

Heathrow Airport Limited: response to MTR Sole Reference Submission in the timetable dispute: HAL / TTP002

Date: 6 November 2020

Prepared by: Heathrow Airport Limited

Status: FINAL

1 DETAILS OF PARTIES

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

- (a) MTR Corporation (Crossrail) Limited whose Registered Office is at Providence House, Providence Place, London, N1 0NT ("**MTR**") ("the Claimant"); and
- (b) Heathrow Airport Limited whose Registered Office is at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("**HAL**") ("the Defendant").
- (c) Heathrow Express Operating Company Limited whose Registered Office is at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("**HEOC**"); and
- (d) Network Rail Infrastructure Limited whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("**NR**").

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2.1 This Response to the Claimant's Sole Reference includes:-

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) A detailed explanation of the Defendant's arguments in support of its position on those issues where it disagrees with the Claimant's Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant's Sole Reference.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute;
- (d) The decisions of principle sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

- 3.1 The substance of the dispute is as set out in MTR's submission, and relates to the December 2020 and May 2021 Working Timetables for the routes between Paddington and Heathrow Airport. As set out below HAL does not accept any submissions of dispute in respect of the May 2021 Working Timetable as the offer date for this timetable has not yet passed, HAL's work in response to the May 2021 bid is ongoing and accordingly a formal offer has not yet been issued by HAL, through its agent Network Rail, to MTR. Further, MTR have been requested to rebid for the May 2021 timetable and the discussions between the parties are still ongoing.
- 3.2 HAL's infrastructure is currently used by two Train Operating Companies, MTR and HEOC. Under the Track Access Agreement between HAL and MTR, MTR has Firm Rights to four trains per hour between Heathrow Airport Junction and Heathrow Terminal 4 via Heathrow Terminals 2-3 (CTA Station) and two trains per hour between Heathrow Airport Junction and Heathrow Terminal 5 via Heathrow Terminals 2-3 (CTA Station), (see Claimant's Appendix 9). Under the Track Access Agreement between HAL and HEOC, HEOC has Firm Rights to four trains per hour between Heathrow Airport Junction and Heathrow Terminal 5 via Heathrow Terminals 2-3 (CTA Station) and none to Terminal 4, (see Schedule 5, table 2.1 [Appendix 1]).
- 3.3 In relation to the subject matter of the claims brought by MTR in its Sole Reference HAL's position is set out below in respect of the issues raised in section 4 of that sole reference.
- (a) Section 4.1, paragraph 1 is agreed. Paragraph 2 is not agreed, HAL did not fail to 'honour MTR Firm Rights' and nor has HAL made a decision not to 'honour MTR Firm Rights', for clarity the rights in question are those contained in table 2.3 of Schedule 5 of the Track Access Agreement between MTR and HAL. Paragraph 3 is not agreed, HAL has applied the Decision Criteria appropriately when making its decision. Paragraph 4 is not agreed, MTR's request for additional Firm Rights is currently under consideration and HAL is working with Network Rail to determine if additional access rights could be sold.
- (b) Section 4.2, paragraph 1 is agreed. Paragraph 2 is not agreed. Terminal 4 has been temporarily taken out of use for passenger services due to the Covid-19 pandemic but is fully open to rail traffic for TOC ECS movements. Paragraph 3 is agreed. Paragraph 4 is partially agreed. HAL

does not agree with the implication that HAL has failed to progress its response to MTR's revised Access Proposal dated 4 September 2020 which asked for two trains per hour to be diverted to Terminal 5 for the December 2020 Timetable. HAL does not agree that the request HAL made of MTR on 23 April 2020 to divert two trains per hour to Terminal 5 in response to the temporary closure of Terminal 4 to passengers and the request for two additional Firm Rights made by MTR on 18 September 2020 should have been considered together. Indeed, the processes of Timetable revision and additional access rights are separate and HAL has properly treated them as such. Paragraphs 5 is agreed although HAL submits that there was industry wide uncertainty at that time. Paragraph 6 is agreed.

(c) Section 4.2, paragraph 7 is agreed on the basis that the reopening date for Terminal 4 is expected to be June 2021 not June 2020 which HAL assumes is an error. Paragraph 8 is agreed. Paragraph 9 is neither agreed or not agreed as HAL cannot comment on why MTR made the request it did. Paragraphs 10, 11, 12, 13 and 14 are agreed. Paragraph 15 is not agreed. HAL has not made a final decision pending the progress of the Covid-19 pandemic and further discussions with MTR.

3.4 On 6 March 2020 HEOC submitted its Access Proposal for December 2020 which consisted of four trains per hour from Heathrow Airport Junction Connection Point to Heathrow Terminal 5 via Heathrow Terminals 2&3 (CTA). We understand from Network Rail that this was offered on 12 June 2020. [Appendix 2]

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

4.1 Issues where the Defendant Accepts the Claimant's Case

(a) HAL accepts the Claimant's Case only in so far as it represents a factual account of the correspondence between the parties and the operations of MTR.

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

MTR's Request to Exercise Firm Rights to Terminal 5 for Two Trains Per Hour for December 2020

(a) MTR's revised Access Proposal dated 4 September 2020 (after the priority date) requested two trains per hour be diverted to Terminal 5. These trains would be operated under Firm Rights

held by MTR. HAL is unable to accommodate this request due to capacity constraints at Terminal 5. Further detail is provided in section 4.3 below but, in summary, it is necessary for HEOC trains to occupy both platforms at Terminal 5 for large periods of each hour of the day due to changes to platform access at Paddington, arising from the delayed Crossrail Project.

(b) In reaching its decision on the December 2020 access request, HAL had consideration to the following:

- (i) HEOC and MTR's respective priority positions under HAL Network Code D.4.2.2(d);
- (ii) The Objective set out in HAL Network Code D.4.6.1; and
- (iii) The Decision Criteria in HAL Network Code D.4.6.2.

(c) HAL notes that MTR and HEOC ostensibly hold the same priority position in respect of their Firm Rights but that MTR did not Exercise its rights to Terminal 5 until after D-40. However, as a result of HEOC's Track Access Agreement with Network Rail on the Great Western mainline, HEOC's rights take priority due to the provisions contained in that Agreement. HEOC has Exercised its Firm Rights to Terminal 5 for December 2020 and as a result of this it is not possible for HAL to accommodate additional trains at Terminal 5 due to the capacity restrictions at Paddington, which are caused by the Crossrail Project. Further, at the Priority Date for the December 2020 Working Timetable MTR did not seek to Exercise its Firm Rights to Terminal 5 which is a relevant consideration under D4.2.2 of the HAL Network Code. Whilst Covid-19 has created unprecedented challenges HAL does not believe that these circumstances should result in the principles laid down in the HAL Network Code being disregarded.

(d) Notwithstanding the above operational difficulties HAL proceeded to assess MTR's application on the basis of the Decision Criteria (Appendix 3). In summary HAL concluded that:

- (i) The infrastructure was not capable of accommodating MTR's request as a result of capacity constraints at Terminal 5 and therefore there would be a negative impact on the capability of HAL's infrastructure.

- (ii) The spread of services between the CTA and Terminal 5 was appropriately met by MTR operating to the CTA and HEOC operating to Terminal 5 and that there was no unmet demand for further services to Terminal 5.
 - (iii) That train service was improved by MTR operating to the CTA as it avoided conflicts with HEOC's Terminal 5 operation and ensured MTR continued to use existing train slots.
 - (iv) That journey times would be as short as practicable if MTR bid to the existing timetable as connections to the mainline were ensured. Further, onward connections for any MTR passenger wishing to connect to Terminal 5 are good and journeys would not be unreasonably lengthened.
 - (v) That running additional services to Terminal 5 would not improve system integration. Prior to the temporary suspension of services to Terminal 4 services were split with different operators serving each station. This has benefits for Heathrow passengers and HAL considers it important that this continues.
 - (vi) That the commercial interests of HAL, MTR and HEOC would be best met by MTR running to the CTA/Terminal 4 and no additional benefit would be derived from running to Terminal 5.
 - (vii) That MTR would suffer no financial detriment as a result of stopping services at the CTA as the journey from the CTA to Terminal 5 is within the Heathrow Free Travel Area.
 - (viii) That HEOC would suffer financial detriment if it was unable to run four trains per hour to Terminal 5.
- (e) Following this careful consideration HAL wrote to MTR requesting that it run all services on a given day to the same Terminal [Claimant's Appendix 7]. HAL's letter did not comment on MTR's request for additional Firm Rights given the outstanding nature of the request. HAL's reasoning for

requesting all services run to the same Terminal was fully in accordance with the Decision Criteria and process set out in D4.2.2 of the HAL Network Code as explained above at 4.2(d).

(f) HAL could accommodate MTR running to Terminal 5 in the evenings and on weekends and has supported this offer being made.

MTR's Request to Acquire Additional Firm Rights to Terminal 5 for a Further Two Trains Per Hour for December 2020

(g) HAL does not agree or accept that MTR had a reasonable expectation that it would be granted Firm Access Rights for an additional two trains per hour to Terminal 5 at any stage. MTR wrote to HAL on 18 September 2020 requesting the additional Firm Rights and HAL responded on 21 September 2020 confirming that the request had been passed to Heathrow's surface access team but that no guarantees on timing could be given [Appendix 4]. HAL then wrote to MTR again on 21 October 2020, repeating what had been confirmed orally, that HAL accepted the request in principle, provided there is capacity available, but that it was subject to a capacity study being undertaken by Network Rail [Appendix 4]. The outcome of this study is still awaited.

MTR's Request for May 2021

(h) It is premature for MTR to have submitted any dispute to the Timetabling Panel regarding the May 2021 working timetable as D-26 is not until 15 January 2021. HAL disagrees that any decision has been made in respect of MTR's bid for May 2021 and has informed MTR that work on the May 2021 bid is ongoing. Given that a New Working Timetable has not yet been published, a dispute cannot properly be said to have arisen, and so this item does not yet fall to be referred to or decided on by the Timetabling Panel. Given the operational uncertainty facing all interested parties in light of Covid-19 HAL does not see any merit in MTR trying to force an early decision. Notwithstanding the above, HAL will address the substance of MTR's arguments on this point so as to provide a complete Response to the Timetabling Panel.

(i) As set out at paragraph 4.2(c) of this Response, HEOC has four Firm Rights to Terminal 5, MTR has two Firm Rights to Terminal 5 and four Firm Rights to Terminal 4. At the point of submitting its bid for the May 2021 timetable on 9 October 2020, MTR will have been aware that:

- (i) there are capacity constraints at Terminal 5 due to the over-running Crossrail Project works (these are further detailed at section 4.3 below) and that with those restrictions in place it would not be possible for HAL to accommodate eight trains per hour at Terminal 5;
 - (ii) HEOC's four Firm Rights take priority over MTR's two Firm rights, due to our understanding of the conditions of HEOC's access to the Network Rail infrastructure and the position of Exercised Firm Rights which subsist during the whole of the timetable period; and importantly
 - (iii) that MTR was bidding for more access rights to Terminal 5 than are included in its legal entitlement under its Track Access Agreement.
- (j) MTR has four Firm Rights to Terminal 4 which it has not bid for, but if it did, it is likely these could be offered and operated, with passengers detraining at the CTA station. It is important that services continue to be scheduled to go to Terminal 4 as they will be needed for direct travel and inter-terminal transfers at the point at which Terminal 4 reopens to passengers, this is expected to be during the period of the May 2021 working timetable.
- (k) In addition, as is set out in paragraph (g) above, HAL does not accept that MTR had a reasonable expectation that it would be granted Firm Rights for an additional two trains per hour to Terminal 5. HAL disagrees with the implication in Section 4.2, paragraph 4 of MTR's Sole Reference submission, that when HAL requested that MTR temporarily divert its two services per hour from Terminal 4 to Terminal 5, that it was in some way understood this arrangement would continue into the May 2021 timetable and by extension to granting two additional Terminal 5 firm rights. That implication/suggestion is incorrect.
- (l) It is for the reasons set out above, having properly complied with Part D of the HAL Network Code, that HAL verbally advised Network Rail on or around 15 October 2020 that HAL was currently of the view that there was not sufficient capacity to allocate four trains per hour to Terminal 5 for each of HEOC and MTR, and requested that Network Rail ask MTR to make an amended bid for four trains per hour to the CTA with passengers detraining there, and the trains continuing to Terminal 4

to reverse direction. In respect of coming to a final decision, HAL has requested two items from Network Rail: (i) that a capacity study is undertaken and (ii) that a formal review of operations at Paddington Platform 6 takes place. HAL awaits the outcome of both of these items and so is not yet able to provide a formal decision to MTR.

MTR's Assertion regarding HAL Competition Law Infringement

(m) MTR also raises entirely unsubstantiated and unmeritorious claims that HAL's conduct in relation to the December 2020 and May 2021 timetables are an abuse of dominance. Whilst HAL notes that the remit of the TTP means it will not be determining any such claims given the serious nature of the statement HAL considers it necessary to respond.

(n) MTR's claim is entirely without merit and we are disappointed that they considered it appropriate to include any such statement. MTR has failed to provide any detail or substance to its statement; indeed it has failed to even engage with the most basic question of whether HAL is dominant and simply made baseless assertions regarding HAL's conduct. Notwithstanding the spurious nature of the claim HAL fully rejects any and all such assertions. HAL's decision making is based on fair, reasonable and non-discriminatory factors and made fully in accordance with all applicable competition law.

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

(a) [REDACTED]
[REDACTED]
[REDACTED] This was a dedicated HEOC platform in the past and has now been made available for use by other operators on the Western Route to allow an enhanced timetable to be operated as planned by the industry. As a result of this it is necessary for HEOC to occupy both platforms at Terminal 5 for large periods of most days, resulting in there being no operational capacity to accommodate MTR services at Terminal 5. On 29 October 2020, the Director of the Industry Timetable Change Programme Management Office (PMO) wrote to HAL, DfT

and Transport for London confirming these platform arrangements are currently in place [Appendix 5].

(b) As HEOC has bid to run four trains per hour from December 2020 HAL's infrastructure will not be able to accommodate MTR trains. [REDACTED]

[REDACTED] If the platform arrangements at Paddington were revised then HAL considers this would help it to accommodate MTR's request.

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

(a) HAL has taken all steps to ensure that its decisions regarding the December 2020 Working Timetable are made in accordance with each operators' Firm Rights and the terms of the HAL Network Code. As such MTR's challenge is unfounded.

(b) MTR has conflated its request to exercise current Firm Rights with its extant request for additional Firm Rights which has not yet been decided, in doing so it has referred to a number of irrelevant criteria in seeking to force HAL to confirm Firm Rights which MTR would not be able to Exercise. Despite HAL's continued attempts to engage constructively with MTR to resolve the matter MTR has pursued this dispute rather than trying to resolve the issues.

(c) HAL accepts that the decision reached has resulted in MTR not being able to operate the services it wished to but this is a result of pressures on HAL infrastructure resulting from the delayed Crossrail Project, not any failings on the part of HAL's decision making. HAL has throughout the process made all decisions in an objective manner and with regard to the HAL Network Code Decision Criteria, as demonstrated.

(d) HAL has followed a robust process in respect of its decision making to date on the May 2021 Working Timetable. That timetable has yet to be finalised and it is therefore premature for MTR to have brought a dispute.

5 DECISION SOUGHT FROM THE PANEL

5.1 For the December 2020 Timetable HAL requests that the panel does not direct HAL to accept MTR's request to exercise Firm Rights of two trains per hour to Terminal 5 as there is no capacity for this

request to be accommodated. Further, the Decision Criteria were applied appropriately and with consideration to all applicable factors.

- 5.2 For the December 2020 Timetable HAL requests that the panel does not direct HAL to accept MTR's request for additional Firm Rights for two trains per hour to Terminal 5 unless and until the Network Rail capacity study is completed and assessed and the issues relating to Terminal 5 are resolved following completion of the Crossrail Project works and the release of Platform 6 at Paddington to HEOC.
- 5.3 For the May 2021 Timetable HAL requests that the panel does not direct HAL to accept MTR's request to exercise Firm Rights of two trains per hour to Terminal 5 as i) the request is premature and ii) Terminal 4 is due to be reopened to passengers in June 2021. In addition, if Terminal 4 were not to be reopened due to the ongoing Covid-19 pandemic there is currently no capacity at Terminal 5 for this request to be accommodated.
- 5.4 For the May 2021 Timetable HAL requests that the panel does not direct HAL to accept MTR's request for additional Firm Rights for two trains per hour to Terminal 5 unless and until the Network Rail capacity study is completed and assessed and the issues relating to Terminal 5 are resolved following completion of the Crossrail Project works and the release of Platform 6 at Paddington to HEOC.

6 APPENDICES

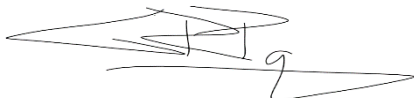
The Defendant confirms that it has complied with Access Dispute Resolution Rule H21.

7 SIGNATURE

For and on behalf of

Heathrow Airport Limited

Signed:

A handwritten signature in black ink, appearing to read 'GAVIN PAYNE', written over a horizontal line.

Print Name: *GAVIN PAYNE*

Position: *DIRECTOR OF ENGINEERING & BAGGAGE*