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10/3/09



Brian Kogan
Deputy Director, Access, Planning & Performance
Telephone 020 7282 2118
Fax 020 7282 2118
E-mail brian.kogan@orr.gov.uk

OFFICE OF RAIL REGULATION

23 February 2009

Andy Hamilton
Managing Director
Wrexham, Shropshire and Marylebone Railway Limited
Great Central House
Marylebone Station
Melcombe Place
London
NW1 6JJ

Andrew Gilbert
Kennedys
25 Fenchurch Street
London
EC3M 5AD

Dear Andy and Andrew

Appeal of Timetabling Panel Determination in respect of reference TTP244

1. I am writing to inform you that the Office of Rail Regulation has today made its first determination of the above appeal. This letter also explains why we have decided to issue the determination in two parts.
2. We have considered all the information and representations submitted by both parties and have completed our review of the Timetabling Panel's determination. We are now in a position to issue our determination on the legal interpretation of the contractual provisions of the Network Code in relation to the preparation of the First Working Timetable.
3. However there are certain issues that have been raised in this appeal which we are not yet in a position to determine, namely, whether the facts of this case could give rise to any liability and/or compensation in the light of our legal interpretation of the contractual provisions of the Network Code in relation to the preparation of the First Working Timetable. These issues were not considered by the Panel, but we believe they ought properly to be considered now. We will require further information from the parties in order to determine these issues.
4. Although we are not able, at this stage, to dispose of this appeal in full, we believe it is in the interests of the parties and the industry as a whole for us to issue our determination on the legal interpretation of the contractual provisions of the Network Code in relation to the preparation of the First Working Timetable as soon as possible.

We consider this will provide greater certainty for the parties of their obligations in relation to the on-going timetabling process.

5. We are therefore issuing our determination of this appeal in two parts. Our first determination is on the legal interpretation of the contractual provisions of the Network Code in relation to the preparation of the First Working Timetable. At a later stage, we will issue our determination on the remaining issues of liability/compensation, as outlined at paragraph 3 above. We are writing separately to you outlining the further information we require in order to determine these remaining issues.
6. We believe that issuing our determination of this appeal in two parts is the most appropriate and expedient means of ensuring that the parties understand their contractual obligations, and that all issues that have been raised in this appeal are properly addressed.
7. I enclose a copy of the determination, which will be published on our web site on Wednesday 25 February along with the notice of appeal and the subsequent representations of both parties.
8. I am copying this letter to Mary Bonar at WSMR and Andrew Durrant at Network Rail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'B Kogan', written in a cursive style.

Brian Kogan

THE OFFICE OF RAIL REGULATION'S FIRST DETERMINATION OF THE APPEAL BY THE WREXHAM, SHROPSHIRE AND MARYLEBONE RAILWAY COMPANY LIMITED ("WSMR") AGAINST DETERMINATION "TTP224" OF THE TIMETABLING PANEL OF THE ACCESS DISPUTES COMMITTEE IN RESPECT OF A JOINT REFERENCE BY WSMR AND NETWORK RAIL INFRASTRUCTURE LIMITED ("NR") REGARDING THE APPLICATION OF PART D OF THE NETWORK CODE AND THE TRAIN SLOTS OFFERED BY NR TO WSMR FOR THE DECEMBER 2008 FIRST WORKING TIMETABLE.

FIRST DETERMINATION: The Office of Rail Regulation determines the aspects of the appeal set out at paragraph 66 below in the manner set out in paragraphs 65 - 77 below.

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I Introduction

1. This is the first determination by the Office of Rail Regulation ("ORR") of the appeal brought by WSMR on 29 September 2008 ("the Appeal"), dealing with ORR's legal interpretation of the contractual provisions of the Network Code in relation to the preparation of the First Working Timetable. The Notice of Appeal challenges the Timetabling Panel's ("the Panel's") determination in reference TTP244 dated 23 September 2008 ("the Determination").
2. The Determination arose out of a Joint Reference by NR and WSMR relating to whether NR had complied with Part D of the Network Code ("the Code") in its compilation of the First Working Timetable to commence in December 2008 ("the December 2008 FWT"). The parties were agreed that NR had offered Train Slots which were technically compliant (with two exceptions relating to stopping pattern) with the rights as set out in WSMR's track access agreement ("the WSMR TAA"). However, WSMR was of the view that it had been offered Train Slots in the December 2008 FWT which were less efficient than would have been the case had Part D of the Code been applied properly. It also made some procedural arguments which are set out at para 30 below. NR maintained that it had applied Part D of the Code correctly in the circumstances and that, in any event, WSMR's approach would not have resulted in any improvement in journey times.

II Facts

3. WSMR commenced operation of its services between Wrexham General and London Marylebone on 28 April 2008. It operated 5

weekday services each way, 4 each way on Saturdays and 3 on Sundays.

4. The relevant chronology for the development of the December 2008 FWT (for the year 2009) is as follows. In September 2006, NR began to develop what the Parties have described as a “Base Plan”. For the purpose of this determination, ORR adopts this terminology. In developing the Base Plan, NR invoked the provisions of Condition D1.5 (which provide for an additional round of consultation where major changes to the timetable are envisaged) because of the major upgrade to the West Coast Mainline. In February 2007 (and prior to the granting of the WSMR TAA), NR published the Base Plan. Network Rail subsequently advised that the hourly freight path on the relevant part of the Base Plan was unlikely to be fully used, and so could be available for WSMR’s services.
5. On 31 August 2007, ORR issued its decision to approve WSMR’s entry into a TAA with NR. In December 2007, NR published the Base Timetable. In December 2007 and January 2008, WSMR expressed its concerns to NR that no provision had been made for WSMR paths.
6. On 31 January 2008, WSMR and NR signed the WSMR TAA on which ORR had issued directions the previous day. WSMR therefore had contractual firm rights by the Priority Date (1 February 2008).
7. NR made its offer of the December 2008 FWT to WSMR on 11 July 2008 and this was replaced by NR’s formal revised offer of all WSMR paths on 29 August 2008. The December 2008 FWT included two journey times for WSMR services to London which are at least 20 minutes

shorter and one service from London which is at least 20 minutes shorter compared with the previous year.

8. The relevant provisions of the WSMR TAA dated 31 January 2008 provide that WSMR has the Firm Rights set out in Tables 2.1 to 8.5 of Schedule 5. For present purposes, it is sufficient to state that WSMR's Firm Rights include: 5 Train Slots each way on weekdays; and maximum journey times of 271 minutes from London and 270 minutes to London on weekdays.

III The Panel's Determination

9. WSMR invited the Panel to:
 - (i) *Confirm that when developing major packages of Timetable Change that Condition D.1.5 does not remove the obligation from NR to develop the First Draft Timetable in accordance with Condition D3.2.3 regardless of the content of the Base Plan;*
 - (ii) *Direct NR to re-evaluate the 2009 Principal Timetable and immediately implement changes to mitigate the effect of the incorrect allocation of priorities; and*
 - (iii) *Direct NR to develop a new Base Timetable based on the priorities as they stood at the Priority date on 1 February 2008 that can subsequently be used as the base timetable for the development of the 2009 Subsidiary Timetable.*
10. NR invited the Panel to:
 - (i) *Confirm that when developing major packages of Timetable Change that it has correctly followed the process described in Condition D1.5 and that once having established a base plan it has no unilateral power to amend that plan for the favour of any operator.*

- (ii) *Confirm that when developing major packages of Timetable change its primary duty is to observe the requirement of Condition 3.2.2 (a) in developing an operable timetable; [sic] which follows the necessary balance between its Firm Rights and the Firm Rights of all Bidders (Condition D3.2.2(b) at all times recognising the necessary of Declared (actual and expected) Firm Rights.*
- (iii) *Confirm that WSMR have been provided with slots in the First Working Timetable for the 2009 Principal Timetable which satisfy all aspects of their Track Access Contract and the Network Code Part D.*

11. The Panel divided its findings into findings of fact, findings of entitlement and its determination. However, there is a substantial degree of overlap between these categories in the Determination. The main findings in the section entitled 'Determination' (paras 24-25) are summarised below, with reference where necessary to the preceding findings of fact and entitlement. The Panel decided that:

- (i) The process established by Condition D1.5 is essentially facilitational and any base plan produced as a result of such consultation is indicative (para 25.2 of the Determination);
- (ii) The outcome of the process established by Condition D1.5 does not pre-empt or inhibit the application of Conditions D2A or D3 or create any obligation towards a Train Operator (para 25.2 of the Determination);
- (iii) NR was in error to have asserted that it could not, of its own initiative, flex Train Slots contained in any such 'indicative' timetable (para 17 of the Determination). Any case made by

Network Rail for refusing to incorporate a particular Bid needs *'to be argued on its merits by reference to its implications for the FWT and not by reference to the output from Condition D1.5'* (para 25.2 of the Determination);

- (iv) There is an expectation that any Firm Rights that have been agreed between NR and a Train Operator, approved by the ORR and notified by the Priority Date are, both individually and in aggregate, "capable of being brought into operation" (in accordance with Condition D3.2.2(a)) and will be incorporated into the First Working Timetable (para 25.3 of the Determination);
- (v) *'Train Operators are entitled to expect that the detail of their Bids and any associated flexing of conflicting services will be undertaken on the basis of priorities established strictly in accordance with Condition D3.2.3'* (para 21 of the Determination);
- (vi) However, the principle set out in sub-para 11(v) above does not imply that all Bids for Firm Rights under Condition D3.2.3(a) are to be satisfied before any rights or expectations of rights under Condition D3.2.3(b) are put on the graph (para 21 of the Determination);
- (vii) Further, Condition D3.2.3 is expressly stated to be "without prejudice to the exercise by Network Rail of a Flexing Right". Therefore, *'Train Slots allocated to meet any Bidder's Firm Rights accorded 'first priority' under Condition D3.2.3(a) can still be flexed by Network Rail within the bounds of those Firm Rights, in order to*

accommodate any other Train Slots in the First Working Timetable, irrespective of the rights or expectations of rights supporting those Train Slots.'

12. Applying these principles to the facts of WSMR's case, the Panel held:
- (i) WSMR's Train Slots were generally faster than those on the previous timetable (para 15 of the Determination);
 - (ii) *'WSMR has not been provided with slots in the First Working Timetable for the 2009 Principal Timetable which satisfy all aspects of their Track Access Contract, but the particular areas where the offer is technically non-compliant (as opposed to "not as good as it might be") are not contested by WSMR.'* (para 25.1 of the Determination; see also paras 15, 20 and 24);
 - (iii) NR did not include any Train Slots for WSMR's services in the work undertaken during the preliminary development consultation period (para 17) but, *'other than in regard to its observations in respect of the status of Condition D1.5 [referred to at 10(iii) above] (which were in any case subsequently withdrawn by NR), the Panel [was] not minded to find that NR otherwise departed from Condition D3 in a way that was to the detriment of WSMR's Firm Rights'* (para 25.3 of the Determination);
 - (iv) As the parties were agreed that NR has generally fulfilled WSMR's Firm Rights, the Panel considered that it had *'no need to attempt a qualitative judgment as to whether, in this instance, had NR taken a different approach in relation to the application of Condition*

D3.2.3, this would necessarily have resulted in a different FWT that would have

- (a) offered WSMR Train Slots giving faster journey times, and still*
- (b) accommodated all of the rights and declared aspirations of other Bidders.'*

13. For all the reasons given above, the Panel decided that it was not necessary for it to grant any remedy (para 25.5 of the Determination).

IV The Conduct of the Appeal before ORR

14. WSMR issued its Notice of Appeal on 29 September 2008 under Part M of the Code ("the Notice of Appeal"). ORR decided to hear the appeal and communicated its decision to do so to WSMR and NR by way of letter dated 16 October 2008. NR submitted its Response to the Notice of Appeal on 11 November 2008 (although incorrectly dated 11 December 2008) ("the Respondent's Notice"). WSMR replied to the Respondent's Notice on 27 November 2008 ("WSMR's Reply"). Finally, NR provided its reply to WSMR's reply on 18 December 2008 ("NR's Reply").
15. ORR indicated that it proposed to determine the Appeal by way of review of the Determination in a letter to WSMR and NR dated 20 January 2009. Neither party objected to this course of action.
16. ORR informed both parties in a letter dated 16 February 2009 that there were certain issues which had been raised in this appeal which it was not as yet in a position to determine, namely, whether the facts of this case could give rise to any liability and/or compensation in the

light of ORR's legal interpretation of the contractual provisions of the Code in relation to the preparation of the First Working Timetable.

17. ORR therefore proposed to issue its determination of this appeal in two parts. The first part ("the First Determination"), which this document represents, was to consist of ORR's legal interpretation of the contractual provisions of the Network Code in relation to the preparation of the First Working Timetable. The second part, which is to be issued after receipt of further information from the parties, would consist of a determination on the remaining issues of liability/compensation.
18. The parties were requested to make any representations on ORR's proposed course of action in writing by Friday 20 February 2009. Neither party objected to ORR's proposal.

V Relevant Provisions of the Code

19. The relevant provisions of the Code are set out in the Annex to this First Determination. In summary, Condition D1.5 concerns the discretionary earlier consultation process which NR may invoke where it envisages major changes to the timetable, Condition D2A sets out the procedure for the development of the Base Timetable, Condition D3.2 refers to the consultation and compilation process for the First Working Timetable and Condition D3.4 refers to NR's flexing rights in preparing the First Working Timetable.

VI The Parties' Submissions

WSMR

20. The substance of WSMR's complaint before the Panel and in this Appeal is that NR's approach to the process set out in Conditions D1.5 and D3 was incorrect and has resulted in the allocation of Train Slots to WSMR which are less efficient with longer journey times and, as such, are less attractive to passengers.
- WSMR relies in particular on the following arguments:
21. It maintains that NR *'acted outside the Condition D process in arriving at the Base Timetable'* (para 1 of the Notice of Appeal). On the facts, WSMR asserts that NR should have included its aspirations in the Base Plan (para 10.2 of WSMR's Reply).
22. While it does not suggest that Panel was required to make the qualitative judgment referred to at sub-paragraph 12(iv) above, it argues that:
- (i) *'The Panel was wrong in failing to find that as a result of the failure by NR to correctly follow the process described in Condition D1.5 and the use of that base plan produced as a result of the incorrect Condition D1.5 process as the Base Timetable had led to WSMR not being offered the more efficient Train Slots it would have been offered had the correct process been followed under Condition D1.5 and then D.3'* (para 2 of the Notice of Appeal);
 - (ii) *'The Panel ignored the prejudicial consequences of NR having rolled forward the results of the incorrect D1.5 work to be both the Base Plan and the First Working Timetable'* (para 4 of the Notice of Appeal). WSMR referred to paragraph 18 of the Panel's findings of fact on this issue;

- (iii) The Panel should have recognised that *'the responsibility of NR in the Timetable Process goes beyond offering a bidder Train Slots which are consistent with its Firm Rights'* (para 1 of the Notice of Appeal).
23. It argues that *'the purpose of the provisions in Condition D requires that the Firm Rights of Train Operators and NR are to be optimised within the requirements of Condition D3.2.2'* (para 1 of the Notice of Appeal). It further suggests in its Reply (para 10.3) that the requirement to optimise Firm Rights is a *'necessary implication of the terms of Part D3.2 including the orders of priority* and that the reference to an *'optimal balance'* (in Part 3.2.2(b)) between notified aspirations of Bidders and NR must also imply an optimal balance as between Bidders with equal priority under D3.2.3.
24. While it broadly accepts the Panel's Determination regarding the function of D1.5 and the fact that the Base Plan is indicative, it believes the Panel should have gone on to conclude *'that in the particular circumstances where NR incorrectly failed to include WSMR's aspirations or rights in the development process under D1.5 and then used the incorrectly developed base plan and an incorrect flexing process, WSMR may have been prejudiced and there was no certainty that any offer made to WSMR would not have been better had NR proceeded correctly.'*
25. Specifically, it disagrees with the Panel's finding set out at paragraph 12(iii) above in the light of the fact that the Base Plan *'which it used to compile a Working Timetable did not include any WSMR Train Slots [and] ... NR ... misinterpreted its obligations in relation to the operation of flexing*

rights, which limited the opportunity to improve WSMR's position' (para 5 of the Notice of Appeal).

26. On the facts, WSMR asserts that *'NR effectively directed or encouraged WSMR to bid for paths which would fit with the Base Plan rather than having itself sought to demonstrate transparently the slots for which WSMR would be expected to bid much earlier in the process and to consider how the timetable could be planned differently'* (para 5 of the Notice of Appeal).
27. It challenges the Panel's findings regarding the order of priorities in Condition D3.2.3 and the operation of flexing rights. It emphasises that *'Condition D.3.2.3 does not empower but requires NR to differentiate between entitlements in order of priority'* and that exercise of a flexing right should not be *'used as an excuse to override priorities'* (para 8 of the Notice of Appeal).
28. It further suggests that NR *'should have accorded first priority to WSMR's bid under Condition D3.2.3 in creating the First Working Timetable but instead appears to have treated other slots having lesser priority as having precedence over WSMR's Bid'* (para 5 of the Notice of Appeal).
29. WSMR argues that the incorrect procedures which occurred in relation to the Base Timetable and the substance of the Panel's Determination (in particular, its failure to direct that a new Base Timetable be drawn up) will result in further prejudice to WSMR in the process leading to offers for the Subsidiary Timetable (paras 6 and 7 of the Notice of Appeal).

30. WSMR also appeals on the procedural ground that the Panel's Determination and the delays in producing it have prevented any improvements in *'the Train Slots ... already offered to it with effect from the Principal Change Date'* (paras 6 and 9 of the Notice of Appeal).
31. In its Reply, WSMR has argued that NR has acted unreasonably in its development of the December 2008 FWT in failing to include WSMR's rights in the Base Timetable, failing to deal correctly with bidding priorities and failing to optimise WSMR's Firm Rights, and that WSMR is accordingly entitled to compensation under Condition D5.4¹, which should take into account the effect on WSMR in relation both to the 2009 (December 2008) Principal Timetable and the 2009 Subsidiary Timetable (paras 12-13 of WSMR's Reply).

NR

32. NR seeks to uphold the Panel's conclusions, but on different grounds from those it argued in the Joint Reference and from those relied on by the Panel. NR's submissions begin by emphasising the length and complexity of the process leading up to the December 2008 timetable (paras 10.1 and 10.4.3 of the Respondent's Notice).
33. In response to WSMR's specific arguments in the Appeal, NR denies that it breached Condition D1.5 (para 11.1 of the Respondent's Notice). It points out that WSMR had no Firm Rights at the time the Base Timetable was compiled and NR identified the freight paths which could be used to meet the aspirational wishes of WSMR in the event

¹ NOTE: The parties referred to Condition D5.7 in their written submissions; however, the correct reference is to Condition D5.4 of the Code. This error has been corrected by ORR on 3 March 2009. Brian Kogan.

that the WSMR TAA was awarded (para 11.1.2 of the Respondent's Notice).

34. However, the focus of NR's submissions is on Condition D3.2.3. NR submits that there is no justification for the argument that a Train Operator's Firm Rights must be optimised or that Flexing cannot be used to defeat the priorities established by Condition D3.2.3 (para 10.3 of the Respondent's Notice).
35. In particular, NR submits that Condition D3.2.3 should be interpreted according to the principles of contractual construction (para 9 of the Respondent's Notice). Applying this approach, NR submits that the order of priority established by Condition D3.2.3 relates only to consideration of a bid by an individual Bidder and therefore is not relevant to establishing priority between different Bidders (para 10.3.5-8 of the Respondent's Notice).
36. NR argues that whether or not it was in breach of Condition D.3.2.3, in all probability the timetable produced would have been no different (para 11.5 of the Respondent's Notice). Further, NR denies that it behaved unreasonably or in bad faith and therefore denies that compensation should be awarded in any event (para 12.2 of the Respondent's Notice).
37. Both parties made further submissions (which mainly but not entirely related to and responded to the points set out above) in their respective replies. All submissions have been considered in reaching this Determination.

VII ORR's consideration of the Appeal

38. ORR determines that the following is the correct interpretation of the relevant parts of Part D of the Code and therefore, of NR's obligations in compiling the Base Timetable and First Working Timetable (including the December 2008 FWT).

Condition D1.5

39. Condition D1.5 provides NR with the discretion to invoke a consultation process at an earlier stage than would otherwise be the case, in circumstances where it considers major timetable changes may be required. It therefore sets out a facilitative rather than mandatory process and there is no requirement for that process to lead to the production of any document (which in the present case, the Parties have called the Base Plan) or other outcome.
40. There is no requirement for NR to deal with the aspirations of Bidders at this stage of the process. Nor is it possible to imply any particular status in the timetabling process going forward to the aspirations of Bidders which are reflected in any Base Plan which NR decides to produce after exercising its discretion under D1.5. We are therefore satisfied that NR had no particular obligations in respect of WSMR's rights at this stage of the process and that WSMR's non-inclusion in the Base Plan was not of itself detrimental to its position.

Base Timetable

41. However, NR is required to develop a Base Timetable (Condition D2A.2). Before the Base Timetable Initial Date (in the present case, 2 February 2007), NR is required to consult with Bidders to establish their aspirations (Condition 2A.1.1) and facilitate and co-ordinate dialogue with all Bidders (Condition 2A.1.3). In developing the Base Timetable, NR is under the express obligation to take account of the aspirations of Bidders for changes to the most recently issued Base Timetable² which have been notified to NR before the Base Timetable Initial Date (Condition D2A.2.2). This obligation is therefore dependent on two conditions: (i) the Train Operator being a Bidder as defined by Condition D1.2; and (ii) the Train Operator having notified NR before the Base Timetable Initial Date of its aspirations.
42. In the present case and as stated above, the Base Timetable Initial Date was 2 February 2007. NR does not suggest that WSMR was not a Bidder and ORR accepts that condition (i) above was satisfied. As regards condition (ii), we note that Condition D2A does not impose any formal requirements on Bidders in relation to notifying NR of their aspirations. NR accepts (at paragraph 10.1.3 of the Respondent's Notice) that it was in frequent contact with WSMR about the latter's aspirations from 2006 and does not claim that WSMR failed to notify NR of its aspirations. ORR is therefore satisfied that NR was required to take account of WSMR's aspirations in the development of the Base Timetable.

² It is unclear why Condition D2A.2.2 requires NR and Bidders to refer back to the most recently issued Base Timetable, rather than the most recently issued Working Timetable. However, ORR has not considered this matter further as it does not impact on the issue to be determined in this appeal.

43. After the expiry of the Base Timetable Initial Date and in consultation with Bidders, NR is required to compile the Base Timetable (Condition D2A.2.4). In compiling the Base Timetable, NR is required to take account of (among other things) the rights or expectations of rights of each Bidder and the Decision Criteria (Condition D2A.2.4(b) & (c)). We are satisfied that NR was required to take account of WSMR's expectation of rights at this stage. We note, however, that there is no reference in Condition D2A.2.4 to any order of priority which NR must follow in compiling the Base Timetable.
44. NR is then required to issue the Base Timetable by the Base Timetable Notification Date (in the present case, 7 December 2007). Condition D2A.3 states that the Base Timetable '*shall show... those Train Slots which NR expects to include in the Working Timetable.*' However, NR may consider that there are major aspects of the Base Timetable which are not capable of being brought into operation without further development work, in which case it must indicate what these are (Condition D2A.3).
45. NR did issue the Base Timetable by 7 December 2007. That Base Timetable did not show WSMR's Train Slots. At paragraph 17 of the Determination, the Panel acknowledged NR's arguments that the planned 'freight path' combined with options more readily identifiable were kept in mind during the development process. It noted that NR had informed ORR in 2007 that if routed via the Coventry Corridor, WSMR paths would align with the hourly 'freight' path in the draft timetable, but that in the event that this path was not available, it would be necessary to find a path by another route.

46. If, at the time of issue of the Base Timetable, WSMR was of the view that it had grounds for challenging NR's decision, it had the right, pursuant to Condition D2A.4.1, to appeal any decision by NR in respect of the Base Timetable to the Panel for determination under Condition D5 provided such referral was made within the period specified in Condition D5.1. Condition D5.1.2(b) states that the relevant time frame for such appeals is within 10 working days of receipt of the relevant timetable. WSMR chose not to exercise any such right. As such, ORR finds that WSMR is not entitled in the present proceedings to appeal against the fact that its Train Slots were not included in the Base Timetable. Similarly, to the extent that WSMR seeks to base its argument concerning further prejudice in the compilation of the Subsidiary Timetable on the content of the Base Timetable alone, it is not entitled to do so.

First Working Timetable

47. However, the focus of WSMR's submissions is on the manner in which the Base Timetable was used in the compilation of the First Working Timetable and the role of prioritisation of Bids in that compilation process. This is addressed below.

Role of Base Timetable in compilation of First Working Timetable

48. It is clear from Condition D3.2.1 that the Base Timetable is relevant to the process by which Bidders notify NR of the rights they intend to exercise (and the corresponding Train Slots for which they are bidding). As that Condition makes clear, although Bidders are required to notify all rights they intend to exercise (whether or not they correspond to Train Slots included in the Base Timetable), they must relate those rights to the existence (or lack) of any Train Slots

contained in the Base Timetable. For example, Condition D3.2.1(a) provides that Bidders must, on or before the Priority Date, notify Network Rail of those Firm Rights which they intend to exercise *'together with (to the extent such Firm Rights are being exercised to obtain the Train Slots which are different to those in the Base Timetable), an explanation of why they wish to exercise such Firm Rights in a manner different to the Base Timetable.'* Further, Condition D3.2.1(d) requires Bidders to notify NR in respect of any amendments, additions or deletions they wish to make *in respect of Train Slots in the Base Timetable.*

49. What is less clear is the extent to which the Base Timetable is relevant to NR's obligations in compiling the First Working Timetable. Condition D3.2.2(c) provides that NR will compile a First Working Timetable which:

'includes, in respect of the relevant Timetable Period, the Train Slots shown in the Base Timetable, together with the additions, amendments and deletions requested by Bidders in accordance with Condition D3.2.1 so far as reasonably practicable, taking into account the complexity of those changes, including any reasonably foreseeable consequential impact on the Working Timetable, and the available time before the end of the Finalisation Period, and having due regard to the Decision Criteria.'

50. Taken in isolation, Condition D3.2.2(c) suggests that the Base Timetable is intended to serve as the basis for the compilation of the First Working Timetable. However, the wording of that provision alone does not make clear whether the Base Timetable simply provides a basis in purely *practical* terms (ie. that rather than starting with a clean sheet, NR begins the process with this working model, in which no Train Slots are finalised and in which all Train Slots can be adjusted

as extensively as is required in order to accommodate, to the extent reasonably practicable, the notifications received pursuant to Condition D3.2.1) or whether it provides a basis in more *substantive* terms (ie. that the amendments, additions or deletions required as a consequence of notifications received pursuant to Condition D3.2.1 are to be made around a more 'fixed' model of the Base Timetable and that, in the event of competing bids for Train Slots, the allocation of Train Slots in the Base Timetable receives some sort of priority).

51. It is ORR's view that the wording of Condition D3.2.2(c) does not of itself support the latter interpretation. It provides that the First Working Timetable *includes* all the Base Timetable slots, together with the amendments, insertions and deletions required by Condition D3.2.1 as far as reasonably practicable etc. This effectively sets out the contents of the finalised First Working Timetable but does not address any issue of prioritisation in terms of the process.
52. Furthermore, Condition D3.4, which sets out the circumstances in which NR may exercise a Flexing Right, expressly states at D3.4.1(a) that NR may exercise such a right in relation to '*any Train Slot included in the Base Timetable*' as well as any request for change notified to NR in accordance with Condition D3.2.1 or any aspiration notified to NR in accordance with Condition D3.2.4 or D3.2.6.
53. This express stipulation regarding Base Timetable slots indicates that they are accorded no particular precedence or permanence and may be altered by exercise of this right in the same way as those slots for which subsequent bids are made. NR's right to flex may be exercised '*at any time prior to the end of the Finalisation Period*' and in doing so it

must have due regard to the Decision Criteria (set out in Condition D6). Those Criteria do not contain any factors which accord particular status to Base Timetable Train Slots either.

54. As stated above, Condition 3.2.2(c) does not indicate that there is any prioritisation of Base Timetable train slots over subsequent bids. The provision which expressly addresses the issue of prioritisation is Condition D3.2.3. However, it is clear from that provision that any hierarchy of priorities distinguishes between *categories of right* (ie. firm rights, expectations of rights etc) rather than between rights which were represented by Train Slots in the Base Timetable and those which were not represented by Train Slots and which were notified subsequently. On any interpretation of Condition D3.2.3, the wording does not suggest that if a Bidder with a Firm Right bids for a Train Slot which conflicts with one allocated in the Base Timetable to a different Bidder with a competing Firm Right, the Bidder to whom the Base Timetable slot was allocated necessarily retains the slot by virtue of that fact.
55. The proviso at the end of Condition D3.2.3, which makes clear that priority is only to be accorded to rights which relate to Train Slots which have been notified in accordance with D3.2.1(d) *or* included in the Base Timetable also suggests that there is no distinction in terms of precedence between Train Slots originally included in the Base Timetable or Train Slots which were subsequently set out in Bidders' notifications. The point of the proviso is simply to make clear that rights which have not been notified or expressed as Train Slots by either means will not be accorded priority in accordance with the three-fold hierarchy in Condition D3.2.3.

56. The reference in the proviso is the only reference to the Base Timetable in Condition D3.2.3. The provision as a whole therefore does not accord any particular status to Train Slots in the Base Timetable. It does not include any particular wording which supports the 'fixed model' interpretation of the Base Timetable outlined at paragraph 50 above.

Prioritisation of Bids

57. Condition 3.2.3 refers to the '*order of priority for inclusion of Train Slots*' in the First Working Timetable. There is a question as to whether the order of priority set out in that Condition is intended to apply as between Bidders, as WSMR suggests, or merely as between the different rights of an individual Bidder, as NR suggests.
58. ORR rejects NR's argument on this issue. Any method of priority for inclusion is intended to apply as between Bidders, for the following reasons:
- (i) NR's stance simply does not reflect the reality that the First Working Timetable is compiled in the context of a multi-party bidding process and the compilation process itself is a collaborative one.
 - (ii) Condition D3.2.3 must be read in the context of Condition D3 as a whole. Condition D3.4 which concerns flexing, clearly describes a process which can clearly be carried out to one Bidder's Train Slots to accommodate another's. Condition D3.2, which precedes it, refers to notification by all Bidders of the

requested slots. Taken in this multi-party context, it would be incongruous to interpret the order of priorities set out in Condition 3.2.3 as a process carried out to an individual party's Bids.

- (iii) Further, the language of Condition D3.2.3 itself refers throughout to "a Bidder", rather than "the Bidder" and to "Train Slots" in the plural.
- (iv) Finally, it is difficult to envisage a situation in which a Bidder would make a Bid which, as regards that Bidder, required NR to engage in the process set out in Condition D3.2.3 because it is highly improbable that an individual Bidder would itself submit conflicting bids for particular Train Slots.

59. However, there is a further question as to the meaning of 'order of priority for inclusion' in Condition D3.2.3. For example, on one interpretation, it could refer to the order in which Train Slots relating to different categories of right are incorporated into the First Working Timetable in the course of the compilation process. On another, it could simply refer to an order of priority in terms of ultimate inclusion in the finalised First Working Timetable (i.e. in those situations where the timetable compilation process cannot accommodate all rights which Bidders have requested to exercise and certain rights will not be included at all).

60. The order of priority could relate to the *process* of inclusion in the timetable, with the effect that slots which have been bid for by Bidders

with firm rights are allocated to them first, and remain allocated to them by virtue of their category of right, irrespective of whether there is a competing bid which is considered later in the process from a Bidder with a lesser category of right.

61. However, Condition D3.2.3 is stated to be '*without prejudice to the exercise by Network Rail of a Flexing Right*', which can be exercised at any time. Further, the application of the Decision Criteria in the flexing process can result in a departure from the prioritisation of rights set out in Condition D3.2.3 so that Bidders with lesser rights can be allocated Train Slots which were also sought by those with Firm Rights. NR's ability to apply such a process facilitates the compilation of a timetable which is in the interests of the industry, passengers and freight users. Further, the right to flex reflects NR's obligation, pursuant to Condition D3.3.2(a), to compile a timetable which is '*capable of being brought into operation*'.
62. In the light of the scope of the flexing right contained in Condition D3.4, an interpretation of Condition D3.2.3 which applies it to initial inclusion in the timetable during the process would not in fact provide an effective safeguard for Train Slots based on firm rights. Therefore, the view that the prioritisation process refers instead to ultimate inclusion of Slots in the timetable as finalised is a more meaningful interpretation, and in ORR's opinion the correct interpretation, of Condition D3.2.3.

Optimisation

63. WSMR has suggested that there was an obligation on NR to 'optimise' individual bids. ORR does not accept WSMR's interpretation of

Condition 3.2.2(b). The wording of the provision refers to achieving an 'optimal *balance*' *between* Bidders' aspirations and NR's aspirations and not to the achievement of 'optimisation' of each individual Bid. Further, as stated in paragraph 48 above, notifications of the exercise of rights are expressed in terms of Train Slots. In compiling the timetable, NR seeks to accommodate the requested bids for Train Slots. In the circumstances, NR is entitled to assume that a Bidder has bid for Train Slots which are optimal for it and that the satisfaction of a Bid is optimisation as far as that Bidder is concerned.

64. Similarly, NR is entitled to exercise a flexing right to the extent permitted by the relevant track access contract. Provided such flexing does not extend beyond the contractually-defined bounds, and has been carried out in a manner which is consistent with the Decision Criteria, it is permissible. There is therefore no question of an obligation to 'optimise' slots in terms of allocation or flexing, nor do any of the relevant provisions in Condition D3 refer to any such obligation.

VIII CONCLUSION

65. The nature of the arguments raised by WSMR in this appeal, as summarised at paragraphs 20–31 above, has necessitated consideration of the workings of all the relevant provisions of Part D (which are summarised in para 19 and set out in full in the Annex).
66. This First Determination sets out at paragraphs 39–64 ORR's interpretation of those provisions. It also addresses (at paragraphs 75

to 78) WSMR's procedural ground of appeal referred to at paragraph 30 above.

67. While ORR's consideration of the relevant provisions of Part D is more comprehensive, it is consistent (in so far as the Panel elaborated on the interpretation of the provisions) with the findings in the Panel's Determination as set out at paragraphs 11(i) - (iv) above, namely that:
- (i) The process established by Condition D1.5 is essentially facilitational and any base plan produced as a result is indicative;
 - (ii) The outcome of the process established by Condition D1.5 does not pre-empt or inhibit the application of Conditions D2A or D3 or create any obligation towards a Train Operator;
 - (iii) NR was in error to have asserted that it could not, of its own initiative, flex Train Slots contained in any such 'indicative' timetable;
 - (iv) There is an expectation that any Firm Rights that have been agreed between NR and a Train Operator, approved by the ORR and notified by the Priority Date are, "capable of being brought into operation" and will be incorporated into the First Working Timetable;
68. It follows that ORR does not accept WSMR's arguments (referred to primarily at paragraphs 21 and 29 above) based on criticisms of the discretionary Condition D1.5 process and resulting Base Plan or its non-inclusion in the Base Timetable for the reasons set out at paragraphs 39 - 46 above.

69. In relation to the Panel's findings on the order of priorities and flexing, ORR agrees with the Panel's findings as set out at 11(vi) and (vii) that:
- (i) all Bids for Firm Rights do not have to be satisfied before lesser rights are 'put on the graph' and;
 - (ii) Condition D3.2.3 is subject to NR's right to flex, which permits the flexing of Firm Rights to accommodate lesser rights.

However, to the extent that the Panel's finding at 11(vii) or at 11(v), which states that *'Train Operators are entitled to expect that the detail of their Bids and any associated flexing of conflicting services will be undertaken on the basis of priorities established strictly in accordance with Condition D3.2.3'* might suggest that the strict hierarchy of priorities governs more than the process of ultimate inclusion in the timetable or that the right to flex is in any way restricted by the wording of Condition D3.2.3, ORR disagrees and refers to its conclusions at paragraphs 57 to 62 of this First Determination.

70. Again, it follows from paragraph 69 above that ORR does not accept WSMR's arguments (at paragraphs 27 and 28 above) in relation to the order of priorities and its suggestion that the right to flex should not be used to 'override' it.
71. WSMR raised a further argument on appeal in relation to optimisation (see paragraph 23 above). ORR does not accept WSMR's argument that there was any obligation to 'improve' WSMR's position, for the reasons set out at paragraphs 63-64 above.
72. In relation to the Panel's application of the principles to the facts (as set out at paragraph 12 above), the parties have not appealed the factual findings at paras 12(i) and 12 (ii) that the Train Slots awarded were

faster than the previous timetable and satisfied WSMR's Firm Rights. WSMR has disputed the Panel's finding as set out at para 12(iii), that *'other than in regard to its observations in respect of the status of Condition D1.5 [referred to at 10(iii) above] (which were in any case subsequently withdrawn by NR), the Panel [was] not minded to find that NR otherwise departed from Condition D3 in a way that was to the detriment of WSMR's Firm Right.'* However, ORR agrees that NR's actions did not depart from Condition D3 in a way that was to the detriment of WSMR's rights, since its rights were ultimately satisfied by the Train Slots granted in the December 2008 FWT.

73. However, ORR disagrees with the Panel's finding, as set out at paragraph 12(iv) that the fact that WSMR's Firm Rights were satisfied renders unnecessary any qualitative judgment as to the potential effect of a different approach by NR to the timetabling process on the Train Slots ultimately offered to WSMR. In order to determine whether NR followed the process for compilation of the First Working Timetable as set out by ORR at paragraphs 39 to 64 above, further information is needed about the particular facts of how WSMR's bid was made and handled. Further, the potential effect of NR's approach has been put in issue by some of the arguments raised and remedies sought by WSMR in this appeal (see paragraphs 22, 24-26 and 31 above).
74. Therefore, as stated in its letter to the parties dated 16 February 2009, summarised at paragraphs 16-18 above, ORR considers that the issues raised concerning NR's potential liability and/or compensation do fall to be determined in this appeal. However, they are not the subject of this First Determination and a second determination will be issued concerning those issues.

WSMR's procedural ground

75. Finally, in relation to WSMR's procedural challenge concerning the length of time taken for the Panel to issue its Determination, Rule A1.8 of the Access Dispute Resolution Rules provides that:

'Subject to rules A1.9 and A1.42 to 1.44, the Panel shall reach its determination in a timely manner consistent with the nature and complexity of the dispute.'

Rules A1.42 to 1.44 do not contain a specific timescale for issuing the Determination. Rule A1.9 provides that:

Rule A1.8 is subject to any specific timescale provisions of the Access Conditions, Access Agreement or any other legal requirements.

76. Regulation 20(5) of the Railways Infrastructure (Access and Management) Regulations 2005 ("the Access and Management Regulations") provides that:

'The infrastructure manager must facilitate the establishment and operation of a dispute resolution system to resolve disputes about the allocation of infrastructure capacity and, where that system is applied, a decision on the matters in dispute must be reached no later than ten working days after the final submission of all relevant information in accordance with that system.'

77. ORR notes that WSMR received the Determination on 24 September 2008. This was twelve working days after the hearing date of 8 September. It did therefore exceed the ten day working time limit provided for in the Access and Management Regulations and incorporated into the ADRR by virtue of Rule A1.8. ORR would emphasise that it is important that appeals are determined within the required timescales so as to avoid causing prejudice to parties.

78. However, in the circumstances of this case, ORR does not accept WSMR's argument that the extent of this delay was such as to cause it prejudice. As stated above, the Panel did not grant WSMR the remedy it sought and therefore WSMR would only have been able to obtain directions concerning re-evaluation of the timetable by successfully appealing the Panel's Determination to ORR. Therefore, the two working day delay caused no particular prejudice to WSMR and ORR has not considered it necessary for the purposes of this appeal to comment on the Panel's reasons for that delay.

A handwritten signature in black ink, appearing to read 'B Kogan', written in a cursive style.

Brian Kogan

Deputy Director, Directorate of Access, Planning and Performance

Duly Authorised by the Office of Rail Regulation

23 February 2009

ANNEX

Relevant Provisions of the Code

DEFINITIONS

“Base Timetable”	means, in respect of any Timetable Period, the timetable issued by Network Rail in accordance with Condition D2A.3 showing those Train Slots which Network Rail expects to include in the Working Timetable applicable to that Timetable Period;
“Bidder”	means each Train Operator, each Access Option Holder and each other person who has been allowed to participate in the procedure set out in this Part D pursuant to Condition D1.2;
“Capacity Request Deadline”	means the last day on which a Bidder may propose changes to the content of the Draft Timetable and which shall be no more than 4 weeks before the end of the Drafting Period;
“Decision Criteria”	means those decision criteria set out in Condition D6;
“Draft Timetable”	means the version of the Working Timetable which Network Rail provides in accordance with Condition D3.2.5;
“Finalisation Period”	means a period, to be notified by Network Rail in accordance with Condition D1.4, normally of 6 weeks and commencing on the first Working Day following the end of the Drafting Period;
“Firm Right”	means: (a) in the case of a Bidder, a right under its Access Agreement in respect of the

quantum, timing or any other characteristic of a train movement; and

- (b) in the case of Network Rail, a right under the applicable Rules of the Route or the applicable Rules of the Plan

which is not expressed to be subject to any contingency outside the control of the holder of the right, except, in a case within paragraph (a) above, the applicable Rules of the Route or the applicable Rules of the Plan, and any reference in an Access Agreement to "Firm Contractual Right" shall be deemed to be a reference to "Firm Right";

"First Working Timetable"

means the version of the Working Timetable in respect of which Network Rail gives notice pursuant to Condition D3.2.7, as that version may be amended in accordance with Condition D3.2.9;

"Flexing Right"

means a right, exercisable by Network Rail, either

- (a) pursuant to Condition D3.4.1 or D4.4.1, to vary a Bid or to define in detail the content of a Train Slot or series of Train Slots in any way within and consistent with the Firm Rights (if any) of the Bidder; or
- (b) pursuant to Condition D3.4.2 or D4.4.2, to vary a Train Slot previously scheduled in the relevant Working Timetable or a Bid as the case may be;

"Priority Date"

means the date, notified under Condition D1.4 and in any event occurring not more than five Working Days after the commencement of the Drafting Period relating to a Timetable

Development Period ending on a Principal Change Date, by which Bidders, in accordance with Condition D3.2.1, must notify to Network Rail those rights which they intend or, as the case may be, do not intend to exercise in either or both of the Timetable Period commencing on that Principal Change Date and the Timetable Period commencing on the next following Subsidiary Change Date;

“Timetable Development Period”

means, in respect of any Passenger Change Date, the period of development of the Working Timetable to be implemented on that date, being a period, to be notified by Network Rail in accordance with Condition D1.4, normally of 55 weeks, ending on the day before that date and comprising in chronological order:

- (a) a Preliminary Period;
- (b) a Drafting Period;
- (c) a Finalisation Period; and
- (d) a Supplemental Period;

“Train Slot”

means a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement;

CONDITION D1 – GENERAL

...

1.5 *Major changes to the timetable*

- 1.5.1 In order to facilitate effective development of the Draft Timetable where Network Rail considers that major

timetable changes may be required, for example to accommodate growth in demand for railway services, Network Rail may decide to invoke a consultation process at an earlier stage than would otherwise be the case with a view to increasing the period for consultation and ensuring that the timetable changes are implemented in a co-ordinated fashion.

- 1.5.2 In such circumstances Network Rail shall notify each Bidder in writing of all relevant information about any such major changes and of the Timetable Development Periods likely to be affected by such changes, and shall give notice to all Bidders of the date it proposes to commence the pre-bidding consultation process in respect of the affected Timetable Development Periods.
- 1.5.3 Any Train Operator wishing to propose significant alterations to its services or any Bidder wishing to introduce significant new services shall consult with Network Rail at the earliest opportunity to assist Network Rail in deciding whether or not to invoke an early start to a pre-bidding consultation process and, if so, in deciding when that process should begin.

CONDITION D2A - BASE TIMETABLE

...

2A.2 *Development of the Base Timetable*

- 2A.2.1 Following the consultation referred to in Condition D2A.1.1, Network Rail shall lead the development of a Base Timetable.
- 2A.2.2 In developing such Base Timetable Network Rail shall take account of any aspirations of Bidders for changes to the most recently issued Base Timetable which are notified to Network Rail on or before the Base Timetable Initial Date relating to the Timetable Development Period in question. Network Rail shall not be entitled to disregard such aspirations by reason solely of their complexity or the available time before the end of the Finalisation Period. . . .

...

2A.2.4 Network Rail, in consultation with Bidders, shall compile a Base Timetable which takes due account of:

- (a) the need to achieve optimal balance between the notified aspirations of each Bidder and the aspirations of Network Rail in respect of the Rules of the Route and the Rules of the Plan;
- (b) the rights or expectations of rights of each Bidder and of Network Rail; and
- (c) the Decision Criteria.

**CONDITION D3 – CONSULTATION PROCESS TO ESTABLISH
THE FIRST WORKING TIMETABLE**

...

3.2 *Process for preparation of the First Working Timetable*

3.2.1 *Notification of rights to be exercised*

Bidders shall, on or before the Priority Date, notify Network Rail in respect of the Timetable Periods commencing on the next following Principal Change Date and the next following Subsidiary Change Date of:

- (a) those Firm Rights which they intend to exercise together with (to the extent such Firm Rights are being exercised to obtain the Train Slots which are different to those in the Base Timetable), an explanation of why they wish to exercise such Firm Rights in a manner different to the Base Timetable;
- (b) those Firm Rights which they have previously exercised to obtain the Train Slots in the Base Timetable but which they do not intend to exercise;
- (c) any other rights which they intend to exercise or wish to negotiate; and

- (d) an indication of any amendments, additions or deletions they wish to make in respect of the Train Slots in the Base Timetable (pursuant to the notifications under paragraph (a), (b) or (c) above), which indication shall include the extent of their requirements (if any) as to the matters set out in Condition D3.3 in respect of each amended or additional Train Slot requested;

and:

- (i) in the case of paragraph (b) above, shall identify any Train Slots in the Base Timetable to which such Firm Rights relate and which they do not wish to operate;
- (ii) in the case of paragraph (C) above, shall distinguish between
 - (A) Train Slots (whether or not included within the Base Timetable) for which they would be seeking priority in the Draft Timetable in accordance with Condition D3.2.3(b);
 - (B) Train Slots (whether or not included within the Base Timetable) for which they would be seeking priority in the Draft Timetable in accordance with Condition D3.2.3(c); and
 - (C) other Train Slots (whether or not included within the Base Timetable); and
- (iii) in the case of paragraph (d) above, shall identify the rights, if any, applicable to each of the amended or additional Train Slots requested.

3.2 *Process for preparation of the First Working Timetable*

...

3.2.2 *Compilation of the First Working Timetable*

Network Rail, in consultation with Bidders, will compile a Working Timetable which is in accordance with the following provisions of this Condition D3.2 and which:

- (a) in Network's opinion is capable of being brought into operation;
- (b) takes account of the need to achieve optimal balance between the notified aspirations of each Bidder and the aspirations of Network Rail as expressed in the applicable Rules of the Route and the applicable Rules of the Plan; and
- (c) includes, in respect of the relevant Timetable Period, the Train Slots shown in the Base Timetable, together with the additions, amendments and deletions requested by Bidders in accordance with Condition D3.2.1 so far as reasonably practicable taking into account the complexity of those changes, including any reasonably foreseeable consequential impact on the Working Timetable, and the available time before the end of the Finalisation Period, and having due regard to the Decision Criteria.

3.2.3 *Priorities in compiling the First Working Timetable*

Without prejudice to the exercise by Network Rail of a Flexing Right, Network Rail shall, in determining the order of priority for inclusion of Train Slots in the First Working Timetable, accord priority:

- (a) first, to the satisfaction of any Firm Rights which:
 - (i) a Bidder may have, provided that

(A) the rights have been notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(a) and constitute Firm Rights on the intended dates of the operation of those Train Slots; or

(B) the rights were exercised in the corresponding timetable prior to the timetable that is being prepared but have not been notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(a). In such case only those rights which relate to quantum and which have been notified to Network Rail prior to the Capacity Request Deadline shall have force; or

(ii) Network Rail may have including those contained in the applicable Rules of the Route or the applicable Rules of the Plan,

each of paragraphs (i) and (ii) above having equal priority;

(b) second, to the satisfaction of any rights or expectations of rights which:

(i) have been notified by a Bidder to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c); and

(ii) correspond to Firm Rights held by that Bidder at the Priority Date under an Access Agreement in force on that date but which at the Priority Date are prevented from constituting Firm Rights

only because any or all of the intended dates of operation of those Train Slots fall after the expiry of the Access Agreement, or fall after the expiry of the Firm Rights from which those Train Slots are derived, and provided that Network Rail reasonably expects that an Access Agreement containing corresponding Firm Rights will be in force on the intended dates of operation of those Train Slots;

(c) third, having due regard to the Decision Criteria, to the satisfaction of any other rights or expectations of rights which:

(i) a Bidder has notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c); or

(ii) Network Rail may have including those contained in the applicable Rules of the Route or the applicable Rules of the Plan, and which (in any such case) do not fall within Condition D3.2.3(a)(ii),

each of paragraphs (i) and (ii) above having equal priority; and

(d) thereafter, having due regard to the Decision Criteria, to the satisfaction of any rights or expectations of rights which a Bidder has not notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c) but which are notified to, Network Rail in accordance with Condition D3.2.4 or D3.2.6

provided that Network Rail shall only accord priority pursuant to paragraph (a), (b) or (c) above if the Train Slots to which the relevant Firm Rights, rights or expectations of rights relate have been notified to Network Rail on or before the Priority Date in

accordance with Condition D3.2.1(d) or included in the Base Timetable.

3.4 *Flexing rights – Preparation of the First Working Timetable*

3.4.1 Network Rail may, in relation to

- (a) any Train Slot included in the Base Timetable;
- (b) any request for change notified to Network Rail in accordance with Condition D3.2.1; or
- (c) any aspiration notified to Network Rail in accordance with Condition D3.2.4 or D3.2.6;

exercise a Flexing Right at any time prior to the end of the Finalisation Period, provided that:

- (i) Network Rail shall have first consulted with each person materially affected by the exercise of such Flexing Right;
- (ii) Network Rail shall, in exercising that Flexing Right, have had due regard to the Decision Criteria; and
- (iii) Network Rail shall notify the Bidder of the exercise of its Flexing Right as soon as practicable thereafter.

3.4.2 Network Rail shall exercise a Flexing Right at any time:

- (a) in order to give effect to a decision of the relevant ADRR panel or the Office of Rail Regulation as provided for in Condition D5; or
- (b) if it is necessary to do so in order to comply with any directions issued or approval given by the Office of Rail Regulation in the exercise of its powers under section 17, 18, 22 or 22A of the Act.