
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute references TTP2517 and TTP2521
(following a hearing held in London, on 04 November 2024)

The Panel:

Paul Stevenson Hearing Chair

Members appointed from the Timetabling Pool

Peter Warhurst elected representative for Franchised Passenger Class, Band 2
Richard Parsons appointed representative of Network Rail

The Disputes Parties:

First Greater Western (“GWR”)

Matt Cambourne Head of Train Planning
Rob Holder Network Access Manager
Justin Kerr-Peterson Senior Strategy Interface Manager
Tom Bubb Strategy Interface Manager
Jake Sprules Senior Commercial Insights Analyst

Network Rail Infrastructure Limited (“NR”)

Tony Worgan Route Access Strategy Manager
Richard Turner Customer Relationships Executive
Adam Hodgson Policy Advisor
Nick Drake-Wilkes Timetable Project Manager
Marco Taylor Strategic Planner
Ben Perfitt Access Planning Manager (*attending virtually*)

MTR Corporation (Crossrail) Ltd. (“MTREL”)

James Linley Head of Performance and Planning

Involved Parties:

Heathrow Express Operating Company Ltd. (“HEOC”)

Paul Fowler Project Manager Planning & Access

Heathrow Airport Ltd.

Unable to attend

In attendance:

Tamzin Cloke Committee Secretary (“Secretary”)

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A Background and Jurisdiction

1. Dispute TTP2517 was raised by GWR by service of a Notice of Dispute on 24 September 2024 in respect of NR's decisions in relation to a capacity study for Easter 2025 on the Western Route. The dispute was brought on the basis that GWR disagreed with the decision due to the impact on its business and its view that, consequently, NR had failed to appropriately apply the Decision Criteria in making its Decision. GWR concurrently requested that the hearing be expedited so as not to impact Informed Traveller timescales.
2. GWR further informally advised the Secretary that it would be issuing a second Notice of Dispute in relation to NR's decisions in the relevant Confirmed Period Possession Plan (Weeks 01 to 04) for Easter 2025. This Dispute was raised on 02 October 2024, and joined with TTP2517 by an order from the Allocation Chair made under ADR Rule B21 on 07 October 2024.
3. GWR's dispute relates to the allocation of capacity for an engineering possession during the Easter 2025 period (Friday 18 April 2025 to Monday 21 April 2025), exclusive of Sunday 20 April where the capacity allocation was accepted.
4. From hereon the decisions are referred to as "the dispute decisions".
5. In its SRD (as clarified following my fourth directions) GWR explained that its disputes were brought forward under Condition D2.2.14 of the Network Code.
6. Neither NR nor MTREL (following MTREL joining as a Dispute Party - see paragraph 14) disputed GWR's right to bring forward this dispute.
7. GWR "reluctantly" accepted NR's proposal for the Restriction of Use. MTREL accepted that the possession was sought to undertake track and associated renewals at Acton East Junction, alongside HS2-related works at Old Oak Common.
8. I was appointed as Hearing Chair on 26 September 2024 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.
9. I have noted that NR has not yet offered the Timetable back to Timetable Participants and I note that in previous disputes (TTP2453, TTP2454, TTP2455, TTP2456) NR had argued that no formal decisions had been issued. At the hearing I sought clarification whether the Disputes Parties wished me to follow the approach taken by Hearing Chair John Hewitt in those earlier disputes, i.e. to proceed on the basis that it would be pragmatic and mutually beneficial to them for the issues to be determined sooner rather than later, and all three Disputes Parties confirmed that they wished the hearing to proceed on the basis that NR had made relevant decisions within the meaning of Part D. Echoing John Hewitt's observation in those previous disputes, I adopt that course without considering the point fully and it remains open for determination on another occasion if and when it is raised or it becomes a matter in issue.
10. In my consideration of the Parties' submissions and my hearing of the Disputes, I was mindful that, as provided for in ADR Rule A5, I should "reach [my] determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

11. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 11 and as otherwise defined in this determination document:

“2TT”	means a two-track timetable.
“ADR Rules”	mean the Access Dispute Resolution Rules and “Rule” is construed accordingly
“AP”	means advance purchase train tickets
“CCOS”	means Crossrail Central Operating Section
“Chapter H”	means Chapter H of the ADR Rules
“Decision Criteria”	means Network Code Condition D4.6 and “Consideration” has the meaning given in Condition D4.6.2
“DfT”	means Department for Transport
“EAS”	means Engineering Access Statement
“ECS”	means Empty Coaching Stock
“GWML”	means Great Western Main Line
“IET”	means Intercity Express Train
“LNER”	means London North Eastern Railway
“LTV”	means London Thames Valley
“Part D”	means Part D of the Network Code
“PPM”	means Public Performance Measure
“Previous Disputes”	has the meaning given in paragraph 30
“RoU”	means Restriction of Use
“SRD”	means Sole Reference Document
“SWR”	means South Western Railway
“TOC”	means Train Operating Company
“tph”	means trains per hour
“TPR”	means Timetable Planning Rules and “Rules” is construed accordingly
“Train Slot”	has the meaning given in Part D
“TTP”	means Timetabling Panel
“WCML”	means West Coast Main Line
“WTT”	means Working Timetable

B History of this dispute process and documents submitted

12. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide SRDs. The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential Involved Parties by the Dispute Parties.
13. On 22 October 2024 GWR served its SRD, in accordance with the dispute timetable as issued by the Secretary.
14. On 24 October 2024 MTREL, which had previously declared itself to be an Involved Party on 24 September 2024 and having reviewed GWR's submission, declared itself to be a Dispute Party. MTREL wished to make submissions in support of the disputed decisions. MTREL requested, and was granted, a 24-hour extension to its submission deadline, which would otherwise have been the same as NR's.
15. On 29 October 2024, NR served its SRD in accordance with the dispute timetable as issued by the Secretary.
16. On 30 October 2024, MTREL served its SRD in accordance with the revised dispute timetable as issued by the Secretary.
17. Heathrow Airport Ltd. and Heathrow Express Operating Company Ltd. declared themselves to be Involved Parties. Only the latter was represented at the hearing.
18. On 01 November 2024 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that the relevant issues of law, were:
 - a. Whether the provisions of Part D entitle NR to limit capacity as a consequence of a possession (in this case the number of tph) provided those decisions are justified by reference to the application of the Decision Criteria as specified in Condition D4.6;
 - b. Whether NR, as a contractual fact-finder, acted reasonably in making the dispute decisions;
 - c. Whether, and to what extent, NR took into account the Objective, as defined in Condition D 4.6.1, in making the dispute decisions;
 - d. Whether in its application of the Decision Criteria, NR erred in law;
 - e. Whether the remedies the Parties seek are available to a Hearing Chair under Condition D5.3.1 and Rule H50 of the ADRR, and in particular, whether Condition D5.3.1(c) is engaged; and
 - f. If Condition D5.3.1(c) is engaged should the Hearing Chair substitute an alternative decision in place of the dispute decisions and, if so, what should that be.
19. The hearing took place on 04 November 2024. 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 Involved Parties were given the opportunity to raise points of concern.
20. I confirm that the Panel had read all of the papers submitted by the Disputes 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. I noted that in its Appendix A NR had

submitted a number of emails embedded in other documents. NR's representative confirmed that the data set out there appeared in aggregate form in other documents before the Panel. I asked NR to point the Panel to anything in particular in those emails which NR wished us to take into consideration.

21. During the course of the hearing, and in response to my fourth directions, GWR provided a document which outlined the capacity for its rolling stock as agreed with the DfT. Importantly, this document showed agreed standing as well as seated capacity. GWR shared this document with the other Disputes Parties. I direct that this document should stand as Appendix 7 to GWR's SRD and that its circulation should be limited to the Panel and the other Disputes Parties.

C Outcomes sought by the Dispute Parties

22. In its SRD, GWR requested I determine that:

- a. NR's decision concerning the number of GWR services to be timetabled was wrong in certain hours, in certain directions on certain days; and specifically that,
- b. NR be instructed to change its decision for the hours, directions and days outlined in GWR's SRD paragraph 5.6. In those hours, GWR asked that NR's decision be replaced with one that permitted GWR to run more services, either through reducing other operators' services or by raising NR's overall cap above 14.5tph. In those hours GWR asked me to direct that it should run 8tph, regardless of whether that was via reducing other services or running more than 14.5tph.

23. The request in paragraph 22(b) above required a finding of exceptional circumstances under Condition D5.3.1(c). GWR stated exceptional circumstances applied due to the related RoU being of exceptional type and effect. GWR contended that RoUs of this duration and effect were usually taken between Christmas and New Year, when passenger demand is substantially reduced. During Easter 2025 GWR was anticipating exceptional demand for long distance journeys on Maundy Thursday (unaffected by the RoU), Good Friday, Easter Saturday and Easter Monday.

24. If that could not be done, in its opening statement GWR asked at least a direction that NR should re-consider its decision. I note that this did not form part of the request in its SRD.

25. NR asked me to determine that it has the capability and entitlement under Network Code Part D to decide to limit capacity (in this instance the number of tph) provided those decisions are justified by reference to the application of the Decision Criteria, based on the information available to NR at the time. NR contended this was in line with previous TTP determinations on this subject matter. NR also sought confirmation that its allocation of available capacity was justified by reference to the application of the Decision Criteria, based on the information available to it at the time.

26. NR did not believe that exceptional circumstances applied, and asked me to find the same.

27. MTREL sought the same decision as NR, with identical wording, including in relation to exceptional circumstances.

D Relevant provisions of the Network Code and other documents

28. The versions of the Network Code Part D and the ADR Rules dated 05 August 2024 were applicable to these dispute proceedings.
29. Conditions A1.1, D3.4.3, D3.4.4, D3.5, and D4.6 are particularly relevant and are appended in Annex A.

E Submissions by the Dispute Parties

30. As I had identified in my first directions in terms of the issues, the dispute decisions raise prima facie very similar questions to those considered in previous determinations, particularly TTP2243, TTP2244, TTP2246, TTP2260, and elements of TTP2251, TTP2453, TTP2454, TTP2455, and TTP2456 (“the Previous Disputes”). The submissions of the Disputes Parties are summarised below.

GWR

31. GWR disputes NR’s decision to limit the number of trains which it will timetable during the RoU, and the decision to limit the spread of train paths to specific TOCs during the possession.
32. GWR contends that on its view the application of the Objective (see Condition D4.6.1) and the evaluation of the Decision Criteria lead to the conclusion that at certain times on certain days it is essential to timetable more GWR trains than NR has allowed.
33. In particular, GWR submits that in its application of the balancing exercise under the Objective and the Decision Criteria NR has placed too much weight on performance and too little weight to meeting passenger demand.
34. GWR argues strongly that NR’s decisions will severely damage GWR customer journeys, net industry viability, and GWR industry reputation. It argues that the decision to limit capacity as proposed will cause denied boarding at key locations, and risks causing an increased incidence of customer accidents, particularly slips, trips, and falls (it is said that there is a correlation between accidents and crowding). GWR says that it supports remedial action to restore overall punctuality but argues that “tinkering at four days in the year will have minimal effect”.
35. GWR points to NR’s analysis of Easter 2024 passenger demand data. That analysis shows that over the whole Easter 2024 weekend there are six time periods in the Westbound/Down direction and thirteen in the Eastbound/Up direction where demand for services exceeds a level of capacity which a 2TT can be sustained at 14.5tph. That data shows that at its peak on Easter Saturday in the Eastbound/Up direction the demand would require 19tph, and on Easter Monday in the same direction, demand would require 20tph.
36. GWR submits that in certain hours in one direction or the other there is scope to reduce the number of trains of other TOCs, and says that NR has not discharged its responsibilities to create space within the overall cap on train paths. It argues for 8tph to be allocated to GWR, by either reducing other TOCs’ services, or increasing the overall cap on services.
37. GWR argues that NR’s decision is inconsistent with the decision taken in connection with Maundy Thursday where, it is said, because there is no RoU NR has accepted an increased number of GWR trains, compared to the WTT, in order to enable the demand to be moved.

38. GWR submits that exceptional circumstances arise under Condition D5.3.1(c). GWR clarified its position in response to my first directions, when it said as follows:

“This is a unique circumstance, the restriction of use applies for a much longer time continuously, the demand pattern is different thus is the opportunity and the risk, the data available at the time of decision was of a different calibre from before; the restriction of use is different thus the number of stations able to be served is different; the ability exists for performance to be enhanced. Fundamentally this dispute does not involve a Sunday or a package of Sundays which subject was the specific element of dispute in the other referral.”

NR

39. NR notes the similarity of the dispute decisions with the Previous Disputes.
40. NR submits that GWR has not disputed the validity or justification for the possession itself, nor the dating of the possession.
41. In essence, NR argues that there are two issues in play. First, there is the question of the holistic capacity of the 2TT being implemented. NR submits that the maximum number of trains that can be run to ensure a robust timetable is 14.5tph. It says that in the previous disputes GWR argued that that the allocation should be 15.5tph. NR notes that the Previous Disputes had in view a possession of the main lines between Ladbroke Grove and Acton West where the possession length was approximately three miles. The dispute decisions have in view a possession of the relief lines between Ladbroke Grove and Southall, where the 2TT requires a possession over approximately seven miles between Ladbroke Grove and Southall West. NR says that as has been the case in the Previous Disputes there are capacity constraints at Portobello Junction where services join and leave the GWML for the CCOS, and on the Heathrow Airport Branch, but in this case there are two station stops to manage, at Ealing Broadway and Southall. NR says that 14.5tph is an “historic high” for the quantum of services operated through the area of the possession during a 2TT, and says that capacity allocations were increased a few years ago following the introduction of fully electric trains.
42. NR submits that GWR has asked to run up to 16tph in certain hours regardless of the effect on performance, prioritising capacity in their (GWR's) favour. It says that GWR has not yet offered information which shows how a TPR compliant timetable could be constructed on that basis.
43. Secondly, NR contends that GWR argues that, even if the overall capacity in terms of the number of train paths cannot be increased, the distribution of train paths should be amended in GWR's favour by removing one or more services from MTREL, reducing the number of serves which MTREL could operate to either four or five.
44. NR makes a number of broader points which have a bearing on the application of the Decision Criteria and the interpretation of Part D
- (1) It contends that, in overview, Part D provides the industry with clear processes to build and amend a timetable, taking into account where required the application of the Decision Criteria. It says that when it is asked to add train paths into a timetable, it will assess the information available at the time. It says that GWR had not provided a

timetable bid based on a 16tph timetable at the relevant time. NR disputes that it has ignored data; it said that it has undertaken a “delicately balanced nuanced” assessment and that its decisions are not unreasonable ones based on the information available. It argues that all TOCs would likely wish to run more services, and often more than the train paths available, i.e. an allocation of paths often requires a balancing exercise.

- (2) From the perspective of performance, NR states that its objective is to seek to stabilise performance given the historic poor performance of the 2TT. With that in view, NR contends that an increase in train paths above 14.5tph is not palatable. It points out that the Wales and Western Region is listed on the ORR’s regulatory escalator for performance, and that as a result of an ORR investigation into Wales and Western performance in contravention of licence condition 1, the Region is required to take steps to “*secure the operation and maintenance of the network in accordance with best practice to meet the reasonable requirements of persons providing services relating to railways in respect of the facilitation of railway service performance to the greatest extent reasonably practicable*”. It says that creating or accepting a poorly performing timetable is not an acceptable outcome for any Timetable Participant, nor acceptable to NR in view of the ORR’s finding as set out above.
 - (3) NR addressed its position on the need for the spread of services to reflect demand. NR does not dispute that the data exercise which commenced in March 2024 shows that there are certain times across the Easter weekend when passenger demand exceeds the number of seats available. It does not dispute the data. NR says that it recognises that there is a trade-off between performance and the need to meet passenger demand, and NR is of the view that 14.5tph best delivers the Objective on the facts of the dispute decisions. In particular, NR says that it must consider the requirements of all Timetable Participants across the whole of the affected period.
 - (4) As to safety (as a consequence of an impact on performance) NR says that it must consider the safety implications within inner London deep level sections, notably the potential for queues to develop on the platforms within those stations which may be affected beyond Paddington onto the GWML which may affect performance on the Elizabeth Line, with potential knock-on effects across the Anglia Route. NR also says that it is not normally possible to remove one service in one direction from a timetable.
 - (5) As to commercial impact, NR says GWR has not quantified the extent of damage to its business or other TOCs as a result of reallocating train paths. It says that the Decision Criteria do not have “reputation” in view as a particular consideration.
45. NR refers to a number of strategies to manage demand which it says are “very regularly” used to deal with such matters, such as the “absolute backstop” of a “do not travel” message. NR says such a backstop is “absolutely nowhere near” being proposed. It also says that operators such as GWR use yield management processes to manage passenger numbers on longer distance routes. It is said that such a process can be used to direct passengers towards more lightly loaded services. It is said that such a process could be used to smooth loadings in the 12 one-hour slots identified. It is also argued that passengers from the North Cotswold and Oxford lines could be directed onto Chiltern Railway services in order to provide journey availability for all passengers and to protect overall industry income, though it recognises that there is commercial competition between relevant operators.

46. NR says that it has worked collaboratively over a year to develop a train plan, the outcome of which has been used to make the dispute decisions. It relies on the decision of the ORR in TTP1174: in summary it is contended that the provisions of the Network Code envisage circumstances in which NR may not achieve the Objective by including all requested Train Slots in the WTT, even where there were no conflicts with other proposals or the Rules. It is said that this might include the scenario where including all requested Train Slots would give rise to a clear and substantial safety or performance concern.
47. As to possible outcomes, NR contends that the circumstances of the possession do not constitute exceptional circumstances. It says that planned maintenance and upgrades are routine during holiday periods when passenger flows are lower. It says that scheduling typically seeks to minimise disruption to regular commuters, and extended periods over holidays are often used to undertake significant projects.
48. NR provides a number of appendices to which I will turn further below.

MTREL

49. MTREL does not dispute GWR's right to bring the dispute. It accepts that the context of the possession is as stated by GWR and NR.
50. MTREL is essentially supportive of NR's position. MTREL says that it recognises the constraints on capacity that result from a 2TT and the associated performance challenges. It agrees with NR's assessment that 14.5tph in each direction represents the maximum number of trains that can operate at a "reasonable level of reliability".
51. As to performance, MTREL says that it has worked with industry partners to improve performance during the operation of a 2TT and it points to a recent period (May 2024 to October 2024) during which it is said that it has not been possible to achieve an acceptable level of PPM or on-time performance even with 14.5tph. MTREL contends that on the performance data which is available the 2TT with 14.5tph in each direction is "fragile".
52. In support, MTREL relies on data relating to its Sunday on-time performance between May to October 2024. It is said that the 18 week period prior to the September 2024 iteration of the 2TT saw an average MTREL performance of 86.9% PPM but its on-time performance dropped to an average of 81.3%. MTREL says that its concession performance target is 95%. It says that it has seen a "significant" drop in PPM during periods of 2TT operation. It says that its overall average of 92.5% PPM between May and September 2024 reduced to 92% PPM during the current 2TT period despite "exhaustive" measures put in place to mitigate delays.
53. MTREL supports NR's position that there is a balance between performance, safety and capacity.
54. MTREL also addresses the question of the allocation between operators, and the impact on passenger safety. It relies on data from the ORR which it says forecasts passenger growth of 8% on the Elizabeth Line in 2024, even allowing for difficulties in collating accurate passenger data due to a recent cyber attack. It argues that there is no evidence to support GWR's suggestion that if the number of train paths were to remain at 14.5tph there should be a reduction in MTREL's frequency from 6tph to 5tph, or 4tph. It says that reducing train frequencies at certain times of the day is not practical from an operational, performance or safety perspective and would compromise its concession agreement. It is

said that increasing capacity in the Thames Valley corridor “may well” impact on contracted customer satisfaction scores and lead to associated penalties, which could damage the commercial interests of all operators.

55. MTREL also argues that there is no evidence that GWR can reliably operate the planned timetable, pointing to the fact that they continue to observe a “relatively high” volume of GWR cancellations due to what is said to be a lack of train crew.
56. MTREL argues that reducing Elizabeth Line service levels on the Western Route will have a knock-on impact on capacity through the CCOS and onto Anglia Route. It adds that there will be an increase in performance risk caused by detraining passengers, terminating, and reversing, MTREL services at London Paddington. It is also said that there may be an issue with overcrowding issues on remaining Elizabeth Line services, introducing an increased safety risk.
57. MTREL emphasises the potential safety risk from any potential reduction in service frequency capacity during the relevant RoU. It says that the Elizabeth Line has high passenger loadings at weekends and refers to sporting events such as West Ham United v. Southampton scheduled for Friday 18 April 2025, Tottenham Hotspur v. Nottingham Forest on Saturday 19 April 2025, and the Harlem Globetrotters at the O2 arena on Monday 21 April 2025.
58. Like NR, MTREL asks about other options such as enhancing the service on the SWR service between Reading and Waterloo, and suggests that GWR might optimise capacity during a 2TT by diagramming high density rolling stock formed of 9/10 car IETs and 8/12 car 387s.
59. MTREL adds that at a meeting with GWR on 16 October 2024 they (MTREL) agreed to discuss GWR’s proposal for varying capacity across the day; MTREL agreed to consider the GWR proposals but said that this would require a “robust” operational review, with a thorough assessment of current and future passenger loadings.
60. As to possible outcomes, MTREL does not accept that exceptional circumstances are present.

F Oral evidence at the hearing

61. The Panel was first keen to identify areas of common ground, and in particular an agreed chronology of events since the Previous Disputes. To that end, NR had provided a chronology (in fact two versions, one Appendix A which it said included commercially sensitive content, the other Appendix A1 which had been disclosed to the Disputes Parties). I understand that the main point of difference between the two is that A1 contained embedded email correspondence, but that the data appears in aggregate in other documents before the Panel.
62. For that reason, the Panel sought to confirm whether the sequence of events specified in Appendix A1 was accurate. Looking at Appendix A1 the Disputes Parties confirmed that it was materially accurate. There was some discussion about the quote that NR “firmly told operators they would not re-look at capacity” and whether the comment had been made by the scheme sponsor, who chaired the meeting, but it was common ground that NR had said that its approach would remain to work on the basis that capacity was 14.5tph.

63. There was no substantive challenge to the accuracy of that chronology. I noted that the chronology ended at 24 September 2024, and in its SRD MTREL had referred to a later meeting with GWR on 16 October 2024 at which it said that it had agreed to consider GWR's proposals about a variation of capacity across particular days, but had said that this would require a robust operational review. In response to questions, MTREL's representative confirmed that there had been discussions with GWR's Head of Interface including some WhatsApp messages about the proposal for Good Friday and he said that his view was that this was "very, very difficult, if not impossible, to do". He added that in his view this would require an operational plan, and he was not aware that there was any such work planned before Easter 2025.
64. I referred the Disputes Parties to the determinations in the Previous Disputes and the detail which was set out there. The Disputes Parties confirmed that they did not wish to depart from anything which they had said there; as such the material there is undisputed material which forms part of the background to the disputes decisions. In particular, it was common ground that Appendix C to NR's SRD is the 26 April 2024 report to which the Panel referred in the TTP2453 et al, at paragraph 37:
- "Historic evidence suggests that performance is poor irrespective whether capacity provided is 14.5, 15.5 or 16.5tph. NR picked up a suggestion made at the hearing TTP2243 et al. that it might be prudent to carry out a trial with trains at 15.5tph to test whether NR's concerns were well founded. This was duly carried out and a report on it dated 26 April 2024 is at HR SRD Appendix C....Unfortunately, on pretty much every Sunday under that review external factors had an adverse impact on performance which renders it difficult, if not impossible, to draft clear or reliable conclusions or set baselines for an 'average' Sunday."*
65. I then wished to clarify whether there was agreed passenger loading data. With its SRD GWR had provided Appendix 1 (NR's analysis of GWR demand), and Appendix 2 (NR's analysis of each TOC's separate demand).
66. With its SRD NR had provided Appendix B (passenger demand analysis, which it said was commercially sensitive), along with Appendices C and D showing 2TT performance analysis on the Western Route dated 26 April 2024, and associated commentary.
67. The Disputes Parties and HEOC, as an Involved Party, agreed that there was little substantive difference between GWR's Appendix 2 and NR's Appendix B. Both showed data relating to GWR, HEOC, and MTREL. It was agreed that these documents could be referred to openly in discussion but I directed that GWR's Appendix 2 and NR's Appendix B should not be published on the Committee's website. No objection was taken to that course of action.
68. It was common ground that the relevant possessions were shown in the 2025 EAS.
69. I am grateful to the Disputes Parties and the Involved Party present for their constructive and pragmatic approach.

Capacity

70. The essence of the disputed decisions, as in the Previous Disputes, is NR's adherence to a capacity of 14.5tph during a 2TT.

71. In exchanges it was accepted that 14.5tph is a historic high, and that before capacity was shared with MTREL there were 10tph (six to GWR, and four to HEOC), which then stepped up to 12tph and then 14.5tph.
72. It was common ground that there have been examples where 15.5tph have run over a limited period of four or five hours, in December 2023, January 2024, and February 2024. Each of these examples related to a Sunday in the time window of approximately 15:00 to 19:00, and relating to a 2TT.
73. In response to further questions from the Panel it was common ground that the operating environment in 2022 was different from that which applies under these disputes. From the perspective of a GWR representative the point of difference is the “ramp up” of MTREL services “which is crowding us out”. It was suggested that this might be mitigated by running MTREL services into London Paddington High Level, but MTREL said that this would be unacceptable, because it would require a passenger interchange at London Paddington.
74. The Panel explored whether 15.5tph could be accommodated during a seven-mile, rather than three-mile, blockade on a Rules-compliant basis (which should be a binary question), and secondly what the outcome was of the 15.5tph trials, and why NR has not persisted with that option.
75. As to the first question, it was common ground between GWR and NR that 15.5tph could be timetabled. GWR argued that the performance data did not show a noticeable difference between 14.5tph and 15.5tph (this is the April 2024 data to which I refer above). NR did not dispute that it could be possible but spoke to the consequences. NR’s representative said that there was a material point of difference between the Previous Disputes and the proposed April 2025 possession, referring back to the extent of the 2TT and the number of station calls, and the fact that this was a relief line rather than a main line possession. He added that with a relief line block NR must move MTREL services across the whole of the infrastructure to get them from the CCOS to the Down Main. He said that as a result of GWR’s dispute NR capacity planning had taken a look, but to “cram” another train path would result in consistent minimum headway operation throughout. He confirmed that substantial pathing time of up to five minutes going through the 2TT section would mean that the timetable has “absolutely no flex in it”.
76. There were some exchanges as to whether a five minute pathing time would actually improve the chance of trains arriving on time at the end of the section, but NR maintained that it is important to bear in mind that the operating environment is closed; the 2TT becomes the “prism” for the main route. NR accepted that the Rules reflect the capability of the infrastructure based on “green signal” running and clear operation, but NR maintained that it had not seen any element of collective recovery over time. Their representative said that when they see late running coming in for whatever reason there is a “ripple effect”.
77. It was NR’s view that the Previous Disputes related to the provision of an additional path during a main line block, but GWR had agreed that there was no additional path available during a relief line block if NR were to deliver a resilient timetable. GWR did not accept that. GWR said – giving the view of the person who prepares the capacity studies – that the maximum Rules-compliant quantum of trains was 18tph. GWR said that they were asking for 16 out of 18tph, on the basis that there would be two spare paths per hour. (As to why GWR was not contending for 18tph GWR confirmed that “we’re in no way asking for

that, or condoning that, because I don't think that would be practical, or sensible from a timetable point of view...".)

78. To the Panel's question whether this data was available to the Panel, GWR confirmed that there was no "physical evidence" available.
79. The Panel queried why NR's planning team were able to find fewer Rules-compliant paths if both were working to the same Rules.
80. There was a brief exchange during which GWR explained how it produces a capacity study on behalf of NR under a contract. This is subject to a quality audit checking process by NR before it is handed to operators. NR confirmed that it had not been shown a capacity study which included 18tph. GWR's representative confirmed that he did not think that one had been produced. He suggested that the discrepancy really amounted to two different perspectives on how one might timetable a service.
81. The Panel wished to probe the extent to which there was any agreed evidence of the performance impact of a 15.5tph timetable as against a 14.5tph timetable.
82. From the exchanges, I understand that no analysis has been undertaken on a consistent basis, and there is nothing which has been shared with operators or the Panel. For example, GWR confirmed that some modelling had been done internally looking at 14.5tph v. 15.5tph. I understood its representative to say that there was no material evidence of anything other than a negligible performance impact, and this was based on data which was available to NR.
83. NR's representative confirmed that because previous disputes had in view the performance impact of a main line closure, and because it had not been said NR could timetable more paths during a relief line closure, it had done no performance modelling on any additional services for relief line closures. NR, however, confirmed that as part of "ongoing" modelling work it has been performance modelling the disputed timetable. We were told that has been going on over the past few months, but has not yet been shared with the industry.
84. The Panel wished to have more information about the actual modelling work which NR had in train. NR's representative confirmed that it now had more data available from the period from the Previous Determinations in July 2024 to the present. This has been mainly with four-track operation in view, but there is now data available from eight weeks of a 2TT. The modelling work has in view relief line blocks similar to the type in dispute.
85. The Panel wished to know what that modelling was hoping to prove, and what further approaches to a RoU it might facilitate in future.
86. It is my understanding that NR is comparing a shorter possession block with a longer possession and is also looking at whether or not reducing train service levels would improve performance.
87. The Panel still wished to have greater clarity on whether it was correct that it was NR's position that for a seven-mile possession at least 14.5tph represents the maximum number of train paths which can be accommodated, whereas GWR contends that the seven-mile possession can accommodate more tph, and it accommodates the same quantum of trains as the shorter possession. The Panel considered that there are two distinct questions: (1)

can 16tph be timetabled with the main lines open; (2) if so, is that a rational decision taking into account the Decision Criteria.

88. NR's representative accepted that it "may well" technically be possible to run 16tph.
89. NR and GWR's representatives variously sought to explain the material points of difference between a three-mile versus a seven-mile possession, and whether having the relief lines blocked meant that there were fewer station stops. There did not appear to be any serious challenge to NR's statement that Ealing Broadway and Southall were on the 2TT section. This is relevant because of NR's contention that there are more station calls in a relief line, than a main line block. NR also stated that both stations are served with 6tph, rather than the 2tph which would stop at Acton Main Line. However, GWR's representative maintained that the seven-mile block has been timetabled on a Sunday with 16tph.
90. As to the impact of the longer versus shorter possession, GWR's representative largely accepted what NR had said about station calls, and the possible issues with junctions. GWR accepted that it increased timetabling complexity, but said that it wasn't a "showstopper", and that there is sufficient capacity in the Rules to manage station stops, and said that train operators should manage station stops, and dwell times accordingly. GWR said the exceptional nature of this possession required all alternatives to be considered in the standard hour to manage performance (GWR pointed to occasions where it had increased dwell times at Reading to improve performance during engineering works).
91. The Disputes Parties accepted that the Rules are fit for purpose, and that timetable planning conforms to those Rules and the assumptions in those Rules.
92. NR confirmed that it is undertaking a review of the stopping headways on the main lines, which NR said has come out of a particular focus on the Rules in the Southall area and the delays in that area when NR runs this particular configuration. NR's representative confirmed that the review could lead to an increase in the headways, which could lead to a reduction in available capacity but said that they are "a long way" off that.
93. The Disputes Parties did not challenge the fact that the available performance data at 14.5tph does not show that action taken during the standard hour to manage performance is necessarily effective. MTREL confirmed that in the last nine weeks of a 2TT its on-time performance is 91%, which is 4% below target.
94. The Panel heard much helpful detail about work done in the industry following last winter (including the plan to improve infrastructure performance, known as Project Brunel), including for example provision for extra dwells, and NR indicated that recent data suggests better performance than in 2023, but this data was not available to the Panel; and NR was not challenged in its assessment that operators remain a long way off targets. The Panel didn't hear any challenge (or any serious challenge) to the proposition that when NR models performance it factors in a 15 minute delay to try to account for a single specific event on timetable performance. Both GWR and NR accepted that performance is better than last winter in terms of infrastructure failures, but the data has not yet been fully collated or presented.
95. The Panel explored other factors which might have a bearing on timetable performance, for example MTR's suggestion that GWR's staffing issues might have an impact on performance. GWR's representative confirmed that GWR would be asking the DfT to

reduce service levels on Easter Sunday, accepting that it would have a struggle to resource services. Otherwise, GWR was confident in its ability to resource a service on the other days over the Easter 2025 weekend.

96. The Panel also wished to consider GWR's suggestion that NR's approach had been, and is, driven, by it being subject to the ORR's regulatory escalator, and the need to reach a particular regulatory objective. NR confirmed that it was placed on the regulatory escalator in or around May 2023. Its representative confirmed that the performance investigation into the NR Wales and Western region was launched in November 2023. It was common ground that NR was placed on the regulatory escalator because of its infrastructure performance. NR responded that it was required to deliver performance whether or not it was on the escalator. The possession covers three days amounting to 1% of NR's performance over the year. NR added that the context of disputes over the 2TT dates back approximately 18 months to a time when it was not on the regulatory escalator.
97. In response to questions from the Panel, GWR accepted that one of the Considerations under the Decision Criteria is maintaining and improving train service performance, and the regulatory escalator provision essentially has in view the same question. GWR accepted my view that this is one of the matters to be considered as part of the overall balancing exercise under the Decision Criteria, and GWR's challenge is that NR has impermissibly put too great a weight on that factor.
98. The Panel also wanted to explore what other options might be available to GWR (taking into account the fact that the available passenger loading data implies that on time slots in certain days up to 20tph globally would be required to meet demand, which won't be available).
99. GWR did not consider that mitigations to manage yield would assist at times of likely peak demand. The Panel explored the use of AP tickets. GWR explained that from its perspective yield management works best when there are trains which are not at capacity, but said that looking at the available analysis a lot of the trains within the time-bands are at, above or approaching capacity. GWR accepted that "do not travel" messages were available but its representative said that GWR did not really want to get into that over the Easter 2025 weekend.
100. The Panel also explored the assumptions on which passenger data modelling had been based. We noted that the stated methodology which underpins the Easter 2024 demand data (Appendix 1 to NR's SRD) records that GWR train capacity is defined as 647 seats on a 9-car IET for fast services and 448 seats on an 8-car class 387 for semi-fast services. GWR confirmed that this is all seated.
101. GWR indicated that the DfT does not permit it to plan for standing for more than twenty minutes and it is only permitted morning and evening, i.e. the Monday to Friday peak into and out of London, Bristol, and Exeter.
102. As I have set out above, the Panel was provided with details of the DfT's agreed capacity for GWR's rolling stock. Since it was not shared with the Involved Parties, the Panel was careful about how it phrased its questions.
103. The Panel also considered GWR's challenge that NR's decision in connection with capacity in connection with the disputed decisions is inconsistent with its approach taken to capacity on Maundy Thursday 2025. GWR emphasized that Maundy Thursday is its

busiest day of the year and that it has the access rights, capacity and train crew to run more trains on Maundy Thursday than it would on (for example) the Thursday immediately preceding it.

104. GWR argued that because on that day the railway is an “open” railway it can run a further two or three relief trains in the afternoon normally on the Down services from London. In other words, the peak expands in duration and a few additional services run in the window between 15:00 and 16:00 and 19:00 and 20:00.
105. NR emphasized that this is based on a four-track railway and is based on a standard GWR service of approximately 1,700 trains a day; accordingly, the additional quantum of trains amounts to approximately an extra three on Maundy Thursday. The Panel was told that on Maundy Thursday at peak hours there would be 17tph in each direction including HEOC services. This was accepted by all Disputes Parties.
106. However, at a headline level, GWR accepted that there is no data available to the Panel which shows the impact on performance (if any) on the additional train paths on Maundy Thursday.
107. The Panel also sought to understand better the range of alternatives (picking up on observations from NR and MTREL) such as diagramming high-density rolling stock, enhancing the SWR service running to Waterloo, or using the Chiltern Railways service.
108. GWR responded that SWR has a cap on the amount of passengers which they will take from other operators, adding that there is often resistance from the operators of alternative routes. A representative of GWR noted that when they had previously asked SWR to move long-distance customers from Exeter etc. it had been declined based on their own capacity needs. He also noted that the journey time from Reading to Waterloo is three times longer than the journey from Reading to Paddington. In substance, the Panel heard that the same issue arises with Chiltern Railway – they are open to ticket acceptance but this is limited due to Chiltern’s capacity and rolling stock constraints.
109. As to the capacity of rolling stock, GWR’s representative explained that every option would be looked at, including running nine and ten cars on the IETS, but he noted that 387s are limited to eight cars for a number of destinations, and can only run where the railway is electrified.
110. The Panel also asked whether there is any event on the Network taking place over the Easter 2025 weekend (for example on the WCML) which might limit alternative options for customers. NR indicated that on Good Friday there is a two-track slow-line block on the WCML South, but it is open other than that. On Easter Saturday, Easter Sunday, and Easter Monday there is an all-line block between London Euston and Milton Keynes. The Panel was told that there was nothing which would affect services on the Chiltern route, the Midland Main Line or East Coast Main Line.

Decision Criteria

111. NR relies on a Decision Criteria document which was appended as Appendix F to its SRD, which appears to be undated and is said to be “indicative”.

112. The Panel had informed GWR that it would require GWR to stipulate whether it was its position that in the application of the Decision Criteria NR had acted in bad faith, irrationally, capriciously, or arbitrarily and, if so, on what basis.
113. GWR stated that in its view NR had acted irrationally, on the basis of the fact that data was available which demonstrated the requirement for more capacity over certain hours, and it was irrational to make a decision to restrict capacity which was Rules-compliant simply based on performance. In response to a question from the Panel, GWR's representative confirmed that it was not being said that the decision was not taken in good faith. In response to a follow-up question from the Panel, GWR's representative confirmed that it was GWR's position that no properly informed or properly directed decision maker could have made the disputed decisions based on the information available to NR at the material time. GWR confirmed that this was its position.
114. NR's representative replied to confirm that NR considered that its decision was a reasonable one in all the circumstances, and it noted that it had the support of MTRREL, another Timetable Participant. NR accepted that GWR's argument was not unreasonable, but said that NR had reached a different view.
115. In terms of the Considerations, as was the case in the Previous Disputes the principal disagreement between the Disputes Parties was the allocation of weight to Conditions D4.6.2(b) and (c). Both Disputes Parties accepted that these Considerations were relevant and should be weighed as of high importance.

	Criteria Considerations	Evidence	NR view	GWR view
(b)	That the spread of services reflects demand;	All three impacted Operators have been included within the demand forecast data analysis. The forecast is developed specifically for Easter 2025. The renewal of Acton East Junction means that most freight services will not operate.	A mixed hourly allocation of capacity of 14.5tph through the day. Capacity allocation is shown on tab 'CTP'. Where demand demonstrates the need for more than 2tph for HEOC, the proposal allows for the service to increase.	The need to spread demand (this overrides all other considerations as it is absolutely essential to meet demand for GWR services without turning passengers away).
(c)	Maintaining and improving train service performance	Historically a 14.5tph timetable delivers a compliant timetable which also usually meets the	The performance challenges that are seen during a 2TT remain today. There is little resilience in the 2TT to cope (or recover) from any operational and external incidents.	NR places too much stress on this aspect in this instance. The effect over the year is minimal and mitigations through reduction in service at other times are possible.

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116. The Panel heard submissions on Condition D4.6.2(b). The Panel wished to understand the potential impact of a possible decision on GWR and MTREL's ability to move passengers, including passengers standing in vestibules or standing on platforms. From the perspective of MTREL we wished to understand the practical impact on its loadings if the substitution of services, for which GWR had called, came to pass.
117. GWR's representative explained that there were a number of time bands, particularly on Easter Monday where trains would be full with standing passengers, particularly in the Up direction to London Paddington between 16:00 and 18:00, but also 11:00 to 12:00. This would mean that even with standees some passengers would need to wait for a train in the next time band that had sufficient capacity. GWR's representative said that he had seen two recent examples, one of which was during a 2TT on a Sunday, the other on a weekday when a passenger with a pushchair could not board because of passengers in the vestibule. Another representative spoke of the safety of staff and customers, for example if GWR could not meet its legal requirements to disabled passengers or if there was a backlash against staff. GWR confirmed these issues are not just seen during a 2TT. GWR indicated that there may be a reputational issue which may lead to passenger loss, but accepted that there was no data available to the Panel which showed that passengers were not returning to GWR arising from one occasion when they could not board a GWR service. GWR's point was that there can be an impact on passenger growth after significant engineering, giving the Severn Tunnel as an example.
118. The Panel explored mitigation, such as running relief trains from Reading further west, in order to provide more capacity for services where GWR alleged passengers would be standing into the West Country, to which GWR responded that this would militate against good customer behaviour and data which suggested that passengers don't wish to risk changing trains. It was also suggested that GWR might run longer sets and attach or detach cars at Didcot, but GWR said that this was not desirable, although they had done it previously. GWR confirmed that it could have a look at running trains that don't come all the way into London. The Panel also explored other mitigations such as a requirement for compulsory reservation. GWR did not think that this would work in the LTV area because of the large walk-up market. GWR accepted that this was a "valid point" and might free up seats for passengers on longer journeys. Its representative added that this was "something we'd definitely look to do". Another GWR representative added that most GWR earnings and journeys came from walk-up products, even for long-distance travel unlike, for example, LNER on which you can book a seat on a train while it's moving.
119. The Panel pressed the point (without going into the confidential detail) that as NR's modelling assumptions only considered seated capacity, were the additional standing capacity to be taken into account in fact GWR could carry more passengers than the modelling assumes, thereby mitigating the challenge in certain hours. NR's representative confirmed that the data shown in what I have directed to be GWR's Appendix 7 shows a higher figure in terms of capacity. GWR was concerned that this would not mitigate the safety risk and said that trains would become "crowded" if passengers were standing and seated.
120. MTREL's representative noted that its trains could carry up to 1,500 people but anything above 1,200 was regarded as unacceptable from its perspective (the Panel noted that NR's Easter 2024 data calculates MTREL capacity on the basis of 995 passengers,

490 seats plus 505 standing with two persons per square metre). Their representative wished to argue that MTREL's passenger numbers had gone up whereas GWR customer numbers were "typically flatlining" (he referred to MTREL carrying 220 million passengers in the last financial year against GWR's 82.5 million). This was relevant to the impact on MTREL, and he said that demand would continue to grow to Easter 2025. He spoke to the limits of the CCOS having only one track in either direction, and the need to turn more trains at London Paddington causing poor performance. MTREL's representative argued that the data shows that with 6tph as proposed, capacity would not match demand, though he thought that during Easter weekend 2025 MTREL would be able to accommodate their quantum of service between London Paddington to Reading. If it were reduced to 4tph he said that it would be unsafe.

121. There was agreement that MTREL services are designed to accommodate standing passengers, and it was agreed that it is not appropriate simply to compare all seated passengers on MTREL trains against all seated passengers on GWR services.
122. The Panel heard inconsistent viewpoints about the suggestion, which was at least strongly implied in GWR's SRD, that variations to the standard hourly timetable, i.e. varying the quantum of service in opposite directions hour by hour, is both deliverable and desirable. GWR appeared to consider that it was practicable and desirable; NR and MTREL appeared to consider that it was not a desirable outcome. GWR's representative said that the capacity matrix already showed a different number of trains in different hours, adding that they had an allocation to run ECS moves in one direction from North Pole depot. MTREL questioned the practicalities arising from the location of their maintenance staff and sidings, stating that if an empty train is to return, it must go down first.
123. NR cautioned that it was important to look at the whole operational balance. Some suggestions were, he said, "too simplistic"; NR's demand graphs show that individual operators have capacity issues, but in different directions at the same time on the same days, i.e. in direct conflict with each other.
124. The Panel heard submissions on Condition D4.6.2(c). From NR's perspective the issue was "minimal" on the basis that the three days in question represent 1% of a whole year's performance. GWR emphasized that the disputed decisions only related to certain hours of the day. NR argued that GWR is not operating on an isolated section of the railway. Its representative argued that it was important to maintain performance for all operators across the Network.
125. NR's representative confirmed that his approach was to path trains into a timetable that was high performing. GWR argued that the performance detriment, if there is one, "is not catastrophic", since it does not stop the trains running, whereas if GWR has insufficient trains people will be left behind. I noted that the relevant Condition does not require performance to be "catastrophic" which GWR's representative acknowledged. He added that if GWR starts to haemorrhage revenue that would be a huge revenue loss to the industry which would come with repercussions. GWR accepted my challenge that this factor was relevant to Condition D4.6.2(f). The Panel questioned whether the provisions of Schedule 4 made provision for appropriate compensation. It was GWR's view that this was "internal railway money", and did not bring revenue into the industry.
126. MTREL emphasized the impact of poor performance and said that customer service, moving the timetable, and safety were the three key elements. He referred to the ripple effect if there were a couple of late trains in a 2TT, adding "we see this time and again". He

referred to MTREL's performance data which showed, he said, that even with all of the interventions made over the past eight weeks during the operation of a 2TT, there had not been a day on which MTREL could achieve above 85% on-time performance, with the average being approximately 82.7%. In other words, the timetable is not performing at the level required at 14.5tph. He said that, in his opinion, 15.5tph "adds too much of a performance risk for us". He added that it's important to consider that MTREL gets customers into and out of central London, and that once trains are in the CCOS there is no recovery time.

127. The Disputes Parties were essentially agreed in their assessment of the other Considerations. GWR wished to emphasize generalised journey time, and it was said that a requirement for connections, for example at Reading, deters passengers. NR emphasized that there are other operators and journey times are also important for HEOC. At a general level all parties were agreed that late-running trains could lead to connections being missed, and more crowded trains lead to longer dwell times.

128. The Panel heard some additional submissions in connection with Condition D4.6.2(f). GWR's representation confirmed that the question of 14.5tph or 15.5tph was not "too large" a commercial issue. A reduction to 4tph for GWR would cause them to rate this as a factor which required greater weight. There was a degree of consensus that all operators plan to reduce service levels, leading to a commercial hit. For example, the MTREL service would be reduced by 40% and HEOC by 50%. I understand that GWR accepted that the disputed decisions represent about a 40% reduction against GWR's typical bank holiday offering on Good Friday, Easter Sunday and Easter Monday, assuming no RoU. In other words, there are commercial considerations for all operators.

Exceptional circumstances

129. As to what factors are exceptional, GWR's representatives argued that exceptional circumstances applied here because the timeframe of the decisions is such that an amended decision could be implemented within the timescales for the Informed Traveller offer.

130. GWR did not consider that any further operational work was required. Its representative said that this might be useful for a future occasion but not here because NR already had enough information to take a decision.

131. To the Panel's challenge that it was relatively common to convene a hearing, notwithstanding the relatively early stage in the timetable planning process (because we are in essence using a capacity study as a proxy for a timetabling decision), GWR referred to the time of year as a further factor. GWR indicated that it could not think of another occasion on which there had been a 2TT including a Saturday for a considerable period of time, and not one which affected Good Friday or Easter Monday too.

132. The Panel also queried whether Easter weekend possessions occur on other routes, for example in the Westbury area to suit freight. GWR accepted that they do, but argued that on the Western Route a RoU in the Paddington area over Easter is the exception. The exceptional factors, GWR's representative argued, are quantum and timing.

133. The Panel also queried whether the requirement of four days for the possession was agreed and how GWR would have expected that to be delivered, if the proposed method is exceptional. GWR argued that a RoU of this nature would normally happen over the

Christmas to New Year period when it's accepted that passenger numbers are lower. GWR argued, and NR agreed, that one factor in the choice of Easter was because of freight shutdown. NR also argued that the GWML is very busy on a weekday, and it would be difficult on a weekday, with full freight services running, to offer 14.5tph to passenger operators.

134. NR's representative confirmed that this type of possession had not been taken at Easter before. He confirmed that nearly all 2TT possessions are limited to Christmas to New Year or Sundays, though he said that one three-week possession would be needed at the end of the HS2 programme. NR argued that having "big works" over Easter has been done on the GWML though not out of Paddington, and elsewhere nationally. Its representative pointed to Didcot and Swindon possessions which although not to the same extent do provide "major challenges" in terms of dealing with customer demand.

135. GWR confirmed that they considered that I had sufficient information to make a decision substituting my own decision for NR's. Their representative also argued that I had sufficient data to substitute a 16tph outcome. He contended that the relevant data was to be found in NR's Appendices 1 and 2. In response, NR's representative confirmed that I had capacity information or loading information which supported their decision to offer 14.5tph and said that they had advised about the work that was going on looking into alternatives but confirmed that this information was not available at the moment. MTREL's representative confirmed that I had enough data to confirm that performance is not currently acceptable.

136. NR and MTREL made brief closing statements. GWR declined to make a closing statement.

G Analysis/Observations and Guidance

137. I should first say that I recognise that the subject matter of the disputed decisions is similar to the Previous Disputes. However, there are some points of difference including the nature of the possession, for which reason I have wanted to record the Disputes Parties' submissions and answers at the hearing in some detail.

138. Turning first to the question of principle which I am asked to answer by NR and MTREL: does Part D entitle NR to take a decision to limit capacity?

(A) NR decision to limit capacity

139. I consider that this question falls into two parts: (1) what is NR entitled to do; and, subject to that, (2) when does any such right arise?

140. I remind myself that it has been agreed that I should decide the disputed decisions on the assumed basis which I set out above. I also remind myself of Condition D3.4.4 which sets out a procedure which NR must follow if it wishes to make a variation of the WTT for the purpose of taking an RoU which is consistent with the published Rules, or the Rules as amended following the procedure set out in D3.4.4.

141. I consider that I do not for present purposes need to decide the question whether a decision to commence the procedure established under Condition D3.4.3 is a decision itself which engages the Decision Criteria, but as part of that process NR may require a Timetable Participant to subject a Revised Access Proposal under Condition D3.4.9 in

respect of any Train Slot and NR may exercise its Flexing Right when responding to such an Access Proposal (see Condition D4.4.1(a)), and in doing so it must apply the Decision Criteria. In any event, pursuant to Condition D3.4.4(b) such procedure for amending the Rules which NR puts in place must require that all decisions by NR are made in accordance with the Decision Criteria.

142. The Disputes Parties are not at that stage yet but I consider that at the appropriate time, subject to the procedure specified in Condition D3.4.4, NR may be contractually entitled to take a decision to limit capacity, since that would be essentially a decision to make a NR Variation which has in view the number of Train Paths for which Timetable Participants may make an Access Proposal.

143. NR refers me to the analysis in the ORR's determination in connection with the appeal in respect of dispute reference TTP1174. I note that that determination had in view the preparation of the New WTT (which is not the position in relation to the dispute decisions) but I consider that the principles are of broader application to decisions under Part D. At paragraph 91 the ORR concluded that:

“ORR considers that the provisions of the Network Code envisage that there will be circumstances where Network Rail may not achieve the Objective by including all requested Train Slots in the WTT, even where there are no conflicts with other proposals or the Rules (or with the applicable International Freight Capacity Notice or Exercised Firm Rights). This might include where requested Train Slots would, if accepted in the WTT, give rise to a clear and substantial safety or performance concern. In such a situation, Network Rail would in the first instance be required to consider whether to exercise its Flexing Right and should only allocate Train Slots in the prescribed order of priority in Condition D4.2.2(d) (and ultimately reject one or more requested Train Slots) to the extent that it is unable to vary requested Train Slots in a manner which will achieve the Objective (and will lead to a WTT which is consistent with the principles in Conditions D4.2.2(a) and D4.2.2(b)).”

144. It is not binding on me, and I acknowledge that it has in view different provisions of Part D from this Determination, but I consider the decision of Hearing Chair John Hewitt in TTP2453 et al. to be persuasive and I respectfully adopt his analysis, for example at paragraph 40 where he says:

“In my judgement, looking at Part D in the round, it affords NR a degree of latitude in the manner in which the Timetable is evolved, and where appropriate, varied. Looking at it objectively I find that if the parties had intended the limitations or constraints contended for by GWR more explicit language would have been adopted.

I am reinforced in this conclusion by the decision of ORR, at paragraph 91, in the appeal decision in TTP1174. In construing Part D the ORR has quite clearly stated that NR has a degree of discretion and that there may be circumstances where the allocation of rights or Train Slots need not follow the norm where there may be circumstances which give rise to a clear and substantial safety or performance concern. I do, of course, accept that paragraph 91 is concerned with a different issue under Part D but the findings of the ORR on the degree of contractual flexibility vested in NR are apt to apply to the interpretation of Condition D3.1.2.”

(B) Application of the Objective and the Decision Criteria

145. I remind myself that GWR argues that NR's application of the Decision Criteria is irrational.
146. I gratefully adopt the summary of the legal guidance which was set out in paragraphs 24 to 26 of the Determination in TTP2453 et al.
147. In addition to that guidance, on the question of the approach to irrationality, I note the well-established dictum of Lord Hailsham in *Re W (an infant)* [1971] AC 682 at 700 that two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.
148. I remind myself that establishing that a decision is irrational is a "high hurdle".
149. I remind myself that it has not been said that NR was not sufficiently properly informed when it took the disputed decisions. To that end, I note that the agreed chronology (Appendix A1 to NR's SRD sets out the process of data gathering, leading to a review of all operators' demand data together on 13 September 2024). That chronology makes it clear that during the information gathering process GWR essentially made the same points as it has made during the determination of these disputes. I also understand that NR had before it the 26 April 2024 capacity study (Appendix C to NR's SRD), which is the most recent such study. This appendix shows Sunday on-time performance from 15 October 2023 to 7 April 2024 across GWR, MTREL, and HEOC. It shows performance during the operation of a 2TT in that window where there have been both main and relief line blocks. The summary is time to 3 minutes arrival at station which I understand is the GWR regulated metric. In summary the data shows that operators' arrival performance fell below the four-track benchmark average performance for both on time and on time to 3 minutes on nearly every Sunday 2TT (both mains and reliefs) in that period. This data was not disputed by the Disputes Parties.
150. I also remind myself that Condition A1.1 of the Network Code stipulates that the "paramount objective in the railway industry is to operate a safe and secure railway on which the elements of risk to safety and security are reduced to a level as low as reasonably practicable. Nothing in this code shall be interpreted or construed as compromising that objective".
151. I cannot conclude that NR's decision is irrational, i.e. such that no sufficiently informed and properly directed reasonable decision maker could have reached the conclusion which NR has reached. Whilst this is not an exhaustive list, I reach this conclusion taking into account the following factors:
- (1) There is only really a dispute between the parties as to the weight to be placed on Considerations (b) and (c). Both assess them as relevant and place a high weight on them. GWR considers that Consideration (b) should override all other Considerations in importance.
 - (2) There was available to NR, and to the Panel, unchallenged evidence regarding performance concerns about a 14.5tph timetable in a 2TT environment. I note the observations about the 26 April 2024 report in TTP2453 et al. and the impact of external factors on that report which made it in the words of the Hearing Chair "difficult, it not possible, to draw clear or reliable conclusions or set baselines for an 'average'

Sunday””. That problem remains and that there is no reliable data available which shows whether NR’s concerns about a timetable at 15.5tph or higher are well-founded. I have considered whether on the available evidence at the time of its decision there was data available to NR which ought reasonably have caused it to reconsider the position adopted in TTP2453 at al. at the point of the decisions and I don’t consider that there was. The Panel heard that there have been examples where 15.5tph have run over a limited period of four or five hours, in December 2023, January 2024, and possibly February 2024. Each of these examples related to a Sunday in the time window of approximately 15:00 to 19:00, and related to a 2TT. But that data does not clearly lead to a conclusion that 15.5tph can be accommodated over a more extended period over a holiday weekend.

- (3) I can accept that different operators might take a different view on acceptable performance and NR is entitled to take into account all those views. I note the concession recorded at paragraph 40 of TTP2453 et al. that there was a degree of consensus that the greater the number of tph, the greater the risk of an adverse impact on performance. NR said that it had considered the “holistic” capacity of the 2TT across the whole of the affected period for all Timetable Participants. With all of the interventions made over the past eight weeks during the operation of a 2TT MTREL had said that there had not been a day on which MTREL could achieve above 85% on-time performance, with the average being approximately 82.7%. This was a factor which NR was entitled to take into account.
- (4) The Disputes Parties all raised unchallenged concerns about the possible risk to performance and, as a result, to safety on different parts of the rail network, whether on the GWML, or in the CCOS, or on Anglia Route. GWR’s assessment of how that risk should be managed is predicated on it receiving any additional train path or paths which may be Rules-compliant. But that cannot be assumed, and the evidence suggests that MTREL’s demand forecast continues to increase and will do to Easter 2025. The Panel heard no evidence that were such additional train paths available they would necessarily be allocated to GWR.
- (5) I have also considered GWR’s suggestion that NR’s approach is being driven by the fact that it is on the ORR’s regulatory escalator. As explored with the Disputes Parties, GWR accepted that one of the Considerations under the Decision Criteria is maintaining and improving train service performance, and in my view GWR’s contention is really another way of putting forward its challenge that NR has impermissibly put too great a weight on performance as a Consideration; and
- (6) Discussions before the Panel suggested that revenue is important to GWR. In their assessment of the Decision Criteria NR assessed this as a relevant factor with medium weight, and GWR assessed it as relevant. Although I take NR’s point that Consideration (f) does not in terms refer to the reputation of an operator, I would accept that reputation forms part of the assessment of an operator’s commercial interests. But countervailing considerations apply. Before the Panel, as in TTP2453 et al., GWR argued that the disputed possession amounted to only 1% of the annual timetable (in fact about one third of 1% because of the number of train paths disputed over the possession). Realistically, this reasonably limits the reputational impact of the possession. Moreover, NR is required to balance the commercial and financial interests of all operators. An approach which commercially favours GWR may adversely impact MTREL.

152. In summary, I accept that all operators may want more train paths than the amount allocated to them, that all have passenger loading issues to deal with, and that each has commercial requirements to consider, but it is quintessential to a balancing exercise that the decision maker may take into account a range of considerations and decide what weight is to be attached to each consideration, so long as the weight attached is objectively reasonable. In the circumstances, it is my view that the view reached by NR was a decision properly open to it, even if another person may reasonably have reached a different conclusion. In taking that view I remind myself that no one Consideration is expressed in Part D as having priority over any other (for example as the ORR concluded in the appeal against the determination in TTP102).

153. I also remind myself that GWR contends that to meet the Objective the solution required has to be “the optimum in the best interest of the industry”. It is said that the Objective “alone says the trains must run”. I really take that to mean that additional GWR trains must run. I don’t consider that this is what the Objective does stipulate – it requires the safe carriage of passengers and goods in the most efficient and economical manner in the overall interests of current and prospective users and providers of railway services. This does not require an assessment from the perspective of one particular operator, or one specific solution. It is for that reason that the assessment takes into account a number of Considerations and requires a balancing exercise.

(C) Exceptional circumstances

154. I wish briefly to address submissions on whether exceptional circumstances are present.

155. The Panel canvassed a point of principle with Disputes Parties, as to whether the test in Condition D5.3.1 applies where the circumstances are exceptional, taking into account a particular route, or operator’s experience, or whether the assessment has in view the rail network generally. In my view that the conclusion is necessarily implicit from the fact that Part D is intended to make industry-wide provision. I note that in its decision in connection with reference HAL/TTP003, the ORR considered it unnecessary to determine what may amount to exceptional circumstances, because of the “potentially wide-reaching” nature of any ORR determination. In my view that approach supports a reading which looks at the question from an industry-wide perspective, rather than from the perspective of a particular route or operator. Further, although it had in view very different circumstances and an earlier version of Part D, I consider that the ORR’s decision in connection with the determination in TTP337 et al. also supports my conclusion. In paragraph 65ff. of that decision the ORR refers to “Licence Conditions” which under those provisions NR was required to meet. These had in view a “disruption index” which was applied nationally rather than disaggregated to a regional or route level. In my view that supports the spirit of my view of the way that Part D is intended to be understood.

156. In its SRD and submissions to the Panel, GWR has argued that the following amount to exceptional circumstances:

- (1) It is said that this is a unique set of circumstances;
- (2) The type and effect of the RoU on the GWML and over an Easter weekend (i.e. for a longer period of time than previous related possessions). Accordingly, the demand factor is different from previous related possessions and the number of stations to be served is different;

- (3) The fact that this RoU is not limited to a Sunday or a package of Sundays;
- (4) The fact that the quality of data is of a “different calibre” from previous decisions; and
- (5) There remains time for the disputed decisions to be changed and for a timetable consistent with an amended decision to be bid for, validated, and advertised under Part D.

157. Quantum and timing are the main factors on which GWR relies. I am not persuaded that exceptional circumstances are present. The factors which are relied on by GWR are in my view relevant to the application of the Decision Criteria but are not of themselves exceptional when looked at from the perspective of the Network as a whole. I take into account the following factors:

- (1) It is not unusual to convene a hearing notwithstanding the relatively early stage in the timetable planning process (using a capacity study as a proxy for a timetabling decision);
- (2) Easter weekend 2TT possessions do occur on other routes, for example in the Westbury area to suit freight, or on the WCML. GWR accepted that they do, but argued that on the Western Route a RoU in the Paddington area over Easter is the exception; and
- (3) Substantial engineering works have taken place on the GWML, though not out of London Paddington. Those possessions – such as Didcot to Swindon – do provide major challenges in dealing with customer demand.

158. I should add that even had I concluded that exceptional circumstances were present I would not have exercised my discretion under Condition D5.3.1(c) on this occasion. In my view the fact that there is time available for the procedure specified in Part D to be followed is a material factor to be weighed in the balance. In my view it is appropriate to allow the contractually agreed process to apply where that is practicable. However, I also take into account the observations of the ORR in HAL/TTP003, albeit in circumstances which are not on all fours with the disputed decisions, that a Hearing Chair should be astute to avoid a decision which is based on a paucity of data. I am not persuaded that I have sufficient information to take a decision which substitutes NR's decision with a decision either to instruct NR to path more than 14.5tph or to re-allocate train paths in such a way as I could assess that this would better meet the Objective.

159. I wish to offer the following guidance to the Disputes Parties:

- (1) To return to the observation which I made in my first directions, I respect the right of all Timetable Participants to wish to avail themselves of the right to appeal under Part D and where properly brought an appeal will be heard. However, this is the latest in a sequence of disputes which are fundamentally similar relating to 2TT operation on the GWML. I have real doubts about the proportionality of further such disputes in the absence of new information which materially changes the position (see below).
- (2) That having been said, the Panel heard evidence that NR was not undertaking performance modelling on any additional services. The Panel heard oral evidence at the hearing that NR had tried to trial additional trains following the view given by

hearing chair John Hewitt in TTP2243 et al., but for various reasons it was said conclusions could not be drawn from those trials. I have set out the relevant paragraphs above from TTP2453 et al. where a later Panel commented on those trials.

- (3) ADR Rule H46 allows the Panel to take into account the evidence and arguments which are put forward at a hearing. Doing so, on the basis of the information which was available to it, as I have indicated above, I am unable to conclude that NR's decisions were irrational.
- (4) It is my view that the requirement for a capacity study (both the type and extent) is to be determined by all the circumstances surrounding the RoU. In giving this view, I have directed myself as to the conclusion reached by the ORR in the appeals in connection with determinations in TTP1706 and TTP1708. There was no finding by the Panel in those determinations that a capacity study was mandated by either Condition D3.4 or D3.5. I note, however, that the ORR considered the text of the EAS and TPR and the extent to which, if at all, a capacity study is required when a RoU is sought under Conditions D3.4 or D3.5. I cannot find anything in the ORR's decision which criticised the view of the Panel in the determinations under appeal that a capacity study should have been completed on the facts which presented themselves at that time.
- (5) NR confirmed to the Panel that as part of ongoing modelling work it has been doing performance modelling of the current 14.5tph. If NR has accepted the principle that further modelling is required it must then ensure that its decision as to the type and extent of that study is rational and that the conclusions drawn are sufficiently robust, having in view the requirements of the Decision Criteria, such that it can take properly informed decisions based on that data. I understand the output of this modelling is not yet available, but in my view NR's present plans fall short of what is required.
- (6) It would be wrong at this point in time to pre-empt the conclusion of that further work, but given that NR accepts that some more modelling is required, should this question arise under a future appeal which relates to a RoU in aid of the HS2 engineering works NR will need to be able to show – backed up with an appropriate capacity study – what the impact may be of pathing more than 14.5tph, setting out the data which supports that conclusion and, a considered assessment of the risk of perturbation so that their decision takes into account whether pathing more tph presents a material risk in connection with performance and/or safety, and the likelihood of that risk. In giving this guidance, I note that the Panel was told that the capacity assumptions on which the present modelling has been undertaken may not reflect true capacity (for example it may be that, at least along certain portions of the GWML, GWR's total seated and standing capacity, and also MTREL's overall capacity, may be greater than assumed, taking into account capacity agreed with the DfT). That factor should be taken into account in ongoing modelling work.
- (7) Given the size of the HS2 programme and the number of possessions which it has and will entail, and given the number of Hearing Chairs who have repeated their dismay about the paucity of data, I am disappointed that NR still does not have better capacity modelling to hand. NR should in my view not simply undertake capacity modelling which affirms the conclusion which it has already reached; it should model such alternatives as may reasonably be available. I accept the Catch-22 conundrum – NR can only act on the information which it has to hand, but if NR does not commission comprehensive capacity studies it will never have available the information which it needs to be able to determine whether more tph is a robustly viable option. From what

I have heard it is only going to be possible for NR and all Timetable Participants to collaborate with each other going forward if GWR and MTREL can see that the options which may (and I do not say are) be available have been adequately tested. As part of that collaborative process, GWR will need to consider whether what it seeks is really in the best interests of the industry, or its own interest.

- (8) Finally, I should add that the Panel has not been assisted by appendices which embed emails. If email chains are genuinely considered to be relevant I suggest that they should be exhibited as an appendix to a SRD.

H Determination

160. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.
161. The disputed decisions were arrived at in compliance with a proper application of the Decision Criteria.
162. The RoUs in the disputed decisions, which limit capacity to 14.5tph, shall stand.
163. Exceptional circumstances, within the meaning of Condition D5.3 are not present.
164. No application was made for costs.
165. 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.



Paul Stevenson
Hearing Chair
27 November 2024

Annexes

Annex A: Relevant extracts from the Network Code

Condition A1.1

1.1 General interpretation

The paramount objective in the railway industry is to operate a safe and secure railway on which the elements of risk to safety and security are reduced to a level as low as reasonably practicable. Nothing in this code shall be interpreted or construed as compromising that objective.

Condition D3.4.3

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.

Condition D3.4.4

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.

Condition D3.5

3.5 Network Rail Variations with less than 12 Weeks Notice

3.5.1 It may be necessary for Restrictions of Use to be arranged by Network Rail with less than 12 weeks notice or otherwise outside the process described in Condition D3.4. The following paragraphs of this Condition D3.5 are intended to facilitate such Restrictions of Use.

3.5.2 Where Network Rail proposes to make any variation to the Working Timetable in circumstances where it is not reasonably practicable to comply with the timing requirements of Condition D3.4, Network Rail shall follow the procedures set out in Condition D3.4 save that:

- (a) the timing requirements specified there; and
- (b) Conditions D3.4.13, D3.4.14 and D3.4.15;

shall not apply. In carrying out those procedures, Network Rail shall be permitted (for itself) and shall prescribe (for affected Timetable Participants) such time periods for each step as are reasonably practicable in the circumstances. Network Rail shall notify all affected Timetable Participants of its final decision in respect of any such change as soon as reasonably practicable. Any variation to a Working Timetable made pursuant to this Condition D3.5.2 shall be a "Network Rail Variation" for the purposes of this Part D.

3.5.3 Any Timetable Participant which is dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation made pursuant to Condition D3.5.2 may appeal in accordance with Condition D5.

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.