

TPP2318 and TPP2320

Seventh Directions, issued on 30 November 2023

Questions for the adjourned hearing

1. As the Parties will recollect, in the Fourth Directions I set out a list of issues which I thought could not be dealt with at the hearing on 15th November 2023, and which were therefore to be remitted to the adjourned hearing. These questions were:
2. *What steps have been taken to act on the ORR's letter to NR and the CRC of 22 Dec 20 (a copy of which is attached for ease of reference)?* (Now falls away, see para 9 below)
3. *Linked with this, how do we define a Capacity Study and distinguish it from a Timetable Study (the definitions used in the Access Impact Matrix)? In this context I note that the Severity Bands 1 and 2 refer to Capacity Studies, the Severity Bands 3 and 4 relate to Timetable Studies, but this distinction does seem to be used widely within the industry.* (Now falls away, see para 9 below)
4. *Still on this point: at pp36/7 of the Appendices to its SRD NR sets out a definition of Capacity Studies. What is the source of this definition and what authority does it have?* (Now falls away, see para 9 below)
5. *Are Capacity Studies that are prepared adequate (TPP2320) and being shared appropriately within NR (TPP2318)?* (Now falls away, see para 9 below)
6. *If either FOC substantiates a claim that NR has told them that it won't flex TOCs' services, how widespread is this and does it represent NR's policy?* (Now refined into separate questions)
7. At the hearing I made it clear that I would welcome comments and suggestions from the Parties to develop and refine the original list. In this context, and in the Sixth Directions, issued after the hearing, I explained that some of these questions would lead to a legal determination of contractual interpretation of issues in dispute, while others were likely to be beyond the power of a TTP, but could be the subject of Observations and Guidance (as required by Rule H51(j)(iii)).
8. It became clear at the hearing that those Capacity Studies which are prepared are not being shared appropriately within NR; Observations and Guidance in the Interim Determination refer to this.
9. Since the hearing, however, as recorded in paragraph 80 of the Interim Determination, my attention was drawn to v1 of the 2025 TPRs, currently out for consultation within the industry. One of the proposals is a complete restructuring of the current Access Impact Matrix. As stated in the Interim Determination, it is clearly more satisfactory for this to be the subject of a pan-industry consultation than to form part of a TTP's Observations and Guidance. This topic will therefore not be carried forward into the adjourned hearing.
10. Positions taken by NR at the hearing, assisted by comments from those Parties that have submitted a response, lead to the following further or amended questions:
11. **Is NR correct in saying that if a freight service diverted in connection with a NR Variation under D3.4 cannot be accommodated on the diversionary route NR is under no duty to apply any Flexing Rights to other operators' services to accommodate the diverted freight services, nor is it required to apply the Decision Criteria in respect of such services?**
12. **If NR is correct in this opinion, then does this interpretation of Part D only apply to freight services, or does it apply to any diverted train?**

- 13. If, however, NR is not correct in its interpretation of Part D on this point, is this in fact an NR policy?**
- 14. To assist in answering these questions, does NR or any operator have any record of NR flexing WTT services to accommodate past diversions, whether of passenger or freight services? If so, how did those circumstances differ from those in TTP2318 and TTP2320? (NOTE – Such records may be more easily identifiable by Schedule 4 teams, for example whether operators who were not directly affected by a possession received Schedule 4 payments, implying their services were amended).**
- 15. Is an amendment to a schedule required as a direct or indirect result of a Restriction of Use a Part D3.3 Train Operator Variation, as NR suggested during the first hearing, or a Network Rail Variation under Part D3.4?**
- 16. Part D entitles NR to exercise Flexing Rights; is there an implied duty on NR to do so if otherwise Access Proposals cannot be accommodated?**
- 17. Should Condition D2.5.1(k) apply only to passenger trains? Given that GBRf's biomass services leave the Network at Liverpool and at Drax, should the reference to services leaving the Network be removed? (These questions can clearly lead only to Observations and Guidance).**
18. The original list of questions is replaced by these questions.
19. I am grateful to the Parties who have submitted comments, most of which have been incorporated above, while regretting that in an email sent to the Secretary after the hearing, which was attached to the Sixth Directions, NR commented that it was not submitting any amendments or additions to the questions, but did feel that they needed recrafting and rebalancing.
20. At the hearing I said that once the list of questions had been finalised I would invite NR to suggest a date by which it could provide its answers to them. At that stage I was anticipating the NR would contribute to the process of refining the questions which predominantly remain legal issues on which the Claimants are entitled to have a determination. (Those that are not capable of determination by a TTP are important to the industry and should therefore form part of Observations and Guidance).
21. It is possible that on reflection NR may not adopt all the positions taken by its representatives at the hearing. Further, NR may be able to offer constructive comments to improve this list of questions. In the circumstances, therefore I am offering NR a further opportunity to comment on these questions (which will enable it to resile from any position taken at the hearing if it thinks it appropriate to do so). Any such comments should be submitted to the Secretary and copied to other Parties by close of business on **07 December 2023**.
22. At the same time NR should provide the date by which it thinks it can provide a document setting out its position on the questions (as amended, if that is the case). Using my powers under H20, I direct that once NR has provided its comments it will be open to the other Parties to respond. A date will then be set for the adjourned hearing, along with confirmed deadlines for the submissions of the Parties and of any other Resolution Service Party wishing to contribute to the adjourned hearing. For the avoidance of doubt, these submissions will constitute the Parties' sole reference documents under ADR Rule H21. These Sole Reference Documents should be structured to respond directly to NR's answers to the questions included in these Directions.
23. Whilst, during the course of a TTP, it is open to any Resolution Service Party to declare itself to be a Dispute Party (Rule H19), I am also mindful that the process needs to be undertaken in an efficient and manageable manner. Consequently, I remind Resolution Service Parties who are not already Dispute

Parties, that they should only declare themselves to be Dispute Parties if they wish to make full submissions, by way of a sole reference document, responses to any directions letters and responding to Chair and Panel questioning during the second hearing day. Any interested parties (as distinct from Dispute Parties) will have the opportunity to make brief comments, when invited, at the end of the hearing day.

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair, TTP2318 and TTP2320