

THE OFFICE OF RAIL REGULATION DETERMINATION OF THE APPEAL BY WEST COAST TRAINS LIMITED (“WCT”) PURSUANT TO CONDITION D5.2 OF THE NETWORK CODE AGAINST DETERMINATIONS TTP 337, 359, 382 OF THE TIMETABLE DISPUTES PANEL (the “PANEL”) OF THE ACCESS DISPUTE RESOLUTION COMMITTEE

DETERMINATION: The Office of Rail Regulation determines the appeal in the manner set out in paragraphs I.53 to I.84 below

<b>I.</b>	<b>Introduction</b> .....	<b>2</b>
<b>II.</b>	<b>Background to the Appeal</b> .....	<b>3</b>
<b>III</b>	<b>The Panel’s Determination</b> .....	<b>5</b>
<b>IV.</b>	<b>Conduct of the Appeal Before the ORR</b> .....	<b>7</b>
<b>V.</b>	<b>The Relevant Provisions of the Network Code and Network Rail’s Licence</b> .....	<b>9</b>
<b>VI.</b>	<b>The Parties’ Submissions</b> .....	<b>10</b>
<b>VII.</b>	<b>ORR’s Consideration of the Appeal</b> .....	<b>16</b>
<b>VIII.</b>	<b>Conclusion</b> .....	<b>24</b>
	<b>ANNEX 1 – RELEVANT PORTIONS OF THE NETWORK CODE</b> .....	<b>25</b>
	<b>ANNEX 2 – RELEVANT PORTIONS OF NETWORK RAIL’S LICENCE CONDITIONS</b> .....	<b>36</b>

## I. Introduction

1. This is the determination by the Office of Rail Regulation (“**ORR**”) of the appeal brought by WCT on 9 February 2011 (the “**Appeal**”). The Notice of Appeal challenges the Panel’s determination of dispute references TTP 337, 359 and 382 dated 1 February 2011 (the “**Determination**”).
2. The Panel’s Determination arose out of a decision of Network Rail Infrastructure Limited (“**Network Rail**”) concerning the timing of planned possessions for the purposes of maintaining the West Coast Main Line during three weekends in the summer of 2011. The possessions would interfere with trains running through the Stockport and Macclesfield corridor over a 16-hour period on each of the three weekends.
3. Network Rail proposed possessions which would commence early Sunday morning and finish at 1630 on Sunday afternoon (“**Network Rail’s Proposal**”).
4. WCT proposed an alternative possession schedule which would commence Saturday evening and finish at 1300 on Sunday afternoon (“**WCT’s Proposal**”).
5. In summary, before the Panel WCT challenged Network Rail’s decision-making and argued that, based on a proper application of the Network Code Decision Criteria, Network Rail’s Proposal should be rejected in favour of WCT’s Proposal. However, the Panel found in favour of Network Rail; Network Rail’s Proposal was upheld.

## II. Background to the Appeal

6. WCT is responsible for running a Very High Frequency timetable along the whole of the West Coast Main Line from London Euston to the West Midlands, Liverpool, Manchester & Scotland, as well as serving areas in North Wales and the Lake District. Other operators, such as First/Keolis Transpennine Limited, XC Trains Limited and Northern Rail Limited ("**Northern Rail**") use the West Coast Main Line.
7. At issue are three proposals made by Network Rail under the 2011 Rules of the Route ("**ROTR**") process, in accordance with the Network Code Part D2.1.3 and National Rules of The Plan ("**ROTP**"). Supplemental issues (relating to TTP382) were items proposed through the Confirmed Period Possession Plan under D2.1.10 of the Network Code and ROTP Part 3.5.
8. The possessions are located between Wilmslow/Cheadle Hulme and Slade Lane Junction via Stockport on the London to Manchester route. They are scheduled to take place in Summer 2011: 26 June 2011, 3 July 2011 and 10 July 2011 (Engineering Weeks 13, 14, 15).
9. Network Rail's Proposal was made under Network Code D2.1.3 on 5 February 2010 (TTP337) and/or 9 July 2010 (TTP 359). Further changes under Network Code D2.1.10 and ROTP Part 3.5 occurred during December 2010 (TTP 382).
10. Dispute References TTP 337, 359 and 382 were notified to the Secretary of the Access Disputes Committee on 26 February 2010, 23 July 2010 and 20 December 2010 respectively (collectively, the "**Disputes**").
11. Network Rail's Proposal was challenged by WCT on the basis of the impact on WCT's passengers on the primary London to Manchester route

on the three summer Sunday afternoons. However, WCT's Proposal would leave passengers travelling on Northern Rail from Manchester Piccadilly to Stockport (and beyond) on Saturday evening with no rail service. Use of a rail replacement road service from Manchester to Stockport (and beyond) on a Saturday evening was predicted to cause significant public order issues.

12. A joint submission document covering all matters in dispute was provided by Network Rail and WCT on 12 January 2011 to the Panel and was copied to all interested parties, including Northern Rail, at the same time. Following this Northern Rail declared itself a Dispute Party and tendered a submission document on 17 January 2011. All documentation was made available to all parties/persons involved, with the exception of redacted WCT passenger load information, which was only made available to the Chair of the Panel.
13. The Panel heard the Disputes on 20 January 2011. The Panel was asked to decide if Network Rail's decision to specify possessions timed between 0030 and 1630 on each of the relevant Sundays (i.e. Network Rail's Proposal) was based on a correct application of the Decision Criteria in Part D of the Network Code. [Determination ¶¶4.2.4; 8.3] At that hearing the Panel also considered a dispute concerning the Coventry Corridor which has since been resolved.
14. The Panel issued its Determination on 1 February 2011, finding in favour of Network Rail and Northern Rail.
15. WCT appealed from the Panel's Determination to ORR on 9 February 2011 pursuant to Part M2(a) and Condition D5.2 of the Network Code<sup>1</sup> on the grounds that the Panel's Determination was detrimental to WCT's

---

<sup>1</sup> The November 2009 version of Part D of the Network Code applies to this Appeal.

passengers and its commercial interests, as well as contrary to agreements between Network Rail, the Department for Transport (“DfT”) and WCT. [Notice of Appeal ¶¶3.5; 4.5]

### III. The Panel’s Determination

16. The Panel was unanimous in its view that Network Rail had properly applied the Decision Criteria.
17. The Determination initially considered the scheduled trains, and their predicted passenger numbers, which would be affected under Network Rail’s Proposal and WCT’s Proposal. [Determination ¶¶9.1 – 9.4.6]
18. The Determination noted that the passenger data provided by the parties was subject to a number of limitations. [Determination ¶¶9.4.3 – 9.4.5] Further, because WCT deemed its passenger data to be commercially sensitive, it provided this data only to the Panel Chair. The Panel noted these issues and went on to calculate that under Network Rail’s Proposal the number of WCT passengers affected would be high (many thousands). The number of Northern Rail passengers affected would be around 1,300 – 2,500. Under WCT’s Proposal, the number of Northern Rail passengers affected would be 2,700 – 5,000. [Determination ¶9.6.1]
19. Network Rail raised public disorder concerns arising from cancelled train services on a Saturday evening out of Manchester Piccadilly station. Northern Rail echoed this concern and submitted a supporting statement from British Transport Police (the “BTP”). The Determination noted that, based on the data available, there could be up to one thousand displaced Northern Rail passengers to manage in under an hour late at night. [Determination ¶¶9.5.1 – 9.5.4] In reply, WCT pointed to a public disorder issue arising on Sunday afternoon under Network Rail’s

Proposal. [Determination ¶9.5.6] The Determination also noted the general preference, as articulated in the Network Rail October 2007 Strategic Business Plan, to avoid bus substitution as it suppresses demand and results in a higher degree of inconvenience and discomfort.

[Determination ¶9.6.2]

20. Effects on passengers were summarised in the Determination as follows:

*“The overall conclusion therefore on effect on passengers, subject to all the caveats that make all figures and assessments to be estimates rather than calculations of definitive figures, is*

*(a) on the Network Rail proposal more WCTL passengers are affected (but the majority of them will be on a WCTL train whilst being diverted and delayed)*

*(b) on the WCTL proposal it is likely that more passengers have to be bussed (but the extent of the difference depends on/is affected by the caveats to the figures)*

*(c) passengers who are bussed are, in general, more seriously affected.”*  
[Determination ¶9.6.3]

21. The Panel then turned to the public order issue:

*“on which the conclusion is that Network Rail are right in apprehending a risk of public disorder with consequential targeting of rail, bus and police staff.”*  
[Determination ¶9.6.4]

22. The Panel went on to note that WCT had attached importance to Efficient Engineering Access (“EEA”) provisions which envisage more of a “seven day railway.” With respect to these concerns, the Panel stated that they were “relevant but not decisive”:

*“It was said in TTP 271 that the standing of the EEA document is that a) it does not have contractual force in the context of the individual Track Access Agreements but b) its intended objectives have significant industry support and c) any such statements of guidelines should be taken into account in an objective assessment of Network Rail proposals. Plainly it is disappointing for there to be disruption to the [West Coast Main Line], particularly after the investment made and the effects on passengers in achieving the upgrade. But I accept Network*

*Rail's contention that this is a factor to be weighed and not decisive in itself.*"  
[Determination ¶9.6.7]

23. The Panel's conclusions on the balancing exercise were as follows:

*"The effect on passengers is by no means clear cut... Those arguments are finely balanced. In that respect there is no clear reason for favouring one alternative over the other. However, the public order element ... is clearer and important and a key element in favouring the decision made by Network Rail. The fears of disorder are well founded, based on practical experience of similar events in recent years, widely shared and supported by an independent view from the British Transport Police. Accordingly, the conclusion I reach, taking all relevant factors into account, is that the balance is in favour of avoiding possessions on Saturday evenings. This is because of the clear risk of public disorder late on Saturday evenings including risks to transport staff, other factors being finely balanced."* [Determination ¶9.6.8]

24. The Panel weighed the evidence before it and found that Network Rail's decision in favour of Sunday afternoon possessions rather than Saturday evening possessions, primarily on public order grounds, was justifiable by reference to the Decision Criteria. [Determination ¶10.6]

25. The Panel concluded:

*"[Network Rail] have correctly applied the Decision Criteria. They have taken into account relevant factors, including having due regard to the Decision Criteria. They have applied their knowledge of the facts, including experience of the consequences of previous work on the [West Coast Main Line] and the consequences of previous possessions. The Decision that they have come to is the outcome of that proper consideration. The Decision is reasonable, proportionate, experience based and results from having due regard to the Criteria."* [Determination ¶10.8]

26. The Panel upheld Network Rail's planned possessions. [Determination ¶11]

#### **IV. Conduct of the Appeal Before the ORR**

27. WCT issued its Notice of Appeal on 9 February 2011 under Part M of the Code (the "**Notice of Appeal**"). In that Notice of Appeal, WCT sought a rehearing rather than a review of the Panel's Determination. WCT also

requested an oral hearing. Further, WCT requested that the appeal process be conducted on an expedited basis given the proximity of the possessions under appeal. [Notice of Appeal ¶¶3.6 – 3.8]

28. Juliet Lazarus, Director of Legal Services, was appointed by ORR as director in charge of the Appeal.
29. Following receipt of WCT's Notice of Appeal, on 11 February 2011 ORR sought representations from the parties on the key issues it had to decide at that initial stage: whether ORR should hear the appeal and, if so, should that appeal be expedited, consist of a review or re-hearing and proceed by way of oral or solely written representations. WCT replied to this request on the same day (11 February 2011). Network Rail and Northern Rail replied on 14 February 2011.
30. Having considered the representations received, ORR decided to hear the Appeal on the basis that the issues raised were of sufficient importance to the industry to warrant determination on appeal by ORR. This decision was communicated to WCT, Northern Rail and Network Rail by way of letter dated 15 February 2011.
31. ORR proposed to conduct the Appeal by way of written representations only, without the oral submissions sought by WCT, unless the parties' substantive responses to the Notice of Appeal persuaded it otherwise. Pursuant to Condition M6 of the Network Code, ORR indicated that it was minded to determine the Appeal by way of a review of the decision of Panel Determination, again unless the parties' submissions persuaded ORR that it was in the interests of justice to hold a re-hearing. This was communicated to the parties in the 15 February 2011 letter.



32. The letter of 15 February 2011 also proposed an expedited timetable to hear the Appeal. This timetable was agreed by the parties (with one minor amendment). In accordance with that agreed expedited process, Network Rail and Northern Rail provided representations on 1 March 2011 (“**Network Rail’s Response**” and “**Northern Rail’s Response**” respectively). WCT chose not to reply to those representations.
33. On the basis of the written representations received, ORR decided not to allow oral submissions and that it would not be in the interests of justice to hold a re-hearing. This was communicated to the parties by way of letter dated 9 March 2011.

#### **V. The Relevant Provisions of the Network Code and Network Rail Licence**

34. The relevant portions of the Network Code are contained in Part D, and are set out in Annex 1 to this Determination.
35. In summary, Part D of the Network Code, entitled “Timetable Change”, sets out those procedures by which the Working Timetable, ROTR and ROTP may be changed. Paragraph D2.1.3 provides that Network Rail must notify train operators of any changes to the ROTR which it proposes to make having due regard to the Decision Criteria.
36. The Decision Criteria are set out under Condition D6.
37. By way of introduction, Condition D6 states that:

*“ ...[t]he Decision Criteria consist of the necessity or desirability of the following (none of which necessarily has priority over any other).”*
38. There then follows a list of the specific Decision Criteria.
39. The relevant portions of Network Rail’s Licence are set out in Annex 2 to this Determination.

## VI. The Parties' Submissions

### WCT

40. WCT submitted that Network Rail's Proposal would affect its passengers and staff alike, through the potential for overcrowding and control issues, as well as the need to divert train services and provide long distance rail replacement bus shuttles.
41. WCT appealed from the Determination on four grounds:
  - i. The Panel erred by not considering if Network Rail's Proposal was consistent with EEA.
  - ii. The Panel erred by failing to consider WCT's contractual obligation to the DfT through its Service Level Commitments ("SLCs") and Network Rail's own breach of its Licence Conditions.
  - iii. The Panel erred by favouring one train operator over another in relying on Northern Rail's relevant passenger load figures which were (1) unsound and (2) acknowledged as being smaller than WCT's relevant passenger figures and placed too much weight on concerns over an associated public disorder situation that could be otherwise managed effectively by Northern Rail and the BTP working together; and
  - iv. The Panel's Determination was unsound as the Panel was not made aware of the risks associated with undertaking tamping works in the summer.

[Notice of Appeal ¶15]

*Ground (i) – Due Regard to Decision Criteria-EEA/TAC*

42. WCT argued that EEA should have formed a decisive element in the decision-making process, in view of the times of the possessions proposed and the services affected. WCT submitted that EEA was very much an agreed and permanent feature of Network Rail's strategy. An important feature of EEA is that a weekday train frequency and journey time operates on the routes south of Crewe and to Manchester all day on Saturdays and from 1200 on Sundays – with works completed in shorter blocks of the line, principally using mid-week night and Sunday morning possessions. Network Rail's balancing, then, did not take into account its obligation to comply with EEA. [Notice of Appeal ¶8.1.8]
43. Further, WCT considered that Network Rail's proposed possession times would put Network Rail in breach of the Track Access Contract (the "TAC") it has entered into with WCT. WCT based this point on a previous determination (regarding journey times in a full timetable). WCT submitted that the Panel failed to take this non-compliance into account. [Notice of Appeal ¶8.1]

*Ground (ii) – Licence Obligations*

44. WCT submitted that Network Rail was in breach of its Licence Conditions. In its capacity as the operator of the network, Network Rail has an obligation to secure the operation and maintenance, the renewal and replacement, and the improvement, enhancement and development of the network:

*"in each case in accordance with "best practice" and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of*

*i) the quality and capability of the network; and*

*ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network". [Licence Condition 1.1]*

45. WCT submitted that a failure to satisfy WCT's reasonable requirements, including its franchise obligation to provide the Very High Frequency timetable and those rights which underpin it (SLCs and TAC), placed Network Rail in breach of its obligations under its Licence. Further, Network Rail has an obligation under its Licence Condition 1.6 to provide a Delivery Plan to ORR. That Delivery Plan reflects EEA principles – which Network Rail would fail to fulfil under Network Rail's Proposal. WCT submitted that the Panel failed to take into account these potential breaches. [Notice of Appeal ¶8.2]

*Ground (iii) – Passenger Numbers and Public Order*

46. WCT provided a detailed set of information about passenger loadings over the routes concerned (loadings at Stockport and Macclesfield). The information was provided by WCT on a confidential basis to the Panel Chair only. Initially, WCT argued that this redaction weakened its case as the other four Panel members were only able to make a "*subjective assessment of the dispute going forward*".<sup>2</sup> [Notice of Appeal ¶8.3.1]
47. The thrust of WCT's challenge, however, was that the Panel ranked public order concerns too high. Northern Rail would be able to manage disruption together with the BTP. WCT noted the evidence that the BTP would not find the situation unmanageable. [Notice of Appeal ¶8.3]

---

<sup>2</sup> WCT went on to note that "*the information provided was still of sufficient qualitative detail, to provide all members with an appreciation of the high numbers of passengers involved and consequently disrupted.*" [Notice of Appeal ¶8.3.2]

*Ground (iv) – Work Risks*

48. WCT declared that the work to be undertaken during the possessions, switch and crossing tamping activities on certain junctions, was susceptible to high temperatures, and queried if Network Rail had taken this into consideration in its decision-making. WCT stated it had:

*“reason to believe following these and other discussions that undertaking such works in the height of summer, when temperatures in reality are potentially at their highest, is indeed a risk that Network Rail have not, to date, factored into this dispute.” [Notice of Appeal ¶8.4.2]*

49. WCT stated that Network Rail did not include this consideration in its initial evaluation or bring it to the Panel’s attention. [Notice of Appeal ¶8.4]
50. WCT requested ORR to uphold its appeal and sought a direction that Network Rail (1) start the possessions at 21:00 on Saturday night to enable an earlier finish time of 13:00 or (2) re-plan the works to a more suitable time of year, or a combination of (1) and (2) above. [Notice of Appeal ¶6]

Network Rail

51. Network Rail requested that the Determination be upheld. In response to WCT’s appeal grounds, Network Rail submitted:
- i. Network Rail challenged WCT’s interpretation of EEA principles under Ground (i). The Panel rightly considered EEA as a non-contractual obligation. [Network Rail’s Response ¶6.1]
  - ii. With respect to Ground (ii), Network Rail maintained that its proposed possession regime would not result in a breach of either its or WCT’s contractual obligations. The relevant contracts make provision for possessions, to the extent those possessions are

scheduled in accordance with Part D of the Network Code. Similarly, properly taking possessions did not lead to a breach of Network Rail's Licence Conditions. [Network Rail's Response ¶¶6.2, 6.3]

- iii. Network Rail maintained that there was no evidence that the Panel misunderstood or misapplied the information received. Further, it was proper for the Panel to accept the views expressed by Network Rail and Northern Rail, and the evidence of the BTP, regarding public safety. [Network Rail's Response ¶¶6.3.6, 6.3.7]
- iv. Network Rail noted that Ground (iv) was not raised before the Panel. In any event, Network Rail clarified that:
  - (a) tamping is regularly undertaken at this time of year;
  - (b) in Network Rail's experience it is unlikely that tamping would be affected by high temperatures; and
  - (c) across the entire network 6.7% of 1,269 and 8.62% out of a total of 1,230 on-track machine shifts were cancelled because of hot weather in June and July 2010 respectively, and that because these percentages cover all on-track machine shifts the percentage of tamper shifts lost is smaller than the percentages would suggest. [Network Rail's Response ¶¶6.3.8 – 6.3.9]

#### Northern Rail

- 52. Northern Rail opposed the appeal and submitted that both the Determination, and the underlying Network Rail decision, were properly

reached. [Northern Rail's Response ¶2] Northern Rail's submissions were as follows:

- i. With respect to Ground (i), Northern Rail argued that the Panel quite clearly considered EEA. While Northern Rail maintained that its primary position was that weight should not have been given to documentation (such as EEA) which was non-contractual under the Decision Criteria, the Chair did not err by not according EEA decisive weight. It was unreasonable for plans and agreements with third parties to be given precedence above all other considerations where they were not reflected in the existing regulatory industry contractual structure. Finally, Northern Rail noted that *“EEA is a plan for the general delivery of works – it is not a guarantee that no specific individual possession will ever be permitted to interrupt the overall objective nor could it be.”* [Northern Rail Response ¶4]
- ii. In response to Ground (ii) Northern Rail noted that, again, the Determination clearly refers to the SLC requirements. The possessions will affect the SLC requirements of both Northern Rail and WCT; neither should be able to claim that its commitments are of greater importance than the other. It is for this reason that the Franchise Agreement between WCT and DfT (the **“Franchise Agreement”**) excludes liability for obligations disrupted by necessary work. Further, Northern Rail disputed the relevance of the Licence Conditions, as alleged by WCT, to the issue before the Panel. [Northern Rail Response ¶4]

- iii. In response to Ground (iii) Northern Rail argued that the information available to the Panel, and the use made of it, was appropriate. [Northern Rail's Response ¶4]
- iv. Ground (iv) was disputed both on the grounds that it was not raised before the Panel and that Network Rail would have taken the likely air temperatures into account in scheduling the engineering works. [Northern Rail's Response ¶4]

## **VII. ORR's Consideration of the Appeal**

- 53. While certain parts of the submissions and evidence will specifically be referred to in the course of this determination, ORR has taken into account all the parties' written submissions in reaching its decision.
- 54. Under Condition D5.1.1 of the Network Code, if any train operator is dissatisfied with any decision of Network Rail made under Part D, including the application by Network Rail of the Decision Criteria, it may refer the matter to the relevant ADRR Panel, here the Timetable Disputes Panel, for determination.
- 55. The proper approach for a Timetabling Disputes Panel where such a reference is made is to consider the evidence before it to determine if the decision by Network Rail was properly made by reference to the relevant parts of the Network Code and, to the extent that the subject matter of the dispute concerns contractual rights, any other relevant contractual obligations. Here, the relevant consideration was whether or not Network Rail had due regard to the Decision Criteria. In ORR's view, an obligation to have "due regard" requires Network Rail to consider each of the Decision Criteria and to give them appropriate weight in the circumstances of the particular case.



56. ORR notes that the Panel stated at paragraph 10.1 of the Determination *“to find against Network Rail there would have to be either a failure in execution of one of the procedures, an unreasonable frustration of a specific right of a Train Operator, unreasonably putting a Train Operator at a disadvantage or (significant here) that Network Rail have made a decision (described as “capricious” in TTP 317 and in TTP 210) which did not take into account either the facts of the case, or the guidance embodied in the Condition D6 the Decision Criteria”*. While these are examples of instances where it may be appropriate to find against Network Rail, ORR considers that the appropriate test is as set out above, namely whether Network Rail had due regard to the Decision Criteria and gave them appropriate weight in the circumstances of the particular case. This formulation was set out by the Panel at paragraphs 8.1, 10.3, 10.6, 10.8; ORR is satisfied that the Panel applied this test.
57. ORR has determined whether the Determination was properly made, taking into account the relevant facts and the Decision Criteria.
58. In particular, ORR has considered each of the grounds set out in the Notice of Appeal.

*Ground (i) – Due Regard to Decision Criteria-EEA/SLCs*

59. EEA has been described variously by the parties as a set of principles, strategies or a regime.<sup>3</sup> It is ORR’s view that EEA is, effectively, a set of principles developed through discussion with the industry and DfT. These principles go to the efficiency of Network Rail’s engineering work, including the optimisation of possessions, with the aim of enabling Network Rail to maintain and renew its network infrastructure more

---

<sup>3</sup> Northern’s Response at page 3 (principles); Network Rail’s Response at page 3 (principles); Notice of Appeal pp 9-10 (strategies) and Supporting Extracts Document (regime and strategies); Peter Leppard July 2007 memo (regime).

efficiently, while minimising major disruption and contributing to offering operators and end users an improved availability of the network. EEA has been reflected in Network Rail's Strategic Business Plan objectives.<sup>4</sup> These were submitted to ORR as part of the 2008 periodic review process and are reflected in the Delivery Plan (described in more detail below at paragraph 66). The principles embodied in EEA are not manifested in a particular contractual agreement.

60. ORR has noted Network Rail's position that EEA reflects goals not rules. This is reflected in a note by Peter Leppard, Network Rail (Head of West Coast 2008), summarising the understanding between Network Rail and DfT relating to the possession regime applying on the West Coast Main Line, dated July 2007 (Appendix 5 of Network Rail's Response). It sets out the ROTR possession hours from December 2008 and states:

*"Inevitably there will occasionally be items of engineering work which cannot be made to fit into the above hours. Although exceptions will be made for these where justified, it must be understood that such exceptions will not be the norm."*

61. Because EEA is a set of principles, rather than a set of ordered rules, it is not possible always to fulfil each and every principle. Indeed, at times principles which are consistent in theory may emerge as conflicting in a particular practical situation. For example, WCT's Proposal would violate another EEA principle (all-day Saturday service) in that it would bring services to an end at 2100 on a Saturday evening.<sup>5</sup>
62. The Determination quite clearly takes into account EEA. [See Determination ¶¶4.1.4; 9.6.6; 9.6.7; 10.6] There is no basis for elevating EEA above the other factors that Network Rail, and the Panel, balanced (there is no specific reference to it within the Decision Criteria). Indeed,

---

<sup>4</sup> This includes the Seven-Day Railway strategy document, as set out in the supporting documentation to the Network Rail October 2007 Strategic Business Plan.

<sup>5</sup> See, e.g. Notice of Appeal, Supporting Extract Document.

the nature of EEA means that there is no one EEA principle which could be applied as the deciding factor.

63. Contrary to WCT's submissions, Network Rail's Proposal will not put either WCT or Network Rail in breach of their contractual obligations. Both WCT's Franchise Agreement (Schedule 1.1, ¶10.4) and TAC (¶5, Schedule 5 ¶7.1) exclude liability for a failure to comply with obligations where Network Rail is properly exercising its rights to take possessions under the TAC and/or Network Code. Further, Network Rail's Proposal would affect the SLC requirements of both Northern Rail and WCT. ORR accepts Northern Rail's argument that neither operator should be able to claim that its commitments are greater than those of the others. [Northern Rail's Response, page 4] Therefore, ORR determines that the Panel was correct not to consider the SLCs, or other contractual obligations of the parties, in any detail.
64. In these circumstances, ORR is satisfied that the consideration of EEA undertaken by the Panel, and the weight given to EEA in the balancing exercise, were appropriate.

*Ground (ii) – Licence Obligations*

65. Licence Condition 1.1 sets out the purpose Network Rail is to achieve, including to secure the operation and maintenance of the network, *“in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders [...] in respect of (i) the quality and capability of the network; and (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.”* Under Condition 1.2, Network Rail shall achieve this purpose

*“to the greatest extent reasonably practicable having regard to all the relevant circumstances”*. This is known as the “General Duty”.

66. Licence Conditions 1.4 and 1.10 specifically require Network Rail to plan how it will fulfil the General Duty and produce a Delivery Plan. However, not everything contained in the Delivery Plan is necessarily enforceable under Condition 1 of the Licence. The Delivery Plan contains some firm or specific obligations which will generally be enforced as Licence commitments but also contains principles and objectives which by themselves are not generally enforceable.
67. In the context of this Appeal, the relevant parts of the Delivery Plan are (i) the obligations specified in the disruption index for passenger and freight services, and (ii) the provisions that indicate that Network Rail’s approach to achieving these obligations will be in accordance with the general principles of EEA.
68. The index is itself applied nationally rather than disaggregated to a regional or route level. It contains specific obligations for the purposes of Licence enforcement; if Network Rail breaches any of the disruption index obligations this would be seen as a failure to meet the reasonable requirements of its customers and funders under Condition 1, and ORR would go on to consider whether, in the circumstances of the case, Network Rail was fulfilling its General Duty.
69. The same is not true of the provisions relating to EEA; these set out Network Rail’s approach to achieving the disruption index obligations that, as principles, do not in general amount to specific enforceable obligations. Against this background, ORR is satisfied that Network Rail’s inability to achieve all the EEA principles in relation to the

possessions in issue in this Appeal does not require further consideration as a breach of its Licence obligations.

70. The Decision Criteria to which the Panel had regard in reaching its Determination do not specifically include a provision that Network Rail must comply with its Licence obligations, although clearly criterion (a) (*“sharing the capacity [...] of the Network [...] in the most efficient and economical manner in all the interests of all users of railway services having regard, in particular, to [...] the proper maintenance, improvement and enlargement of the Network”*) requires similar considerations to those covered by the General Duty. ORR underlines that it was the Panel’s role to determine whether Network Rail correctly applied the Decision Criteria, not to determine whether Network Rail was in breach of its Licence Conditions.
71. In any event, as indicated above, ORR does not consider in this case that the question of whether there have been Licence breaches requires further consideration. Therefore, ORR considers that the Panel did not err by making its Determination without specifically taking into account Network Rail’s compliance with Condition 1 of its Licence.

*Ground (iii) – Passenger Numbers and Public Order*

72. WCT has argued that the Panel members, as a result of not being provided with the specific passenger information, were only able to make a *“subjective assessment of the dispute going forward”*. [Notice of Appeal ¶8.3.1] The reliability of the numbers provided to the Panel by Northern Rail was also challenged.
73. ORR upholds the approach taken by the Panel. The Panel was given information about the passenger numbers by the train operators. With

respect to the WCT data, although some data was given to the Panel, the full passenger numbers were only given to the Chair, who was then able to make his analysis of this data available to the rest of the Panel.

Questions regarding the reliability of the Northern Rail passenger data were noted and taken into account in the Determination. [Determination ¶¶ 9.3.4, 9.4.2 – 9.4.5, 9.6.1]

74. The Determination acknowledged that more WCT passengers would be affected based on Network Rail's Proposal. [Determination ¶¶9.6.3] This was the crux of the issue; there is no challenge to this conclusion. There is no evidence that the data were assessed in any way improperly.
75. Given this, it was open to the Panel to balance the issues using the data made available to them. As noted in paragraph 47 above, WCT's challenge on passenger numbers was also concerned with the Panel's treatment of public order concerns in that balancing exercise, namely that they ranked such concerns too high. The Panel identified that, having considered the evidence on passenger numbers before it and the nature of the alternative disruptions proposed (i.e. bussing of passengers or alternative/longer train journeys), the public order concerns identified by Network Rail (and Northern Rail) should be included in the balancing exercise and that it tipped the balance in favour of Network Rail's Proposal. [Determination ¶¶9.6.8]
76. ORR does not accept WCT's argument that the Panel's conclusion should be rejected because more weight might have been given to the passenger numbers had the full WCT passenger data been made available to the Panel, or that the Panel placed too much weight on the public order issue. Nor does ORR accept that the Panel were not mindful of the limitations of the passenger data it had received from Northern Rail.

77. In future, however, ORR's view is that, generally speaking, best practice is to provide all members of the Panel with the same information for the purposes of their decision-making.

*Ground (iv) – Work Risks*

78. WCT raised in its Notice of Appeal, for the first time, a concern regarding the ability of Network Rail to carry out the proposed engineering works (tamping) in June and July.
79. Part M of the Network Code provides that appeals shall be conducted by way of a review, unless ORR considers that it would be in the interests of justice to hold a re-hearing. In a review, a party is not entitled to raise an issue afresh. However, it is of course open to a party to demonstrate that an issue which was not raised before a Timetable Disputes Panel is one that should, in the interests of justice, be considered by ORR and, if it can do this, ORR will proceed by way of re-hearing an appeal rather than simply holding a review.
80. When a party raises an issue afresh before the ORR which could have been raised before the Timetable Disputes Panel there is a heavy burden on that party to satisfy ORR that the interests of justice require a re-hearing. Here, WCT was aware of this issue at the time of hearing before the Panel but no reason as to why it did not raise this issue at that time has been proffered.<sup>6</sup>
81. Nor has sufficient evidence of a risk arising from scheduling tamping in the summer months been presented to demonstrate that it is in the interests of justice to consider this issue afresh. Network Rail states that

---

<sup>6</sup> In its Notice of Appeal, WCT stated that it became aware of this potential issue at a meeting in August 2010 and in subsequent discussions. [Notice of Appeal ¶8.4.1] The Panel hearing took place on 20 January 2011.

tamping is regularly undertaken at this time of year. [Network Rail's Response ¶6.3.8] ORR does not consider that WCT has presented evidence to displace Network Rail's scheduling judgment or effectively challenge this practice. For these reasons, ORR is not satisfied that it is in the interests of justice to conduct a re-hearing to consider this point rather than a review of the Determination. Therefore, ORR determines that Ground (iv) of the Notice of Appeal does not arise for determination.

### **VIII. Conclusion**

82. ORR does not find in WCT's favour on any of its challenges to the Panel's determination.
83. ORR agrees with the Panel that the decision was ultimately made properly taking into account all relevant considerations. Network Rail satisfied its obligation to consider the Decision Criteria and gave them due regard in the circumstances of this case.
84. The Appeal is dismissed.



Juliet Lazarus  
Director of Legal Services  
Duly Authorised for the Office of Rail Regulation  
18 March 2011



## ANNEX 1 – RELEVANT PORTIONS OF THE NETWORK CODE

### DEFINITIONS

“ADRR”	means the set of rules regulating the resolution of disputes, entitled “Access Dispute Resolution Rules” and annexed to this code;
“Act”	means the Railways Act 1993 as amended;
“Access Agreement”	means any particular access contract, whether or not entered into pursuant to any directions of the Office of Rail Regulation under the Act, incorporating this code;
“Access Dispute Resolution Rules”	means the set of rules regulating the resolution of disputes between Access Parties, entitled “Access Dispute Resolution Rules” and annexed to this code;
“Access Option Holder”	,means any person who may exercise an access option in respect of a railway facility;
“Network”	means the network in respect of which Network Rail is the facility owner and which is situated in England, Wales and Scotland;
“Network Change”	has the meaning ascribed to it in Part G of this code;
“Network Code”	means the document entitled “Network Code”
“Network Rail”	means Network Rail Infrastructure Limited, incorporated in England and Wales under registered number 2904587;
“relevant ADRR Panel”	means the Panel established under Part E of the Access Dispute Resolution Rules which is to determine a relevant dispute in accordance with the principles and procedures set out in Part A of the Access Dispute Resolution Rules;
“Restriction of Use”	means, for the purposes of the Network Code, a restriction of use of all or any part of the Network;
“Routes”	means, in respect of an Access Agreement, those parts of the Network which a Train Operator has permission to use pursuant to that agreement;
“Services”	means, in respect of an Access Agreement;

- (a) the services for the carriage of passengers by railway;
- (b) the services for the carriage of goods by railway; and
- (c) any other train movement for the purpose of testing the physical or operational characteristics or capabilities of any railway asset;

“Track Access Contact Parties” or “TAC parties” means, in respect of any Access Agreement other than an access option, Network Rail and the Train Operator who are party to that Access Agreement;

“Train Operator” means (without prejudice to Condition 1.3), in respect of an Access Agreement, a person (whether or not an operator of trains) who has permission to use track pursuant to that agreement;

“Working Timetable” means the timetable which Network Rail is obliged to draw up pursuant to Condition D2.1.1 and D2.1.6.

## Part D – Timetable Change

### DEFINITIONS

“Bid” means any Train Slot included in the Base Timetable (to the extent not varied or withdrawn by any subsequent Bid), or any bid made to Network Rail for one or more Train Slots (comprising, as the case may be, the notifications (if any) made in accordance with Conditions D3.2.1, D3.2.4 and D3.2.6, any Spot Bid or any Revised Bid);

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

“Decision Criteria” means those decision criteria set out in Condition D6;

“Development Commencement Date” means the first day of a Timetable Development Period;

“Passenger Change Date”	means the Principal Change Date or, as the case may be, the Subsidiary Change Date; ;
“Possessions Strategy Notice”	means a notice issued by Network Rail in accordance 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;”
“Principal Change Date”	means the date, to be notified by Network Rail in accordance with Condition D1.4 and normally falling on the Sunday next following the second Saturday in December in any calendar year, or such alternative dates as may be notified by Network Rail in accordance with the provisions of Directive 2001/14/EC;
“Subsidiary Change Date”	means the date to be notified by Network Rail in accordance with Condition D1.4 and normally falling on the Sunday which is eight days before the last Monday in May in any calendar year, or such alternative dates as may be notified by Network Rail in accordance with the Regulations;
“Subsidiary Rules Revisions”	means, in respect of any Timetable Period commencing on a Subsidiary Change Date, any revision to the applicable Rules of the Route or the applicable Rules of the Plan that either: <ul style="list-style-type: none"> <li>(a) is not material in nature and makes no material adjustment to or correction of detail set out in the applicable Rules of the Route or applicable Rules of the Plan; or</li> <li>(b) is material in nature but the need for which was not reasonably foreseeable when the applicable Rules of the Route or applicable Rules of the Plan were previously revised;</li> </ul>
“Timetable Period”	means the period of operation of a Working Timetable;
“Train Slot”	means a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement;
“Working Day”	means each of Monday to Friday (inclusive) excluding common law and statutory public holidays.

## **PART 2 – CONSULTATION PROCESS TO ESTABLISH THE RULES OF THE ROUTE/PLAN**

### **2.1 *Review of the Rules of the Route/Rules of Plan***

#### **2.1.1 *Consultation***

At least 8 weeks prior to the Development Commencement Date Network Rail shall consult with each Bidder in respect of Network Rail's anticipated requirements for Restrictions of Use needed to undertake maintenance, renewal and enhancement works on the Network during the Timetable Period to which such Development Commencement Date relates and the next following Timetable Period.

#### **2.1.2 *Review by Network Rail***

Following the consultation referred to in Condition D2.1.1 Network Rail shall, before the Development Commencement Date:

- (a) in respect of any Timetable Period commencing on a Principal Change Date, review the applicable Rules of the Route and the applicable Rules of the Plan for that Timetable Period and the next following Timetable Period and decide whether any amendment is required to either or both sets of Rules (including any amendment for the purposes of the implementation of any Network Change in accordance with Part G of this Network Code, Vehicle Change in accordance with Part F of this Network Code or of the implementation of any matter which is the subject of a notice issued in accordance with Condition D2.2); and
- (b) in respect of any Timetable Period commencing on a Subsidiary Change Date, review the applicable Rules of the Route and the applicable Rules of the Plan and decide as to whether any Subsidiary Rules of the Plan and decide as to whether any Subsidiary Rules Revisions should be made to either or both sets of Rules.

In conducting its review in accordance with this Condition D2.1.2 Network Rail shall consult with:

- (i) each Bidder which is likely to be affected by the applicable Rules of the Route or the applicable Rules of the Plan; and
- (ii) each International Operator to ascertain the provisional International Paths that it wishes to have scheduled in the relevant Working

Timetable and Network Rail shall incorporate that information in the Preliminary Rules of the Route/Plan Proposal.

### 2.1.3 *Preliminary Rules of the Route/Plan Proposal*

Network Rail shall, on or before each Development Commencement Date, serve a notice (“Preliminary Rules of the Route/Plan Proposal”) on each Bidder specifying:

- (a) in the case of a Development Commencement Date relating to a Principal Change Date the changes (if any) to the applicable Rules of the Route and applicable Rules of the Plan for the Timetable Period commencing on that Principal Change Date and for the Timetable Period commencing on the next following Subsidiary Change Date which, having due regard to the Decision Criteria, it proposes to make or, if no changes are proposed, that fact;
- (b) in the case of a Development Commencement Date relating to a Subsidiary Change Date the changes (if any) to the applicable Rules of the Route and applicable Rules of the Plan for the Timetable Period commencing on that Subsidiary Change Date which shall be deemed to be a Subsidiary Rules Revision and which, having due regard to the Decision Criteria, it proposes to make or, if no changes are proposed, that fact;

and, in either case, its reasons.

### 2.1.4 *Consultation with Bidders*

Each Bidder shall:

- (a) consider the notice served on it by Network Rail in accordance with Condition D2.1.3 and discuss with Network Rail any concerns it may have in respect of the Preliminary Rules of the Route/Plan Proposal;
- (b) within 3 weeks of receipt of the Preliminary Rules of the Route/Plan Proposal give notice to Network Rail of any representations or objections it wishes to make in relation to that Preliminary Rules of the Route/Plan Proposal and any alternative proposals it may have; and
- (c) in respect of any Subsidiary Rules Revision, within 3 weeks of receipt of the Subsidiary Rules Revision, give notice to Network Rail of any representations

or objections it wishes to make in relation to that Subsidiary Rules Revision and any alternative proposals it may have.

#### 2.1.5 *Rules of the Route/Plan Decision*

- (a) Network Rail shall, following consideration of any representations, objections and alternative proposals made by affected Bidders in accordance with Condition D2.1.4, review the Preliminary Rules of the Route/Plan Proposal or, as appropriate, the Subsidiary Rules Revision and, having due regard to the Decision Criteria, decide what amendments if any should be made to the applicable Rules of the Route and the applicable Rules of the Plan.
- (b) Network Rail shall, no later than 4 weeks after the issue of the Preliminary Rules of the Route/Plan Proposals or, as appropriate, the Subsidiary Rules Revision, notify each Bidder which is likely to be affected by the applicable Rules of the Route or the applicable Rules of the Plan of the amendments it has decided to make pursuant to Condition D2.1.5(a) or, where no amendments are proposed, that fact.

#### 2.1.6 *Optimisation of the Draft Timetable*

Notwithstanding the provisions of D2.1.4 and D2.1.5 Network Rail shall have the right having consulted with affected Bidders to make further modifications to the applicable Rules of the Route and the applicable Rules of the Plan, having due regard to the Decision Criteria, to facilitate optimisation of the Working Timetable; and Network Rail shall promptly notify the Bidders thus affected.

#### 2.1.7 *Referral to the relevant ADRR Panel*

Following notification of Network Rail's decisions in accordance with Condition D.2.1.5(b) or D2.1.6 a Bidder may refer any aspect of those decisions (including any decision of Network Rail not to make an amendment or any decision by Network Rail as to whether or not a revision is a Subsidiary Rules Revision) for determination by the relevant ADRR Panel under Condition D5, provided that such referral is made within the period specified in Condition D5.1.

#### 2.1.8 *Possessions Strategy Notice*

No such reference under Condition D2.1.7 shall be made in respect of any matter referred to in a Possessions Strategy Notice which is within and consistent with the method of implementation established pursuant to Condition D2.2 and which has:

- (a) not been referred to the relevant ADRR Panel for determination prior to the date referred to in Condition D2.2.4;

- (b) been finally determined by either the relevant ADRR Panel or the Office of Rail Regulation pursuant to that Condition or Condition D5.2; or
- (c) been determined by the relevant ADRR Panel and is not the subject of an appeal to the Office of Rail Regulation pursuant to Condition D5.2;

*2.1.9 Implementation pending outcome of determination*

Notwithstanding the provisions of Conditions D2.1.7 and D2.1.8, but subject to Condition D2.1.10, Network Rail shall be entitled to implement (in particular for the purposes of developing the Working Timetable to be implemented on the next succeeding Passenger Change Date) any aspect of the applicable Rules of the Route or the applicable Rules of the Plan which has been referred for determination pursuant to that Condition, pending the outcome of that determination.

*2.1.10 Procedure for amendment of the Rules of the Route/Plan and amendment of scheduled Train Slots*

Network Rail shall include within the Rules of the Plan a procedure to enable amendment of the Rules of the Route and the Rules of the Plan and consequential amendment of scheduled Train Slots other than as provided for in the foregoing provisions of this Condition D2.1. Notwithstanding the provisions of Condition D2.1.9, Network Rail shall not be entitled to implement any change to that procedure until any appeal of any such change has been determined pursuant to Condition D5.

*2.1.11 Contents of amendment procedure*

Each of the procedures proposed by Network Rail pursuant to Condition D2.1.10:

- (a) shall provide that no amendment shall be made to the applicable Rules of the Plan or the applicable Rules of the Route or that no revision shall be made to an accepted Bid (as the case may be) unless:
  - (i) Network Rail shall have consulted, to the extent reasonably practicable, with each Bidder likely to be affected by the amendment or revision (as the case may be); 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.

## **CONDITION D5 – TIMETABLE APPEAL PROCEDURE**

### **5.1 *Right of appeal to relevant ADRR Panel***

#### **5.1.1 Grounds for making an appeal**

Without prejudice to Conditions D4.6.2, D4.7.1 and D4.8.6, if any Bidder is dissatisfied with any decision of Network Rail made under this Part D, including:

- (a) the application by Network Rail of the Decision Criteria;
- (b) the acceptance or rejection by Network Rail of any Bid;
- (c) the exercise by Network Rail of a Flexing Right; and
- (d) any decision of Network Rail which may be referred to the relevant ADRR Panel under Condition D2.1.7, D.2.1.11, D2.2.4 or D2.2.7,

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

#### **5.1.2 Timescales for making an appeal to the relevant ADRR Panel**

- (a) A reference to the relevant ADRR Panel under Condition D5.1.1 shall, save as shown in paragraph (b) or (c) below, be made within five Working Days of receipt of the relevant decision from Network Rail. If Christmas Day occurs within such period of five Working Days then the period shall be lengthened to 10 Working Days.
- (b) A reference to the relevant ADRR Panel in respect of a decision by Network Rail regarding Trail Slots notified to Bidders in accordance with Condition D2A.3 or Condition D3.2.7 shall be made within 10 Working Days of receipt of the relevant decision.
- (c) A reference to the relevant ADRR Panel pursuant to Condition D2.2.4 shall be made within 30 days of receipt of the notification referred to in Condition D2.2.3.

### **5.2 *Right of appeal to the Office of Rail Regulation***



If Network Rail or any Bidder is dissatisfied with any decision of the relevant ADRR Panel in relation to any matter referred to it under Condition D5.1, that person may, within five Working Days of receipt of the relevant ADRR Panel's written reasoned determination, refer the matter to the Office of Rail Regulation for determination under Part M....

### **5.3 *Power of dispute bodies***

In relation to a reference to it made pursuant to Condition D5.1 or D5.2, any dispute panel or the Office of Rail Regulation (as the case may be) (each a "dispute body") 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;

5.3.2 having given general directions, on the application of Network Rail within five Working Days ... of the determination of the matter in question (or such longer period as the dispute body shall allow), to make such further orders as it shall consider appropriate in order to provide the parties with guidance as to the interpretation and application of such general directions.

## **CONDITION D6 - DECISION CRITERIA**

The Decision Criteria consist of the necessity or desirability of the following (none of which necessarily has priority over any other):

- (a) sharing the capacity, and securing the development, of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interest of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network;

- (b) seeking consistency with any current Route Utilisation Strategy which is either (i) published by the Strategic Rail Authority or the Department for Transport before 31 May 2006, or (ii) established by Network Rail in accordance with its Network Licence;
- (c) enabling a Bidder to comply with any contract to which it is a party (including any contracts with their customers and, in the case of a Bidder who is a franchisee or franchise operator, including the franchise agreement to which it is a party), in each case to the extent that Network Rail is aware or has been informed of such contracts;
- (d) maintaining and improving the levels of service reliability;
- (e) maintaining, renewing and carrying out other necessary work on or in relation to the Network;
- (f) maintaining and improving connections between railway passenger services;
- (g) avoiding material deterioration of the service patterns of operators of trains (namely the train departure and arrival frequencies, stopping patterns, intervals between departures and journey times) which those operators possess at the time of the application of these criteria;
- (h) ensuring that, where the demand of passengers to travel between two points is evenly spread over a given period, the overall pattern of rail services should be similarly spread over that period;
- (i) ensuring that where practicable appropriate provision is made for reservation of capacity to meet the needs of Bidders whose businesses require short term flexibility where there is a reasonable likelihood that this capacity will be utilised during the currency of the timetable in question;
- (j) enabling operators of trains to utilise their railway assets efficiently and avoiding having to increase the numbers of railway assets which the operators require to maintain their service patterns;
- (k) facilitating new commercial opportunities, including promoting competition in final markets and ensuring reasonable access to the Network by new operators of trains;
- (l) avoiding wherever practicable frequent timetable changes, in particular for railway passenger services;

- (m) encouraging the efficient use of capacity by considering a Bidder's previous level of utilisation of Train Slots;
- (n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Rules of the Plan; and
- (o) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.

In its consideration of paragraph (d) of this Condition D6, Network Rail shall not be entitled to determine that its Restrictions of Use of any part of the Network shall be as contemplated by any relevant maintenance contract by reason only of the terms and conditions of that contract. In this paragraph, "relevant maintenance contract" is a contract which Network Rail shall have entered into, or shall intend to enter into, with any person for the maintenance, renewal or the carrying out of any other work on or in relation to the Network.

## ANNEX 2 – RELEVANT PORTIONS OF NETWORK RAIL’S LICENCE CONDITIONS

### Part 1 - Scope

1. The Secretary of State, in exercise of the powers conferred by section 8 of the Railways Act 1993 (as amended) (“the Act”), hereby grants to Railtrack PLC (“the licence holder”) a licence authorising the licence holder:
  - a. to be the operator of the network;
  - b. to be the operator of a train being used on a network for any purpose comprised in the operation of that network; and
  - c. to be the operator of a train being used on a network for a purpose preparatory or incidental to, or consequential on, using a train as mentioned in (b) above,subject to the conditions set out in Part II hereof (“the conditions”).
2. This licence shall come into force on 1 April 1994 and shall continue in force unless and until revoked in accordance with the provisions of the Schedule hereto or by not less than 10 years’ notice given to the licence holder by the Secretary of State, such notice not to be given earlier than 25 years after the date on which this licence comes into force.

...

### Part III - Conditions

#### 1. Network Management

##### *Purpose*

- 1.1 The purpose is to secure:

- (a) the operation and maintenance of the network;
- (b) the renewal and replacement of the network; and
- (c) the improvement, enhancement and development of the network,

in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of:

- (i) the quality and capability of the network; and
- (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.

#### *General Duty*

- 1.2 The licence holder shall achieve the purpose in condition 1.1 to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.
- 1.3 The following obligations in this condition are without prejudice to the generality of the general duty in condition 1.2 and compliance with those obligations shall not be regarded as exhausting that general duty. In fulfilling each of those obligations, the licence holder shall at all times comply with the general duty in condition 1.2.

#### *Planning*

- 1.4 The licence holder shall plan the means by which it will comply with the general duty in condition 1.2 over the short, medium and long term to meet reasonably foreseeable future demand for railway services.
- 1.5 In complying with condition 1.4, the licence holder shall consult, and take into account the views of, persons providing services relating to railways and funders so as to facilitate effective industry wide planning.
- 1.6 In complying with condition 1.4, the licence holder shall prepare and provide to ORR plans, strategies or other documents demonstrating its compliance and proposed compliance with the general duty in condition 1.2, including:
  - (a) the delivery plan referred to in condition 1.10;
  - (b) the route utilisation strategies referred to in condition 1.14;
  - (c) other plans, strategies or documents that ORR may reasonably require from time to time;
  - (d) revisions of the plans, strategies and other documents referred to in condition 1.6 (a) – (c) that ORR may reasonably require from time to time.
- 1.7 Each of the plans, strategies, and other documents referred to in condition 1.6 shall demonstrate the position, as appropriate, on a network-wide basis and at a suitably disaggregated level of detail.
- 1.8 Each of the plans, strategies and other documents prepared in compliance with condition 1.6 shall be provided to ORR in respect of such period, in such format and structure, to such standard and level of detail and in

accordance with such requirements (including any requirements as to publication) as ORR may, from time to time, specify by notice or in guidelines to the licence holder.

- 1.9 Any notice or guidelines to the licence holder issued under condition 1.8 may include a procedure under which ORR may object to the contents of a plan, strategy or other document on grounds specified in the notice or guidelines.

*Delivery Plan*

- 1.10 In complying with the duty in condition 1.4, the licence holder shall prepare, provide to ORR and publish a delivery plan setting out what the licence holder proposes to do to comply with the general duty in condition 1.2.

- 1.11 The delivery plan shall be prepared in such format and structure, to such standard and level of detail and in accordance with such requirements as ORR shall specify by a notice or in guidelines issued to the licence holder under condition 1.8 so as to enable:

- (a) providers of services relating to railways and potential providers to plan their businesses; and
  - (b) funders of services relating to railways and potential funders to plan their future financial and service requirements,
- in each case with a reasonable degree of assurance.

- 1.12 No notice or guidelines issued by ORR under condition 1.8 shall be effective in relation to the delivery plan unless:

- (a) it is issued on or before the date which is 5 months before the delivery plan is to be published; and
- (b) ORR has first consulted the licence holder and taken into consideration any representations duly made.

- 1.13 The licence holder shall be excused from the obligation to publish any part of the delivery plan to the extent that ORR:

- (a) is satisfied, after consultation with the licence holder, that publication would or might seriously and prejudicially affect the interests of the licence holder or any other person; and
- (b) gives notice to the licence holder to that effect.