

## TTP2243, TTP2244, TTP2245, TTP2260 and Elements of TTP2251

### Network Rail Infrastructure Limited Sole Reference Document

#### 1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows: -

(a) Heathrow Airport Limited (“**HAL**”) and Heathrow Express Operating Company Limited, whose Registered Offices are at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW (“**HEOC**”) (the “**Claimants**”); and

(b) First Great Western Limited whose Registered Office is at Milford House, 1 Milford Street, Swindon, SN1 1HL (“**Great Western Railway**”, “**GWR**”) (“**the Claimant**”); and

(c) Network Rail Infrastructure Limited, whose Registered Office is at 1 Network Rail, Waterloo General Office, London SE1 8SW (“**Network Rail**” or “**NR**”) (the “**Defendant**”).

(d) MTR Corporation (Crossrail) Limited whose registered office is at 63 St Mary Axe, London, EC3A 8NH (“**MTR Elizabeth Line**”, “**MTR-EL**”) (“**the Defendant**”).

1.2 Network Rail agree with the list of parties that may be affected by findings in this matter as provided within the Claimants submissions.

#### 2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant’s Sole Reference includes: -`

(a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.

(b) A detailed explanation of the Defendant’s arguments in support of its position on those issues where it disagrees with the Claimant’s Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant’s Sole Reference.

(c) Any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute.

(d) The decisions of principle sought from the Chair in respect of

(i) legal entitlement, and

(ii) remedies;

(e) Appendices and other supporting material.

### **3 SUBJECT MATTER OF DISPUTE**

Network Rail does not dispute either GWR nor HEOC's right to bring this dispute in accordance with Condition D5 of the Network Code insofar as the Network Code and ADRR are applicable.

This is a dispute in relation to the allocation of capacity to account for a series of possessions ("RoU") decided by Network Rail to enable the building of the new Great Western Main Line station at Old Oak Common. It is submitted that there are two issues at play. Firstly, what is the holistic capacity of the two-track timetable being implemented. Network Rail submit that the maximum number of trains that can run to ensure a robust timetable is 14.5 trains per hour (tph). The Claimants argue that this assessment is incorrect, and that the allocation should be 15.5tph. Secondly, that if the overall capacity was increased, the Claimants are both arguing that any additional capacity should then be allocated to their services. GWR are seeking one additional tph whereas HEOC are relying on their Track Access Agreement which provides them with the right to run 4tph (vice the 2tph that have been suggested by Network Rail).

Neither Claimant has disputed the validity or justification provided by Network Rail for the possession itself. Both are unhappy with the potential allocation of capacity. Network Rail have not yet offered the Timetable for the Weeks in question back to Timetable Participants and as such submit no decision has been issued regarding this matter.

The dispute brought by GWR relates to Network Rail's application of the Decision Criteria under D4.6.

The dispute brought by HEOC relates to Network Rail's application of the Decision Criteria under D4.6 and the application of the Determination from TTP2207.

### **4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE**

#### **4.1 Issues where the Defendant Accepts the Claimant's Case**

4.1.1 For the purpose of this defence document, Network Rail will address the GWR Sole Reference Document (SRD) first, and then the HEOC SRD.

4.1.2 Network Rail accepts that the presence of the new Elizabeth Line services (MTR-EL) has changed the landscape and nature of timetabling for this area of the network and as such additional considerations must now be accounted for when making decisions such as these.

4.1.3 Network Rail accepts that the RoU for Weeks 33 (12<sup>th</sup> November 2023), 37 (10<sup>th</sup> December 2023) and 43 (21<sup>st</sup> January 2024) are very close to London and that GWR consider this area of the network essential to their operations.

4.1.4 It is agreed that when implementing two-track timetables in this area there has always been a need to slow services and curtail the number of trains that run to enable a robust service to operate.

4.1.5 Network Rail agree that this dispute has arisen because GWR disagree with the proposal to limit the number of trains throughout the day (nominally set by Network Rail at 14.5 tph) and that GWR also disagree with the allocation of the subsets of this capacity over three operators (GWR, MTR-EL and HEOC). It is also accepted that Network Rail must reach decisions such as this via the application of the Decision Criteria contained within Part D of the Network Code.

4.1.6 Network Rail agree with GWR's understanding of the Decision Criteria contained within their para 5.2.

4.1.7 In relation to the HEOC SRD, Network Rail accept that HEOC have previously raised an issue heard under reference TTP2207, on the basis that Network Rail issued a decision for Timetable Week 11 reducing their services from 4tph down to 2tph.

4.1.8 It is accepted that HEOC wrote to Network Rail on 3 July 2023 as per the HEOC SRD para 4.2 with specific requests being made of Network Rail and that Network Rail in turn responded on 7<sup>th</sup> July 2023 as per para 4.3..

4.1.9 Network Rail agree that HEOC Track Access Agreement contains the right to operate Heathrow Express (HEX) services four times every hour in each direction and their comments regarding contractual provisions within their paras 4.9 through 4.12.

## **4.2 Issues where the Defendant qualifies or refutes the Claimant's Case**

4.2.1 For the purpose of this defence document, Network Rail will address the GWR Sole Reference Document (SRD) first, and then the HEOC SRD.

4.2.2 GWR note a dispute over the interpretation of Conditions D3.4.3 to D3.4.5 (para 4.2), but do not appear to have provided any explanation as to where they believe we have erred. Whilst Network Rail cannot refute a dispute that has not clearly explained, we submit that we have correctly followed the processes within D3.4 and D3.5 as appropriate.

4.2.3 GWR also dispute Network Rail's interpretation of D4.6. Network Rail submit that it has applied the Decision Criteria in line with Part D requirements and reached a reasonable decision. Further details are provided below in relation to these arguments.

4.2.4 GWR claim there has never been a tolerance of overcrowding (para 4.3). Network Rail are unsure as to the relevance of this as in relation to the application of D4.6.

4.2.5 GWR claim in para 4.3 that there has previously been agreement over the number of trains over the two-track section. 14½ tph is a historic high for the quantum of services operated through this area and capacity allocations were increased a few years' ago following the introduction of fully electric train fleets. The opening of the Elizabeth Line and the introduction of MTR-EL services along with significantly changing passenger demand has changed the factors that need to be considered as Network Rail are obligated to treat all Timetable Participants in an impartial manner when seeking to enact "the Objective" under D4.6.1.

4.2.6 MTR EL have advised that they do not agree with adding further services during 2 track operation, as such a timetable is not deliverable at an acceptable performance level. Network Rail Western Route is currently on the ORR's regulatory escalator for failing to reach performance targets. Creating and / or accepting a poor performing timetable is not an acceptable outcome for any timetable participant. NR is aware of the aspirations of all operators on this route to have more paths allocated to them and this has led to the extensive workstreams to understand the demand and develop a train plan that have been taking place collaboratively for over a year. Network Rail has used the outcomes from this work to make decisions regarding the allocation of capacity in line with the Network Code.

4.2.7 GWR note that Sunday has always been the busiest day of the week for their long-distance journeys. Network Rail qualify this by noting that both Fridays and Saturdays appear busier, but that more services operate on those days. GWR's assertion may rest on their definition of 'long distance journeys'.

4.2.8 GWR claim (para 4.3) that the proposed capacity allocation for the relevant weeks will severely damage GWR customer journeys, industry revenue and the reputation of both GWR and the industry. They claim that the Network Rail decision is both unfounded and unnecessary. Network Rail submit that no evidence has been provided to explain or substantiate the claim that the decision (specifically to not include one additional GWR 5 car tph between Paddington to Oxford) causes reputational damage to either GWR or the industry. It is also noted that "reputation" is not strictly a consideration contained within D4.6.2. Network Rail has reached its decision via application of the Decision Criteria and supplied this information to impacted operators. GWR note that the services offered are "insufficient to move the business on offer". However, the data requested by Network Rail and supplied by GWR does not support this assertion. The data does not demonstrate that GWR have been allocated an insufficient service to move their passengers based on mixture of five and a nine-car services. This suggests that the capacity allocation within the Capacity Studies is accurate. The Capacity Study shows GWR running 80% of their normal Sunday services with MTR-EL running 60% and HEX at 50%.

4.2.9 Network Rail also refute GWRs allegation within para 4.3 around the removal of services which they hold Rights for without showing reason. Network Rail have reached a decision to reduce all three operators' services based on the evidence provided to it regarding passenger numbers (demand). This has been justified via reference the advance timetable work undertaken which has also identified that the 'pinch point' is now located at Ladbroke Grove. The overall length of the two-track timetable is less of an impactful factor. In trying to include 14.5tph, Network Rail have also reduced margins wherever possible resulting in consistently tight crossing moves – this has an effect of importing risk of delay and poor performance into the timetable, but we have provided a balance between performance and ensuring services are meeting demand.

4.2.10 GWRs Appendix 1 is an attempt to show that a timetable can be created to include an additional path by increasing the proposed quantum of services up from 14.5 tph to 15.5 tph with the additional service being a 5-car service running to/from Oxford. This would appear to relate to D4.6.2 (c) (performance). It is accepted that performance is an essential criterion for delivering service to customers. Network Rail note that the fully modelled SX timetable operates at 14tph on the relief lines and GWR are seeking to operate service levels in excess of this. Network Rail are currently listed on the ORRs regulatory escalator for performance. Creating and / or accepting a poor performing timetable is not an acceptable outcome for any timetable participant. Typically, all operators wish to run more services. Often, they wish to run more services than there are existing paths. Network Rail are obligated to make decisions regarding the allocation of capacity in line with the Network Code and submit that is what has happened here. Network Rail agrees that Appendix 1 shows a Timetable which might be able to operate, but there is no evidence supplied by GWR which demonstrates that this level of service can be operated at an acceptable performance level. Network Rail also notes that what has been supplied is not a complete timetable, as it does not show MTR-EL ecs movements.

4.2.11 GWRs Appendix 2 is evidence in support of D4.6.2(b) (spread of services meeting demand). Passenger data submitted by both GWR and HEOC indicate that both sets of passenger numbers can be catered for by the services suggested within the Capacity Studies. It is submitted that this supports 14.5tph as well as the subset allocations within the Capacity Study.

4.2.12 GWRs Appendix 3 is evidence in relation to D4.6.2(f) (commercial interests). In response, Network Rail makes the same comments as in 4.2.11 above

4.2.13 GWR (para 5.1) state that it doesn't believe Network Rail have taken these decisions in accordance with the Decision Criteria. As detailed previously, Network Rail refute this assertion.

4.2.14 GWR have provided opinion (para 5.3) around customer retention and reputation. Whilst Network Rail accept that this is a concern for GWR, the same must be equally applied to all commercial entities such as MTR-EL and HEOC, and not just to GWR. GWR also acknowledge that delivery of a timetable has to be right and that a poorly performing timetable is likely to cause reputational damage. This would seem to agree with the Network Rail position that to exceed 14.5tph is to create a timetable that will not deliver.

4.2.15 GWR (para 5.4) assert that they desire a robust timetable which Network Rail agree with. However, they also assert that in order to meet “the Objective” any such timetable must allow the maximum profit to be gained from that day. Whilst it is understandable that GWR are seeking to maximise their own profit, Network Rail must take a holistic view of the railway. Network Rail are concerned with trying to create a high performing and robust timetable for all timetable participants, not just for the commercial gain of GWR. The maximisation of profit is not a sole justification or rationale for the allocation of capacity.

4.2.18 GWR assert (para 5.6) that their plan to increase to 15.5 tph (with the additional train allocated to themselves) delivers a robust plan that does not damage reputations. It is unclear to Network Rail at this stage why not gaining an additional 1 tph from the number which has been operated for at least five years would cause reputational damage, nor the extent of any such damage. The passenger data provided does not support GWRs assertions here. It is acknowledged that growth is an aspiration of all operators and is a factor Network Rail will keep under review for the two-track allocation.

4.2.19 GWR (para 5.7) have provided their interpretation of the Decision Considerations at a very high level and without any detailed explanation of how they interpret this, nor any weighting attached to the Considerations. As Network Rail have previously supplied its Decision Criteria (Appendix C), we will not repeat the detail within this paper. The following comments and questions are raised in relation to GWRs assertions:

(b) Demand – GWR want more services to meet demand. As detailed above, passenger numbers provided to Network Rail indicate that this demand has been met. Network Rail have shown via the Capacity Study that the timetable will meet the demands of passenger movements effectively across the whole day.

(c) Performance – the existing SX WTT on the relief lines operates at 14 tph. This has been extensively modelled and tested in order to produce an acceptable WTT. Network Rail will be sharing performance modelling information with Operators on 2<sup>nd</sup> August 2023. Until the evidence demonstrates that further services can operate robustly, Network Rail must create timetables at 14.5 tph which does not import and increased risk of performance degradation.

(d) Journey Times – GWR have made an argument in very general terms and seem to conflate the concept of journey times with demand. Network Rail has sought to keep journey times for services in the timetable as low as possible. Adding in additional services imports additional risk of delay incidents leading to longer journey times.

(e) Integration – GWR claim more people will travel under their plan (one would assume on their additional service). As the passenger numbers do not appear to support the need for an additional GWR service Network Rail would query the accuracy of this argument. Any additional passengers would have a choice of alternative services. No evidence has been provided to Network Rail to demonstrate that anyone is unable to travel under this timetable.

(f) Commercial Interest – GWR state ‘viability requires a sufficiently attractive product’. This appears to suggest that GWR consider that their allocation under 14.5tph is not viable, but the addition of 1 train changes this?

(g) ESG’s – Insufficient information has been provided by GWR for Network Rail to understand how not being awarded an additional train slot for these select Sundays can impact on their growth.

(i) Environment – Network Rail agree that more passengers on rail vice other transportation types is beneficial to the environment. It is unclear what evidence is being relied on that passengers are not utilising the available rail services in favour of other methods of travel, or not traveling at all.

(j) Efficiency – Network Rail would ask for additional clarification from GWR as it is not clear what their comments mean here.

4.2.20 Within their summing up (para 5.9), GWR appear to make the argument that revenue generation for GWR should attract a high priority under D4.6.2. Whilst Network Rail acknowledge the importance of this to GWR, it must be re-emphasised that this is a factor that remains of utmost importance to both MTR-EL and HEOC as well. Passenger demand data shows that there are enough GWR services within the Capacity Study. Network Rail again note that the number of services per hour which GWR can operate has not been reduced, and is still 6.5 tph, and that GWR operate a higher percentage of their normal Sunday service than does any other timetable participant.

4.2.21 Turning to the HOEC SRD HEOC note at para 4.4.1 that despite Network Rail noting further works were required, a decision was issued in relation to Possessions for Week 29 and 33 respectively. Network Rail accepts that some performance modelling remained outstanding when the decisions were issued. This was essential in order to meet timetable planning deadlines – week 29 bids were due just 13 working days later.

4.2.22 HEOC also note at para 4.4.2 that a decision was issued regarding Capacity Studies for these possessions requiring a reduction from 4tph down to 2tph “without the need for further assurance work”. Network Rail have used the most current information available to it at the time of the decision including passenger data which supports the reduction to 2tph. Assurance work had been undertaken for week 11, and the studies issued for weeks 29+33 replicated what had already been assured.

4.2.23 At para 4.5, HEOC claim that Network Rail request for these possessions did not specify that a reduction in services would be required. They note this information was not included in the request, nor the subsequent decision issued. It is claimed that Network Rail only notified HEOC of the requirement for reduction in services when the Capacity Study was provided on 5<sup>th</sup> July 2023 (para 4.6). As noted within TTP2207, this is unfortunately a disruptive possession with the usual 4 track being reduced to 2 track availability. The Capacity Studies available have been shared at the earliest possible opportunity and are indicative of Network Rails position regarding maximum capacity and the allocation of that capacity. Disruptive possessions ultimately mean that not all services can be accommodated (either because they are not rules compliant, or because to include them would lead to a timetable that performs badly). There have been many occasions where a two-track timetable has been run in this area, and on each and every occasion services have been reduced during the day. It is submitted that until Network Rail make the formal offer for the relevant timetable week, a decision on capacity has not been finalised.

4.2.24 Whilst Network Rail acknowledge that HEOC issued their Notices of Dispute at the earliest possible point (para 4.7), we refute that we have placed HEOC in a challenging position because of our actions. The allegation appears to be that because GWR have made tickets available for the public to purchase that this is somehow Network Rail's fault. Network Rail cannot and do not control when GWR make tickets available for purchase. Typically, we would expect this to happen on or around TW-12 as per D3.4.14. If GWR choose to take a risk to sell tickets earlier, this is a commercial decision for them alone.

4.2.25 At para 4.8.1 HEOC note that Network Rail have undertaken analysis of passenger data but failed to disclose the results. Network Rail wrote to HEOC on 07 July 2023 noting that the passenger data supplied by HEOC closely matched the forecast used for HEOC in the CTP process. Following receipt of the final information from all Operators on 19 July 2023, Network Rail wrote to all Operators on 25 July 2023, again including HEOC, advising them that capacity allocation had been made in proportion to passenger demand. Commercial considerations meant that Network Rail could not share the data openly. Network Rail shared detailed analyses with each of the three operators, again including HEOC, on 27 July 2023.

4.2.26 At para 4.8.2 (a), HEOC note that they are not satisfied that observations provided by Network Rail are sufficient to demonstrate a reduction to 2tph. Network Rail refutes this. As noted in 4.2.25 above, details were provided to HEOC on 27 July 2023 – which Network Rail view as a reasonable response period.

4.2.27 At para 4.8.2 (b), HEOC note that are not satisfied that observations provided by Network Rail are sufficient to be a “Deep Dive”. Network Rail supplied information to operators about week 11 performance on 18 July 2023. Operators were invited to a meeting to review the information in more detail on 27 July, but this was pushed back to 02 August to enable all Operators to attend.



4.2.28 At para 4.8.3, HEOC note that NR has failed to share/ disclose modelling. The attached timeline identifies modelling activities. Network Rail wrote to Operators on 29 June 2023 identifying timescales when detailed modelling work would take place. Network Rail further communicated to Operators on 18 July 2023 noting the work which is ongoing regarding modelling. A meeting has been arranged for 02 August 2023 to discuss and review the outputs.

4.2.29 At para 4.8.4, HEOC note that NR has failed to disclose updated capacity studies. Network Rail qualifies this by noting that updated capacity studies cannot be created until the modelling work demonstrates that more than 14½tph can operate. Network Rail has supplied capacity studies for weeks 29+33 which reflect the latest evidence – which at this point is the same as applied in week 11.

4.2.30 HEOC are claiming in para 4.8.5 that Network Rail have not justified why capacity should be limited to 14.5tph. 14.5 tph has been the number of services run on a two-track timetable for a number of years and represents a historic high in terms of the number of services run on this two track. Network Rail notes that the fully modelled SX timetable operates at 14tph on the relief lines and HEOC are seeking to operate services in excess of this. Network Rail are currently listed on the ORRs regulatory escalator for performance. Creating and / or accepting a poor performing timetable is not an acceptable outcome for any timetable participant. Typically, all operators wish to run more services. Often, they wish to run more services than there are existing paths. Network Rail are obligated to make decisions regarding the allocation of capacity in line with the Network Code and submit that is what has happened here.

4.2.31 HEOC note within para 4.13 that the correct Code Condition in this instance should be D3.4 vice the referenced D3.5. Network Rail acknowledge this minor administrative mistake but would submit that the process detailed within D3.4 has been followed.

4.2.33 Network Rail refute HEOCS assertions of non-compliance within their para 4.14 and note as follows:

(i) In respect of D3.4.7, HEOC acknowledge that prescribed deadlines have been met by Network Rail. HEOCs complaint is that the proposal for the RoU did not contain notification that a reduction in services would be needed at either TW-30 or TW-26. To facilitate the planning of a possession, Network Rail may require the submission of a Revised Access Proposal (D3.4.6). Such a requirement must be notified to the affected operator by no later than TW-22 (D3.4.10(a)). It is at this stage (as per D3.4.10(b)) that Network Rail must specify the aspects of the Access Proposal that need revision and the reasons for this. It is submitted that there is no Code requirement to notify HEOC of the specifics of a reduced service pattern at either TW-30 or TW-26.

(ii) In respect of D3.4.8, HEOC acknowledge consultation has occurred but claim they had no notification that the disruptive possession would require or result in a reduced service pattern for weeks 29 and 33. Network Rail submit that the provision of the Concept Train Plan is informing operators of the reduction with detail following within each Weeks individual Capacity Study.

(iii) In respect of D3.4.14 (it is assumed that HOEC meant to reference D3.4.13), the comments in the above paragraph are also applicable re the provision of both the Concept Train Plan and Capacity Study.

4.2.34 Network Rail issued Decision Criteria on 7<sup>th</sup> February 2023, and updated these on 1<sup>st</sup> March 2023. The Decision Criteria were assessed against the best information available regarding passenger numbers and timetable performance at that time. The Decision Criteria can only be re-assessed once there is evidence available to support this reassessment. Network Rail collected passenger data as soon as was reasonably practicable following the Determination of TTP2207. Network Rail assessed this information and fed back to operators just over a week after the last set of data was provided. Network Rail wrote to Operators on 25 July 2023 to confirm that capacity allocation had been made in proportion to passenger demand. Therefore there is no new evidence available to re-assess the decision criteria.

4.2.35 Within their para 4.14.2(b)(i), HEOC claim that the reduction to 2tph does not maintain/ improve performance. Network Rail would refer to the information contained within the Decision Criteria document which evidences how we have accounted for this consideration. HOEC have provided no specific information or evidence to support their claim. The importance of performance of the timetable in this instance is reflected by the fact that Network Rail assigned a 'High' weighting to this consideration factor.

4.2.36 Within their para 4.14.2(b)(ii), HEOC claim there has not been a fair balancing of commercial interests. Network Rail refute this claim and would note that we asked for relevant information at the outset of this process which HEOC provided. Network Rail note that HEOC have not specified or evidenced what, if any commercial information we have failed to account for or why this would result in a different outcome. Network Rail utilised HEOC's own data sets and commercial forecasting as part of the decision process which resulted in an increase in their service offering at the start of the day (back up to four trains per hour up to 09:00). In terms of reputational impact, Network Rail note that HEOC have provided no explanation or evidence to support this claim. It is also noted that this is not a consideration factor under D4.6.

4.2.37 Within their para 4.14.2(b)(iii), HEOC claim that they are not able to utilise assets efficiently. As detailed within the published Decision Criteria, Network Rail have published the possession itself within the EAS 2024 and provided both a concept train plan and Capacity Study to allow collaboration with Timetable Participants to try and maximise the efficiency of the timetable. On the basis that this timetable is to facilitate a disruptive possession, Network Rail accepts that a reduction in services for all Timetable Participants may mean less efficient utilisation of their assets for the duration of the possession. Between 05:00 and 09:00 HEOC are running the maximum 4 tph on both the main and relief line (full quantum of services).

#### **4.3 Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination**

4.3.1 Neither Operator has noted in their submission that the published SX timetable has been fully assessed and the Relief Line SX WTT contains 14tph. Neither Operator has recognised that delivery of this train service is not at acceptable levels, and that Network Rail is on the regulatory escalator with regard to poor train performance. All affected Operators (HEOC, GWR, and MTR-EL) have all registered complaints at Route Viz Sessions (which are not minuted) regarding delivery of the 2TT when in place at weekends – with less train services contained than operators are asking for in this submission.

4.3.2 With the introduction of the Elizabeth Line, the railway is committed to providing metro style services to Acton Main Line, West Ealing and Hanwell which now have Sunday services that did not previously run.

It is submitted that neither the concept train plan nor the Capacity Study produced by Network Rail for this matter are binding in nature but rather is indicative only. Neither has the status of a 'decision' under Part D of the Network Code.

#### **4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant**

4.4.1 It is acknowledged that due to the disruptive nature of the possession, this is a situation whereby multiple Access Proposals have been made that do not sit together perfectly within the timetable. Network Rail submit that it has applied the Decision Considerations under Part D utilising all the information requested, supplied and available to us to reach a decision which is justified against D4.6. It is also submitted (in line with TTP1880) that the decision reached by Network Rail is an informed and reasonable one i.e., one that is not arbitrary nor capricious (as per *Braganza v BP Shipping Ltd* and another) as referenced in Appendix B.

4.4.2 As noted above, Network Rail submits that it has adhered to and applied the Network Code correctly in reaching the decision on the allocation of capacity. We have considered all the Decision Considerations under D4.6.2 and applied any that are relevant to the situation as evidenced by the provision of the Decision Criteria. Network Rail submits that it has adhered to D3.4, D4.4.1 and D4.6 contrary to HEOCs submission at para 5.1.1.

4.4.3 14½ tph is a historic high for the quantum of services operated through this area and capacity allocations were increased a few years' ago following the introduction of fully electric train fleets. MTR EL have advised that they do not agree with adding further services during 2 track operation, as such a timetable is not deliverable at an acceptable performance level. Network Rail Western Route is currently on the ORR's regulatory escalator for failing to reach performance targets. Creating and / or accepting a poor performing timetable is not an acceptable outcome for any timetable participant. NR is aware of the aspirations of all operators on this route to have more paths allocated to them and this has led to the extensive workstreams to understand the demand and develop a train plan that have been taking place collaboratively for over a year. Network Rail has used the outcomes from this work to make decisions regarding the allocation of capacity in line with the Network Code.

## 5 DECISION SOUGHT FROM THE CHAIR

- 5.1 Network Rail note that GWR claim that exceptional circumstances are present in this case. Network Rail disagree. A reduced two-track timetable has been implemented on numerous occasions over the years for this area of the network. There is nothing exceptional about this. It is accepted that the introduction of MTR-EL services has changed the landscape, but this has not been sudden or unexpected. Network Rail submit that this is in fact 'the new normal'. Within GWRs Notice of Dispute it is noted that GWR requested that elements of certain disputes be expedited so that matters that are substantially similar can be heard together. Whilst Network Rail had no objections to this (as per ADRR Chapter B Rule 3 (e)), we disagree that this would constitute 'exceptional circumstances' under Part D Condition D5.3.1. It is submitted there is nothing exceptional about asking for similar matters to be heard together at one hearing. We also disagree with GWR that this is a matter that could set a precedent for a decade or more. Network Rail acknowledge that any ADC determination certainly sets a persuasive precedent of value, but that if and when circumstances change, Network Rail will be factoring relevant new information into its decision making around capacity limitations and allocations.
- 5.2 Network Rail note HOECS request for a determination that they are permitted to run 4tph on the Sundays in question under their Contract. Network Rail agrees that HEOC have this right within their contract, but that application of D4.6 has on this occasion, led to a reduction in these services to account for the disruptive nature of the possession. It is submitted that no determination is required from the Chair on this point.
- 5.3 HEOC request determination that NR complete the requirements of their para 4.3. Network Rail agree that it needs to continue working towards the completion of these actions and submits that it is doing so. Network Rail fed back to Operators with regard to passenger data on 25 July 2023, followed up in detail with individual operators on 27 July 2023. This is just six working days after the last information was supplied to Network Rail (19 July 2023). Network Rail has supplied dates in the timeline which note timetable modelling activities
- 5.4 Network Rail submits that it has followed and applied the relevant contractual provisions and the Network Code correctly, in doing so has reached a reasonable decision and asks the Panel to confirm this.
- 5.5 Network Rail requests that the Panel should uphold the decision made by Network Rail in relation to its decision to take the possessions for the relevant Weeks.

6 **APPENDICES**

Appendix A - Network Rail Chronology

Appendix B – TTP1880 Extract

Appendix C – Decision Criteria

7 **SIGNATURE**

For and on behalf of  
*[usually Network Rail Infrastructure Limited]*

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Signed

**Tony Worgan**

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Print Name  
Tony Worgan

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Position  
Access Planning Manager

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