

# Heathrow Airport Limited: Appeal Notice, in the timetable dispute: HAL/TTP003

Date: 5 November 2021

Prepared by: Heathrow Airport Limited

Status: FINAL

**To:** the Office of Rail and Road (the **ORR**)

**To the Respondents:** MTR Corporation (Crossrail) Limited (**MTR**)

**And the Interested Parties:** Heathrow Express Operating Company Limited (**HEOC**), Network Rail Infrastructure Limited (**Network Rail**) and First Great Western Limited.

## **1 NOTICE OF APPEAL UNDER PART M OF THE NETWORK CODE (TTP003)**

- 1.1 Under Condition D5.2.1 of Part D of the HAL Network Code (the **Network Code**), Heathrow Airport Limited (the Appellant), referred to as HAL in this notice of appeal) is appealing the determination of the Timetabling Panel of the Access Disputes Committee dated 27 October 2021 (the **Determination**) in respect of TTP/003 on a number of grounds as described in this notice of appeal.
- 1.2 This notice and the attached documentary evidence constitutes HAL's complete notice of appeal in accordance with Condition M3.1.1 of Part M of the Network Code (the **Notice of Appeal**).
- 1.3 Unless otherwise defined/stated:
- (a) the terms used in this Notice of Appeal, have the meaning given to them in the Determination unless otherwise stated; and
  - (b) references to paragraphs are references to paragraphs in the Determination.
- 1.4 The evidence in support of this Notice of Appeal comprise:
- (a) a copy of the Determination; and
  - (b) the other Appendices.
- 1.5 Given the scope of HAL's appeal, HAL has taken an inclusive approach to which documents it relies on and has appended to this Notice of Appeal. In order to assist the ORR however, HAL would direct the ORR to read as a priority:
- (a) the Determination (Appendix 1);
  - (b) the MTR Sole Reference document (the first document in Appendix 2);
  - (c) the HAL Assessment in which HAL recorded its decision (Appendix 9 to the MTR Sole Reference);
  - (d) the HAL Response (the first document in Appendix 3);
  - (e) the amalgamated MTR Sole Reference and HAL Response exchanges of MTR and HAL in relation to HAL's application of the Decision Criteria (Appendix 12 to the HAL Response); and
  - (f) the other Appendices to this Notice of Appeal.
- 1.6 The facts are largely as stated in Section F of the Determination, except as disputed in paragraph 5.11 below.

## 2 REQUEST TO EXPEDITE

- 2.1 Pursuant to Condition M6.1.1, HAL requests that the ORR order that the appeal should be heard on an expedited timeframe based on HAL's proposed timetable. HAL believes it is in its interests, and the interests of MTR, any other Appellant and the Interested Parties, that this appeal should be dealt with on an expedited basis for the reasons given in this section 2. On that basis, HAL does not expect that any of those parties would object to HAL's request. Under Condition M6.1.2, however, those parties will have the opportunity to make any representations in response, and HAL has taken that into account in its proposed directions below.
- 2.2 The Determination relates to the December 2021 timetable and it requires HAL to take action as soon as reasonably practicable, but in any event from a date not later than 3 January 2022 or alternatively the start of Period B of the December 2021 timetable, if that falls earlier (the **Deadline**).
- 2.3 Given the proximity of the Deadline, and the potential impacts of HAL implementing the Determination, it is in the interests of justice that this appeal be heard on an expedited timeframe so that all parties involved know the outcome before the mandated timetable changes become operational and they are able to plan and take responsive action accordingly. It would cause significant disruption to those involved, including Network Rail and the wider network, if the impacts of the Determination were to be reversed after first being introduced.
- 2.4 Accordingly, HAL proposes the following directions for the appeal proceedings:

<b>Date (no later than)</b>	<b>Appeal directions</b>
10 November 2021	ORR will communicate its decision on whether appeal should proceed to it and reasons for that decision
11 November 2021	MTR will serve its representations in response to HAL's request to expedite this appeal (if any)
15 November 2021	ORR will order the timeframe on which the appeal is to be heard
17 November 2021	MTR may serve on HAL, any other Appellant/Respondent and the ORR, a Respondent's notice
24 November 2021	any Interested Party may serve on HAL, any other Appellant/Respondent and the ORR, written submissions on the appeal (if any)
26 November 2021	ORR will fix a date for an oral hearing of the appeal to take place (if required) and notify HAL, MTR, any other Appellant/Respondent, and the Interested Parties of the date of the hearing and of the procedure that shall be adopted at the hearing
3 December 2021	Date of hearing (if required)
17 December 2021	ORR will serve its determination on HAL, MTR and any other Appellant/Respondent and Interested Party

### 3 WIDER MAINLINE/INDUSTRY IMPLICATIONS

- 3.1 Condition M4.1.1 sets out a discretion for the ORR to refuse to accept an appeal to it, including on the ground that the matter in question is not of sufficient importance to the industry. In addition, the ORR has indicated that it is open to considering appeals in relation to the HAL infrastructure where such an appeal has implications for the wider network and/or wider industry relevance. For the reasons given in this section 3, the Determination, if left to stand, will likely affect future decision-making in relation to the wider network, because the issues central to HAL's appeal in this section 3, relate to the interpretation and application of the Network Code, which itself is in material respects identical to the network code that governs the wider network. More immediately, the TTP's decision is going to have performance impacts not just on HAL's infrastructure, but also on the wider network, because there will be less contingency in the system. The TTP's flawed decision must be addressed and corrected, because of this, and to ensure due process and robust decision making in future Alternative Dispute Resolution procedures.

#### **Status of timetable bids in the context of agreements to deviate from the Network Code**

- 3.2 The parties in this matter adopted the Change Strategy, and so agreed different timing requirements for the submission of bids for the December 2021 timetable, without formally changing the Network Code. From time to time, different rules and timings outside the scope of the prescribed rules are adopted in the industry, and is not unique to HAL's Network Code, which is closely aligned with the one that applies on the wider network. It is likely, given the ongoing uncertainty of the continuing impact of COVID-19, as well as the ongoing progression towards more flexible timetabling triggered by the impacts of COVID-19, that the kind of revisions the Change Strategy introduced, will recur. Given the need for arrangements relating to HAL's infrastructure to remain aligned with timings and requirements adopted by Network Rail, HAL expects to have to comply with these changes when they arise. There is clear disagreement between the TTP and HAL as to the legal interpretation of the Network Code relating to Train Operator Variation Requests (**TOVRs**). It is essential for future certainty, to understand which interpretation is correct and what the legal entitlements of Timetable Participants are when they submit bids in such circumstances (including what the status of any bid submitted pursuant to any revised industry process might be, when the Network Code has not been formally changed).

#### **Scope and application of an infrastructure manager's duty to take reasonably informed decisions**

- 3.3 The TTP determined that HAL was not under particular time pressure when it made its decision for the December 2021 timetable. HAL believes this determination is wrong. A key issue of wider application, is what role time plays (if any) in an infrastructure manager's duty to be reasonably informed when it makes any decision under Part D, because infrastructure managers are frequently required to make decisions in short timeframes. There should be a consistent interpretation and application of this duty across the wider network and HAL's infrastructure.

#### **To what extent can infrastructure managers rely on professional judgment/experience in making decisions?**

- 3.4 The TTP placed great reliance in the Determination on the need for data when HAL made its decision for the December 2021 timetable. HAL believes the TTP was wrong to do so. Data will not always be available (including because of time constraints, see paragraph 3.3 above) and HAL believes that decision-makers

should be entitled to rely on their professional judgment and experience as well. There are wider industry implications for decision-makers in understanding whether empirical data is required for every decision under Part D or whether any of those decisions can be based on other factors, including professional judgment.

**To what extent must an infrastructure manager record every step of its decision?**

- 3.5 The TTP determined that HAL's written account of its decision in relation to the December 2021 timetable, did not properly record every relevant facet of a reasonable decision-maker's decision. HAL disagrees and argues that such an account must be adequate to record the decision-maker's decision and to allow those directly affected by it and interested parties to understand it. But the burden placed on an infrastructure manager must be proportionate and reflective of the circumstances in which its decision is made – see paragraph 3.3 above.

**To what extent can an infrastructure manager rely on previous analysis?**

- 3.6 The TTP determined that HAL did not consider alternative operational solutions, which might permit both MTR and HEOC services to operate to Terminal 5 in the December 2021 timetable. HAL submitted that it had already considered and discounted the sorts of solutions the TTP focused on, due to performance concerns. There is wider industry application in answering the question of whether an infrastructure manager must revisit and justify discounting a suggested alternative solution when making a decision under Part D to include or flex Train Slots, where no circumstances have changed since the last time that solution was considered.

**How far must an infrastructure manager go in order to understand Timetable Participants' commercial interests?**

- 3.7 The TTP argues in the Determination that HAL did not know and did not go far enough to find out what the commercial interests of MTR and HEOC were. HAL argues that it is not necessary for it to go as far as the TTP appears to suggest to understand the likes of the revenue, cost base and profit margin of a Timetable Participant for the purpose of applying the Decision Criteria. The decision criteria in relation to the wider network is consistent in this respect. This issue therefore has wider application and requires clarity as to what an infrastructure manager must understand regarding the financial aspects of a Timetable Participant's business, including assessing that responsibility in the context of confidentiality and competition considerations.

**When substituting an infrastructure manager's decision under Part D, must a TTP (or ORR if appropriate) provide reasons for the substituted decision by reference to the Decision Criteria or otherwise?**

- 3.8 The TTP has substituted HAL's decision relating to the December 2021 timetable for its own, using the power under Condition D5.3.1(c). HAL argues that the TTP has not explained its reasoning for reaching that substituted decision or demonstrated that it has duly applied the Decision Criteria in reaching its decision. The issue of whether and to what extent a TTP (or ORR if appropriate) must set out its own application of the Decision Criteria when substituting its decision for one made by an infrastructure manager applying the Decision Criteria, is sufficiently important given the potential implications of a TPP (or ORR) decision and the equivalent provisions in relation to the wider network.

**4 GROUNDS OF APPEAL**

HAL appeals the Determination on the following grounds:

- (a) the TTP has based the Determination on the wrong timetable bids, which has misdirected the TTP's conclusions about HAL's responsibilities under the Network Code;
- (b) the TTP has come to the wrong conclusion as to the extent and quality of information HAL possessed or was required to obtain in order to make its decision, which has materially influenced its assessment;
- (c) the TTP has failed to appreciate that HAL is required to apply the Decision Criteria to every decision made under Part D of the Network Code, and so wrongly concluded that HAL failed to ask itself the correct question when making its decision;
- (d) the TTP has wrongly concluded that HAL did not give consideration to alternative timetabling solutions that may have allowed both MTR's and HEOC's requested services to operate to Terminal 5 in the December 2021 timetable;
- (e) the TTP has wrongly concluded that HAL did not apply the Decision Criteria and that its application was materially flawed; and
- (f) the TTP has failed to provide any reasons for its own substituted decision and has failed to apply the Decision Criteria.

## 5 DETAILED GROUNDS OF APPEAL

### The Determination has not been made in relation to the correct timetable bids

#### The July Proposals were TOVRs under the Network Code

- 5.1 It is common ground that MTR submitted an Access Proposal and HEOC made a Rolled Over Access Proposal, in each case by the Priority Date in March 2021 for the December 2021 timetable (the **March Proposals**).
- 5.2 It is also common ground, that the Network Code was not formally changed by the parties to reflect the revised timing introduced by the Change Strategy. From this, in paragraph 161, the TTP states that it *'follows that the provisions of Condition D2.4 apply.'* The TTP then goes to some length to explain that because of this, the March Proposals have standing as far as the Network Code is concerned.
- 5.3 The TTP then goes on to discuss the proposals that MTR and HEOC both made on 9 July 2021 for the December 2021 timetable in accordance with the Change Strategy, each updating the respective March Proposal (the **July Proposals**). The TTP recognises in paragraph 167, that the July Proposals could not be revised Access Proposals within the scope of Condition D4.2, HAL presumes because the TTP accepts that the July Proposals were submitted after D-26. The TTP then argues that the July Proposals cannot be TOVRs because the New Working Timetable had not been published when the Timetable Participants issued them, and *'logically a Timetable Participant must have notice of the NWT before it can seek to vary it'* (paragraph 168).
- 5.4 The TTP therefore takes time to explain what the July Proposals were not as far as the Network Code is concerned, but does not explain what they actually were. Having taken that position, the TTP is left with no other choice but to ignore the July Proposals altogether as far as the Network Code is concerned, stating that *'the July Proposals have no contractual status'* (paragraph 169).

5.5 The TTP refers to Condition D3.1.1 in paragraph 168 in support of its argument. This permits Timetable Participants to submit Train Operator Variations (the written form of which are TOVRs) as follows:

*'3.1.1 From D-26 and during the relevant Timetable Period, Timetable Participants may wish to vary either the New Working Timetable, if it is before the Timetable Change Date, or otherwise the Working Timetable on an ad hoc basis by:*

*(a) adding an additional Train Slot on one or more occasions;*

*(b) amending the detail of one or more Train Slots;*

*(c) removing one or more Train Slots.*

*Any such variation is referred to as a "Train Operator Variation". The process to be followed where a Timetable Participant seeks a Train Operator Variation is set out in Condition D3.3.'*

5.6 The relevant defining characteristics of a TOVR under Condition D3.1.1 then, are that it is submitted in writing during the relevant Timetable Period, but only from D-26, and it seeks to add, amend or remove a Train Slot. Condition D3.3.3 adds that:

*'3.3.3 From D-26 and during the relevant Timetable Period, a Timetable Participant is entitled to make a Train Operator Variation Request and HAL shall have the power to accept, reject or modify it, subject to the timeframes set out in Condition D3.3.6 below and acting in accordance with Condition D4.3.'*

5.7 Based on the above, and contrary to the TTP's finding, both MTR and HEOC had the right to submit TOVRs after D-26 which sought to add, amend or remove Train Slots in the New Working Timetable as it existed prior to publication. Both did that by each submitting a July Proposal. The July Proposals therefore meet the requirements of Conditions D3.1.1 and 3.3.3 in order to qualify as TOVRs.

5.8 There is no requirement in either Condition D3.1.1 or 3.3.3 for the New Working Timetable to be published before a TOVR can be submitted. Under Condition D2.1.6, the New Working Timetable is the Prior Working Timetable, during the Timetable Period in which it is finalised. It therefore exists both before and after publication. The TTP has therefore wrongly read the requirement for publication of the New Working Timetable into Conditions D3.1.1 and 3.3.3.

5.9 Timetable Participants are to have electronic access to the *'evolving draft of the New Working Timetable'* under Condition D2.6.2 and so could be said, to use the TTP's term, to *'have notice of the NWT'* before its publication. It is entirely plausible therefore, that a Timetable Participant, knowing the Train Slots that have been included in the New Working Timetable in draft form, and pursuant to Conditions D3.1.1 and 3.3.3, would submit a TOVR in order to add to those Train Slots and/or amend or vary them, without necessarily waiting for publication.

5.10 MTR and HEOC submitted the July Proposals in good faith and they both altered Train Slots in the New Working Timetable to varying degrees. Neither Timetable Participant would have submitted a proposal on the basis that it had no contractual status. Rather each would have done so on the basis that its proposal had some standing as far as the Network Code was concerned, and by submitted it, expected to create obligations on HAL's part (albeit both were proceeding under the misapprehension that the Change Strategy had amended the Network Code for the December 2021 timetable).

- 5.11 It must follow from what the TTP has concluded, that if in fact the parties did not change the terms of the Network Code and so the provisions of Condition D2.4 apply, then the provisions of Condition D3 and D4, indeed all of Part D, must also apply. And it must also follow that, if the July Proposals cannot be revised Access Proposals, but met the requirements of Conditions D3.1.1 and 3.3.1, they must be TOVRs instead, indeed they can only be TOVRs. The TTP is wrong therefore to conclude as it does in paragraph 33, that the variations the July Proposals introduced were *'not material for this appeal.'*
- 5.12 This mistake is fundamental. Rather than being *'not material'* the July Proposals are critical; they are the very documents on which HAL had to make a decision. Further, it is hard to see how declaring the July Proposals as having *'no contractual status'*, is consistent with the principle of determining this dispute on the legal entitlements of the parties and on no other basis (paragraph 156). HAL contends that the July Proposals were part of the legal entitlements of MTR and HEOC, and once submitted, HAL had a duty to consider them as TOVRs in accordance with the requirements of the relevant provisions of Conditions D3 and D4. HAL acknowledges that it did not consider them in accordance with the requirements of Condition D3.3.6, but only because like all other relevant parties, HAL was following the process introduced by the Change Strategy. But irrespective of that misapprehension, HAL was correct to consider the July Proposals and based its decision upon them. It should certainly not have ignored them, which is what the TTP's argument seems to lead to.

TTP's arguments are wrongly predicated on the March Proposals

- 5.13 At paragraph 176, it is stated that, in relation to the nature and extent of evidence required to support a decision, the *'material time is the time at which the decision was taken'*. By its own admission, the TTP states in paragraph 61, that the material date was 9 September 2021 (see also paragraph 180(f)), although HAL would contend that the material time was between August 2021 and 9 September 2021, as it formulated and began to document its decision, and issued its reasoning during that period. Specifically, HAL carried out its assessment, and Network Rail made the offer for, the December 2021 timetable and published the New Working Timetable on HAL's behalf, in each case with regard to the July Proposals and not the March Proposals. From this, it follows that HAL considered whether or not it could use its Flexing Right and applied the Decision Criteria to the July Proposals and not the March Proposals.
- 5.14 Having concluded that HAL's decision was made in respect of the March Proposals, and not the July Proposals (which are to be ignored), the TTP is then able to:
- (a) find that HAL's assessment was *'not an assessment which required particular urgency'* (paragraph 183);
  - (b) as a result, then find that *'[HAL's decision] should have been taken with the benefit of fuller evidence'* (paragraph 183);
  - (c) ask *'why the PMO meeting was not called sooner'* (paragraph 75);
  - (d) find that when HAL compiled the New Working Timetable, HAL was required by Condition D4.2.2 to *'endeavour wherever possible to comply with all Access Proposals submitted in accordance with Condition D2.4 and to accommodate all ROAPs'* (paragraph 163), notwithstanding that such Condition does not apply to TOVRs; and
  - (e) avoid resolving the problem of deeming the acceptance of two conflicting TOVRs pursuant to Condition D3.3.7 where the New Working Timetable has not been published (see paragraph 6 of



the HAL Assessment (Appendix 9 of the MTR Sole Reference) and paragraph 4.15 of the HAL Response (Appendix 3).

- 5.15 The decision in this dispute was not taken by HAL in reference to and around the time of the March Proposals, but in reference to and around the time of the July Proposals because they each varied the relevant March Proposal and because of the time constraints imposed by the requirements of the Change Strategy. It is why the PMO meeting was only called '*at a relatively late stage*' (paragraph 75).
- 5.16 This is significant, because the TTP has therefore reached its determination in relation to the wrong timetable submissions. It has predicated all of its subsequent arguments on these mistakes.

**HAL did not fail to take an informed decision**

The degree to which HAL should be informed must be assessed in the context of the time available

- 5.17 Having determined (wrongly) that HAL took its decision in respect of the March Proposals, the TTP then determined in paragraph 181, that '*in all material respects HAL failed to [...] take a decision which was properly informed.*'
- 5.18 Crucially, the TTP's misapprehension as to when and in what respect, HAL took its decision, leads the TTP to the view that the '*paucity of available data is material to its assessment of HAL's compliance*' (paragraph 182). In the TTP's own words therefore, this time component is critical to the TTP's judgment as to whether or not HAL was properly informed.
- 5.19 The scope of HAL's duty to make an informed decision and to evidence gather, must be reflective of the circumstances. When those circumstances demand urgent decisions, the degree to which HAL must inform itself and gather evidence, must naturally be less onerous than the duty that applies in less pressured times. This view is evidently shared by the TTP when it says:
- 'The evidence required will vary from case to case and the level of detail required will also vary from case to case, depending on the importance of the decision, and the speed with which the decision must be made.'* (paragraph 176)
- 5.20 In paragraphs 184 and 188, the TTP notes the compressed timescales the Change Strategy caused for itself, yet the TTP does not acknowledge that those timescales had a bearing on HAL's ability to make a decision in the first place. HAL contends, that it is only by disregarding the July Proposals, that the TTP can get itself to a position where it can determine that HAL had enough time to gather adequate data (by the TTP's measure) before making a decision.
- 5.21 The reality was different. HAL's decision was made by reference to the time constraints created by the Change Strategy, and after the two July Proposals had been received and after Network Rail had assisted HAL to understand the differences between the March Proposals and the July Proposals, to ensure that it treated them properly and fairly under the Network Code. Network Rail was itself in the process at that time of trying to finalise the timetable for the whole network, including the short notice COVID-19 changes which the Change Strategy was introduced to help manage. This meant that the decision was taken under '*particular urgency*', contrary to the TTP's finding.
- 5.22 HAL is criticised in the Determination for not undertaking a Qualitative Risk Assessment regarding the perceived safety risk at the PTI (paragraph 180(g)), for not having '*sufficient data on passenger numbers or the spread or balance of passenger demand*', not seeking data '*from MTR*' (both paragraph 180(d)),

and for not having the '*evidence [...]available to enable HAL to undertake a properly informed view*' (paragraph 180(g)). It was not practicable after the July Proposals were received and in the remaining time available, for HAL to have procured a risk assessment, undertaken more up-to-date passenger counts or gathered any further information beyond what it already possessed.

- 5.23 The TTP appears to place no store in the idea of an infrastructure manager exercising professional judgment in preparing the New Working Timetable and complying with the Decision Criteria. HAL asserts that it used its experience and professional judgment to make certain assumptions in respect of the decision it had before it for the December 2021 timetable. The TTP appears to focus exclusively on the value of data and does not recognise that HAL was able to exercise its professional judgment also. The ORR in paragraph 23 of the appeal of TTP1064, recognises the importance of professional judgment, and goes so far to say that it may be appropriate for that judgment to lead to the disregarding of available information by an infrastructure manager:

*'It is also our view that the TTP's statement that all available sources of information should be used, is to be read in conjunction with the TTP's finding that "...a professional judgment must be applied in assessing which inputs are likely to be useful...That recognises that, having applied professional judgment, there may be reasons why Network Rail decides not to use all sources that are available to it. A decision not to use all possible sources does not automatically mean the changes are therefore unreliable and should not be implemented.'*

HAL did have (and considered) passenger data

- 5.24 In any event, HAL already had passenger data on which to base its decision, as confirmed at the TTP hearing, which showed that passenger numbers on HEOC services were higher than those on MTR services by a ratio of approximately 4:1. HAL did not feel it was its place to share the precise data with the TTP because it was information that pertained to the MTR and HEOC businesses and so was commercially sensitive. HAL invited the TTP to ask HEOC and MTR if they would share their data, but the TTP declined to pursue this line of enquiry further. The TTP acknowledges that HAL had data it had gathered '*about the spread or balance of demand*' (paragraph 94). Given that the TTP did not see that data, it is difficult to understand how the TTP was able to conclude that '*HAL did not have sufficient data on passenger numbers or the spread or balance of passenger demand*' (paragraph 180(d)).

Additional passenger data was not required

- 5.25 The TTP asked whether HAL had data as to the proportion and make-up of passengers before and after 20:00 on weekdays, ages of those passengers (and even somehow prospective passengers), whether they are employed or not, or were persons of restricted mobility (paragraph 95). HAL did not have such data. But HAL is not aware that any train operator, and certainly not Network Rail (as a comparator), that would have meaningful information in relation in these kinds of data points. It would be unreasonable and disproportionate to require an infrastructure manager to procure that volume of data before making a decision (even before one considers the compressed timescales in this case).
- 5.26 In addition, not every aspect of an infrastructure manager's decision will be based on data. Decisions in the rail industry, particularly in relation to timetable planning (when decisions sometimes need to be made quickly), are often informed by and made using experience and assumptions. The TTP in paragraph 32 of determination TTP1610 (see Appendix 11 of the Response) supports this view:

*'The panel bears in mind that compiling the timetable is a complex process but despite that complexity and the technology that goes into the work, the process is an art and not a science. There was a consensus at the hearing to the effect that if you gave the same problem to five different planners you will get five different outcomes, all of which would be in the range of what is reasonable.'*

The Timetable Participants did not provide any additional relevant information

- 5.27 The TTP also ignores the duty of Timetable Participants to ensure they inform HAL of any information they consider relevant to their proposal that they wish HAL to factor into its consideration. In paragraph 31 of the Appeal in relation to Determination TTP1064 (see Appendix 10 of the Response), the statement of a Network Rail witness is cited on the subject of its information gathering responsibility and what role, if any, a Timetable Participant might play in that regard. The witness is quoted as saying:

*'[Network Rail] is somewhat reliant on operators to explain why a revision will have an impact on performance, or why it will have an impact upon them. When this information is provided [Network Rail] is well placed to assess and weigh these considerations appropriately, which it cannot do if operators provide only assertions. Where supporting information is not provided by operators, then all [Network Rail] can reasonably do is place more weight and importance on the evidence it does have before it.'*

- 5.28 The ORR, in paragraph 32 of that Appeal determination, appears to accept this argument:

*'[The Timetable Participant] could have raised issues with Network Rail in relation to the application of the Decision Criteria to specific changes.'*

- 5.29 MTR could have raised matters with HAL regarding its July Proposal, but it chose not to do so. However, even if MTR had come forward, or HAL had made additional enquiries of MTR, HAL queries whether in either case this would have advanced the knowledge base on which HAL was to make its decision, given the limited and non-specific information MTR provided with its Sole Reference, which was criticised by the TTP (paragraphs 63 and 94).

**HAL did not fail to ask itself the correct question**

- 5.30 In paragraph 181, the TTP determined that HAL '*failed to ask itself the correct question*'. It is not entirely clear what is meant by this criticism. The TTP states in paragraph 181 that this follows from what the TTP has stated '*above*' in the Determination. It is not clear precisely which part of the Determination '*above*' refers to. In any event, HAL would make the following points in the remainder of this section 5 in response.

HAL did not ask itself the wrong starting question

- 5.31 HAL did not, contrary to the TTP's determination in paragraph 180(b), approach each Consideration with a fixed goal in mind of wanting to prioritise a regular express service from London Paddington. The TTP makes this finding of fact without justification or reference to the evidence on which it is based. HAL understands from paragraph 74 of the Determination, that the TTP may be seeking to rely on HAL's representative at the hearing who used the term '*without stepping through the parts*' in relation to not needing to document every detail of HAL's decision in the HAL Assessment. The TTP, however, is wrong to extrapolate from this term that HAL failed to '*step through the parts*' more broadly in carrying out its duty, because it had a '*fixed goal*' in mind. Moreover, it is inconsistent with the TTP's own conclusion

that HAL assessed and gave weight to different Considerations in reaching its decision, including performance and safety risks.

- 5.32 HAL was entitled to reach the view that there was, for example, more demand for a regular express service based on the data considered, or that train service performance would be better met in the present circumstances by express services running to Terminal 5, or that by maintaining the existing timetable of (as offered) 4tph stopping services to Terminal 4 and 4tph express services to Terminal 5, this would be in the overall interests of passengers. However, this does not make it a *'fixed goal'*. HAL's fixed goal was to achieve the Objective.

The significance of the July Proposals to the question HAL should have asked itself

- 5.33 The TTP states that the starting point for what was required of HAL, was to ask itself whether it *'could comply with [the March Proposals], whether or not this required the exercise of its Flexing Right (Condition D4.2.2.(c))'* (paragraph 178).
- 5.34 HAL was not, ultimately required to ask itself whether it could comply with the March Proposals, since both of those submissions were overtaken by the July Proposals. Having wrongly concluded that only the March Proposals are material, the TTP wrongly applies the Condition D4.2.2 duty in paragraph 163 to HAL's decision. Since HAL's decision concerned the July Proposals, which as TOVRs, cannot, by definition, be Access Proposals or Rolled Over Access Proposals, the duty in Condition D4.2.2 did not apply to the July Proposals.

When the Decision Criteria must be applied

- 5.35 The TTP also says in paragraph 178 that (HAL's emphasis), if *'HAL concluded that it could not accommodate all requested Train Slots it must then have applied the Decision Criteria.'* The TTP appears to be saying here that the Decision Criteria is only applied after HAL has concluded that all Train Slots in both proposals cannot be accommodated (i.e. after concluding there is a conflict). This would mean that, in the TTP's view, HAL should not have tried to apply the Decision Criteria and met the Objective from the outset in considering if all requested Train Slots could be accommodated. This would mean in turn, that HAL should have given no consideration to the likes of performance or safety until after deciding that not all Train Slots could be accommodated. HAL considers this to be an incorrect assessment. It is precisely because of those performance and safety considerations, that HAL decided not all Train Slots should be accommodated, and this is the correct approach under Part D.
- 5.36 This conclusion runs counter to Condition D4.6.1, as confirmed by the findings of the ORR in appeal determination TTP1174 (Appendix 6). Both Condition D4.6.1 and that determination (paragraphs 60 to 68 thereof), make clear that the Decision Criteria must be engaged in relation to any decision that HAL makes under Part D. That includes applying the Decision Criteria to deciding at the outset, whether HAL could incorporate the July Proposals as TOVRs into the New Working Timetable (whether or not using its Flexing Right), and not, as the TTP suggests, only applying it after deciding that not all Train Slots could be accommodated.
- 5.37 Paragraphs 76 and 91 of the appeal of determination TTP1174 (see Appendix 6) are instructive in this regard. They state that:

'76. [...] *the circumstances in which Network Rail must consider exercising its Flexing Right (prior to allocating Train Slots in the prescribed order of priority) include not only where*

*it cannot include all Train Slots without the resulting WTT breaching the principles in Conditions D4.2.2(a) and D4.2.2(b), but also where Network Rail cannot achieve the Objective (taking into account the Considerations) by including all requested Train Slots in the WTT.*

91. *ORR considers that the provisions of the Network Code envisage that there will be circumstances where Network Rail may not achieve the Objective by including all requested Train Slots in the WTT, even where there are no conflicts with other proposals or the Rules [...]. This might include where requested Train Slots would, if accepted in the WTT, give rise to clear and substantial safety or performance concern. In such a situation, Network Rail would in the first instance be required to consider whether to exercise its Flexing Right and should only allocate Train Slots in the prescribed order of priority in Condition D4.2.2(d) (and ultimately reject one or more requested Train Slots) to the extent that it is unable to vary requested Train Slots in a manner which will achieve the Objective (and will lead to a WTT which is consistent with the principles in Conditions D4.2.2(a) and D4.2.2(b)).'*

- 5.38 While paragraph 76 of that appeal determination is concerned with the exercise of Network Rail's flexing right in the context of Condition D4.2.2, HAL argues that the principle paragraph 76 establishes, also applies in the context of exercising HAL's Flexing Right when dealing with TOVRs under Condition D4.3.1(a). Paragraph 91 of that appeal determination establishes that an infrastructure manager can preclude requested Train Slots where the Objective is not met because there are a clear and substantial safety or performance risks associated with including some or all of those requested Train Slots.

HAL had already previously considered the viability and consequences of alternative solutions

- 5.39 In the context of wrongly applying the Condition D4.2.2 duty to HAL's decision, the TTP appears to have put particular focus on (i) the so-called PMO Solution (as defined in the Determination, and discussed at the PMO meeting on 8 October 2021) involving the removal of the fifth HEOC train from the HAL infrastructure circuit, and (ii) the other solution that the TTP explored extensively at the hearing – the stabling of one of HEOC's trains at Terminal 4 (the **Terminal 4 Solution**). In so doing, the TTP does not appear to have attached any weight to HAL's arguments as to the consequence of introducing either of these options. It appears enough to the TTP that they are theoretically operable. The TTP's position appears to be that HAL should either simply have accommodated MTR's Firm Rights to Terminal 5 or exercised its Flexing Right to achieve the same, making whatever changes were necessary to the HEOC Train Slots or circuit to deliver either solution. Copies of the draft and final PMO minutes are attached as Appendices 7 and 8.
- 5.40 It is also the case that, the viability of the PMO Solution, the Terminal 4 Solution, and other alternative solutions, have continued to be questioned in discussions between all relevant parties after the TTP hearing, as part of ongoing efforts to find an amicable outcome. This is because of the performance risk they potentially import. The TTP has therefore mandated an operational outcome in its Determination that has not been validated and so without knowing what the consequences of doing so will be. See attached minutes from the meeting held on 21 October 2021 held between all relevant parties (Appendix 9).
- 5.41 The TTP asserts that there is no evidence that HAL obtained or evaluated alternative options, whether by way of exercising its Flexing Right or otherwise (paragraph 179). The PMO Solution and the Terminal 4

Solution have been considered by HAL a number of times before in relation to previous Timetable Periods and the one in question. Specifically, the PMO Solution was first looked at in preparation for when the capacity constraint at London Paddington was being introduced. The Terminal 4 Solution has long been considered and deployed as a temporary option in the event of perturbation, including where there is a route blockage at the CTA, but its implementation as a running hours solution has been ruled out because of the risks to performance it carries when perturbation then occurs because of the route blockages it creates – at that point, there is no meaningful contingency left. The PMO Solution was discussed in relation to this Timetable Period with Network Rail, MTR and HEOC, but not actively progressed further because of the perceived performance risks.

- 5.42 HAL has had long-standing, substantial performance concerns about the kind of solutions discussed at the meeting held by the PMO on 8 October 2021 and the hearing. For example, in relation to stepping up the HEOC service (the effect of the PMO Solution), proceeding with the Terminal 4 Solution or creating other operational solutions that would result in route blockages on the HAL infrastructure. It was right and proper therefore, for HAL, in satisfying its obligation under Condition D2.6.1 to compile the New Working Timetable, and in trying to achieve the Objective (including by exercising its Flexing Right), to consider whether to include all requested Train Slots to Terminal 5, and not simply do so, or flex aspects of them to achieve the same, merely because it is theoretically possible to include them. In fulfilling those obligations, HAL found that safety and performance risks associated with including both MTR and HEOC's proposals were and are clear and substantial, because doing so gives rise to an increased risk at the CTA's PTI and it causes a material impact to HEOC's operational resilience and the ability to recover from perturbation on the HAL infrastructure.
- 5.43 The performance risk of stepping up, is considered in the '*Performance Analysis – Impact of 4 Train Service versus 5 Train Service*' document in Appendix 10, prepared in support of this Appeal Notice. This shows, among other things, using the performance data over the period of January 2021 to October 2021 (where a five train express service has been in operation as a reference point), 1,091 instances of between 6 and 30 minutes delay having occurred to HEOC's services. In a stepped up, 4 train service, which the TTP has effectively mandated with its decision, if each one of those 1,091 instances had been stepped back, at least two cancellations would have occurred in each case, one at Terminal 5 and one in respect of the return journey from London Paddington. That would have meant at least 2,182 cancellations to the service over that period. The performance risk is stark therefore and it is this risk that HAL had in its mind when it discounted the PMO Solution and similar alternatives that the TTP favours.
- 5.44 The TTP's questions around the implementation of the PMO Solution referred to in paragraph 79, reveal that the TTP incorrectly approached this operational solution as if it was dealing with an ordinary railway. It suggested that '*not having extra trains in circuit was a fairly standard thing for a TOC to do*'. That may be so on the wider network, but it ignores the fact that the HAL infrastructure serves the country's international hub airport. Because of the nature of the journeys passengers make to the airport, both air passengers and staff, performance is paramount. This is why the HAL representative refers to the importance of getting '*the service that the airport needed*'. The HAL infrastructure bounds the Decision Criteria and is not bounded by any other infrastructure or some notional infrastructure against which ordinary operating practices can be measured.
- 5.45 Similarly, the other '*scenarios*' the TTP enquired of at the hearing (paragraph 82), either are unworkable from a timing perspective, or carry the same adverse performance outcomes from HAL's perspective. HAL

contends that while it should continue to consider solutions to optimise the use of the HAL infrastructure, Part D of the Network Code does not mandate the repeated consideration and documenting of that consideration of timetabling outcomes which have already been discounted for being theoretically possible, but undeliverable in the real world, whether literally, or because of the performance of safety risks inherent in them. Unless intervening circumstances apply, this would be a wasted endeavour and disproportionate. HAL would point once again (see paragraph 4.35 of the HAL Response) to paragraph 34 of determination TTP1610 to the requirement for a sense of proportionality in this regard.

#### No deemed acceptance of the July Proposals

5.46 HAL has accepted that it did not reply to the July Proposals, which are TOVRs, within the timescales prescribed by Condition D3.3.6 (again because it was following the Change Strategy) and that ordinarily this would mean they both should be deemed accepted under Condition D3.3.7 (see paragraphs 6.4.4 and 6.4.5 of the HAL Assessment (Appendix 9 of the MTR Sole Reference), paragraph 4.15 of the HAL Response (Appendix 3) and paragraph 2.11 of the HAL response to the TTP's Directions (Appendix 5)). However, HAL does not consider this appropriate, because deemed acceptance of both TOVRs cannot occur where:

- (a) the aggregate effect of operating the services in those TOVRs (being 6tph to Terminal 5) is, in the circumstances, contrary to the Objective because they give rise to the material increase in the safety risk at the CTA's PTI and the material reduction in the operational resilience of HEOC's service and the ability to cope with perturbation on the HAL infrastructure (see paragraphs 5.39 to 5.45 above); and
- (b) having reached the conclusion in paragraph 5.46(a) above, there only being sufficient capacity at Terminal 5 in the circumstances to operate 4tph safely and without material performance risk, the Train Slots that MTR and HEOC wish to operate to Terminal 5 come into conflict with each other as both requests cannot then be accommodated.

## **6 TTP IS WRONG TO CONCLUDE HAL FAILED TO APPLY THE DECISION CRITERIA CORRECTLY**

6.1 The TTP decided that HAL did not apply the Decision Criteria correctly '*to the extent that its decision is materially flawed*' (paragraph 180). HAL disputes that its decision was materially flawed and the TTP was wrong to reach this conclusion for the reasons set out in this section 6.

#### HAL was reasonably properly informed

6.2 In paragraphs 180(a) and (d), the TTP states that HAL was required to ensure it was reasonably properly informed in respect of each Consideration when it made its assessment, but that it had insufficient passenger number data. HAL contends that it was reasonably properly informed in the circumstances in which its decision was required to be made. See paragraphs 5.17 to 5.29 above. In relation to the TTP's assessment of Considerations (b), (d), (e) and (h) insofar as it relates to passenger demand, see paragraphs 7.7 and 7.7 below. Regarding Consideration (d) (that journey times are as short as reasonably possible), the TTP appears to have taken a very narrow and selective interpretation of this. It appears from paragraph 112, that the TTP has confined its assessment to the actual time spent on the train (which it concludes would be the same as between HEOC and MTR services running between London Paddington and the CTA). But then it has factored in the wait times at the CTA for MTR passengers in order to justify that MTR's proposal is perhaps better for journey times, but ignored the additional wait times that are

likely to arise for HEOC passengers at London Paddington and Terminal 5 because of a less frequent HEOC service, or one affected by increased perturbation risk (paragraph 111).

HAL did not have a fixed goal in mind

- 6.3 In paragraph 180(b), the TTP states that HAL approached each Consideration with a fixed goal in mind. See paragraphs 5.31 and 5.32 above.

HAL correctly considered safety concerns

- 6.4 In paragraph 180(c), the TTP suggests that HAL was preoccupied with safety and performance concerns. The TTP seems to discount the safety issue presented by MTR's services operating to Terminal 5 in the present circumstances of Terminal 4's closure, giving rise to both through and stopping services calling at the CTA. As the risk of running both terminating and through MTR services already exists at the CTA twice a day on weekdays, and the '*safety risk is "very well controlled"*' (paragraph 86), the TTP seems to have decided that safety should not have formed a meaningful part in HAL's analysis, because the level of risk is there today and perceived by the TTP to be relatively small at the PTI.
- 6.5 This is to miss the point. The issue is the increase in safety risk presented by the MTR proposal relative to not permitting its services to serve Terminal 5 in the present circumstances and continuing with the existing timetable. As the HAL representative pointed out at the hearing, the MTR proposal would increase the number of instances of terminating and through MTR services calling at the CTA to 37 times a day from twice a day currently. A 1,750% increase in the opportunity for passenger confusion and so a PTI incident to occur. That is not an insignificant increase in safety risk, relative to the situation today, and HAL argues that no responsible infrastructure manager would ignore such an increase in deciding whether requested Train Slots should be introduced.
- 6.6 The TTP also argues that there is inconsistency in HAL selling MTR Firm Rights to Terminal 5, presumably on the basis that operating them on the HAL infrastructure would be safe, and then not honouring them because of a perceived safety risk. This argument pays no regard to the fact that when those rights were sold, Terminal 5 was not capacity constrained, Terminal 4 was not closed and MTR's services to Terminal 5 would not result in both terminating and through services running to the CTA. It is also suggestive that once an infrastructure manager has sold access rights, it can never make a decision to restrict or deny them because of safety concerns in the circumstances of a given timetable period. This runs counter to the rights HAL has as an infrastructure manager under Part D of the Network Code and would throw into question why those rights would be needed if an infrastructure manager always had to grant a Timetable Participant the rights that infrastructure manager had first sold it.

HAL correctly considered relevant commercial interests

- 6.7 In paragraph 180(e), in relation to Consideration (f) (commercial interests), the TTP states that HAL asked itself the wrong question, and that its commercial interest focus was too narrow. HAL rejects this criticism. Once the TTP decides that all requested Train Slots to Terminal 5 can be theoretically accommodated (ignoring the performance and safety cost of doing so), that means that its assessment of the commercial interest Consideration is fatally skewed.
- 6.8 This is because the TTP is then comparing the outcome of HAL's decision in respect of Terminal 5 for this Consideration – HEOC's 4tph express services – with those services plus MTR's 2tph stopping services. In other words, it is comparing 4tph to Terminal 5 with 6tph to Terminal 5. Once the assumption is made



that all requested services can run to Terminal 5, then that outcome is obviously going to better meet the commercial interest test, including for HAL. This is why the TTP concludes, it seems, that HAL ignored '*its broader commercial interest arising from running a more (or less) attractive service*' in paragraph 180(e). But to reach this conclusion, is to ignore that HAL had already ruled out operating 6tph to Terminal 5 in the present circumstances, because it did not meet the Objective. Avoiding the significant risk of perturbation to services running to the airport is in the airport's commercial interest. Once that is understood, it is clear that the only way to accommodate both operators at Terminal 5 in the present circumstances, is to replace half of HEOC's existing services with MTR's. At that point, MTR's proposal is clearly abstractive of HEOC's, which cannot possibly be in HEOC's commercial interest, also a relevant component of the proper application of Condition (f). In aggregate, this is, in HAL's view, the proper assessment of the commercial interest Consideration.

- 6.9 Separately, the reference to the highest demand being in the week in the HAL Assessment, rather than the weekend, (as confirmed at the hearing), was merely a typo in the HAL Assessment and therefore not reflective of HAL's decision being based on a material error of fact. Having seen the HAL Assessment and heard what was said at the hearing, the TTP did not afford HAL a chance to clarify the discrepancy.

HAL considered the effect of mitigation of the environment

- 6.10 In paragraph 180(f), in relation to Consideration (g) (mitigating the effect on the environment), the TTP wrongly determines that this Consideration did not form part of HAL's decision at the material time, because the TTP fails to consider what decision HAL was making at the material time. Once HAL had ruled out any alternative options where both proposals could be accommodated without significant performance or safety risk, HAL was deciding between two things – MTR's proposal and HEOC's. The sentence '*This Consideration [(g)] has not formed part of our decision.*' in the Annex to the HAL Assessment, should then reasonably be read as '*This Consideration [(g)] has not formed part of our decision to choose between MTR's proposal and HEOC's.*' That is why HAL confirmed in its Response at paragraph 4.38, that the Consideration was neutral in HAL's thinking because HAL considered there was nothing meaningful to decide between MTR and HAL on this point. That is not the same as saying HAL discounted this Consideration altogether.
- 6.11 The TTP proceeds in paragraph 180(f), to conclude that a reasonable decision maker would have favoured MTR in relation to Consideration (g) because of '*the reduction in the number of interchanges and providing a more efficient service for those transiting from west London*'. HAL does not agree. This is a surprisingly narrow, and misguided, conclusion to reach for a number of reasons. It does not sit comfortably with the TTP describing a '*vital and key part of the transport "offer" at Heathrow Airport [being] an efficient and effective road and rail connection with central London*' (paragraph 21). This conclusion is supported by HAL's confirmation that '*generally speaking [passengers] do not come from west London*' in response to the TTP's questions about connectivity (paragraph 124) a confirmation, which was based on passenger data, whereas the TTP's analysis in this area was not.
- 6.12 So in the TTP's own estimation, the vital part of the transport offer at the airport, is not the connection to or from west London, but central London, and it therefore accepts that the rail connection to west London is secondary. However, in terms of how the TTP has approached its decision in applying relevant Considerations, the reverse appears to be true. It also ignores the fact that both the HEOC and MTR services deliver modal shift, both (and not MTR alone) having a positive mitigative impact on the

environment, and within that context, the fact that because of the differential in passenger numbers in HEOC's favour, arguably the HEOC services actually deliver more modal shift than MTR's services.

No requirement to resolve conflicting Consideration outcomes

- 6.13 HAL accepts that if it had found a conflict between the outcome of applying two or more Considerations, then it should, as argued in paragraph 180(g), have applied the weighting as suggested by the TTP. But HAL does not agree that any weighting was necessary, because there was no such conflict. HAL found in favour of the HEOC proposal in relation to every Consideration, except where HAL found the proposals neutral in relation to Consideration (g). The TTP has not provided proper explanation for why such a conflict arose, or a full account of its findings in relation to all Considerations (see the preceding parts of this section 6).
- 6.14 HAL had duly applied safety and performance considerations (which the TTP wrongly attributes solely to Condition (c) – safety is a component of the Objective) in previously discounting alternative timetable solutions that involved HEOC and MTR operating an aggregate of 6tph to Terminal 5 in the present circumstances. Aware of having already reached that conclusion, with no intervening changes which warranted revisiting those alternative solutions, it was then a binary choice for HAL in relation to the December 2021 timetable, between MTR's services or HEOC's services operating to Terminal 5. In making that decision, HAL did not unduly ascribe weight to safety and performance considerations as the TTP suggests. The other points in paragraph 180(g) have been addressed elsewhere in this Notice of Appeal.

**7 TTP FAILED TO EXPLAIN WHY ITS SUBSTITUTED DECISION FAVOURS INCLUSION OF MTR SERVICES**

Failure to explain exceptional circumstances

- 7.1 Pursuant to Condition D5.3.1(c), the TTP accepts that it should only substitute its own decision in 'exceptional circumstances'. However, it fails properly to explain why that test is met here. A key justification given by the TTP for asserting the 'exceptional circumstances' jurisdiction, is set out in paragraph 189(c), which provides:

*' Ordinarily, the TOCs would not reasonably expect any exceptional change in demand during the currency of the WTT. Exceptionally, it is likely that passenger demand will increase prior to March 2022 as recovery from the COVID-19 pandemic continues and it remains unclear when T4 will reopen. This justifies putting in place a through service for intermediate stations to T5.'*

- 7.2 This is surprising justification for asserting exceptional circumstances. It is presumptive, and having referred to the exceptional threat COVID-19 has posed, then ventures that that threat is over. HAL would expect the TTP to provide more fact-based reasoning for its decision to take the decision, which by definition, is an exceptional one. This is particularly the case because the effect of that decision is to impose its own timetabling solution in place of HAL's, either with the effect of reducing the number of passenger services HEOC can operate, or greatly increasing the perturbation risk by effectively requiring HEOC services to step up or create route blockages.

Failure to explain and justify substituted decision

- 7.3 Having asserted the 'exceptional circumstances' jurisdiction to substitute its own decision, the TTP then makes the substituted decision with virtually no analysis or reasoning. The TTP has gone to great lengths

to explain why HAL took its decision wrongly, but it has not provided reasons as to why that leads it to conclude that it should include MTR's Firm Rights to Terminal 5. This is contrary to Rule H51(k). The Determination does not properly explain how, when weighing up what the TTP clearly decides are conflicting Considerations outcomes (see paragraph 7.9 below), the TTP comes out in favour of MTR's proposal. The TTP has not explained whether it has applied the Decision Criteria in reaching this conclusion, or how the application of the Decision Criteria correctly leads the TTP to the conclusion that its decision is the right outcome. On this ground alone, the Determination is fundamentally flawed and unjust.

Requirement to apply the Decision Criteria in TTP substituting its decision

- 7.4 An example of how the TTP should have approached its assessment, can be seen in the Determination of TTP1706 and 1708 (see Appendix 11). In that regard, Network Rail's application of the Decision Criteria was challenged, in a similar way to the challenge to HAL's application in the Determination. The TTP there, came to the view in paragraph 73, that it should properly apply the Decision Criteria itself if it was minded to substitute its own decision for Network Rail's:

*'The Panel then turned to the Decision Criteria, as it thought it necessary to apply its own judgment to the Considerations in case it was to substitute an alternative Decision pursuant to D5.3.1(c).'*

In that Determination, the TTP went through its assessment of each of the Considerations as it would apply them. This is the proper, indeed the only, approach where a TTP intends to rely on Condition D5.3.1(c) to substitute the decision of an infrastructure manager with its own, and which the TTP has determined should be made by that infrastructure manager applying the Decision Criteria.

- 7.5 One aspect of the TTP's substituted decision is particularly unjust. As confirmed in paragraph 79, both MTR and HEOC run more trains in the circuit than trains run per hour. The natural consequence of the TTP's decision (short of half of HEOC's 2tph to Terminal 5 being removed to accommodate MTR's) is that HEOC's extra train must either be removed entirely from the circuit, or parked elsewhere, whether on the HAL infrastructure potentially causing a route blockage or on the wider network. The consequence of which is to almost entirely remove HEOC's ability to manage perturbation to its services and avoid cancellations. The TTP's decision leaves MTR's additional trains untouched and so its ability to manage perturbation remains undiminished. This fact does not seem to have formed a part of the TTP's considerations and does not appear to be *'in the overall interests of current and prospective users'*, as per the Objective, since passengers demand regular, predictable and reliable services, and the effect of this decision seems to threaten that.
- 7.6 Paragraph 180(d) reveals that the TTP might have favoured MTR's proposal when Considerations (b) (the spread of services reflects demand), (d) (that journey times are as short as reasonably possible), (e) (maintaining and improving an integrated system of transport), and (h) (enabling operators of trains to utilise their assets efficiently) are supposedly properly applied, although this view is expressed in somewhat equivocal terms and no proper reasoning is provided. The TTP simply justifies this conclusion for each of these Considerations by reference to a single, aggregated rationalisation: *'the broader spread of services which would result from the exercise of MTR's Firm Rights to T5, reducing the number of connections for passengers not transiting to or from central London, and avoiding the need to run empty rolling stock on the HAL infrastructure.'* It is unclear how each of these three supposed benefits can meet to each of those four Considerations equally, which is the only inference that can reasonably be drawn having been

expressed in this way. The TTP's preference for MTR's proposal in relation to these Considerations, is also entirely based on the premise of there being sufficient data available, which it says was not the case. Given that insufficiency of data, that premise is self-fulfilling and without foundation.

- 7.7 Equally, in merely asserting one aggregated rationalisation for the supposed benefits of MTR's proposal for Considerations (b), (d), (e), and (h), there is no indication that the TTP has recognised any of the benefits that the HEOC proposal might have, either identified by HAL in the HAL Assessment, or by the TTP's own assessment. This failure was precisely what the TTP accused HAL of, and appears to have led the TTP to conclude that HAL approached *'each Consideration with a fixed goal in mind in wanting to prioritise a regular, express service from London Paddington'* (paragraph 180(b)).
- 7.8 Paragraph 180(f) states more definitively what the TTP's position might be in respect of Consideration (g) than it does in paragraph 180(d) in relation to Considerations (b), (d), (e) and (h). The only other reference in paragraph 180, is to Consideration (c) (maintaining and improving train service performance), but here the TTP only appears to be saying what conclusion HAL should have come to in the context of weighing up conflicting proposals, given HAL's concerns about safety and performance. This is not an explanation of the TTP's own assessment of which proposal better met Consideration (c).
- 7.9 The TTP's approach to the Decision Criteria in paragraph 180 is clearly not comprehensive. It fails to mention what its conclusions would be in relation to Considerations (a), (c) and (f), or how the Objective is better met by either proposal. It is unknown whether the TTP also favoured MTR's proposal in respect of each or some of these Considerations, whether, because they are not mentioned, whether the TTP agreed with HAL's conclusion that HEOC's proposal better met them in each case, or whether it considered the outcome neutral in respect of them as between the two proposals. The reference in paragraph 180(g), that *'HAL ought to have concluded that the application of two or more relevant Considerations would lead to conflict'* appears to suggest that the TTP at least agreed with HAL's assessment in some respects, that the HEOC proposal better met at least one of these Considerations, but it is uncertain in what respects and which. The TTP then fails to apply weighting between those conflicting Considerations to resolve that conflict, which is a significant criticism of HAL in the Determination.

## 8 DECISION SOUGHT

- 8.1 HAL submits that this appeal should be heard by the ORR as the TTP's flawed decision making should be corrected, and to ensure it does not have any precedent value for future timetabling disputes of this nature. The issues of (i) interpretation of Conditions D3.3.1 and 3.3.3 (what constitutes a TOVR); (ii) what an infrastructure manager is required to base its decision on, and its duties in relation to information gathering; (iii) when and how the Decision Criteria should be applied by infrastructure managers; and (iv) what is required from a TTP (or other decision-making body) when relying on Condition 5.3.1(c) to substitute an alternative decision in place of a challenged one, each of which are matters which are of significant importance to the industry as outlined in section 3 above.
- 8.2 HAL asserts that the grounds outlined in Condition M4.1 of Part M of the Network Code do not apply.
- 8.3 HAL requests from the ORR:
- (a) declarations that:
    - (i) the TTP erred in its interpretation of Condition D3: the July Proposals were TOVRs and HAL was correct in treating them as such;

- (ii) the TTP erred in its determination that HAL did not take a properly informed decision: HAL was required to consider the July Proposals in compressed timescales and therefore the requirement to properly inform itself in making its decision is limited by those timing constraints;
  - (iii) the TTP erred in its determination that HAL did not apply the Decision Criteria correctly in the circumstances; and
  - (iv) the TTP erred in substituting its own decision without sufficient justification, including failing to provide any reasons for, or apply the Decision Criteria in reaching, its decision; and
- (b) a direction that, in accordance with Condition D5.3.1(b) of the Network Code, HAL's decision in relation to the New Working Timetable stands and should accordingly be reinstated.

9 **SIGNATURE**

For and on behalf of

*Heathrow Airport Limited*

Signed:



Print Name: *GAVIN PAYNE*

Position: *DIRECTOR OF ENGINEERING & BAGGAGE*

## APPENDICES

<b>Appendix 1</b>	The Determination HAL/TTP003 27 October 2021
<b>Appendix 2</b>	The MTR Sole Reference TTP003 and Appendices thereto
<b>Appendix 3</b>	The HAL Response TTP003 and Appendices thereto
<b>Appendix 4</b>	The TTP's Directions
<b>Appendix 5</b>	HAL's response to the Directions
<b>Appendix 6</b>	ORR Appeal of Determination TTP1174
<b>Appendix 7</b>	Draft PMO Minutes of meeting on 8 October 2021 (TTP referenced at hearing)
<b>Appendix 8</b>	Final PMO Minutes of meeting on 8 October 2021 (shared by HAL after hearing)
<b>Appendix 9</b>	Minutes of meeting between relevant parties on 21 October 2021
<b>Appendix 10</b>	Performance Analysis – Impact of 4 Train Service versus 5 Train Service
<b>Appendix 11</b>	Determination TTP1706 and 1708