that after publication he had challenged GWR about its bid. GWR had responded to say that it was unable to reduce its service down to 6.5tph following publication. Having made a final decision under D3.4, NR was now reliant on GWR agreeing a Variation by Consent under D3.6, or on the Hearing Chair of a TTP directing a different outcome under D5.3.1(c).

112. The Panel queried why, using the same validation process, GWR's excess bid was not identified but HEOC's was. NR's representative said that because HEOC had been clear that it was going to bid 4tph in accordance with its contractual rights, NR had this bid in mind. He said that NR did not expect that other TTPs would bid in excess of the capacity study and the quantum identified in the Decision Criteria.
113. NR's representative accepted that as a result GWR has an extra service on three times in each direction. On each such occasion it moves up to 8tph. He said that GWR cited other disruption on the Network, the nature of the long distance market, and the reopening of Nuneham Viaduct on 09 June (and therefore being unwilling to disrupt Oxford services further beyond 09 June) as reasons for not being willing to reduce the service back down to 6.5tph.
114. With respect to the capacity study and the CTP, the Panel asked whether the reduction in possession limits relates only to Week 11, or the whole 2TT. NR's representative confirmed that it applies for nearly all 2TT possessions, apart from where there are other works on top of HS2 works, and for all HS2 works (where there is no dispute) from the period on Saturday night until 08:00 Sunday.
115. Given that this reduced footprint is the "new normal", the Panel queried whether a new capacity study was required. A NR representative confirmed that the advance timetable team had looked at the reduced footprint. He said that the reduced footprint was only one factor, because there are bottlenecks on the Heathrow infrastructure (platforms and the tunnels), in the Ladbroke Grove area, and at other points and crossings. He said that the evidence supported the conclusion that 14.5tph was the right number to operate on the GWML, and this was not materially affected by the possession being shortened.
116. This data had not been provided to the Panel and NR's representative was not able to say whether it was available to be shared with us, HEOC's representative referred the Panel back to the earlier discussion about GWR's additional services. By inference, therefore, additional TPR-compliant capacity existed. NR's representative confirmed that its advance timetable team had only ever looked at capacity using the CTP as a base, and had not used the GWR 8tph (total trains of 16.5tph) that arose as a result of the Week 11 Offer.

Consultation

117. The Panel considered HEOC's submissions about NR's consultation. To the Panel's question about what else HEOC would have said, had the consultation which it wanted taken place, HEOC's representative argued that had it been more involved or consulted in the development of the CTP, which he said seemed to have been developed in isolation based on the capacity allocation, HEOC could have had discussions about 3tph, three trains every 20 mins, whether stopping patterns could be adjusted with MTR, or whether 16tph could be accommodated. Whereas, he said, HEOC had provided the information, NR

had undertaken numerical analysis, the CTP had been applied and issued, and HEOC had not had the opportunity to suggest alternative solutions.

118. The Panel pointed out to HEOC that the Panel had been presented with a Sunday timetable consultation document from October 2022 (“New document 3”) which showed HEOC with a 2tph allocation. HEOC’s representative accepted that this document had been circulated. To the Panel’s suggestion that the evidence which we had available suggested that certainly between October 2022 and March 2023 there had been silence from HEOC, HEOC’s representative agreed that this was a fair observation. He said that there had been emails and working groups where HEOC had said that it would like to run 4tph. HEOC accepted that it didn’t have a fallback position – “*we had stuck to our guns to say we want 4tph...*”. HEOC accepted that this had been its single position in connection with the development of the CTP.
119. NR’s representative agreed, and added that after the Offer and the publication of the Week 11 timetable he had had a discussion about 3tph with HEOC. NR’s representative reiterated points made earlier (recorded in para 87 and elsewhere) about the lateness of this discussion.. NR’s representation confirmed that this discussion was based around the Offer, not the CTP. NR’s representatives suggested that there might have been earlier conversations about the 3tph in connection with the CTP but no formal request had been made by HEOC (which had wanted 4tph), albeit this could be looked into in the future. HEOC’s representative accepted that this account was fair.

Calculation methodology

120. The Panel suggested that NR’s collection of data from TOCs was inconsistent. HEOC’s SRD refers to use of forecast data, and challenging of the same. NR’s letter of 27 April 2022, specifies the use of past data, not forecast data.
121. NR’s representative confirmed the use of past data for GWR and HEOC and forecast data for MTR. He also confirmed that NR had used MOIRA (industry-wide revenue) data. The Panel understands that MOIRA is a revenue demand and passenger forecasting model approved by the DfT. He quoted from the second page of the letter which indicated that MOIRA data was used for GWR and HEOC. He pointed to the request on the first page for MTR to use forecast data.
122. The Panel challenged HEOC to say what could have been done differently. HEOC’s representative confirmed that HEOC does not have MOIRA data but uses its own data.
123. HEOC’s representative said that HEOC had provided some gateline data which “*didn’t give a complete picture unfortunately*”. He said that the data had been updated, but did not have details other than referring to an email with numbers for 2019 actuals. He added that some HEOC ticketing data is “*tricky*” because some customers have a season ticket and they don’t pass through the gateline in the same way, and so are not registered.
124. Challenged as to what NR should practically have done differently, HEOC’s representative suggested that, knowing about the May 2023 timetable change, NR should, perhaps, have waited and compared actuals with actuals. HEOC’s concern was that HEOC is a “*very specific*” TOC and NR should not necessarily have compared airport passengers travelling with HEOC, and airport passengers travelling with MTR.

125. HEOC's representative accepted that NR is in a "difficult" position where comparative data is not available, where it is difficult to obtain actual data and there is a concurrent need to plan for a disruptive possession, which may not allow NR to wait.
126. NR's representative also pointed out that the May 2023 timetable was not in operation when NR made the decision.

Decision Criteria

127. The Panel first sought to understand whether HEOC sought to challenge the Considerations which NR had assessed as relevant, and the weight attributed to them.
128. HEOC had given greatest weight to D4.6.2(b) (spread of service) and D4.6.2(c) (improving performance).
129. HEOC's representative said that he would not come to a different view as to which factors were relevant. HEOC did not consider that NR's assessment of the Decision Criteria had omitted anything fundamental.
130. I explained to the parties that the Panel understood that different decision makers may take different views depending on where they sit and one person's view can be different from someone else's. In terms of the evidence base, looking at the conclusions NR has reached, HEOC was asked to confirm whether there was data in its possession which it hadn't provided to NR which HEOC considered would lead to different conclusions. The Panel noted that HEOC had not argued this in its SRD.
131. HEOC's representative confirmed that there was not, and that he contended that it was a question of interpretation. He confirmed that HEOC had supplied actual data. Its issue was with the number of passengers on trains and the utilisation of assets. He said that he thought that HEOC was shown as carrying 800-odd passengers (though he wasn't sure). In any event, HEOC was shown to be loaded to twice the capacity of an MTR service which, he said, was in his opinion the wrong way around. The capacity of MTR's services is greater than that of HEOC's, for which reason he said that HEOC does not understand why, if MTR can carry more passengers, it needed to run more trains and be half loaded, whereas HEOC is shown as being "crush loaded" with half the number of trains which it was contractually entitled to run.
132. HEOC's representative confirmed that it had written to NR's Anna Scannell on 1 November 2022, but had not had a response ("New document 4").
133. NR's representative confirmed that specific capacity for each of the train services was taken into account. When asked whether this would mean that the number of people on a HEOC train would be far higher than on an MTR train, NR's representative said that it looked at data on capacity for HEOC, MTR, and GWR trains. He said that this data was considered confidential as between each party and was set out in a document "New document 6") for which reason it had not been shared. NR confirmed that some of the data had come from HEOC, but said that the data had not been shared with HEOC for verification.
134. Discussion then followed about confidentiality. I explained that the starting point was that if this data was relevant to our decision (which it appeared to be) it should be shared with the Hearing Chair and Panel in accordance with my Fifth Direction – though not with

the Parties in the first instance - but that it would be preferable if each contributing TOC could give its consent, and confirm the accuracy of the data which related to it. Ultimately, each TOC gave its consent for sharing with the Panel, but HEOC was not able to confirm that the data was consistent with the data which it had supplied to NR. I turn later in this decision to consideration of how it is best to handle this data. Neither HEOC nor any interested party contested the approach which the Panel suggested.

135. Although I have set out the various observations below in respect of each Consideration, some observations apply across more than one Consideration, and I have taken into account all evidence and submissions in reaching my decision.

Condition D4.6.2(a)

136. HEOC's representative accepted that this was a relevant Consideration and accepted NR's weighting.
137. NR's representative confirmed that the data on future demand forecasts set out in New document 6 would enable the Panel to understand its conclusion. The Panel pointed out that it had not yet been able to study this data.
138. In terms of seeking to understand the overall impact for TOCs, I suggested that MTR had done less well overall, going from 10tph to 6tph under the Offer, and would go from 10tph to 4tph if capacity were re-allocated (assuming 14.5tph). MTR's representative confirmed the position.
139. HEOC's representative did not challenge this. He said that there had never been any discussion about 3tph, only 4tph, 2tph or 0tph. He asked about the 0.5tph in 14.5 tph and how that is managed, on the basis that if 15tph were practically-speaking available, a further 1tph could be allocated to HEOC.
140. NR's representative referred to its Decision Criteria document which showed that HEOC had been offered 3tph between 09:00 and 10:00. He said 3tph had been offered where available.
141. HEOC's represented disputed that this was the offer, saying that in Week 11 the offer was even numbers only.
142. NR's representative confirmed that it was his understanding that HEOC went from four, to three, to two, as its Decision Criteria document showed. This was later confirmed to be correct.

Condition D4.6.2(b)

143. HEOC's representative accepted both that this Consideration was relevant, and NR's weighting. HEOC also accepted that the wording of the Consideration does not require equal capacity to be allocated, in all circumstances, between TTPs.
144. When asked whether a reference in the Decision Criteria document provided for a proposal for more tph to allow the service to increase, NR confirmed that this was only intended to allow for an uplift to a cap of 14.5tph.

145. The Panel queried why, if NR had used HEOC's data to justify offering 3tph in some hours, it didn't do so for other hours later in the day. NR's representative said that later in the day is a "massive peak" for all TOCs, and as a general proposition the demand for all TOCS is as high, if not higher, particularly around long distance travel.
146. The Panel asked HEOC whether it was saying that NR's conclusions regarding the spread of demand were unreasonable. HEOC's representative repeated the point about train loading capacity. He said that MTR had surplus capacity, whereas HEx Services would be at maximum loading. He repeated his contention that MTR could carry the same number of passengers with fewer trains, but HEOC could not because it was already at maximum capacity. HEOC later observed that overcrowding on HEOC services would also have a detrimental impact on passenger experience.
147. The Panel also queried NR's decision to predicate its decision on demand up to 2026, given that the decision relates to 2023. NR's representative said that the CTP looked at forecasting to 2026 in the first instance, then considered performance modelling and whether the data suggested NR should carry out other capacity work or revise the CTP..
148. HEOC's representative accepted that in terms of capacity on the Network generally one could say that there was overall suitable provision for 'airport passengers', but he said there was a flaw in the way this had been approached. He said that the issue was understanding how the passenger data is split looking at the relative numbers going to Heathrow Airport, rather than to intermediate stops (he posited that NR's approach might be fair if MTR was carrying 800-900 passengers but only six for Heathrow, thus requiring a stopping service rather than a direct airport service).
149. NR's representative confirmed that the data requested and received breaks down into GWR, MTR towards Reading, MTR towards Heathrow (as opposed to Reading), and HEOC. He said that NR took destination into account in its exercise of discretion, allocating the number of seats for a fair balance across demand. He said that the numbers are set out in New document 6. NR did not consider that the approach which it had followed had been set out in its public explanation of its methodology.
150. The Panel put the point that any conclusion based on demand forecasting would be based on extrapolation, whereas the specific possession in view is in June 2023. The Panel challenged whether it was not more appropriate to focus on data closest to the point of decision; demand forecasting for 2026 is not relevant. The Panel said that it accepted that NR could not take actual data into account at the time of the decision, because it needed to take the MTR May 2023 uplift into account, but using 2026 data takes into account two years of MTR uplift, rather than one month.
151. NR's representative responded that data from forecasting is based on percentage increase year on year. On that basis he said that NR had used the best available data in connection with the CTP, based on the services available for the Offer. He also said that data from 2026 had not been used to make any decisions.
152. The Panel queried the language in the Decision Criteria document which suggested that the conclusion was predicated on the demand position in 2026. NR responded that all TOCs provided data beyond 2026. He said that 2026 was used as a good average for figures across all TOCs, on the basis that demand is higher across the board for all TOCs in 2026 than in 2023. NR was trying to avoid the need to redo its work every time similar possessions took place.

153. NR's representative confirmed that NR had received data from HEOC as part of the development of the CTP covering the period 2023 – 2027. From this, NR had inferred that TOCs were content with its approach.
154. HEOC's representative suggested that he didn't think that HEOC was content with taking a *"random future example"* to apply to this Offer. He said that he could not see how it was relevant to take a forecast of passenger numbers and then apply it to a weekend three years earlier when there might be huge changes. He stated that HEOC numbers across those dates were fairly accurate because HEOC understands its service, but he said that this might not necessarily be the case for MTR's newly uplifted service. He accepted that there had been some adjustment but *"in a year's time we are going to know a lot more about the difference in passenger numbers using MTR to get to the airport, and we may find that HEOC's numbers are no longer accurate."*
155. The Panel noted that NR had referred to data up to and including 2026. NR's representative said that it had collected data due to the ongoing possessions going up to 2026. He said that the same period of data had been taken from all TTPs, the same calculations had been applied to all TTPs, and NR did not consider that HEOC would have been adversely impacted.
156. There was some discussion about an industry presentation regarding the methodology used. NR's representative said that it had been shared with all TOCs. It was suggested that this set out the loading which each TOC would have at the most busy hour of a Sunday, or average Sunday hour. HEOC's representative thought that this was the same email dated 1 November 2022 to which he had earlier referred (in which HEOC had given a response to NR) (New document 4), i.e. that NR's methodology and results had been openly shared during 2022.

Condition D4.6.2(c)

157. HEOC accepted that this Consideration was relevant but would have weighted as medium, rather than high.
158. NR's representative pointed to what he said were numerous items of correspondence from all TOCs about poor performance, and stated that the NR Western Route is on a regulatory escalator from the ORR for poor performance at the moment. HEOC's representative accepted this. In NR's opinion this justified a 'high' weighting as reasonable.
159. The Panel pointed out that the evidence before it of past performance data demonstrated that 14.5tph has not met performance targets in certain scenarios and this would remain the case with the CTP. Therefore, and given the high weighting for improving performance, the Panel queried why NR had maintained 14.5tph rather than seek a reduction in overall tph. NR's representative pointed to already significant overcrowding at 14.5tph, and said that he was not sure how the industry would cope with any increase in overcrowding from a further reduction. NR representative noted that safety, as well as performance, concerns apply to overcrowding.
160. To questions about whether this was a matter of instinct, judgement or professional assessment, NR indicated that GWR already experiences overcrowding on Sunday leisure services, particularly during summer. NR contended that, as a whole, performance challenges remain and re-allocation of available paths between TOCs would not change

that position. NR and MTR also agreed that there was a safety factor arising from overcrowding on the CCOS at deep level stations, if passengers had to wait longer for a further-reduced MTR service, NR noting that the only TOC from which it would be able to re-allocate airport services to HEOC would be MTR. MTR's representative pointed to safety implications on an island, low-level platform for passengers destined for Reading and Heathrow.

161. HEOC's representative agreed that this was likely and that this safety risk has materialised in previous perturbation. He said that if the industry accepts that 2TT leads to performance issues, whilst noting the industry awaits the impact of CTP modelling, but it also accepts safety concerns, the answer may be to run more than 14.5tph to move people and accept the impact on performance (i.e. to increase to 16tph or something else unless NR could demonstrate an "*exponential drop*" in performance by introducing a further 1tph). For this reason HEOC considered that a medium weighting is appropriate. He said that the impact may be acute for HEx Services whose passengers expect a 15 minute service and need to wait for 30 minutes.
162. NR's representative noted that industry has for 25 years agonised over balance between performance and capacity and never come up with an agreed solution. If NR already acknowledges latent performance risk with 14.5tph, as the evidence suggests, and if there is increased safety risk with reduction of MTR to 2tph, there needs to be a decision which balances performance and safety. An NR representative suggested that this would not be a factor between London and Heathrow because there is 6tph overall in both the pre- and post-May 2023 2TT, but the balance will be different between HEOC and MTR. There would be more space on trains in Week 11 than in February 2023 due to MTR's higher carrying capacity. HEOC's representative, however, repeated his point that introducing two stopping services uses more capacity and is less efficient.
163. NR's representative suggested that it had not been clearly demonstrated that removing MTR's stops would release additional paths, and, in any event, NR also needed to consider cross-route performance, transferring delay from Western Route, through the CCOS to Anglia. There was some dispute as to whether there would be an effect on performance in Week 11, but the MTR representative considered that the recovery times for Elizabeth Line services were tight and MTR had been strongly challenging NR on cross-route performance recently.
164. NR confirmed that no performance data was available because the timetable had not run yet. NR based its allocation on the numbers provided by TTPs. Its representative said that the available data did not lead to the conclusion that HEOC would be allocated additional paths, even if taking out intermittent stops increased overall capacity.
165. Pressed on what HEOC meant by "other factors" (see para 20(9)) in addition to journey time and reliability, its representative confirmed that it meant customer experience, based on the HEOC offer of a 15 minute service, with a 15 minute journey time.
166. To the challenge that Week 11 is timetabled disruption, of which passengers have advance notice, HEOC's representative suggested that at least 50% of its customers are passengers who turn up without pre-booking.
167. HEOC's representative also queried why NR did not consider other combinations, involving GWR, other than either swapping two HEOC slots or two MTR slots. NR's representative argued that - in terms of performance - it did not matter how paths were

allocated, because it had assessed that 14.5tph delivers performance and allocating HEOC slots from elsewhere would not solve the performance issues described in para 159 above.

168. The Panel asked HEOC why, having written to NR in the past about poor performance, it would wish to risk poor performance. HEOC's representative replied that it is important to understand the performance impact and to show that a higher Right Time performance can be achieved at 14.5tph than with 15tph.
169. HEOC said that in its view, NR should have provided that performance data. Its representative said that they know that the pre-May 2023 2TT performs poorly but can live with it when allocated 4tph. On modelling, NR's representative confirmed that NR will model 14.5tph from Week 11 and will share the results in June. He said that there had been no time to carry out detailed performance modelling at STP timescales.
170. Looking at the October 2022 presentation (slides 6 and 7), the Panel said that it inferred that adopting the pre-May 2023 capacity allocation for May 2023 passenger numbers led to very high loadings on MTR and less than 25% loadings on HEOC services. The numbers evened out, or at least appeared to be more sustainable, when 2tph were reallocated from HEOC to MTR (Week 11 capacity allocation).
171. HEOC confirmed that it did not accept those numbers and referred to the 01 November email. It stated NR had not used the correct number of HEOC passengers, nor the correct MTR loading capacity. It said that there are 374 seats on an 8 car HEOC service but if all of those were taken, with the quantum of luggage its customers carry, HEOC would be crush-loaded. To compare that to MTR, the carrying capacity for those trains is advertised at 1,500 or 1,200 (both numbers were given in oral evidence) passengers, not the 450 stated in NR's slides. There are 450 seats but that doesn't reflect capacity of the train; taking account of that adjustment leads to a significantly different loading factor.
172. The Panel observed that the load factor percentage appears to take train loading capability into account, not just passenger numbers. NR said that the October 2022 presentation was produced from the figures requested by NR, and to which HEOC responded (New document 4). NR confirmed that those numbers had not been worked into this presentation and that the numbers are indicative of the methodology used by HEOC when calculating loadings. NR said that it had revisited the data as documented in New document 6 and had not made its decision on the basis of the data summarised in the October 2022 presentation. HEOC said that the capacity allocation output in the October 2022 presentation, which was based on the tables in slides 6 and 7, had not come across as indicative.
173. The Panel noted that the information provided by HEOC assumes that the carrying capacity of MTR service increases from 450 to 1,200, and noted that HEOC expressed concern that if HEOC seats were all occupied there would be an overcrowding issue due to luggage. To the Panel's query that this equally applied to MTR, HEOC responded that it thought not because a proportion of those passengers would not be going to the airport, or an unspecified number of them, though he accepted that "*we have no real way of knowing*".
174. The Panel asked how NR had deployed New document 4, and whether it had adopted HEOC's view of MTR's capacity, or only HEOC's view of its own loadings. In particular, what carrying capacity was assumed in respect of an MTR service, since HEOC's assumption is 1,200 but the October 2022 presentation states 450. NR confirmed that capacity allocation was set out in New document 6, particularly section 4.3. The Panel agreed that it would

consult that document and form a view. Having reflected, the Panel considered that the document was relevant and considered that it could draw the required conclusions without needing to share that document amongst all Parties and interested parties.

Condition D4.6.2(d)

175. HEOC confirmed that it did not consider this Consideration relevant.
176. HEOC said that for trains that were offered it was content with journey time, and it confirmed the Week 11 Offer was consistent with journey time protection in its TAA, but in terms of overall passenger experience of journey time HEOC said that is likely to increase due to the 30 minute gap in service (increased from 15 minutes).
177. NR's response to whether journey times or waiting times were going to be longer because of fewer HEOC services, was that passengers post COVID now had a wider choice of services, and for specific HEOC passengers there would be a longer wait time, but there was still a choice, including a MTR option, for HEOC customers, and the Offer provides 6tph to airport for passengers to make those decisions
178. Regarding this Consideration NR reconfirmed points made earlier that it had appropriate data from TOCs, that it had been taken into account but that this was contained in confidential New document 6. NR thought that TTPs would be satisfied with New document 6, were they able to view it.
179. HEOC gave a view as to what proportion of passengers are using its services compared to other services. HEOC said that there were weekly mode share figures published for "surface access" passenger arrivals at the airport. On that basis HEOC said that it had between 8-10% per month of passengers who arrive or leave the airport.
180. HEOC could not find the latest mode share report but NR confirmed that all TTPs were aware from letters in June 2022 of the data which it was collecting.
181. In terms of the data in table 9 of the NR consultation document, it was noted that the count shows numbers on Heathrow destination trains regardless of actual passenger destination, which may overstate MTR numbers going specifically to the airport because MTR stops at intermediate stations.
182. HEOC said that it would still question NR's overcrowding calculations. Its representative said that he didn't believe 630 people on a MTR service was 120% of MTR capacity; he said previous modelling and figures for the MTR business case had included the presumption that MTR would regularly carry 1,200 or 1,500 passengers. HEOC did not see how within 2TT the capacity had shrunk by 50%. NR could not say whether there was any response to HEOC's concerns.
183. HEOC had a further question regarding the potential Split B, regarding the note at the bottom of the table on allocation of 2tph from HEOC to MTR. HEOC said that it was confused as to why swapping one airport train for another changes how the airport is served.
184. The Panel put the question that "the man on the Clapham Omnibus" would look at HEOC's suggestion that there's more capacity on MTR services and suggest that this would relieve capacity concerns regarding the London to Heathrow flow, and could justify

swapping one airport service for another. HEOC responded by saying that would over-increase capacity, i.e. it still leaves an issue.

185. NR emphasised that it had only acted on data that had been requested and provided by TTPs. As and when that data had been updated NR said that it had taken it into consideration. It asked whether HEOC was now questioning the validity of data provided by other TTPs but it did not seem to the Panel that HEOC could ask that question, not having seen the data. HEOC did say that it did not think that the data was correct because of the assumed MTR carrying capacity. MTR's representative said that it had also raised the same point as HEOC about luggage on its services reducing carrying capacity, and that therefore its true carrying capacity in Week 11 would be below the number suggested by HEOC.

Condition D4.6.2(e)

186. HEOC confirmed that it did not assess this Consideration as relevant and maintained that position at the hearing and made no representations..

187. The Panel asked NR whether the split of allocation between operators could lead to greater fragmentation of services on the Network. NR pointed to its Decision Criteria document and said that the same passenger numbers would be served under the Week 11 proposal.

188. HEOC accepted that it was probably right to consider it relevant and to give it a low weighting. HEOC thought that there was a "*pedantic*" argument about mode share and said it would not have a business if passengers did not want a non-stop service to London Paddington: there is a demand for regular fast non-stop trains between London Paddington and Heathrow.

Condition D4.6.2(f)

189. Both Parties assess that this Consideration is relevant and weight it as medium,

190. The Panel challenged HEOC as to whether there was a reputation impact on HEOC specifically, rather than railways generally. The Panel asked what evidence HEOC had of such an impact.

191. HEOC said that "*as a one off, Week 11 is minimal*" (I infer that HEOC means that the commercial and reputation impact would be minimal), HEOC's concern is that there are 26 weeks of similar HS2 access. HEOC said that a lot of HEOC passengers turn up without checking. HEOC's representative noted a period in the past when there had been customer drop off which he speculated was a result of a perception about reliability. He said that he was more concerned about the long term impact of the position around the regularity and turn up and go option.

192. The Panel put the point that this disruptive possession is not materially different from a regular Section 7 possession. HEOC did not challenge that point. On the point about the availability of compensation, its representative said that it did not have the benefit of compensation under Schedule 4, but it had negotiated compensation as part of its TAA.

193. HEOC's representative accepted the fact that as this possession was planned, this factor would mitigate its effect on customers.

Condition D4.6.2(g)

Condition D4.6.2(h)

194. Neither Party assessed these Considerations as relevant or made any submissions.

Condition D4.6.2(i)

195. NR assessed this Consideration as relevant but with a low priority.

196. HEOC did not regard this Consideration as “*that relevant*”. It argued that potentially passengers might not wait at London Paddington and might take a taxi but he said that the impact would be “*very low*”.

197. HEOC accepted that because its train service had not been reduced before any comments on effect were speculative; previously when the HEx Service was not running, MTR was not running either, as all instances had related to severe operational disruption.

198. There was some evidence given at this point about the comparative impact of relief line closures, but as this did not apply to Week 11 I did not consider it relevant.

Condition D4.6.2(j)

199. Both Parties assess this Consideration as relevant. NR weighted it as medium. HEOC weighted it as high.

200. HEOC said that reducing to 2tph doesn't provide it with any efficiencies in terms of driver and rolling stock use. As a result HEOC still needs to pay for the same fixed asset and run half the number of trains and incur a potential revenue impact. Essentially HEOC would have 50% of service but more than 50% of cost. HEOC said that it needed 100% of the resources to run 50% of the train plan, and would not be able to mitigate the effect with notice, other than taking units out to sit at London Paddington.

201. NR argued that all TOCs would have similar fixed costs, and lower revenue from not running trains. HEOC accepted that any TOC in this position would face the same issues. HEOC accepted that there was no basis for thinking that HEOC would be disproportionately disadvantaged as compared with another TOC.

202. HEOC confirmed that it had the same fixed resource, and as a result being offered one extra slot would not be more efficient than managing 2tph.

Condition D4.6.2(k)

Condition D4.6.2(l)

203. Neither Party assessed these Considerations as relevant or made any submissions.

204. I offered the interested parties the option to make representations, which they did as follows:

- (1) GBRf was satisfied the Panel had conducted a thorough investigation and had no further questions.

- (2) GWR said that many things have cropped up and been answered, Their representative said that there were many things he would say if there were time. He said that they were probably not specifically relevant, save that the train service on 11 June is open and passengers had already made reservations on them.
- (3) HAL said that as always it just liked to have the best possible service for passengers at Heathrow Airport.
- (4) MTR, on the subject of AML, said that this matter had been raised post offer, and noted the £20bn spend on Crossrail. He queried the sense of closing AML for HS2 and not just in Week 11. He said that from MTL's perspective the issue is providing a service for customers who now have the Elizabeth Line.

Additional documentary evidence provided

205. As I have set out above the Panel received some additional documentation during the hearing (and in one case after, as I set out below). These are included as an annex to this determination ("Annex A"), save for New document 4 and New document 6, which are described below.

- (1) Andy Derbyshire email of 01 November 2022 with additional HEOC data ("**New document 4**")

The Panel understands that this is HEOC's response to New Document 5. For 2023, this shows a Sunday passenger forecast (average over the year) of 14,969, and a peak hour HEx passengers (average) forecast of 1,835.

The forecast for 2023 shows the passenger split by hour of operation, and shows a peak at hour nine at 12.26%.

HEOC provided tables showing an adjusted overview of the capacity which in its view better reflects passenger experience. Looking at the Up Direction, factoring in an assumption of a carrying capacity of 1,200 for MTR (rather than 450 as used by NR) shows HEx at 107.38% capacity, and the Elizabeth Line at 26.27% (on the basis that MTR's allocation is 4tph).

In terms of the passenger numbers, HEOC's figures show HEx at 808 and the Elizabeth Line at 1,261. The passenger split is HEx 10.86% and the Elizabeth Line 16.95%.

For the Down Direction the figures using the same carrying capacity, HEx has a capacity of 136.67% against HEx's 46.88%. The figures show the Down passenger split as HEx 13.65% and the Elizabeth Line 29.89%.

By comparison on the Up the GWR main passenger split is 59.89% and on the Down 48.12%.

The figures also show that in the Down Direction, were MTR to run 2tph and HEx were to run 4tph, the Elizabeth Line's capacity would be 93.75% whilst HEx would be 68.35%.

On that evidence, in the Up Direction, the Elizabeth Line would carry 453 more passengers than HEx, and in the Down 1,222 more.

In the email, as argued at the hearing, HEOC argues that having all seats occupied means a HEx Service is considered heavily occupied, due to the amount of luggage, seat layout etc. As a result, HEOC says to properly compare this to a heavily loaded MTR Class 345, an assumption of 1,200 passengers has been used (compared with the 450 seats in the initial illustration), given their advertised capacity of 1,500 and layout biased towards standing passengers. HEOC's argument is that the HEx capacity at the peak hour is broken, particularly in the Down direction if a 2tph allocation is used whereas in a 4tph scenario there is sufficient capacity for all.

The same chain also shows that in October 2022 NR had raised the possible split in 6tph between HEOC and MTR. HEOC's representative replied on 19 October 2022: *"As to your question re a potential even split of the 6TPH, I think we'd want to know whether this is feasible and what NR might propose before we fix timings.....I don't think it would matter entirely to HEx which service out of our 4 were suppressed."*

(2) Confidential commercial document from NR dated 15 March 2023 ("**New document 6**")

Because of the basis on which this document was shared with the Panel I will not refer to it in detail. The report notes that the biggest change was in relation to the HEx forecasts. The base counts data used for the initial analysis based on ticket machine sales was, the report states, later agreed between Network Rail and HEOC to be inappropriate, and they were replaced by aggregate journeys data provided by HEOC.

NR's forecasts relate to a normal Sunday in 2020 (not a Sunday with a 2TT in operation). The report notes that *"It should be noted that the approach is high level, and that looking at the forecasts in a more granular level, carries greater risk than looking at the overall picture. For example, forecast demand for a specific service group, route section and time band will carry greater risk of inaccuracy than say the forecast for total demand over the day for that service group and route section"*.

Of note, this document refers to Elizabeth Line Inner Suburban passengers which it notes *"are passengers travelling from London to stations before airport junction (including Acton Main Line, Ealing Broadway, West Ealing, Southall and Hayes and Harlington.) These passengers have a choice of whether to the EL services to Reading or the EL services to Heathrow."*

The report considers load factors compared with seating for the busiest hour of service 17:00 to 18:00. Looking at the scenario with HEx running 4tph shows HEx carrying only 8.7% passengers in the Down Direction and 6.4% on the Up, with other TOCs carrying substantially greater numbers. Taking the Up Direction as an example, the August 2022 figures show HEx passenger numbers at 276, which reflects the figure provided by HEOC. The updated Up figures show HEx with 455 passengers.

From the data provided by HEOC for its forecasts, I understand that its split by direction is 44/56 Up/Down. From the figures provided by HEOC its total passenger numbers were forecast to be 683 over this hour, which does not reconcile with the per hour figure provided by HEOC. That said, although the per hour figures don't align I note that the

overall figure for passengers over a 24 hour period in 2026 used by NR does align with the data provided by HEOC totalling 7,716 on the Up and 9,821 on the Down.

At the busiest hour used by HEOC, however, the figures show that significantly more passengers would be carried by TOCs other than HEOC, and the demand data for 2026 suggests that this trend would continue.

As a general point, it can be observed that the demand trend for 2026 shows a clear trend that other TOCs would be moving more passengers.

Materially for present purposes the report sets out the differences against the August results presented.

206. I should add that since NR raised the issue of being subject to regulatory escalation as a result of Western Route performance, the Panel also noted three pieces of information published by ORR and NR, which are in the public domain¹. The Panel infers from NR's evidence that NR is in the 'below expectations' box as described in the first document, and Stage 1 or 2 in the second document (since anything above that would be published on ORR's website). Assuming that this inference is correct, NR will be subject to increased scrutiny and monitoring by ORR.

G Analysis/Observations and Guidance

207. There are several preliminary legal points which I need to address:

- (1) HEOC's entitlement to bring this reference under Part D.
- (2) Whether NR has met the necessary conditions under Conditions D2.2 and D3.4.2.
- (3) Data and confidentiality

Preliminary point 1. HEOC's entitlement

208. In my Second Directions I addressed in detail my preliminary view that the dispute is a Restriction of Use for HS2 Works within the meaning of the HS2 Supplemental Agreement, which varies HEOC's TAA.

209. I am grateful to the Parties for their helpful submissions, and I understand it to be common ground that the Parties accept the provisional conclusion which I set out in my Second Directions.

210. Accordingly, I proceed on the basis that Part D applies to this reference. My Second Directions should be read alongside this decision.

Preliminary point 2. Conditions for a NR Variation

211. As set out above, HEOC has contended that NR has sought to rely on the 2024 EAS and the 2024 CTP (as opposed to those for 2023) to justify the reduction in service in

¹ <https://www.orr.gov.uk/sites/default/files/om/overall-framework-for-regulating-network-rail.pdf>;
<https://www.orr.gov.uk/sites/default/files/om/economic-enforcement-statement.pdf>;
<https://www.networkrail.co.uk/wp-content/uploads/2022/12/Network-Rail-Limited-Half-year-performance-report-2022.pdf>

relation to the (2023) possession, which is said to be a “*neither satisfactory nor a compliant*” approach.

212. In its submissions, HEOC has sought to rely on Condition D2.2. I accept that Condition D2.2.1 provides that: “*Both the Timetable Planning Rules and the Engineering Access Statement (together referred to as “the Rules”) are revised on a bi-annual basis, each revised version being operative for the same Timetable Period as the Working Timetable to which they pertain. The Rules must be revised and updated, in accordance with the procedures described in this Condition D2.2, as a first stage in the preparation of a New Working Timetable.*”

213. I understand it to be HEOC’s submission that Condition D2.2 only allows for a bi-annual revision of the Rules and, it follows, a 2024 EAS cannot be used to support a Restriction of Use in 2023 (because that revision of the Rules would not be bi-annual).

214. However, as I noted in my Second Directions, Condition D3.4 allows for a NR Variation with at least 12 weeks’ notice. I understand that it is common ground that NR has sought to make a NR Variation within the meaning of Condition D3.4. Condition D3.4.2 provides that NR shall be entitled to make a variation to the Working Timetable provided that:

(a) the NR Variation is made only for the purpose of taking Restrictions of Use which are consistent with the Rules, as published following the process set out in Condition D2.2 or as amended in accordance with the procedure established pursuant to Condition D3.4.3; and

(b) NR complies with the procedure set out in this Condition D3.4.

215. In other words, Condition D3.4.2 provides an additional way by way NR may amend the Rules. This reference does relate to a NR Variation made for the purpose of a Restriction of Use.

216. In my view HEOC’s submission on this point is not well founded for the following reasons:

(i) The National TPRs state that NR has to conduct a capacity study, which it did. I infer that the output is consistent with the practical planning values in the TPRs because the Panel heard unchallenged evidence that the ATTUne system offered it back against the TPR values (adding in extra GWR trains as a result). The physical limits of the possession will also have been manually checked by NR planners, and as a consequence it should be compliant with the engineering footprint.

(ii) On the available evidence the 2023 EAS, from Version 2, made provision for the relevant possession. HEOC has not challenged that evidence.

(iii) I accept that the Decision Criteria document supplied by NR referred to the 2024 EAS but the Panel was told in evidence by NR that in the 2023 EAS there are a number of weeks with a 2TT possession and that there are more in the 2024 timetable year, but based on the same principle and there was no evidence that the principles set out (certainly from Version 2 of the 2023 EAS) differed. The specific details of the possession are never given in the EAS, but form part of the capacity study later on. NR’s representative said that the Week 11 possession went into

Version 2 of the 2023 EAS and was referred to in all versions since. HEOC did not challenge that evidence (or not seriously).

- (iv) Consistent with that evidence, the EAS did not allocate paths per hour to any operator.
- (v) To the extent that it may be said that NR is relying impermissibly on a 2024 CTP I do not consider that this limits NR's rights under Part D, because the CTP does not form part of the TPRs.
- (vi) Accordingly, so far as material NR was acting consistently with the 2023 EAS. I would accept that this was varied on a number of occasions, but HEOC did not challenge the validity of those amendments.

217. I also identified that, in my view, there had not been strict compliance by NR with the requirements of Condition D3.4. Neither Party challenged that view, or decided that as a result the NR Variation was of no effect. The only challenge made by HEOC relates to the Rules (which I have addressed above), and the question of consultation, which I address below.

218. In my view, subject to my consideration of the Decision Criteria below, the NR Variation is not ineffective as a result of any procedural departures from Part D. In forming my conclusions above, I have directed myself to the determination of the ORR in the appeal to HAL/TTP003 (concerned with the approach to the provisions of Part D as a result of the Change Strategy adopted as a result of challenges posed since 2020). At paragraph 48, the ORR summarised its view and asked whether at the time, the parties considered that their actions had some meaning, which I infer is intended to mean some contractual meaning. The ORR considered, at paragraph 49, the most "fair and reasonable" outcome based on the way that the parties had themselves behaved at the relevant time. Looked at from that perspective, it is clear to me that the Parties worked at all material times on the basis that the steps which they were taking had contractual effect.

219. I have also considered HEOC's challenge in connection with the consultation process followed by NR. I accept that Condition D3.4.8 requires consultation with TTPs which are affected directly or indirectly. Part D does not specify what is required by way of such a process, but I am satisfied that there has been consultation. Whilst the Network Code does not have the status of a statute, as a comparison I bear in mind that the requirements of statutory consultation have been summarised in Coughlan [2001] Q.B. 213 at [108] per Lord Woolf; and Gunning (1985) 84 L.G.R. 168, recently reaffirmed by the Supreme Court in Moseley [2014] UKSC 56). In order for consultation to be fair, a public body must ensure:

- (i) That the consultation must be at a time when proposals are still at a formative stage;
- (ii) That the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;
- (iii) That adequate time is given for consideration and response; and
- (iv) That the product of consultation is conscientiously taken into account when finalising the decision.

220. Although I do not make a finding that this standard necessarily applies under Part D (where the participating bodies are not necessarily public bodies), in my view NR has discharged its duty, at least substantially. I refer, in particular, to New document 1, and NR's clear attempts to gather data from TTPs, the evidence of discussions between the Parties, which I have summarised above (including a presentation in August 2022, with further input sought and provided in November 2022), and evidence that NR has taken the product of that consultation into account by the offer of a third train slot. I accept that HEOC is not happy with the outcome, but the resolution of those concerns is really more a question of the application of the Decision Criteria, rather than a failure to consult in my view.

Preliminary point 3, Data and confidentiality

221. There are some weaknesses in the extent and quality of the data with which the Panel has been presented as part of this reference. In particular:

- (1) I note the provisions of ADR Rule H31 in relation to material which may be commercially sensitive. It is not ideal for the Panel to be presented with data which has not been checked and validated by all relevant parties, in order that the Panel has an unchallenged basis on which to work. I have taken the approach which was endorsed by the ORR's appeal determination regarding TTP337/359/382, at paragraph 77, where the ORR indicated that generally speaking it is best practice to provide all members of the Panel with the same information for the purposes of their decision making. In the appeal, from which I take it to be implicit that the ORR accepts that this approach (which may entail documents being held back from one or more Parties) may be appropriate. As I have noted above, HEOC did not challenge this approach.
- (2) There is a discrepancy between NR and HEOC in terms of the assumptions which they make about passenger loading. NR has used the figure of 450 for Elizabeth Line trains (the seated capacity) but HEOC has suggested that the figure of 1,200 is more appropriate given the quantum of standing passengers possible. There is no agreed basis as to how to assess seating v. standing, or luggage requirements. In the Panel's view, for reasons of consistency, the loading should either be "seated" or "seated + standing" for both HEOC and MTR, and if an allowance is made for space taken by luggage, this should be a % reduction in passenger capacity and documented as such. It does not appear to the Panel that HEOC took this approach when it submitted its proposals re: respective loadings.
- (3) There have been some queries about the demand figures provided to NR by HEOC and their basis of collection, I infer that the change in figures provided is due to HEOC using different data. HEOC said that their customers tend not to go through the gateline in a way that is easily recorded, and as a result the initial gateline data provided was low. That said, I take into account New document 1 which suggests that it was open to HEOC to provide suitable data if it felt that the gateline data wasn't representative (NR's letter provides different examples of possible data). HEOC provided suitable data when the decision indicated that HEOC would not be getting their 4tph.
- (4) There is also some doubt in my mind as to how NR has taken into account the data provided to NR in New document 4. As set out above, the total figures appear to match but it's not clear how NR has calculated the per hour figures in that document.

- (5) One of the issues raised by HEOC relates to stops at intermediate stations. New document 6 states that intermediate station MTR passengers can use both Reading and Heathrow services. There seems to be no argument about MTR having 2tph to Reading (rather an argument about the split of airport services), so it may be that HEOC is correct that it could retain 4tph and the intermediate stations would still be served by MTR Reading services (undermining a point which I understood NR to make about needing MTR airport services for the intermediate stations).
- (6) It would have been useful to understand (and on this point I agree with HEOC) the origin / destination split for all MTR passengers, to understand how many are for the airport and how many for the intermediate stations. I would have thought that such data should have been part of the business case for upgrading some of the stations (with AML in view).
- (7) NR's methodology has focused on the year 2026. Having considered the point carefully, I consider that using 2026 was inappropriate. I understand the desire to reduce rework and not to undertake a capacity study each year, but there is a big difference between 2023 and 2026, or at least potentially so, as discussed in the hearing.

222. In future hearings such as the above, as a **recommendation** the Panel would benefit significantly from the provision of agreed data and an agreed chronology.

Application of the Decision Criteria

223. I now turn to my assessment of the Decision Criteria, taking into account the observations of the Parties. I note that Condition D4.4.1 provides that In making any decision in the course of implementing the procedures set out in Conditions D3.4 or D3.5 NR must apply the Decision Criteria in accordance with Condition D4.6 (see Condition D4.4.1(c)).

224. The application of the Decision Criteria (cumulatively the Objective and the Considerations) amounts to an exercise of contractual discretion. A contractual discretion must be exercised in good faith and not capriciously. The duty of rationality is now well established and is often referred to as the 'Braganza' duty after the leading case, Braganza v. BP Shipping Ltd [2015] UKSC 17 and is implied by law. A discretion must be exercised consistently with its contractual purpose: British Telecommunications plc v. Telefonica O2 UK Ltd [2014] UKSC 42.172. The duty of rationality is intended to act as a safety valve to protect one party from taking advantage of its role as a decision maker.

225. In summary, to comply with the duty of rationality, the decision-maker must:

- a. Ask the right question, taking into account the circumstances and the terms of the contract;
- b. Take account of relevant matters;
- c. Ignore irrelevant matters; and
- d. Avoid a result so outrageous that no reasonable decision maker could have reached it.

226. The process must be consistent with the parameters of Condition D4.6. The Panel reminds itself of the observations of the ORR in its decision on appeal in references

TTP1706/TTP1708 that the decision maker must be properly informed when exercising the Decision Criteria.

227. Where a decision-maker is required to take account of a range of considerations then, in the absence of any guidance to the contrary, it is a matter for the decision maker to decide how much weight should be attached to each of those considerations, provided that the amount of weight attached is reasonable.
228. In addition, there should be evidence to support the decision and to demonstrate that the relevant opinion was held at the relevant time. The evidence required will vary from case to case and the level of detail required will also vary from case to case, depending on the importance of the decision, and the speed with which the decision must be made. The material time is the time at which the decision is taken.
229. I remind myself that establishing that a decision is irrational is a 'high hurdle'.
230. In its appeal in connection with the reference in HAL/TTP003, the ORR did not identify any errors in this summary of the relevant legal provisions set out above.
231. The starting point is the decision: this is a decision about a Week 11 timetable offer for Sunday 11 June 2023. I bear in mind that the evidence required will vary from case to case – in my view the evidence base required to justify a single day disruptive possession may be less full than for the NWT, for example.
232. The Panel heard extensive submissions from the Parties. It was essentially common ground that it was reasonable for NR to attribute most weight to Conditions D4.6.2 (b) that the spread of services reflects demand; and (c) maintaining and improving train service performance. In my view this is not unreasonable in circumstances where a disruptive possession has in view time-limited access and, as such, it is reasonable that it would weigh more in the balance than Condition D4.6.2(a) (maintaining, developing and improving the capability of the Network). It was common ground that it was reasonable for this Consideration – (a) - to have a low weighting.
233. From HEOC's perspective, there are two headline concerns, first the fact that there may be potentially more capacity available both as a result of the shortened possession footprint and, it contends, in the event that services were not required to stop at intermediate stations such as AML.
234. From the evidence provided, it is my view reasonable that NR did not opt to offer a reduced number of train paths to GWR below 6.5tph. Accordingly, it follows that any reduction in train paths would need to reduce either/or the paths offered to HEOC or MTR.
235. I have considered carefully whether NR has discharged its duty to be properly informed and I pay careful regard to the weaknesses in the data which I set out above. I accept that demand and forecast data is material to NR's assessment of these Conditions. In my view, for the single Week 11 possession which is in view here, NR has on balance discharged its duty. I note, in particular, that its methodology has sought data up to 2026. As I have set out above, I do not consider that this is a reasonable approach when the possession is limited to 2023.
236. However, against that I weigh in the balance the reality that NR has sought data across the years 2023 to 2026. The weaknesses in the data do not, on the evidence available,

override several countervailing circumstances, including the facts that a) MTR is forecast to have significantly higher raw passenger numbers than HEOC (and as a result is moving more people) and b) whichever way the figures are considered, has a higher carrying capacity (whatever approach is used to the number of standing passengers), and it follows has the ability to move more displaced / excess passengers as a result of there being an overall reduction in capacity. This conclusion derives support from the data in New document 6 which, I understand, GWR and MTR agree and which is said to be broadly consistent with data from RailPlan.

237. I also bear in mind that the evidence does suggest that there is demand for the service at intermediate stations between London Paddington and Heathrow Airport but, for the reasons set out above, I cannot form a view on numbers as a result of the data available to me.

238. As set out above, the Panel heard for the first time evidence from NR that it had, in error, validated capacity at 16pth. The question is whether NR could make a properly informed decision to offer 16tph. I accept that this offer was made in error, and that no performance data will be available until June. As discussed during the hearing, I would encourage NR to performance assess both the CTP and the Offer made in order to reach a properly informed view on capacity for future possessions. I accept the argument that NR has focused on 14.5tph and has not shown what else may be possible but that is because the data is not (yet) available.

239. I also note HEOC's view that there may be a case for increasing capacity in order to offset potential safety concerns about overcrowding. From the perspective of a longer-term view I would expect NR to produce data to support its view (I note that its view was supported orally by MTR, but I note that MTR is not disinterested). However, in my view, given the limited nature of this possession there are particular countervailing considerations, which it is appropriate for NR to weigh in the balance as at the time of its decision:

- (1) The unchallenged evidence that NR is currently subject to the regulatory escalator in connection with its performance.
- (2) Evidence which shows that HEOC has recently complained about Network performance. This is supportive of NR's concerns about performance with its present assessment of capacity (though I accept that HEOC's concerns did not arise from a 2TT possession such as this).
- (3) In the circumstances, however, I consider that it is reasonable for NR to await performance data in June before undertaking a further assessment of capacity. I note this, because I understand that it is now HEOC's position that rather than substituting them for another TOC in respect of some train paths, they contend that NR should make an offer framed around greater capacity.
- (4) Using the data provided by HEOC in November 2022 it is possible to calculate loadings based on the figure of 1,200 for an MTREL service (albeit that there remains a question about how to take into account luggage, which would reasonably reduce that figure).
- (5) Using (1), the updated figures from HEOC, (2) an assumed load of 1,200 for MTR at the busy hour selected (in my view reasonably), and (3) giving HEX 4ph, would lead to the following loading figures:

- (a) In the Up Direction a load factor of 30.4% for HEx against 41.8% for EL Reading and 48.9% for EL Heathrow;
- (b) In the Down Direction, a load factor of 41.4% for HEx, against 88.9% for EL Heathrow and 31% for EL Reading.

240. In other words, even working from HEOC's preferred assumptions leads to an inconsistent result and, for the reasons which I set out above, the outcome is likely to be even less clear cut (and less clearly favourable to HEOC's case) because of the challenges which the data pose. I do not consider that HEOC's proposed approach taken in comparison with MTR services is reasonable, which is a factor to which I consider that I am entitled to bear in mind when assessing the data. Standing back, in my view it is not unreasonable for NR to opt to prioritise the trains with the highest overall loading capacity, as a fail-safe that if there were issues loading HEOC services, those passengers could be moved onto MTR services. It would not be possible to move the same quantum of passengers from an overcrowded MTR service to a HEOC service, and in any event this would not take into the issues raised in the hearing about overcrowding on Paddington above-ground platforms being safer to manage than overcrowding on the low-level island platform. Whilst a matter of judgement, in my view such a view is reasonable.

241. As to Condition D4.6.2(d), in my view it was reasonable for NR to assess this as relevant, and to assess it with a medium weighting. I note that HEOC did not consider this relevant, but it is not in my view unreasonable for NR to wish to consider the need for journey times to be as short as possible, though for this to yield to other Considerations such as ensuring that the spread of services meets demand. To this end, I note that HEOC framed its submissions around passenger experience, and its desire to offer a 15 minute service (though I note that this Consideration does not have in view passenger experience).

242. As to Condition D4.6.2(e) (maintaining and improving an integrated system of transport for passengers and goods), HEOC initially maintained the stance that this was not a relevant factor. NR assessed it as relevant and low weighted with which HEOC agreed on reflection. I consider that a reasonable decision maker would consider this as relevant, but not attribute the same weight to it as other factors. I note NR's unchallenged conclusion that the same number of passengers will be served under this proposal. NR agreed with the Panel's suggestion that providing more TOCs on the mainline is in one view less integrated, with a greater potential for connections to be missed and so forth. NR agreed and considered their approach was a reasoned approach looking at losing certain services out of the pattern, but thought this weighed less in the balance than other factors such as spread of services reflecting demand. I conclude that this is a reasonably informed assessment and it wasn't seriously challenged.

243. As to Condition D.4.6.2(f) (commercial interests), NR had assessed this as relevant and medium (in other words it did not disregard the commercial element). I agree with NR that this Consideration does not specifically refer to reputational matters, as HEOC had argued, but I agree with HEOC that reputation is a relevant factor from a commercial perspective. The relevance and weighting were common ground between the Parties.

244. There was no challenge that NR was not properly informed. The Panel challenged HEOC as to whether there was a reputational impact on HEOC specifically, rather than railways generally. HEOC did not provide any evidence of commercial damage (its observations whilst fair were anecdotal and not recent). HEOC accepted that "as a one off,

Week 11 is minimal” from which I infer that HEOC means that the commercial and reputational impact would be minimal), HEOC’s concern was with a 26 week possession strategy. With that in view, in the circumstances (this is a limited possession which would be advertised) I consider that NR reached a reasonable conclusion.

245. As to Consideration D4.6.2(i) NR assessed this Consideration as relevant but with a low weight. HEOC did not regard this Consideration as “that relevant”. It argued that potentially passengers might not wait at London Paddington and might take a taxi but he said that the impact would be “very low”. HEOC accepted that because its train service had not been reduced before any comments on effect were speculative and accepted that by default if the HEx Service was not running, MTR would not be running either. In the circumstances I consider the NR’s assessment is reasonable.

246. As to Condition D4.6.2(j) both Parties assess this Consideration as relevant. NR weigh it as medium. HEOC weighs it as high. There was no real challenge to NR’s assessment that all TOCs would have similar fixed costs, and lower revenue from not running trains. HEOC accepted that there was no basis for concluding that it would be impacted disproportionately compared with any other TOC. Given that reality, in my view NR’s conclusion is reasonable in the circumstances.

247. I consider that it was reasonable for NR to adopt the stance that certain Considerations were not relevant, and note that this is a matter of common ground between the Parties.

248. Taken in the round, and stepping back, in all the circumstances of this possession, I consider on balance that NR was sufficiently informed, and has made a decision which is reasonable, and not arbitrary or capricious. I note that in its preparation of its application of the Decision Criteria NR directed itself properly to the Objective, and for the reasons discussed above I consider that their approach meets the Objective.

H Determination

249. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.

250. I have considered carefully the routes of disposal which are open to me under Condition D5.3.1.

251. At the conclusion of the hearing, I canvassed the question of disposal with the Parties. Neither Party considers that there are any exceptional circumstances in present. I reminded the Parties that this was a condition precedent before I could substitute my decision for the decision under challenge (see Condition D5.3.1(c)). This is relevant because during the hearing, HEOC had contended that it should be offered more train slots because capacity is (or may be) higher than 14.5tph. As I have set out above, in my view this is not an order open to me because it would require me to substitute my view for NR’s decision.

252. As I have sought to emphasise above, I am required to take a decision in relation to the limited possession which is in view (notwithstanding that I understand HEOCs interest in future possessions).

253. In different circumstances (for example for a longer term possession), as a result of some of the challenges in the data outlined above, I may have been minded to give general direction to NR to achieve a result which took into account further studies on capacity (in

accordance with Condition D5.3.1(a), in light of the evidence heard at the hearing. But, because of the circumstances of this reference, not least the fact that the timetable has been uploaded and tickets are on sale, such that NR cannot realistically take such further steps I consider that the challenged decision should stand.

254. No application was made for costs.

255. 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.

A handwritten signature in black ink, appearing to read 'Paul Stevenson', with a long horizontal stroke extending to the right.

Paul Stevenson
Hearing Chair
24 May 2023

Annexes

Annex A: Additional documentary evidence provided

Provided in a separate zipped folder, comprising:

Title	Description
New document 1	NR letter to Sophie Chapman dated 27 April 2022
New document 2	Email from HEOC to NR dated 22 August 2022
New document 3	Powerpoint Sunday TT consultation document from October 2022
New document 4	Andy Derbyshire email of 01 November 2022 with additional HEOC data. Not published. (See para 205.)
New document 5	Powerpoint Sunday TT consultation document from August 2022
New document 6	Confidential commercial document from NR dated 15 March 2023. Not published. (See para 205.)

Annex B: Relevant extracts from the Network Code

2.2 Revision of Timetable Planning Rules and Engineering Access Statement – D-64 to D-44

2.2.1 Both the Timetable Planning Rules and the Engineering Access Statement (together referred to as “the Rules”) are revised on a bi-annual basis, each revised version being operative for the same Timetable Period as the Working Timetable to which they pertain. The Rules must be revised and updated, in accordance with the procedures described in this Condition D2.2, as a first stage in the preparation of a New Working Timetable.

2.2.1 A The Rules shall permit the operation of International Freight Train Slots included in the applicable International Freight Capacity Notice.

2.2.2 Between D-64 and D-60, Network Rail shall consult with Timetable Participants in respect of any proposed changes to the Rules.

2.2.3 Following consultation in accordance with Condition D2.2.2, and not later than D-59, Network Rail shall provide to all Timetable Participants a draft of the revised Rules (the “Draft Rules”).

2.2.4 Following distribution of the Draft Rules and by D-54 Timetable Participants may make representations to Network Rail in respect of any changes they propose or objections they may have to the Draft Rules provided to them in accordance with Condition D2.2.3.

- 2.2.5 Following D-54 and by D-44, Network Rail shall consider the representations and objections made to it by Timetable Participants pursuant to Condition D2.2.4 and any changes to International Freight Train Slots reflected in the applicable International Freight Capacity Notice and may amend the Draft Rules. Not later than D-44, Network Rail shall issue the final revised Rules to all Timetable Participants.
- 2.2.6 In preparing revised Rules, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.1 and to provide to Timetable Participants its reasons for making the revisions to the Rules.
- 2.2.7 Between D-44 and publication of the New Working Timetable at D-26, Network Rail may further revise the Rules where it considers, acting reasonably, such revision necessary or desirable in order to optimise that New Working Timetable. Before making any such further revisions to the Rules, Network Rail must first consult with all Timetable Participants who may be affected by the proposed changes. Network Rail will then inform all affected Timetable Participants of any such changes as soon as practicable after they are made. The amending power created by this Condition D2.2.7 is without prejudice to the amending power referred to in Condition D3.4.
- 2.2.8 Subject to Condition D2.2.9 below, any Timetable Participant dissatisfied with any decision of Network Rail in respect of those Rules (including any decision to revise those Rules pursuant to Condition D2.2.7) is entitled to appeal against any part of it. Any such appeal shall be conducted in accordance with Condition D5 and must be made by a Timetable Participant:
- (a) in respect of any decision to revise the Rules pursuant to Condition D2.2.7, within five Working Days of receipt of Network Rail's decision;
 - (b) otherwise within fifteen Working Days of receipt of Network Rail's decision.
- 2.2.9 No appeal may be brought pursuant to Condition D2.2.8 in respect of any part of the Rules which conforms with any Possessions Strategy Notice which has:
- (a) not been appealed in the timeframe for appeal set out in Condition D6.4.1; or
 - (b) has been appealed but has been finally determined by a timetabling Panel or the Office of Rail and Road.

3.4 Network Rail Variations with at least 12 Weeks Notice

- 3.4.1 The procedures described in this Condition D3.4 are designed to facilitate the planning of Network Rail Restrictions of Use at least 12 weeks prior to the start of each Timetable Week.
- 3.4.2 Network Rail shall be entitled to make a variation to the Working Timetable provided that:
- (a) the Network Rail Variation is made only for the purpose of taking Restrictions of Use which are consistent with the Rules, as published following the process set out in Condition D2.2 or as amended in accordance with the procedure established pursuant to Condition D3.4.3; and
 - (b) Network Rail complies with the procedure set out in this Condition D3.4.
- 3.4.3 Network Rail shall include in the Rules a procedure to enable amendment of the Rules, following their finalisation in accordance with Condition D2.2. This amending power is without prejudice to the amending power referred to in Condition D2.2.7, and is to be utilised in order to facilitate changes which Network Rail considers necessary to take Restrictions of Use.
- 3.4.4 The procedure referred to in Condition D3.4.3:
- (a) must require that no amendment to the Rules may be made unless Network Rail has consulted with all Timetable Participants likely to be affected by the amendment;

- (b) must require that all decisions of Network Rail be made by application of the Decision Criteria in accordance with Condition D4.6;
 - (c) may authorise changes to the procedure.
- 3.4.5 All amendments to the Rules made pursuant to the procedure referred to in Condition D3.4.3 shall be subject to the appeal procedures in Condition D5 as if they were made pursuant to a procedure set out in this Part D.
- 3.4.6 Notwithstanding anything stated elsewhere in this Part D, where any amendment is made to the procedure referred to in Condition D3.4.3 by use of that procedure, the amendment shall not take effect until the determination of any appeal against the same.
- 3.4.7 Where Network Rail proposes to make any variation to the Working Timetable consequent upon an amendment to the Rules made in accordance with this Condition D3.4, Network Rail shall provide to each Timetable Participant, by TW-30, its proposals for Restrictions of Use in respect of the corresponding Timetable Week. All such proposals may be amended or supplemented by Network Rail at any time prior to TW-26 and such amendments or supplements should also be provided to Timetable Participants prior to TW-26.
- 3.4.8 After TW-30 but by TW-26, Network Rail shall consult with each Timetable Participant affected (directly or indirectly) by the Restrictions of Use proposed pursuant to Condition D3.4.7 and shall seek to agree all Network Rail Variations to be made.
- 3.4.9 To facilitate the planning of any Network Rail Variation, Network Rail may require that any Timetable Participant shall submit a revised Access Proposal in respect of any Train Slot.
- 3.4.10 Where Network Rail requires a revised Access Proposal:
 - (a) the requirement must be notified to the affected Timetable Participant no later than TW-22;
 - (b) Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reasons for this;

- (c) Network Rail shall specify a reasonable period in which the revised Access Proposal must be provided, and in any event the revised Access Proposal shall be submitted no later than TW-18.

3.4.11 Network Rail may modify, accept or reject a revised Access Proposal and where it modifies or rejects any revised Access Proposal, it must provide written reasons for its decision.

3.4.12 Where a revised Access Proposal has not been submitted by a Timetable Participant as required by Network Rail, Network Rail shall be entitled to make a Network Rail Variation of any Train Slot in respect of which the revised Access Proposal was required and no appeal may be made in respect of Network Rail's decision.

3.4.13 Not later than TW-14, Network Rail shall notify all Timetable Participants of its decision in respect of Network Rail Variations to be made pursuant to the procedure in this Condition D3.4.

3.4.14 Not later than TW-13, any Timetable Participant affected by Network Rail's decision notified pursuant to Condition D3.4.13 shall inform Network Rail whether it accepts or disputes that decision.

3.4.15 At TW-12, Network Rail shall record and provide to all Timetable Participants, in accordance with Condition D3.7.1, the Network Rail Variations to be made pursuant to this Condition D3.4.

3.4.16 Subject as provided in Condition D3.4.12, any Timetable Participant which is dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation may appeal against it in accordance with Condition D5.

4.4 Decisions concerning Network Rail Variations

4.4.1 In making any decision in the course of implementing the procedures set out in Conditions D3.4 or D3.5, Network Rail:

- (a) is entitled to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10;
- (b) may not effect any Network Rail Variation to the extent that the variation is inconsistent with the Rules;
- (c) shall, subject to the over-riding principles set out in sub-paragraphs (a) and (b) above, apply the Decision Criteria in accordance with Condition D4.6.

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)-(l) 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) the content of any relevant Long Term Plan and any relevant Development Timetable produced by an Event Steering Group;
- (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;
- (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 Capacity to which the Strategic Train Slot relates; and
- (l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.

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 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 C: Train loadings by operator, in different scenarios using data supplied during the hearing

1. NR REPORT									
Up direction 1700 to 1800									
Operator	Pax No	Pax Split	Carrying capacity	Route capacity	Allocation split	Trains allocated	Pax per train	Load factor	
GWR fast	4458	62.9%	650	14.5	9.1	6.5	686	105.5%	
EL Reading	1003	14.1%	450	14.5	2.1	2	502	111.4%	
EL Heathrow	1173	16.5%	450	14.5	2.4	2	587	130.3%	
HEX	455	6.4%	374	14.5	0.9	4	114	30.4%	
Total	7089	100.0%			14.5	14.5			
Down direction 1600 to 1700									
Operator	Pax No	Pax Split	Carrying capacity	Route capacity	Allocation split	Trains allocated	Pax per train	Load factor	
GWR fast	3622	50.9%	650	14.5	7.4	6.5	557	85.7%	
EL Reading	744	10.5%	450	14.5	1.5	2	372	82.7%	
EL Heathrow	2133	30.0%	450	14.5	4.3	2	1067	237.0%	
HEX	619	8.7%	374	14.5	1.3	4	155	41.4%	
Total	7118	100.0%							

Table 1: Train loading table taken from New document 6, which is an updated version of a table published in New document 5 (this table was used in NR’s decision for Week 11 and shows estimated load factors for a pre-May 2023 capacity allocation). See para 221(4).

2. NR REPORT ADJUSTED FOR MTR CAPACITY									
Up direction 1700 to 1800									
Operator	Pax No	Pax Split	Carrying capacity	Route capacity	Allocation split	Trains allocated	Pax per train	Load factor	
GWR fast	4458	62.9%	650	14.5	9.1	6.5	686	105.5%	
EL Reading	1003	14.1%	1200	14.5	2.1	2	502	41.8%	
EL Heathrow	1173	16.5%	1200	14.5	2.4	2	587	48.9%	
HEX	455	6.4%	374	14.5	0.9	4	114	30.4%	
Total	7089	100.0%							
Down direction 1600 to 1700									
Operator	Pax No	Pax Split	Carrying capacity	Route capacity	Allocation split	Trains allocated	Pax per train	Load factor	
GWR fast	3622	50.9%	650	14.5	7.4	6.5	557	85.7%	
EL Reading	744	10.5%	1200	14.5	1.5	2	372	31.0%	
EL Heathrow	2133	30.0%	1200	14.5	4.3	2	1067	88.9%	
HEX	619	8.7%	374	14.5	1.3	4	155	41.4%	
Total	7118	100.0%							

Table 2: Table 1 updated to include MTR capacity as submitted by HEOC (see paras 171-174, 239)

3. NR REPORT ADJUSTED FOR MTR CAPACITY & WK 11 ALLOCATION

Up direction 1700 to 1800									
Operator	Pax No	Pax Split	Carrying capacity	Route capacity	Allocation split	Trains allocated	Pax per train	Load factor	
GWR fast	4458	62.9%	650	14.5	9.1	6.5	686	105.5%	
EL Reading	1003	14.1%	1200	14.5	2.1	2	502	41.8%	
EL Heathrow	1173	16.5%	1200	14.5	2.4	4	293	24.4%	
HEX	455	6.4%	374	14.5	0.9	2	228	60.8%	
Total	7089	100.0%			14.5	14.5			
Down direction 1600 to 1700									
Operator	Pax No	Pax Split	Carrying capacity	Route capacity	Allocation split	Trains allocated	Pax per train	Load factor	
GWR fast	3622	50.9%	650	14.5	7.4	6.5	557	85.7%	
EL Reading	744	10.5%	1200	14.5	1.5	2	372	31.0%	
EL Heathrow	2133	30.0%	1200	14.5	4.3	4	533	44.4%	
HEX	619	8.7%	374	14.5	1.3	2	310	82.8%	
Total	7118	100.0%							

Table 3: Table 1 updated to include MTR capacity, as submitted by HEOC (see paras 171-174, 239) and Week 11 allocation

4. NR REPORT ADJUSTED FOR MTR CAPACITY, WK 11 ALLOCATION & 01 NOV NUMBERS

Up direction 1700 to 1800									
Operator	Pax No	Pax Split	Carrying capacity	Route capacity	Allocation split	Trains allocated	Pax per train	Load factor	
GWR fast	4458	63.4%	650	14.5	9.2	6.5	686	105.5%	
EL Reading	1003	14.3%	1200	14.5	2.1	2	502	41.8%	
EL Heathrow	1173	16.7%	1200	14.5	2.4	4	293	24.4%	
HEX	401	5.7%	374	14.5	0.8	2	201	53.6%	
Total	7035	100.0%			14.5	14.5			
Down direction 1600 to 1700									
Operator	Pax No	Pax Split	Carrying capacity	Route capacity	Allocation split	Trains allocated	Pax per train	Load factor	
GWR fast	3622	51.0%	650	14.5	7.4	6.5	557	85.7%	
EL Reading	744	10.5%	1200	14.5	1.5	2	372	31.0%	
EL Heathrow	2133	30.1%	1200	14.5	4.4	4	533	44.4%	
HEX	597	8.4%	374	14.5	1.2	2	299	79.8%	
Total	7096	100.0%							

Table 4: Table 3 updated to include HEOC numbers from New document 4 (see para 205)