



**Heathrow  
Express**

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*BY EMAIL*

**TTP2243, TTP2244, TTP2245, TTP2251 and TTP2260**

**Third Directions of the Hearing Chair dated 4 August 2023**

**HEOC's Submissions – 8 August 2023**

Further to the Third Directions of the Hearing Chair to the Parties on 4 August 2023, we set out below HEOC's submissions in respect of the relevant questions addressed to the operators set out therein (the "**Submissions**").

The Hearing Chair's questions for the operators are reproduced below for reference. For clarity, references to defined terms refer to those in HEOC's Sole Reference Document dated 26 July 2023.

For the purposes of these Submissions, HEOC refers to evidence submitted with HEOC's SRD as appropriate. In addition, HEOC has provided the Hearing Chair with an appendix containing further evidence (referred to below as "**Appendix A**").

For the operators

1. *Please can **MTR, HEOC and GWR** confirm whether they agree with NR's statement made in para 4.2.8 of its SRD: The Capacity Study shows GWR running 80% of their normal Sunday services with MTR-EL running 60% and HEX at 50%. If any of them do not, NR should bring to the hearing the evidence it relies upon for making that statement.*

HEOC confirm that it agrees with NR's statement at paragraph 4.2.8 of its SRD (as specified above). HEOC notes that it is being required to reduce its service on Weeks 29 and 33 to a far larger extent than other operators. We refer the Panel to the Capacity Studies which show the requirement for the HEx service to be reduced to 2 tph on both Weeks (which is provided in **Appendix 1 of HEOC's SRD**, items 1.6 and 1.7), which is half of HEOC's entitlement as per paragraph 2.1 of Schedule 2 of the Track Access Agreement.

2. *Do the Parties (MTR, HEOC and GWR) accept the assertion of Network Rail, cited in 4.2.10 and referred to elsewhere in the SRD, that 'Creating or accepting a poor performing timetable is not an acceptable outcome for any timetable participant'? Are there circumstances in which the Parties might indeed accept de-prioritisation of performance in order to favour other concerns?*

HEOC's position is that there can be circumstances in which it may indeed accept de-prioritisation of performance in order to favour other concerns. These concerns include the importance of running an efficient, reliable and satisfactory rail service between Central London and Heathrow Airport, a key part of the UK's transport infrastructure. Failure to do so damages the 'Britain is Great' campaign.

However, NR has thus far failed to produce any performance modelling data for its concept train plan to demonstrate (i) the levels of performance it can deliver, or (ii) the impact that increasing the number of tph would have on performance. NR is merely relying on assumptions and historic data to make decisions with respect to two track timetable allocations. HEOC notes that NR was due to commence performance modelling work in respect of the concept train plan in October 2022 and to complete it in June 2023, but it has failed to do so. As such, NR has not considered the relevant data when reviewing the Decision Criteria (including Conditions 4.6.2(c) and 4.6.2(d)) and making the capacity allocations.

To provide 4 tph instead of 2 tph, even if this may result in a poor performing timetable, gives HEx passengers an overall better level of service in terms of journey time and experience, particularly because there would be less over-crowding both on trains and stations and the expected frequency of trains can be maintained. By reducing the HEx service by 50%, HEx passengers are experiencing an unacceptably low level of service and increased journey times, which is suboptimal for those travelling to Heathrow Airport.

3. *In its SRD, NR has set out its reasons for its decision restricting access to 14.5 tph. Do the Parties GWR and HEOC contend that for those reasons, and in context, that decision was:*
  - a. *Not made in good faith;*
  - b. *Irrational;*
  - c. *Capricious; or*
  - d. *Inconsistent with the contractual purpose.*

HEOC's responses to points 3(a), 3(b) and 3(d) are set out below, which it submits should be accepted by the Panel in addition to or in the alternative to each other.

Firstly, HEOC submits that NR appear to have failed to act in good faith in making its decision to restrict access to 14.5 tph. As set out in detail in HEOC's SRD, NR failed to inform (or even suggest to) HEOC that NR's requests for the Possessions would involve a reduction in services and failed to provide such information at the relevant time in accordance with Condition D3.4. NR only provided the relevant information on 5 July 2023, after the decisions were issued. Due to NR's failure to disclose such information at the relevant time, HEOC was not in a position to

make an informed decision in respect of such requests. NR did not give HEOC a fair opportunity to consider the requests and raise any objections or disputes (which it would have done), and it proceeded with making the capacity allocations for Weeks 29 and 33 without any proper input from HEOC or other operators. It seems therefore that NR has failed to act in good faith by failing to provide such crucial information to HEOC and other operators and proceeding with its decision-making essentially in a unilateral manner. By way of evidence, HEOC refers the Panel to **Appendix 1 of HEOC's SRD, items 1.1 - 1.5 (inclusive)**.

Secondly, HEOC submits that NR's decision to restrict access to 14.5tph is irrational, particularly when at certain points during Week 11, NR did in fact run 16 tph (see in this regard slide 15 titled 'Table of Quantum' of **Appendix A**). NR purports to ground its decision on the same Decision Criteria which it used to justify the possession for Week 11 however, the data used for Week 11 was inadequate to a significant extent, and such inadequacies have not been rectified since. NR has had sufficient time since the TTP2207 Determination to obtain the required information and to carry out the necessary performance modelling, which it has failed to do. NR's decision can therefore be considered to be irrational.

Finally, HEOC submits that NR's decision is inconsistent with the contractual purpose. HEOC's position is as set out in paragraphs 4.9 to 4.14 of HEOC's SRD, namely that:

- (i) HEOC has a contractual right to operate the HEx Service four times every hour as specified in paragraph 2.1 of Schedule 2 of the Track Access Agreement; and
- (ii) Clause 2.4 of the Supplemental Agreement does not give NR the right to repeatedly disregard HEOC's contractual rights (thereby causing repeated disruption and inconvenience), and NR is bound by the procedures set out in Part D of the Network Code.

Because an agreement has not been reached pursuant to Clause 2.4 of the Supplemental Agreement, and NR has not acted in accordance with its obligations in Clause 2 of the Supplemental Agreement or Part D of the Network Code, the decision is inconsistent with the contractual purpose.

By way of evidence, HEOC refers to the extracts of the Supplemental Agreement and Network Code appended to its SRD.

*If a Party contends that the answer to any of those points is 'yes' it shall set out the gist of its arguments for doing so and shall identify the evidence it wishes to rely upon in support of them.*

#### For NR

HEOC is providing a submission in respect of question 7 of the Hearing Chair's Third Directions to address the Week 29 offer which was only issued on 4 August 2023.

*Please can NR confirm what train service has been offered for Week 29 on 04 August 2023 (i.e. does the train service offered match the Capacity Study for Week 29) (date taken from NR's timeline appendix)?*

HEOC has been offered two trains all day in every standard hour in respect of Week 29 (Sunday 15 October 2023) (as specified in **Appendix B**). This offer reflects the 'standard hour' capacity study for Week 29, but it does not align with the offer that was provided for Week 11 (Sunday 11 June). In respect of Week 11, NR offered HEOC an allocation of more than 2 tph during the start and end of the day but this offer has not been reflected for Week 29. In contrast to Week 11, for Week 29, the start-up is affected by the all-line block at Ladbroke Grove until 07:20 but it is not clear to HEOC why 4tph has not been offered during the same slots as Week 11. NR has failed to provide sufficient justification for their offer.

To be clear, the offer for Week 11 was as follows:

Down – 4tph until 09:25 then 2tph until 22:55 then reverting to 4 tph until the end of the service.

Up – 4tph until 09:57 then 2tph until 22:57 then reverting to 4tph until the end of the service.

Yours faithfully



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