| **Joint submission to Access Disputes Panel or Timetabling Panel** **By****NXEC Trains Limited****and****Network Rail Limited** **TTP Reference 290**  |
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**1                    DETAILS OF PARTIES**

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

(a)               NXEC Trains Limited whose Registered Office is at 7 Triton Square, London, NW1 3HG. (“NXEC”) ("the Claimant"); and

(b)                NR Infrastructure Ltd, whose Registered Office is at Kings Place, 90 York Way, London, N1 9AG (“NR” (“the Respondent”))

(c)                Correspondence to NXEC should be addressed to Adrian Caltieri, Deputy Operations Director, 25 Skeldergate, York YO1 6DH, Tel:0845 059 3057, email [redacted]

Correspondence to NR should be address to Matt Allen, Network Access Unit Manager, Network Rail, Network Access Unit, City Exchange, 11 Albion Street, LEEDS, Tel: 0113 341 2230, Fax: 0113 341 2341, Mob: [redacted]. Email: [redacted]

**2              THE PARTIES’ RIGHT TO BRING THIS REFERENCE**

2.1           This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition D 2.1.7 of the Network Code.

**3            CONTENTS OF REFERENCE**

The Parties have together produced this joint reference and it includes:-

(a)           The subject matter of the dispute in Section 4;

 (b)            A summary of the issues in dispute in Section 5;

 (c)            A detailed explanation of the issues in dispute prepared by the claimant with a paragraph by paragraph response from the respondent(s) in Section 6;

(d)             Any further issues raised by the respondent in Section 7;

(e)        The decisions of principle sought from the Panel in respect of legal entitlement and remedies in Section 8; and

(f)            Appendices and other supporting material.

**4           SUBJECT MATTER OF DISPUTE**

4.1       Network Rail’s proposed amendments to the Rules of the Route, specifically in relation to proposed disruptive engineering access, between London and Peterborough, weekends between weeks 1, to 3, of the 2010 timetable year, and Sunday nights in weeks 48,49,51,52,53, notified in the Network Rail Document “Version 2 Rules of the Route,” dated 27 February 2009, and amended by email dated 27 October 2009.

The series of possessions planned between weeks 48 and 3 between Stevenage and Biggleswade on the southern section of the ECML are principally required to deliver S&C renewal works at Hitchin. The work is to renewal in modern equivalent of 10 point ends and 3 partial renewals, in the Hitchin area (see appendix ‘a’ for the full details of the work. NR is also planning to deliver works at Fletton (293yds of formation and drainage renewals) and Bridge works at Connington Br166having taken the opportunity to optimise the planned disruptive access with other works.

4.2      The Part or Condition that the dispute relates to is The Network Code, D 2.1.5 (a) whereby Network Rail is required to consider the representations of affected bidders, in this case NXEC, “having due regard to the Decision Criteria”.

4.3       A copy of the relevant extract(s) from the document(s) referred to above is/are attached at Annex 1 Containing:

4.3.1 The preliminary Rules of the Route Proposal (Version 1) dated 14 November 2008.

4.3.2 NXEC’s response dated 19th December 2008.

4.3.3 Network Rail’s Version 2 of the Rules of the Route Dated 27 February 2009.

4.3.4 NXEC’s referral to ADC dated 20 March 2009.

4.3.5 Network Rail email dated 27 October 2009.

4.3.6 Network Rail’s Network Licence Part III, Part A is also relevant to the dispute.

**5         SUMMARY OF DISPUTE**

5.1On the weekends relevant to this dispute, NXEC wishes to operate a level of service which is within its Quantum Firm Rights;

5.2 The current Rules of the Route permits the operation of NXEC’s Quantum Firm Rights;

5.3 Network Rail has proposed changes to the Rules of the Route in accordance with Network Code D.

5.4 NXEC made representations regarding these proposed changes.

5.5 Network Rail is required to consider these representations, with due regard to the Decision Criteria. (NC. D. 2.1.5 (a))

5.6 NXEC considers that Network Rail did not fully consider the Decision Criteria and therefore referred NR’s decision to the ADC on 20 March 2009.

Relevant Background Information.

5.7 Since National Express commenced operation of the ICEC franchise in December 2007 it is has worked with Network Rail to achieve improved customer satisfaction through the 7 Day Railway. A visit by the Secretary of State, Lord Adonis in March 2009 resulted in a changed industry position on the acceptability of bus substitution. National Express East Coast, Network Rail and the Secretary of State have listened to customers expectations and are determined to provide train services rather than bus replacement services whenever possible.

5.8 In previous years the substitution of trains by buses on ECML was deemed to be acceptable. However, in recent years passenger numbers have grown, motorway congestion has increased and stakeholders are keenly aware of the environmental benefits of rail over car use. This has made the use of buses impracticable at certain locations on the ECML e.g. York – Newcastle and south of Peterborough where volumes of passengers result in unacceptable queuing times to board replacement buses there is an increased risk of increased slips/trips/falls as large numbers of passengers navigate steps which were never designed for these volumes of passenger flows. Additionally there has been a noticeable increase in media ridicule that key intercity routes have not been open, especially at bank holiday and school holiday weekends which affects adversely affecting industry reputation, to the extent that it affects demand on unaffected weekends, and according to research by ATOC mid week also. NXEC is also acutely aware of the personal interest of the Secretary of State in the disruptive possessions which took place at Easter 2009. Under the terms of its Franchise Agreement, should the possessions currently planned for weeks 1,2 and 3 go ahead, NXEC will have to inform the Secretary of State.

 5.9 To facilitate the operation of trains, National Express East Coast has worked cooperatively with Network Rail to identify new innovative methods of safely operating trains, (or in some cases re-enabling earlier methods of facilitating engineering work and the operation of trains) to deliver increased levels of customer satisfaction whilst at the same time enabling Network Rail to maintain and renew its infrastructure.

5.10 To illustrate the success of this strategy in Version 1 of the ROTR the following all line blocks were proposed. Week 48 - Saturday & Sunday, Week 49, - nil, Week 50 - from 15.45 Saturday, Week 51 - nil, Week 52 - Sunday, Week 53 - Sunday, Week 2 - Saturday & Sunday, Week 3 - mid Saturday to mid Sunday. Following constructive challenge, these all line blocks have now been replaced by an engineering strategy which has enabled the operation of a minimum of 3 paths per hour in each direction except for the weekends of weeks 1,2 and 3.Of these three paths, NXEC is utilising two, whilst the third is being used by a high capacity train operated by First Capital Connect. Whilst not the level of train service encompassed in the WTT, NXEC considers that this represents an equitable sharing of the capacity for the carriage of passengers whilst enabling the proper maintenance of the Network as envisaged by the Decision Criteria. It should be noted that due to rail geography there is no reasonable diversionary route available when the line is blocked between Hitchin and Stevenage.

5.11 In terms of weeks 1, 2 and 3, despite ongoing dialogue NXEC has not been able to persuade Network Rail to amend its engineering plan to facilitate the operation of a reasonable level of train service and this is the essence of this reference to the ADC.  In deciding upon a restriction of use in the Rules of the Route, Network Rail must take into account NXEC’s representations, having due regard to the Decision Criteria. NXEC considers that Network Rail has not fully taken into account the alternative proposals that NXEC has made with regard to executing the engineering work nor when considering the Decision Criteria has it taken full account of NXEC’s reasonable requirements of being able to operate an adequate train service and of the impact on customers.

5.12 Network Rail remains committed to achieving the 37% improvement in network availability for passenger services that it is a regulatory target for the company by the end of Control Period 4. The delivery plan to achieve this is more commonly known as the ‘7 Day Railway’. One of the underlying principles of the ‘7 Day Railway’ engineering access strategies are to keep people off buses and on trains. The ‘7 Day Railway’ engineering access plans are an emerging strategy developing throughout the control period strongly linked to the significant cost efficiency challenges for the way that we deliver track renewal activities. The track renewals programme forms the largest section of the ‘7 Day Railway’ plan and on Main Line Intercity routes plans are in place to delivery track renewals in 16 or 8 hour possessions, depending upon the complexity of the site.

5.13 Network Rail’s is dedicated to delivering track renewal activities on main line routes in line with the below ‘glide path’ plan:

 

5.14 Supporting the emerging ‘7 Day Railway’ strategies and post the planned close of both the EC and WC routes in March 2009, Network Rail with ATOC developed the concept of route categorisation. Network Rail has promised that wherever it can reasonably do so it will keep passengers on a train in preference to transferring them to a bus. Network Rail has committed to implementing the route categorisation on category ‘A’ routes in the plans that are developed during December 2011 timetable year.

5.15 The key principles of the route categorisation strategy are:

* Network Rail will work with its customers to reduce the disruption to rail users by engineering work
* Network Rail will deliver an increase in the availability of the network for passenger traffic of 37% by 2013/14
* The reliance on fewer buses at weekends to move passengers round engineering works
* Wherever it can safe and reasonable to do so will keep passengers on a train in preference to transferring them to a bus
* Network Rail seek to make available routes accounting for around 60% of weekend passenger miles at all times
* A route between Scotland and London will always be available

5.16 Route Categorisation and 7DR initiatives greatly reduce the number of buses the industry is forced to use to move passengers round engineering works, however it is likely that for the foreseeable future there will be some requirement for a ‘reasonable’ level disruptive engineering access to be taken that requires an alterative road service to operate.

5.17 The changes that Network Rail has been able to make to weeks 48 to 1 is evidence of Network Rail’s reasonableness to consider NXEC’s proposals when appropriate to reduce the disruptive impact of the original possession plan for the works at Hitchin. This significant change in the plan has increased the delivery costs for the work and increased the number of risks that need to be managed to ensure the successful delivery of the works on site. In weeks 48 to 1 it has been possible to alter the possession access and develop special methods for train working past the site which provides FCC and NXEC with a basic level of service over this section of the ECML. In each week other than week 2 and, to a far lesser extent, week 3 NXEC are able to run a service of 2 trains per hour in each direction.

5.18 It has take a considerable amount of time and meticulous planning has been undertaken by delivery team to investigate the appropriateness of the special train working proposals identify by NXEC, unfortunately this has meant it has taking longer to respond to the customers queries and counter proposals that we would have liked. The plan for the Hitchin works is the first time that special working arrangements for coasting of electric hauled trains at 40mph past a renewals site has ever been trialed for preplanned engineering works.

 **6          EXPLANATION OF EACH ISSUE IN DISPUTE WITH RESPONSE**

6.1 National Express East Coast considers that Network Rail has not taken into account its Licence Commitments when considering the alternative proposals for undertaking the engineering works planned for weeks 1, 2 and 3 :

Network Rail’s Network Licence Condition 1.1 requires it, “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] The licence holder shall achieve the purpose in condition 1.1 to the greatest extent reasonably practicable having regard to all relevant circumstances….”.

Network Rail: Network Rail does not agree that it has breached any part of its Licence Condition as the conditions of Part D of the Network Code are being correctly followed in regard to taking the decision to implement the engineering access plan that delivers the works at Hitchin.

6.2 NXEC is not seeking to prevent Network Rail from maintaining and renewing its infrastructure but is seeking to persuade Network Rail to maintain and renewing its infrastructure in such a manner that is in accordance with best practice and satisfies NXEC’s reasonable requirements of operating an adequate train service for the benefit of passengers.The following is NXEC’s proposal to Network Rail to achieve this:

**Week 1 Commissioning of Platform Y at King’s Cross and associated OHL and maintenance work– block of all lines to Finsbury Park and all platforms for 12 hours (00.01 to 12.00 Saturday) and block of fast lines and platforms 1-6 from 12.00 Saturday to 05.00 Monday.**

NXEC has suggested that 53 hours is excessive for commissioning of the platform and has asked for at least 2 running lines and 4 main train shed platforms (plus 9 to 11) to be available.

Network Rail – A meeting is planned for the 10th November to discuss the Kings Cross station project works, this possession will be the subject of further discussion. The possession was originally a 52hr all lines BLOCKED and recently we have been able to open the slow lines and platforms 7 to 11, it is hoped that further refinement of the access can be discussed and agreed on 10th November. Feedback from the 10th November will be available for the hearing, and will be included in our opening statement.

6.3 **Week 2 S&C Renewals at Hitchin (2256 points) - Down Slow & Down Fast BLOCKED 52 hrs**

 **(00:30 Sat to 04:30 Mon)**

Taking into account Network Rail’s Licence, the Decision Criteria and the impact upon passengers which would result from such a possession National Express is not convinced that the proposed work is being planned in accordance with best practice and in an efficient manner to satisfy the reasonable requirements of National Express. It is our view that on a critical piece of infrastructure such as the ECML at a location where there is no reasonable rail diversionary route a cross-over from the Down Fast to the Down Slow can be replaced without the necessity for a 52 hour all line possession.

Network Rail has amended the engineering plan for week 1 to facilitate the passage of 3 trains per hour via means of normal electrified paths for Northbound services and wrong direction working for Southbound services over the Down Slow and coasting over the Down Fast.

Network Rail has not been able to amend the engineering plan for week 2, and reduced the all lines BLOCKED for the following reasons;

* The Up Fast can not be made available for traffic, ballast train and on track machine working arrangements
* Single Line working over one line is the only method of passing trains when renewing 2256pts at Hitchin South. 2256 pts are a 70 mph crossover which will have associated OLE alterations.
* SLW between Sandy and Stevenage would be so restrictive that the running of a viable timetable could not be achieved.
* Network Rail has taken the decision to optimise access to reduce the overall disruption to all customers that operator on the south end of the ECML and has agreed to deliver all OLE work originally planned on the weekends of weeks 1 and 2 in a single weekend (week 2). This avoids further requests for either access solely for the OLE work which would require a minimum 3 lines BLOCKED possession between Stevenage and Cambridge Jn.

6.4 **Track renewal at Fletton (293 yards on Dn Main) – all line block for 52 hours (01.05 Saturday to 05.30 Mon)**

NXEC - It is understood that 24 hours are required for this track renewal. NXEC has asked for this job to be broken up into smaller chunks and be carried out during the no trains period on successive Saturday night/Sunday mornings.

Network Rail - The Fletton plain line track renewals item is 293yds formation renewal and drainage replacement works. The drainage works are in line with Network Rails commitment to the ORR to increase the amount of drainage work undertaken in CP4 compared with previous control periods.

This work is planned to be moved to week 2 and optimised with the Hitchin works as in week 1 it is now possible to open 2 line past the work at Hitchin.

 These works are planned on the back of the Hitchin possessions to avoid further disruption on route in additional weeks as stand alone possessions as well as eliminating further potential for clashes with West Coast Main Line possessions. FCC have indicated that they would not support the separation of the Fletton plain line track renewals away from the possession access planned for Hitchin, due to the concern they have that this would mean acceptable additional disruption on alterative weekends when no disruption is currently planned.

6.5 **Bridge 166, South of Connington South Jn – all line block for 52 hours (01.05 Saturday to 05.30 Mon)**

NXEC - Originally 3 bridge jobs were proposed to be carried out, this has now reduced to one. NXEC has suggested that this bridge job should also be carried out during a Christmas shutdown period.

Network Rail - These works could be replanned and delivered in an alterative engineering access proposal which would be less disruptive to train services, however since it is not possible to provide a fit for purpose train service past the Hitchin S&C renewal and OHL works an optimisation opportunity is available to deliver these works in week 2.

6.6 **Catenary and contact wire runs between Stevenage and Hitchin (1600m on Up Fast) – block of Up Slow, Up Fast and Down Fast for 52 hours (01.05 Saturday to 05.30 Mon) week 1**

**Catenary and contact wire runs between Stevenage and Hitchin (1600m on Dn Fast) – block of Dn Slow, Dn Fast and Up Fast for 52 hours (01.05 Saturday to 05.30 Mon) week 2**

NXEC has asked for this work to be carried out during a Christmas shutdown period and to fund the cost of extra resources by avoiding Schedule 4 payments to NXEC that would be payable at other times. NXEC cannot run an acceptable level of service when single line working past this worksite A response has not been received from Network Rail.

Network Rail - Restricted resources over the Christmas period determine the number of jobs that can be delivered, existing equally disruptive OHL works would need to be related into a stand along weekend possession dated other than over the Christmas period. Network Rail can confirm that all the OLE work originally planned over two weekends can be delivered in single possession in week 2. When working on the Down Fast wire run the Down Slow is BLOCKED with machinery and Up Fast needs to be blocked due to the closeness of the contact wire on the adjacent line (the opposite is applicable when working on the Up Fast).All wires held together by one support and can’t work adjacent to a live line.

6.7 **Week 3 All line block between Stevenage and Biggleswade Crossovers until 12.30 Sunday.**

NXEC - It is not clear from the possession details what this disruptive access is required for. NXEC has always questioned the need and asked for full justification for this all line block and have suggested that 2 lines should be made available.

Network Rail – To facilitate the easements to the possession in week 1, commissioning works have been replanned from week 1 to 3. This possession is now be utilising for follow up works on 2256 and completion works on 2266A pts and 2271pts S&T commissioning . 2266A and 2271 pts.

6.8 **Weeks 48, 49, 51, 52, 53 all lines blocked between Stevenage and Biggleswade crossovers from 21.00 Sunday.**

 NXEC - It is not clear from the possession details what this disruptive access is required for. NXEC has always questioned the need and asked for full justification for this all line block and have suggested as a minimum that the start time be relaxed to enable the passage of the last through services on Sunday evening.

Network Rail – These Sun/Mon follow up shifts are mainly required to complete signal testing activities, associated with the newly installed S&C. The possessions would also be used to deliver any outstanding snagging or follow up works.

6.9 NXEC’s position is that when considering the Decision Criteria as required by Network Code, D 2.1.5 (a), Network Rail has not taken full account of NXEC’s reasonable requirements of being able to operate an adequate train service and of the impact on customers.    NXEC has reviewed the Decision Criteria in this context as follows:

*(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 interests 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;*

NXEC - This criteria requires the sharing of capacity. Network Rail’s current proposal does not grant any capacity for the carriage of passengers. NXEC has proposed alternative methods of enabling Network Rail to maintain and improve its infrastructure in a safe manner whilst at the same time enabling the operation of an adequate level of passenger service. In addition the transfer of circa 16,500 passengers on Saturday and circa 19,000 passengers on Sunday from train to bus and back to train represents a significant increase in safety risk from slips, trips and falls. This will require the operation of 338 buses on Saturday and 389 on Sunday with the increased safety risk of road transport.

Network Rail – Delivery teams have review the counter proposals from NEXC for all of the weeks between 49 and 3 and for all weeks other than for week 2 they have been unable to alter delivery methods for the renewals to allow 3 tph to operate in each direction. Our safety experts in the delivery teams have been able during the renewal of 2256A , 2256B pts to come up with a robust delivery method that delivers the work in anything less than a three line blocked possession. The alterations to the plans for weeks 48 to 1 (inc) demonstrate Network Rail’s commitment to reduce the disruptive impact of engineering works on the travelling public. It is Network Rails view that when considering the overall programme of works between weeks 48 and 3 that the 52hr possession request in week 2 is a reasonable proposal. Network Rail can confirm that the route to Leeds via the MML are available and that the route to Scotland via the WCML is open. Network Rail would like to explore the options for operating additional trains on these routes to help reduce the number of passengers to interchange between trains and buses and the EC.

*(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;*

NXEC - The Route Utilisation Strategy is linked to the HLOS growth metrics for the ECML. Disruptive possessions which prevent the operation of a reliable service will not facilitate delivery of the ECML growth metric.

Network Rail - Does not accept that one weekend’s closure for 52hrs of the ECML route between Stevenage and Hitchin will mean that the HLOS growth metrics are not achieved.

*(c) enabling a Bidder to comply with any contract to which it is 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;*

NXEC expect to carry circa 16,500 passengers on Saturday and 19,000 passengers on Sunday. Although the replacement of trains by buses is not a breach of the contact for carriage it is arguably a breach of the moral contract to carry passengers with the level of comfort., safety and journey time that they would expect for a rail journey. The continued use of buses at holiday weekends has led to widely known industry ridicule.

Network Rail – The possession have been part Network Rail’s ROTR/P proposals since version 1 ROTR. If Network Rail is successful at defending the decision for the week 2 possession NXEC will br required to bid for train services alterations via the Supplemental Timetable Revision Process (NC part D 4.8).

*(d) maintaining and improving the levels of service reliability;*

The substantial reduction of the ECML train service offer, over 3 weekends during the Easter holiday period does not represent either maintaining or improving levels of service reliability. If it goes ahead it will leave a large number of leisure customers with a perception that the rail industry is unable to offer a suitable product.

Network Rail – Deferral of the two track renewal worksites will over the next few years required maintenance engineer’s to visit the Hitchin & Fletton sites on a more frequent basis in disruptive possession access. Deferral of these renewal would also lead to the possible requirement to impose TSRs on the ECML at these locations (see appendix **x** from the local track maintenance engineer).

*(e) maintaining, renewing and carrying out other necessary work on or in relation to the Network;*

NXEC - The NXEC proposal enables the delivery of this criteria, though with a different work plan.

Network Rail – The work is to renew in modern equivalent 10 point ends and 3 partial renewals, in the Hitchin and at Fletton 293yds of formation and drainage renewals and Bridge works at Connington Br166having taken the opportunity to optimise the planned disruptive access in week 2. Maintenance engineers are concerned that deferral of the track renewals will increase the level of maintenance at these locations and the risk of having to impose TSR’s to mitigate against the deferred renewals. Detailed investigation by our engineering delivery teams have concluded that its is not possible to deliver the week 2 S&C renewals and OHL works in anything other than a three line possession.

*(f) maintaining and improving connections between railway passenger services;*

NXEC - The inability to operate trains between Peterborough and London will lead to amended timetables, extended journey times resulting in the breaking of connections

*(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;*

NXEC - The current engineering plan results in an enormous deterioration in service patterns. In addition there is no certainty that the volume of passengers expected to travel at these weekends can actually be safely accommodated on road vehicles. It should be noted that the weekends involved are Easter weekend and the final weekend of the school Easter holidays. The East Coast Main Line is the prime rail route between London and West Yorkshire, the North East and Scotland, serving three of UK rail’s top 10 (by revenue) flows. In addition, the West Coast Main Line is closed in week 1 north of Carlisle which is expected to result in increased travel on ECML.

Network Rail – The week 1 possession has been amended in such away that permits 3 tph to operate passed the site of work in each direction. In week 2 Network Rail can confirm that the WCML is open between Euston and Glasgow and operating a normal weekend timetabled service..

*(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;*

N/A

*(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;*

N/A

*(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;*

NXEC’s assets will be less efficiently utilised as they are unable to deliver their main function, i.e. the carrying of passengers between London and Yorkshire, the North East and Scotland. Network rail’s proposal will result in the hiring in of road vehicles and the total number of passengers carried will be less than had a train service operated.

*(k) facilitating new commercial opportunities, including promoting competition in final markets and ensuring reasonable access to the Network by new operators of trains;*

Engineering work which results in trains not operating destroys the commercial opportunity to seek modal switch from air and road to rail, especially at times of high demand such as Easter weekends and weekends at the beginning/end of school holidays

*(l) avoiding wherever practicable frequent timetable changes, in particular for railway passenger services;*

The Network Rail proposal is requiring a destructive timetable change for railway passenger services

Network Rail - whenever practical

*(m) encouraging the efficient use of capacity by considering a Bidder’s previous level of utilisation of Train Slots;*

The Network Rail proposal, by not permitting any service to operate represents the least efficient use of capacity,

*(n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Rules of the Plan; and*

N/A

*(o) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.*

Research by ATOC and SDG has indicated significant long term business damage being caused by replacement bus services. Research by SDG in 2005 found that 17% passengers who had a poor experience during engineering work would travel by rail less (whether during engineering work or otherwise). In the same report 54% of passengers said they travelled by rail during engineering work only when they had no choice.

ATOC has also undertaken research in this and concluded that, **“**train operators lose £100million a year in fares as a result of passengers deciding not to travel by rail because rail replacements are running”.

Engineering work, executed as in Network Rail’s proposal is not in the commercial interest of NXEC, or, due to the impact on industry reputation the commercial interests of other TOC’s or Network Rail.

Network Rail – Due to the relatively closeness in time of these possessions the planning and requisition of the materials for the works at Hitchin have already started. Network Rail would incur abortive and additional costs if the works were deferred. Any imposed TSR’s due to the work not being carried out would course delay and incur schedule 8 payments to all operators that use the ECML route. The impact of the TSR’s could also require the timetable to be reviewed in the Hitchin area (trains moving slower through the Cambridge Jn area could important ROTP timetable conflicts in the pathing of services in this area) and would impact Network Rails ability to deliver commercial agreements with other TOC’s.

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.

**7           ANY FURTHER ISSUES RAISED**

7.1               Respondent may list any further claim or issue that it wishes to be resolved.

7.2               Response by Claimant.

**8           DECISION SOUGHT FROM THE PANEL**

The Panel is asked to determine:

8.1 NXEC requests The Panel to determine that in taking a balanced view of the Decision Criteria, NXEC’s reasonable request to operate an adequate level of train service between Peterborough and Stevenage is a key determinant when taking into account the lack of a suitable rail diversionary route, the volume of passengers, the passenger dissatisfaction resulting from operating replacement bus services and the increased safety risk resulting from transfer of large numbers of passengers from train to bus and back to train. Therefore Network Rail should only be permitted to Restrict Use below an adequate level of service when there is no other reasonable method of undertaking the engineering work. In this case Network Rail has not demonstrated that no such alternative reasonable methods of undertaking engineering work exist. Therefore NXEC remains un-convinced that this final position is in accordance with best practice and therefore their review of the Decision Criteria is flawed. The panel is therefore requested to direct Network Rail to further review their access requirements for weeks 1,2 and 3 to enable the operation of an adequate level of train service.

8.2 Network Rail asks the panel to confirm that the correct application of the decision criteria has been applied for the disruptive engineering access planned in weeks 1 to 3 between Stevenage and Hitchin, and to direct NXEC to accept the disruptive engineering access as now planned.

**9          APPENDICES AND ANNEXES**

The parties confirm that they have complied with Rule A1.34 of the Access Dispute Resolution Rules, which requires that

“*Copies of the following documents shall also be annexed and cross referenced to the reference:*

1. *the relevant extracts of contractual documents containing the provision(s) under which the referral to the Panel arises (other than provision(s) from* **[the current]** *Access Conditions);*
2. *the relevant extracts of contractual documents containing provision(s) associated with the substance of the dispute; and*
3. **[the relevant extracts of]** *any other documents referred to in the reference”. (Rule A1.34)*

Extracts of Access Conditions/ Network Code ARE included where the dispute relates to previous (i.e. no longer current) versions of these documents.

All appendices, and annexes have been bound into the submission, and are consecutively page numbered.

Any information only made available after the main submission has been submitted to Panel Members, will be consecutively numbered, so as to follow on at the conclusion of the previous submission.

**10                    SIGNATURES**

For and on behalf of *National Express*

 *East Coast*  Ltd For and on behalf of *Network Rail*  Ltd

Signed Signed

Print name Mike Hogg Print name Matthew Allen

Position: Operations Director Position: Network Access Unit Mgr

Date: Date:

***LIST OF APPENDICES, ANNEXES AND SUPPLEMENTARY MATERIAL***

Appendix 1 : Summary of the points at Hitchin planned for renewal

Appendix 2 : Impacts if works deferred

Appendix 3 : Summary of the alterations made to the original plan to deliver the Hitchin S&C renewal works

**Appendix 1 : Summary of the points at Hitchin planned for renewal**

2269A PTS – DOWN FAST - 32M 06CH (WEEK 48)

2269B PTS – UP FAST – 32M 06CH (WEEK 48)

2266B PTS – DOWN –FAST – 32M 06CH (WEEK 48)

2270B PTS – UP FAST – 32M 11CH (WEEK 49)

2271A PTS – DOWN FAST – 32M 06CH (WEEK 51) COMMISSIONED IN WEEK 3 (NEW 70MPH CROSS OVER)

2271B PTS – DOWN SLOW – 32M 11CH (WEEK 52) COMMISSIONED IN WEEK 3 (NEW 70MPH CROSS OVER)

2270A PTS – UP SLOW – 32M 11CH (WEEK 53) - PARTIAL

2273 PTS – UP SLOW – 32M 12CH (WEEK 53) - PARTIAL

2272A PTS – UP FAST – 32M 12CH (WEEK 01)

2272B PTS – UP SLOW – 32M 12CH (WEEK 01)

2256A PTS – DOWN FAST – 31M 18CH (WEEK 02) – 70 MPH X OVER RT60

2256B PTS – DOWN SLOW – 31M 18CH (WEEK 02) – 70 MPH X OVER RT60

2266A PTS – DOWN SLOW – 31M 79CH (WEEK 51,52 or 03) – PARTIAL ( Was originally planned in week 01 but now due to the easement to this possessions the work is re-dated to week 3).

**Appendix 2 : Impacts if works deferred**

|  | **Consequences of Deferral** |  |  |  |
| --- | --- | --- | --- | --- |
| **HITCHIN S&C** | If not completed as scheduled | If not completed within 1 year (i.e. by end of 10/11) | If not completed within 2 years (i.e. by end of 11/12) | If not completed within 3 years (i.e. by end of 12/13) | If not completed within 4 years (i.e. by end of CP4) |
| **Performance** |  |  |  |  |  |
| TSR Implication | Yes | 80 | 30/50 | 30/50 | 30/50 |
| Additional Requirement for Disruptive Access (e.g. for Maintenance) | 1 x 8hrs All Line Block | 1 x 8hrs All Line Block. 2 x ROTR. | 1 x 12hrs All Line Block. Multiple ROTR. | 2 x 12hrs All Line Block. Multiple ROTR. | 2 x 12hrs All Line Block. Multiple ROTR. |
| **Financial** |  |  |  |  |  |
| Additional Maintenance Required | Yes | 25K. Spot retimber & Tamp | 75K. Major tamping. Spot reballast and retimber. | 150K. 2 all line tamps. Reballast, retimber, spot ironwork replacement. | 150K. 2 all line tamps. Reballast, retimber, spot ironwork replacement. |
|  |  |  |  |  |  |
|  | **Consequences of Deferral** |  |  |  |
| **FLETTON PLTR** | If not completed as scheduled | If not completed within 1 year (i.e. by end of 10/11) | If not completed within 2 years (i.e. by end of 11/12) | If not completed within 3 years (i.e. by end of 12/13) | If not completed within 4 years (i.e. by end of CP4) |
| **Performance** |  |  |  |  |  |
| TSR Implication | Yes | 80mph  | 80mph | 50mph | 50 Mph |
| Additional Requirement for Disruptive Access (e.g. for Maintenance) | 2 x ROTR | 5 x ROTR | 5 x ROTR | 8 x ROTR | 8 x ROTR |
| **Financial** |  |  |  |  |  |
| Additional Maintenance Required | Yes Tamp 2 x yearly | Yes Tamp 2 x yearly + kango x3 | Yes Tamp 2 x yearly + kango x3 | Yes Tamp 2 x yearly + kango x6 | Yes Tamp 2 x yearly + kango x6 |
|  | 15K | 30K | 30K | 40K | 40K |

**Appendix 3 : Summary of the alterations made to the original plan to deliver the Hitchin S&C renewal works**

| **Week No.** | **Possession Number** | **Version 1** | **Current** | **Easement / More Disruptive ?** |
| --- | --- | --- | --- | --- |
| **48** | **P2009/1137481** | **Three line block between the hours of 08.00 Sat to 05.00 Mon with the 4th line blocked between 00.55 Sun and 09.15 Sun and 21.00 Sun to 05.00 Mon** | **2 line block ( Fasts )between the hours of06.00 Sat - 22.15 Sat and 09.15 Sun to 21.00 SunCoasting over Down Slow**other times as follows :**00.01Sat - 02.30 Sat Down Fast , Up Fast and Up Slow blocked02.30 Sat to 0600 Sat , 22.15 Sat to 0915 Sun and 2100 Sun to 0430 Mon All blocked** | **Easement** |
| **49** | **P2009/1137357** | **Two line block ( Fasts ) 00.55 Sun to 04.45 Mon with Slows blocked 00.55 Sun - 09.15 Sun and 21.00 Sun to 04.45 Mon** | **2 line block ( Fasts ) between the hours of0915 Sun to 2100 SunCoasting over Down Slow**other times as follows :**0105 Sun to 0915 Sun and 2100 Sun to 0430 Mon All blocked** | **Negligible** |
| **50** | **P2009/1138701** | **Fast s blocked 15.45 to 04.45 Monday and Slow blocked 15.45 Sat to 09.15 Sun and 23.45 to 04.45 Mon** | **2 line block ( Fasts ) between the hours of17.00 Sun to 09.15 Sun**other times as follows :**01.05 Sun to 09.15 Sun All Blocked** | **Easement** |
| **51** | **P2009/1154103** | **Two line block ( Fasts ) 00.55 Sun to 04.45 Mon with Slows blocked 00.55 Sun - 09.15 Sun and 21.00 Sun to 04.45 Mon** | **2 line block ( Down Slow , Down Fast ) between the hours of09.15 Sun to 21.00 Sun**other times as follows :**01.05 Sun to 09.15 Sun and 2100 Sun to 0430 Mon All Blocked** | **Easement** |
| **52** | **P2009/1154114** | **Three line block between 00.55 Sun and 16.55 Sun and a 1 line block of the Down Slow between 16.55 Sun and 04.45 Mon** | **2 line block ( Down Slow , Down Fast ) between the hours of09.15 Sun to 21.00 SunCoasting over Up Fast**other times as follows :**01.05 Sun to 09.15 Sun and 2100 Sun to 0430 Mon All Blocked** | **Easement** |
| **53** | **P2009/1137365** | **Three line block between 00.55 Sun and 16.55 Sun and a 1 line block of the Down Slow between 16.55 Sun and 04.45 Mon** | **2 line block ( Up Fast , Up Slow ) between the hours of09.15 Sun to 21.00 SunCoasting over Down Fast**other times as follows :**0205 Sun to 0915 Sun and 2100 Sun to 0430 Mon All Blocked** | **Easement** |
| **01** | **P2010/1156811** | **All Line block 00.55 Sat to 05.30 Mon** | **Double Up Block ( 62 hour possession )Coasting over Down FastBetween the hours of 06.00 Sat to 01.05 Sun and 09.15 Sunday to 15.00 Monday**other times as follows :**01.05 Sat to 0600 Sat and 0105 Sun to 0915 Sun All blocked** | **Easement** |
| **02** | **P2010/1138627** | **All line block 08.00 Sat to 05.00 Mon ( 45 hours )** | **All blocked ( 54 hours )01.05 Sat to 04.30 Mon** | **Minimal increase in disruption overall but not to NXEC** |
| **03** | **P2010/1138598** | **All blocked 13hrs 30 mins00.55 Sun to 14.30 Sun** | **All blocked 11hrs 30 mins01.05 Sun to 11.30 Sun** | **Easement** |