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**TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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**Determination in respect of references TTP310 and 312**  
*(following a hearing held at 1 Eversholt Street on 27<sup>th</sup> January 2010)*

**The Panel**

**Steve Carter:** elected representative for Non-Franchised Passenger Class  
**Jonathan James:** appointed representative of Network Rail  
**Nigel Oatway:** elected representative for Non-Passenger Class, Band 2  
**Neil Sutton:** elected representative for Franchised Passenger Class, Band 1

Panel Chairman: **Bryan Driver**

**The Parties**

**For XC Trains Limited ("XC") (TTP310):**

**Sarah Kendall** Production Director  
**James Carter** Track Access Manager  
**John Cherrington** Engineering Access Manager

**For First GB Railfreight ("GBRf") (TTP312)**

**Ian Kapur** Timetabling Manager

**For Network Rail Infrastructure Ltd ("Network Rail")**

**Joe Warr** Senior Network Access Planner, LNW Territory  
**Matthew Allen** Network Access Unit Manager  
**Trevor Harris** Project Manager  
**Darren Nock** Testing & Commissioning Engineer

**David Shipman** Senior Project Engineer (present as a witness)  
**Mick Brook** Project Operations Interface Specialist (present as a witness)

**Brief Summary of Dispute, and the jurisdiction of the Panel**

1. The Panel was asked to adjudicate on the outstanding concerns of XC and GBRf in relation to the content of the document entitled **EEPW12: Water Orton Corridor Re-signalling, Possession**

**Strategy Notice, PSN-MA-012, Version 2.0**, and dated 11<sup>th</sup> September 2009 (henceforward referred to as "EEPW12v2"). Specifically

1.1. **XC** was concerned at

- 1.1.1. the extent of disruption to its Sunday services on several routes, given the high proportion of those services that passed through Water Orton;
- 1.1.2. the extent that the Restrictions of Use planned in connection with Water Orton re-signalling did not appear to be being taken into account in the other Restrictions of Use proposed for the 2011 Rules of the Route, potentially resulting in some Sunday services facing multiple disruptive Restrictions of Use; and
- 1.1.3. a specific problem in relation to the diversionary route to be used to accommodate the Water Orton Restrictions of Use, inasmuch as Network Rail's alterations to hours of opening for that route during 2010 would prevent XC maintaining the route knowledge at its Leeds depot necessary to operate the required diversions in 2011.

1.2. **GBRf** maintained that Network Rail

- 1.2.1. had not correctly complied with various of the requirements set out in Network Code Condition D2.2, governing the need for consultations with Train Operators, and the manner in which Network Rail was required to respond to Train Operator representations, and that therefore EEPW12v2 should not be recognised as a valid Possession Strategy Notice. Furthermore, following that failure, Network Rail
- 1.2.2. was wrongly persisting with a proposed Restriction of Use in **Week 35 2011** for Phase 1 commissioning that resulted in GBRf being denied access to the Hams Hall inter-modal terminal, necessarily resulting in a breach of its contractual obligations to a major customer. Specifically the proposed blockage between 23:50 Friday and 06:00 Monday will prevent GBRf from running the following inter-modal trains and light locomotive:

4M02 16:43 (FO) Felixstowe North – Hams Hall (arr. 00:25)

4L02 04:40 (SO) Hams Hall – Felixstowe North (arr. 11:42)

4M21 03:26 (SO) Felixstowe North – Hams Hall (arr. 08:57)

0M21 09:37 Hams Hall – Wembley InterCity Depot (arr. 12:30)

2. The Panel acknowledged the following contextual matters affecting its consideration of these disputes.

- 2.1. The re-signalling of the Water Orton Corridor had been the subject of consultation in accordance with the provisions of Network Code Part G, Network Change, and the Network Change was established.
- 2.2. Notwithstanding concerns in some quarters that the scope of the final scheme was less radical than one earlier proposed, the need for the works proposed was accepted and supported by Train Operators
- 2.3. The necessary implementing works required "*a programme of coordinated Restrictions of Use extending over: (a) a period of more than one year*" [Condition D2.2.1(a)] and, as such, were appropriate to be supported by a "Possession Strategy Notice".
- 2.4. Condition D2.2.4 provides that "*if any Bidder is dissatisfied as to:*
  - (a) *any matter concerning the operation of the procedure in this Condition D2.2; or*

(b) *the intended method of implementation of the proposed works as notified by Network Rail pursuant to Condition D2.2.3 and, in particular, the application by Network Rail of the Decision Criteria*

*it may, at any time prior to the date 30 days after the date on which it was notified pursuant to Condition D2.2.3 of the intended method of implementation, refer the matter to the relevant ADRR Panel for determination."*

- 2.5. Following publication of EEPW12v2 seven Train Operators had formally registered disputes with the Secretary, who had proposed that
    - 2.5.1. the common points in each dispute would most fairly be addressed at a single hearing
    - 2.5.2. each appellant should make a written submission of its case, and that
    - 2.5.3. Network Rail should make a single response addressing the points raised by each appellant.
  - 2.6. In the event only three of the appellants made formal submissions, and one of these reached agreement with Network Rail and withdrew from the formal ADR process.
  - 2.7. The remaining disputes relating to Condition D2.2 fell, in accordance with the provisions of Condition D5.1.1 (d), and the presumption within ADR Rule A1.14, to be referred to the jurisdiction of a Timetabling Panel.
3. XC therefore invited the Panel to determine that:
- (a) ***"Network Rail has not taken due regard of XC's ability to comply with the contractual requirements of its Service Level Commitment (SLC2), nor the ability to exercise its Firm Track Access Rights, when reaching its final decision regarding the Water Orton Possession Strategy Notice and the planning of other engineering work during the timetable year.***
  - (b) ***The level of access which XC should be allowed to exercise over the service groups for which it is contracted without multiple disruptions on the length of the route.***
  - (c) ***Through its routine closure of the Lichfield Trent Valley High Level to Wichnor Jn route, Network Rail have not made reasonable endeavours to maintain an appropriate diversionary route to allow XC to exercise its full Level One Rights."***
4. GBRf invited the Panel to determine:
- (a) ***That Network Rail did not consult with GBRf on either the content of the Water Orton Decision PSN or the method of implementation of the proposed works thus contravening Network Code Condition D2.2.2***
  - (b) ***That Network Rail had shown no evidence that, in deciding the intended method of implementation of the Water Orton Decision PSN 2011 & 2012, it had had due***

*regard to the Decision Criteria, contravening Network Code Condition D2.2.3(a);*  
and

- (c) *GB Railfreight also requests that if the Panel finds in favour of either (a) or (b) or both, that it directs Network Rail to withdraw the Water Orton Decision PSN 2011 & 2012, dated 15th September 2009, or find a suitable method of operation that allows GBRf to run its services listed in paragraph 6.1.2. [ see above paragraph 1.2.2]”*

5. Network Rail asked the Panel to determine that

- (a) *“That PSN-MA-012 EEP MW12 Water Orton Corridor Resignalling was correctly consulted by Network Rail in accordance with the condition D2.2 of the Network Code;*
- (b) *That Network Rail has correctly applied the Decision Criteria in regard to the decisions that were made in PSN-MA-012 EEP MW12 Water Orton Corridor Resignalling and that Network Rail is entitled to take the possessions published in this document.*
- (c) *That the disruptive engineering access described in the Water Orton PSN should be deemed to have priority over Network Rail’s 2011 Rules of the Route proposals on the route between Birmingham and Newcastle for other works, in accordance with condition D2.2.3 of the Network Code.”*

#### **Some preliminary issues of definition; the relevant contractual provisions**

6. The Panel reminded itself that,

- 6.1. as stipulated in the Access Dispute Resolution Rules, it must *“reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis”* (Rule A1.18).
- 6.2. the entitlements of the parties in this instance derive from
- 6.2.1. the Track Access Contracts of XC and GBRf;
- 6.2.2. compliance with the processes and obligations set out in Network Code Part D, and in particular Condition D2.2 **Possession Strategy Notice**
- 6.2.3. any relevant amplification of the meaning of these documents, and the obligations that they impose on the parties, as may be contained in a determination of either a *“relevant ADRR Panel”* (persuasive authority) or the Office of Rail Regulation (binding authority);
- 6.3. in respect of any question of remedy;
- 6.3.1. ADR Rule A1.19 prescribes that *“The Panel shall (a) where the Access Conditions or Access Agreement require that a specific remedy be granted, grant that remedy accordingly; or (b) where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Panel, exercise that discretion in*

accordance with any requirements and criteria set out in the Access Conditions and Access Agreement after due consideration of all remedies and orders that could properly be made”.

6.3.2. **Condition D5.3** of the Network Code states that “any dispute panel shall, in determining the matter in question, have the power:

5.3.1 *in determining the matter in question:*

- (a) *to direct Network Rail to comply with directions which specify the result to be achieved but not the means by which it shall be achieved (“general directions”);*
- (b) *to direct the parties to accept any submissions made by Network Rail as to any Train Slots; and/or*
- (c) *to specify the Train Slots and other matters which Network Rail should have determined in its decision made pursuant to this Part D,*

*provided that a dispute panel shall only take any action under paragraph (c) above in exceptional circumstances;”*

**Definitions**

<p>“Possessions Strategy Notice”</p>	<p>“Means a notice issued by Network Rail in connection with Condition D2.2.3 in relation to Network Rail’s proposed implementation of works requiring Restrictions of Use, as such notice is amended from time to time” [Condition D]</p>

**Condition D2.2 Possessions Strategy Notice**

2.2.1 *Notice of proposed possessions strategy*

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

- (a) *a period of more than one year; or*
- (b) *a period which contains two or more Passenger Change Dates,*

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

- (i) *such particulars of the proposed method of implementation of the works as are currently available to enable each such Bidder to understand the likely effect of the proposed works on its Services or the operation of its trains; and*
- (ii) *an explanation of Network Rail’s reasons for the proposed method of implementation.*

*In this Condition D2.2 the expression “method of implementation” means a statement containing a programme of Restrictions of Use which would be required in order to carry out the proposed works.*

## 2.2.2 Consultation on proposed method of implementation

Network Rail shall invite the submission of comments from each Bidder to which it has given notice under Condition D2.2.1 within such period as is reasonable in the circumstances having due regard to the likely effect of the proposed works on those Bidders and shall consult with them concerning the method of implementation for the proposed works.

## 2.2.3 Notice of intended method of implementation

Subject to having complied with the foregoing provisions of this Condition D2.2, Network Rail shall issue to each Bidder to which it gave notice under Condition D2.2.1 a notice of its intended method of implementation for the proposed works ('Possessions Strategy Notice'), provided that:

- (a) in deciding such intended method of implementation, Network Rail shall have had due regard to the Decision Criteria; and
- (b) it shall have taken into account any comments submitted to it pursuant to Condition D2.2.2 and given its reasons for discounting any it has discounted.

## 2.2.4 Right of appeal

If any Bidder is dissatisfied as to:

- (a) any matter concerning the operation of the procedure in this Condition D2.2; or
- (b) the intended method of implementation of the proposed works as notified by Network Rail pursuant to Condition D2.2.3 and, in particular, the application by Network Rail of the Decision Criteria

it may, at any time prior to the date 30 days after the date on which it was notified pursuant to Condition D2.2.3 of the intended method of implementation, refer the matter to the relevant ADRR Panel for determination.

## 2.2.5 Relationship with Part G and Condition D2.1

The provisions of this Condition D2.2 shall be without prejudice to:

- (a) the provisions of Part G, if the works referred to in a Possessions Strategy Notice, once completed, would constitute a Network Change within the meaning of that Part; and
- (b) the requirement to comply with Condition D2.1, to the extent that the implementation of the proposed works in accordance with the method of implementation would require an amendment to the applicable Rules of the Route and/or the applicable Rules of the Plan.

## 2.2.6 Amendment procedure

Network Rail shall include within the Rules of the Plan a procedure to enable amendment or withdrawal of any Possession Strategy Notice (subject to Conditions D2.2.7 and D2.2.8).

### 2.2.7 Contents of amendment procedure

*The procedure proposed by Network Rail pursuant to Condition D2.2.6:*

- (a) *shall provide that no amendment shall be made to a Possessions Strategy Notice unless:*
  - (i) *Network Rail shall have consulted, to the extent reasonably practicable, with each Bidder likely to be affected by the amendment; and*
  - (ii) *due regard shall have been had to the Decision Criteria; and*
- (b) *shall be deemed to have been accepted by each such Bidder unless any such Bidder shall, within five Working Days of the relevant procedure being sent to it, have referred any aspect of it to the relevant ADRR Panel for determination in accordance with Condition D5.*

### 2.2.8 Priority

*In the event of any inconsistency between the applicable Rules of the Route and/or the applicable Rules of the Plan for a particular Timetable Period (once finalised in accordance with Condition D2.1.5) and any Possessions Strategy Notice (or any amendment to a Possessions Strategy Notice) relating to such period, the applicable Rules of the Route and/or the applicable Rules of the Plan (as the case may be) shall prevail to the extent of such inconsistency.*

## The Evidence laid before the Panel

12. The **individual submissions** of the three parties (XC, GBRf and Network Rail), incorporating annexes including

### 12.1. Generally applicable papers

- **EEPW12: Water Orton Corridor Re-signalling, Possession Strategy Notice, PSN-MA-012, Version 1.0, ("EEPW12v1")** dated 10<sup>th</sup> July 2009
- **EEPW12: Water Orton Corridor Re-signalling, Possession Strategy Notice, PSN-MA-012, Version 2.0**, dated 11<sup>th</sup> September 2009
- **Minutes of Operator Consultation Meetings**
  - Notes from Water Orton resignalling meeting 08/04/09
  - Notes from Water Orton resignalling project PSN response meeting 19/08/09
- Appendix C to Network Rail paper: undated tabulation entitled "**Changes made to the access plan during operator consultation**".

### 12.2. Relating to XC's representations

- Details of XC's firm rights;
- Extracts from Rules of the Route/ Rules of the Plan relating to route between Lichfield and Wichnor Junction;
- Details of correspondence relative to route learning and availability of route between Lichfield and Wichnor Junction;
- Response to EEPW12v1 dated 07/08/09;

- Details of XC Service Level Commitment (“SLC”);
  - Tabulation of **“Details of proposed 2011 possessions affecting XC service groups which run through the geographical area covered by the Water Orton PSN.”**
  - “Tablecloth” graphic representation of above, illustrating how frequently throughout 2011 individual service groups would be affected by multiple Restrictions of Use.
- 12.3. Relating to GBRf’s representations
- **“First GB Railfreight’s Response to the Water Orton Preliminary PSN 2001 [sic] & 2012 [EEPW12v1];** document undated but confirmed by both Network Rail and GBRf as sent on 02/08/09.
  - **“First GB Railfreight’s Response to the Water Orton Resignalling Decision PSN 2011 & 2012 [EEPW12v2];** document undated but confirmed by both Network Rail and GBRf as sent on 06/10/09.
  - E-mail correspondence 25/11/09 and 01/12/09 seeking response to above, and update on items in dispute;
  - 02/12/2009: e-mail response from Network Rail to GBRf covering *“a spreadsheet which contains Network Rail’s formal reply to GBRf’s Water Orton PSN response”*.
13. A Directions letter from the Panel Chairman to the parties dated 18<sup>th</sup> January 2010, seeking further clarifications, in particular in relation to
- 13.1. the remedies sought by each party,
  - 13.2. the application of the Decision Criteria, and
  - 13.3. orders of magnitude assessments of the compensation available for the Train Operators in respect of the disputed possessions, under Track Access Contract Schedule 4
14. The responses from Network Rail (19/01/2010), XC (25/01/2010 and GBRf (22/01/2010) to the above.
15. Opening statements (also supplied in hard copy) from XC, GBRf and Network Rail, followed by questioning of representatives of the parties by the Panel.

### **The Contentions of the Parties**

16. The Panel considered that the arguments of the parties could be summarized as follows.
17. XC argued its case by reference to
- 17.1. the key importance of the route via Water Orton in relation to the Service Level Commitment for most of its service groups;
  - 17.2. the extent to which delivery of the weekend SLC was impacted upon by the frequency with which routes were affected by multiple Restrictions of Use which, because of differing planning protocols in different parts of Network Rail resulted in difficulties in maintaining any degree of consistency in Timetables as between consecutive weekends;
  - 17.3. the critical factor for XC in operating its services during the Restrictions of Use required to deliver the Water Orton Corridor Re-signalling works, is that it have adequate access to the diversionary route via Lichfield City and Wichnor Junction via Alrewas. This access is not just necessary during the Restrictions of Use; it is also essential that it be available on a regular basis during 2010 sufficient to ensure that all those train crew potentially required to work



diverted services over this route are able to retain the necessary route knowledge. This is of particular significance for train crew based in Leeds, whose ability to maintain that knowledge in a train-working context is being impeded by the proposed limitation on the opening hours of the route in the 2010 Rules of the Route/Rules of the Plan.

- 17.4. the combined impact of all the above factors was materially interfering with the ability of XC to realise the potential of the weekend market, which is dependent upon the ability of customers to depend upon the availability and predictability of Sunday services.
18. GBRf argued that
  - 18.1. it had responded formally to EEPW12v1 but had not received a response from Network Rail, prior to the issuing of EEPW12v2,
    - 18.1.1. any exposition of how” *in deciding such intended method of implementation, Network Rail shall have had due regard to the Decision Criteria*” [Condition D2.2.3(a)]
    - 18.1.2. any form of specific acknowledgement that it had “*taken into account any comments submitted to it [by GBRf] pursuant to Condition D2.2.2 and given its reasons for discounting any it has discounted.* [Condition D2.2.3 (b)].
  - 18.2. EEPW12v2 had not incorporated even the editorial points raised, and still introduced itself as a “Draft Possession Strategy Notice.
  - 18.3. Whilst a change in midweek 34 to allow the continued use of the Slow lines between Whiteacre Junction and Kingsbury Junction for the passage of W10 gauge trains was welcome, the practical implications and the impact upon booked services was still unclear;
  - 18.4. critically, GBRf would be placed in significant breach of contract with its customer because the proposed Week 35 Restriction of Use for Phase 1 Commissioning would prevent the running of three W10 gauge inter-modal services to/from Hams Hall. GBRf did not believe that there was capacity available (either physically or contractually) for those trains to be dealt with at other terminals (e.g. Birch Coppice), and that Network Rail’s proposed scheduling of works should take account of these considerations;
  - 18.5. GBRf had calculated potential compensation in respect of an inability to access Hams Hall on the basis of Category 2 compensation under Schedule 4 of its track access contract, and concluded that at this tariff the scale of economic hurt would be unacceptable;
  - 18.6. taken together, for both procedural and practical reasons, EEPW12v2 should be deemed an invalid document that should be withdrawn and re-worked.
19. **Network Rail** argued that
  - 19.1. It considered that it had complied with the requirements of Conditions D2.2.2, and D2.2.3;
  - 19.2. it had held consultation meetings both before the issue of EEPW12v1 and then before issuing EEPW12v2 to which all affected Train Operators had been invited but that GBRf had not been able to attend in either case. However minutes of both meetings had been produced and sent to GBRf;
  - 19.3. on 01/12/09 Network Rail had sent GBRf a spreadsheet that set out what responses Network Rail had made to GBRf’s representations;
  - 19.4. Train and Engineering Access Planners were familiar with the requirement to have “*due regard to the Decision Criteria*”, and would have done this as a standard part of dialogue. The formal tabulation of the Decision Criteria included in the submission reflected a retrospective assessment of their relative importance, but was thought to be a fair reflection of the way in which the Decision Criteria had had been applied at the time;

- 19.5. At each stage Network Rail had sought to minimise the impact of the works on all Train Operators, and significant changes had been made prior to the issue of EEPW12v1, again prior to EEPW12v2, and in a range of bi-lateral discussions with those Train Operators that had not pursued their formal disputes.
- 19.6. The question of the availability of the Lichfield- Wichnor Junction route, both for diversions and for preliminary route learning, was an “open” question, and Network Rail was seeking a practical solution to put to XC.
- 19.7. It was not feasible to reduce the duration of the commissioning Restriction of Use in Week 35 in such a way as to give GBRf the access it required to Hams Hall, and Network Rail considered that there was nothing more to be done directly without a complete re-scheduling of the whole project;
- 19.8. Network Rail had found a way to maintain access to Birch Coppice Terminal and would seek to agree with GBRf any options that would allow GBRf to operate a service or services into that Terminal during the Week 35 Commissioning Restriction of Use.

### **The Panel’s findings of entitlement in respect of the Dispute**

20. The starting point for the Panel’s considerations is that responsibility for best use of the Network, and for ensuring that it is the most efficiently renewed and maintained is, subject only to the overall jurisdiction of the Office of Rail Regulation, exclusive to Network Rail. That said, the Panel must satisfy itself that Network Rail had not, in making any specific proposal
  - 20.1. failed in the execution of one of the procedures to which it is contracted through the Track Access Agreements and the Network Code,
  - 20.2. unreasonably frustrated a specific right of any Train Operator,
  - 20.3. unreasonably put one Train Operator at a disadvantage, in order to advantage others, or
  - 20.4. made a capricious decision which did not take into account either the facts of the case, or the guidance embodied in Condition D6, the Decision Criteria.
21. The Panel found that the function of, and justification for, a PSN is that, once properly agreed and documented, it provides, to Network Rail and Train Operators alike, the necessary degree of certainty as to how a major scheme will be delivered, against which to plan other activities. Thus
  - 21.1. Network Rail can be certain that Restrictions of Use needed for the scheme will be incorporated into the “*applicable Rules of the Route*” in the relevant following years; and
  - 21.2. Train Operators can reasonably argue against the inclusion in those future Rules of the Route of Restrictions of Use that will affect their operations “around” the PSN Restrictions of Use.
22. A corollary of the fact that decisions made regarding a PSN can have implications for several future years, is that
  - 22.1. the audit trail by which those decisions are documented for the benefit of persons or bodies who may be accountable for enacting them in future, must be comprehensive and all-embracing; and
  - 22.2. once finalised, the detail covered by the PSN should not be open to amendment, other than in accordance with the terms of the “*Amendment Procedure*” included within the Rules of the Plan (as required by the provisions of Condition D2.2.6), and within the constraints set by Condition D2.2.8.
23. The Panel finds that it is required to consider the Water Orton PSN (EEPW12v2) issues raised by XC and GBRf from two specific perspectives, namely

- 23.1. whether the prescribed procedures defined in Condition D2.2 have been properly complied with, and
  - 23.2. whether any of the Restrictions of Use set out in EEPW12v2 take insufficient account of the requirements of the two dissenting Train Operators, GBRf and XC.
24. The Panel noted that, on the first point, it is explicitly requested by NR to find that [the PSN] “was correctly consulted by Network Rail in accordance with the condition D2.2 of the Network Code” (Network Rail Submission 8.1(a)), and that the contrary view is argued by GBRf. The Panel considered that if it were not able to uphold the position argued by Network Rail then
- 24.1. it would be appropriate to conclude that there was no *de facto* PSN for the Water Orton Works: and therefore
  - 24.2. there would be no grounds for addressing the points of detail.
25. The Panel finds that both sub-paragraphs (a) and (b) of Condition D2.2.3 impose very specific preconditions that Network Rail is required to fulfill, as between the conclusion of the consultation required by Condition D2.2.2 and the issuing of a PSN. It is the view of the Panel that it is not sufficient for Network Rail to assert that it has fulfilled those requirements, but that, if challenged, it must be able reasonably to demonstrate, by reference to records, that they have been fulfilled, at the time, and not retrospectively.
26. The Panel has had to consider the specific representations of GBRf regarding the failure to respond to its document submitted on 2<sup>nd</sup> August 2009, as reflected in its follow up response document of 6<sup>th</sup> October 2009. The failure by Network Rail to respond to GBRf’s document dated 2<sup>nd</sup> August 2009 alone leads the Panel to the conclusion that Network Rail had not fulfilled the requirements of D2.2.3(b) before issuing EEPW12v2 on 16<sup>th</sup> September 2009. For this reason it follows that, in the view of the Panel, it cannot find as requested by Network Rail, that [the PSN] “was correctly consulted by Network Rail in accordance with the condition D2.2 of the Network Code” and that therefore the effective position is that Network Rail is not entitled to deem EEPW12v2 a “Final” PSN.
27. The Panel also notes that there has been significant further dialogue between Network Rail and the various Train Operators such that some of the detail contained in EEPW12v2 is no longer operative, and requires updating.

### The Panel’s Determination

28. Taken together these points lead the Panel to determine as follows:

- 28.1. In relation to the following propositions

***That PSN-MA-012 EEPPMW12 Water Orton Corridor Resignalling was correctly consulted by Network Rail in accordance with the condition D2.2 of the Network Code;***

and

***That Network Rail did not consult with GBRf on either the content of the Water Orton Decision PSN or the method of implementation of the proposed works thus contravening Network Code Condition D2.2.2***

and

***That Network Rail had shown no evidence that, in deciding the intended method of implementation of the Water Orton Decision PSN 2011 & 2012, it had had due regard to the Decision Criteria, contravening Network Code Condition D2.2.3(a);***

Network Rail has not developed the Water Orton Decision PSN (EEPW12v2) in a manner compliant with the requirements of Condition D2.2. Specifically it did not satisfy the pre-

condition in Condition D2.2.3(b); and therefore there is, as yet, no valid Final PSN governing these works;

- 28.2. In relation to the other propositions (see paragraphs 3,4 and 5 above), in the light of its finding at 28.1, it would not be appropriate for the Panel to seek to adjudicate on the issues of detail that have been submitted.
29. For the avoidance of doubt, it should be understood that Network Rail is not, by this finding, in any way disbarred from carrying through to a successful conclusion the procedures set out in Condition D2.2, resulting in a valid Final PSN for the Water Orton Corridor Re-signalling scheme and potentially
  - 29.1. incorporating
    - 29.1.1. all the matters resolved since the commencement of consultation under Condition D2.2.2., together with
    - 29.1.2. those items where it has not been possible to reach agreement, and Network Rail has taken responsibility for a specific proposed course of action; and
  - 29.2. providing stability for the Restrictions of Use required to deliver the Water Orton Corridor Re-signalling scheme, as an input to the Rules of the Route for both 2011 and 2012.
30. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.



**Bryan Driver**  
**Panel Chairman**

6 February 2010