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## ***TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE***

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### **Determination in respect of reference TTP324**

*(following a hearing held at 1 Eversholt St, Euston on 29<sup>th</sup> March 2010)*

#### **The Panel**

**Nigel Oatway:** elected representative for Non-Passenger Class, Band 2  
**Graham Owen:** elected representative for Non-Franchised Passenger Class  
**Matt Pocock:** appointed representative of Network Rail  
**Colin Pratt:** elected representative for Franchised Passenger Class, Band 2.

Panel Chairman: **Bryan Driver**

#### **The Parties**

##### **For West Coast Trains Ltd ("WCT")**

**Robert Hodgkinson** Commercial Operations Manager  
**Jonathan Dunster** Head of Operations & Planning  
**Simon Pilkington** Consultant

##### **For Network Rail Infrastructure Ltd ("Network Rail")**

**Ian Leigh** Acting Customer Relations Executive (Virgin Trains)  
**Jason Nash** Capacity Allocation Manager  
**Jonathan Cooper** Commercial Advisor

#### **Brief Summary of the dispute**

1. The Panel was asked by WCT to find that Network Rail in compiling the May 2010 Timetable, had acted inappropriately in respect of the Offers made in response to WCT's Bids for Train Slots compliant with its Firm Rights, insofar as the Working Timetable contains in excess of 100 Train Slots where the Journey Time is scheduled to exceed the Maximum Key Journey Time in Schedule 5 of the WCT Track Access Contract, by margins of up to 37 minutes.
2. Network Rail noted the substance of WCT's case and conceded that the May 2010 Timetable would include Train Slots where the Journey Times exceeded the Maximum Key Journey Times in Schedule 5 of the WCT Track Access Contract; however, all such instances could be justified by reference to

- 2.1. Network Rail's Firm Rights in relation to the operation of Network Code Condition D2.2 (Consultation process to establish the Rules of the Route/Plan), and
  - 2.2. the discretions in Clause 7.1(c) of Schedule 5 of the WCT Track Access Contract (a template document in this respect) permitted the scheduling of Extended Journey Times to cater for Restrictions of Use.
3. WCT invited the Panel to determine that:
- (a) ***"Network Rail, in relation to those Firm Access Rights listed as non-compliant, is reasoned to be in Breach of WCTL Schedule 5 Track Access Agreement";***
  - (b) ***"Network Rail [should] be directed to resolve ALL those non compliant services listed, bringing them back to within their contractual Maximum or Fastest 'Key' Journey Time(s)".***

Network Rail asked the Panel to determine that

- (a) ***Network Rail has provided paths during the times of agreed restriction of use (in the Rules of the Route) in accordance with the decision criteria (e) and (f).***
- (b) ***That Network Rail is correct to approach the ORR for a Journey Time Review Notice to amend the relevant journey times in the contract.***

### The jurisdiction of the Panel

4. The Panel was satisfied that the matter is one that should properly be heard by a Timetabling Panel, meeting under the terms of Network Code Part D, as all the matters in question arise because a *"Bidder is dissatisfied with ...decision[s] of Network Rail made under this Part D"*. However, the Panel also recognised that one possible outcome of its determination of the matter would be to require Network Rail to review and amend Train Slots already offered and accepted by other Train Operators.
5. The Panel reminded itself that,
  - 5.1. as stipulated in the Access Dispute Resolution Rules, it must *"reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis"* (Rule A1.18).
  - 5.2. the entitlements of the parties in this instance derive from
    - 5.2.1. the Track Access Contract of WCT (and those of other affected parties);
    - 5.2.2. compliance with the processes and obligations set out in Network Code Part D;
    - 5.2.3. compliance with the processes and obligations set out in the Rules of the Plan, ;
    - 5.2.4. any relevant amplification of the meaning of these documents, and the obligations that they impose on the parties, as may be contained in a determination of either a *"relevant ADRR Panel"* (persuasive authority) or the Office of Rail Regulation (binding authority);
  - 5.3. in respect of any question of remedy;
    - 5.3.1. Rule A1.19 prescribes that *"The Panel shall (a) where the Access Conditions or Access Agreement require that a specific remedy be granted, grant that remedy accordingly; or (b) where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Panel, exercise that*

*discretion in accordance with any requirements and criteria set out in the Access Conditions and Access Agreement after due consideration of all remedies and orders that could properly be made”.*

5.3.2. **Condition D5.3** states that “any dispute panel shall, in determining the matter in question, have the power:

5.3.1 *in determining the matter in question:*

- (a) *to direct Network Rail to comply with directions which specify the result to be achieved but not the means by which it shall be achieved (“general directions”);*
- (b) *to direct the parties to accept any submissions made by Network Rail as to any Train Slots; and/or*
- (c) *to specify the Train Slots and other matters which Network Rail should have determined in its decision made pursuant to this Part D,*

*provided that a dispute panel shall only take any action under paragraph (c) above in exceptional circumstances;”*

5.3.3. In relation to these powers of “the dispute panel” the Panel noted that any determination it might make could have a material bearing upon the options opened to Network Rail under the terms of Condition D4.7, in particular D4.7.2(c).

#### **“4.7 Variation of scheduled Train Slot**

4.7.1 *Once a Bidder is deemed to have accepted a decision of Network Rail under Condition D3.2.8 or D4.6.2 or Network Rail has accepted a Bidder’s Bid in accordance with Condition D3.2.7 or D4.5, both the Bidder and Network Rail shall, subject to Conditions D3.4.2, D4.4.2 and D4.7.2, be bound by that decision.*

4.7.2 *A Train Slot scheduled in the Working Timetable may be varied by Network Rail:*

- (a) *in accordance with the procedures provided for in Condition D2.1.10, D4.5.3 or D4.8; or*
- (b) *by agreement between Network Rail and the Bidder (provided that every other affected party has also agreed in writing); or*
- (c) *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.”*

#### **The Evidence laid before the Panel**

6. The Panel confirmed that, in accordance with the duties and procedures laid down in Access Dispute Resolution Rules, Part A (“The function and Operation of Panels”), it had reviewed and taken into consideration, as a “knowledgeable peer group with relevant railway expertise” [Rule A1.3(a)], the following items

6.1. [WCT’s] **Individual submission to Timetable Panel Dispute Reference TTP324 – May 2010 Subsidiary Timetable Offer vs. Schedule 5 Non Compliances in Virgin West Coast Trains Track Access Agreement**; including Appendices

Annex “A”

*Extracts from the Network Code (D3.2.3, D3.2.7 & D3.2.8);*

- Annex "B" : Extract from the WCTL TAC (Schedule 5, Clause 7.1);*
- Annex "C" : E-Mail of Assurance from Network Rail dated 01/10/09;*
- Annex "D" : Minutes of Network Rail Timetable Meeting on 09/11/09 offering further assurances that resolution would be achieved by May 2010;*
- Annex "E" : Map of Virgin Trains Network*

6.2. **Network Rail's Response** to the above, including Appendices

- Annex "A" Access Condition D3.2.8 and D5.1*
- Annex "B" Paragraph 7.1 of Schedule 5 of the Track Access Contract*
- Annex "C" Section 4.6 from the section 18 application form for the new TAC*
- Annex "D" Rules of the Route Section 4 between Watford Junction and Bournemouth*
- Annex "E" The Decision Criteria Access Condition D6*
- Annex "F" Paragraphs 7.5 -7.8 of Schedule 5 of the Track Access Contract*

6.3. In the light of an assertion in Network Rail's response at paragraph 5.3 that "Network Rail with the agreement of the Train Operators decided to reduce the amount of unplanned delay during times of two track working between Euston and Rugby, between Rutherglen East Junction and Eglinton Street Junction on the approaches to Glasgow Central, between Stafford and Crewe, Dutton and Edge Hill and Balshaw Lane and Preston by actually timing the railway on a two track, slow line, basis for all operators", Network Rail had been asked, by the ADC Secretary to produce the documentary evidence to support this contention, and in particular the basis upon which the agreement had been achieved. In response Network Rail had tabled

- 6.3.1. Notes of a meeting (Virgin Trains WCML EEA – VHF Timetable; NAUM119) on Friday 24<sup>th</sup> July 2009 between WCT and Network Rail;
- 6.3.2. Notes of **LM SLC 2TT 2010 meeting 4/8/09**; Issue LM/VT SLC conflict resolution; meeting attended by representatives of WCT, London Midland and Network Rail; and follow up e-mails relating to agreement to retiming of 1F27, 5P10 and 1A01;
- 6.3.3. Notes of meeting on 18/08/2009, **HOBC discussions WCML South**; meeting attended by representatives of WCT, London Midland, Freightliner and Network Rail; and
- 6.3.4. Notes of meeting on 27/08/09: Review of VT Engineering Allowances and EEA access principles, attended by representatives of WCT and Network Rail.

6.4. Opening statements from WCT and Network Rail. The WCT statement also tabled three new documents, namely

**Annex 1** Extracts from **ORR's Section 18 Approval letter** dated 09/12/2008

**Annex 2** Extract from **NETWORK RAIL and WEST COAST TRAINS' RESPONSE DOCUMENT TO ALL SECTION 18 CONSULTEES 2008**

**Annex 3** Extract from **NETWORK RAIL and WEST COAST TRAINS' SECTION 18 APPLICATION 2008**

6.5. Answers to questions posed by the Panel Chairman and Members.

- 6.6. Subsequent to the Hearing,
- 6.6.1. Network Rail submitted, by e-mail, an amendment to its submission, commencing *"It came to light after the hearing that the Network Rail submission paper contained an error in that section 5.2 stated that the Rules of the Route had been agreed by WCTL. This is an inaccurate representation of the position, as the May 2010 Rules of the Route is the subject of a dispute between WCTL and Network Rail registered as TTP291..."*
- 6.6.2. Network Rail's revision to its evidence was put to WCT, who in its reply drew the Panel's particular attention to **"ORR's determination of journey time protection for First ScotRail Limited (ScotRail)"** dated 1<sup>st</sup> February 2010, as offering clarification of some of the key concepts in the dispute.
- 6.7. As a consequence of these last two interventions the Panel reviewed its determination to ensure, in particular, that it took account of the ORR determination, given that such determinations have, by ADR Rule A1.17(b), binding authority.

### Some preliminary issues of definition; the relevant contractual provisions

7. The procedures to be followed in the formulation of the Rules of the Route, the Draft Timetable and the First Working Timetable to translate the Firm Rights of the Train Operator into Train Slots, and the Firm Rights of Network Rail to provide for Restrictions of Use are covered variously in Condition D4, and the Track Access Contract between WCTL and Network Rail, originally prepared for the December 2008 Timetable and now consolidated into the version dated 11<sup>th</sup> December 2009. Part D of the Network Code was re-issued on 26<sup>th</sup> November 2009, and all quotations relevant to this case are from these versions of these two documents (unless otherwise noted).

#### Network Code : Part D - TIMETABLE CHANGE

##### DEFINITIONS

<b>"Scheduled"</b>	<i>"means, in relation to the quantum timing or any other characteristic of a train movement, that quantum timing or other characteristic as included in the applicable Working Timetable"</i> [WCT TAA Schedule 5 Part B]
<b>"Working Timetable"</b>	<p><i>"means the Timetable which Network Rail is obliged to draw up pursuant to Condition D1.6.1"</i> [Network Code condition A1.2]</p> <p><b>Condition D1.6 Working Timetable</b></p> <p><b>"1.6.1</b> Network Rail shall draw up a timetable showing, so far as reasonably practicable, every train movement on the Network, including:</p> <p>(a) every service for the carriage of passengers by railway, every service for the carriage of goods by railway, every Ancillary Movement and every other Service;</p> <p>(b) the times of arrival and departure of trains at origin and destination, at every intermediate stopping point and at appropriate passing points; and</p>

	<p>(c) all relevant timing allowances,</p> <p>as they shall have been amended pursuant to Part H and including goods train planning publications and documents detailing platforming arrangements.</p>
<b>First Working Timetable</b>	<p>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; [Network Code Part D]</p>
<b>"Firm Right"</b>	<p>"means:</p> <p>(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</p> <p>(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";"</p> <p>[Network Code Part D "Definitions"]</p>
<b>"Flexing Right"</b>	<p>means a right, exercisable by Network Rail, either</p> <p>(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</p> <p>(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;</p>
<b>Applicable Rules of the Route</b>	<p>"means the Rules of the Route in force in respect of the Routes on the Principal Change Date 2008, as from time to time amended or replaced under Part D of the Network Code"</p> <p>[WCTL –Front End Consolidated to 5<sup>th</sup> Supplemental Clause 1.1 Definitions]</p>
<b>Applicable Rules of the Plan</b>	<p>"means the Rules of the Plan in force in respect of the Routes on the Principal Change Date 2008, as from time to time amended or replaced under Part D of the Network Code"</p> <p>[WCTL –Front End Consolidated to 5<sup>th</sup> Supplemental Clause 1.1 Definitions]</p>
<b>Journey Time</b>	<p>means the time in the Working Timetable to be taken by a Service in travelling between the specified departure point and specified destination for that Service (including Pathing Time, station dwell time, performance allowances, engineering recovery allowances and any other allowances as provided for</p>

	<i>in the Applicable Rules of the Plan and or the Applicable Rules of the Route” [WCT Track Access Contract Schedule 5 “Definitions”]</i>
<b>Key Journey</b>	<p><i>means a Passenger Train Slot with the characteristics specified in the first second or third columns of Table 6.2 [Fastest Key Journey Time] or Table 6.3 [Maximum Key Journey Time]”.</i></p> <p><i>[Columns 1,2 &amp; 3 in both tables define respectively Service Description, Calling Pattern and Specified Equipment ]</i></p>
<b>Key Journey Time</b>	<p><i>“means a Fastest Key Journey Time or a Maximum Key Journey Time.</i></p> <p><i>[In Tables 6.2 and 6.3 the numerical values associated with these categories are set out in column 4, and expressed in minutes between the nominated origin and destination (and on occasion an intermediate point)]</i></p>
<b>“Restriction of Use”</b>	<p><i>means in respect of any day, any restriction of use of all or any part of the Routes (other than one caused by a Recovery Allowance which was contained in the Applicable Rules of the Plan relevant to that day notified to each Bidder on or before the end of the Drafting Period under Part D of the Network Code) which results in:</i></p> <p><i>(a) a difference between the Applicable Timetable on that day as compared with the First Working Timetable in respect of that day: and/or</i></p> <p><i>(b) a difference between the First Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day” [WCTL TAA: Schedule 4 “Part 3” Definitions]</i></p>
<b>Network Rail Restriction of Use</b>	<i>“means any Restriction of Use other than an Operator Restriction of Use” ” [WCTL TAA: Schedule 4 “Part 3” Definitions]</i>
<b>Restriction of Use Day</b>	<i>“means a day on which a Network Rail Restriction of Use is taken or deemed to be taken” [WCTL TAA: Schedule 4 “Part 3” Definitions]</i>
<b>Recovery Allowance</b>	<i>“means an allowance for additional time incorporated in the First Working Timetable or (where the Train Operator requests that the allowance is not incorporated in the First Working Timetable and Network Rail complies with that request) the Applicable Timetable to allow a Train to regain time lost during an earlier part of its journey” [WCTL TAA: Schedule 4 “Part 3” Definitions]</i>
<b>Applicable Timetable</b>	<i>means, in respect of any day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Condition D1.6.1 as at 22:00 hours on the day prior to that day” [WCTL TAA: Schedule 4 “Part 3” Definitions]</i>

**Extract from Schedule 5 of the WCT Track Access Contract dated December 2008**

**7 Provisions applicable to Journey Time protection**

**Restriction on changes to Rules of the Route and Rules of the Plan**

**7.1 In relation to the Applicable Rules of the Route and the Applicable Rules of the Plan:**

- (a) Network Rail shall not propose or agree to any amendments to the Applicable Rules of the Route or the Applicable Rules of the Plan which would prevent it from Scheduling a Journey Time in the Weekday, Saturday and Sunday Working Timetables:
  - (i) which is equal to or less than the Fastest Key Journey Time specified for at least one Passenger Train Slot for each of the Key Journeys specified in Table 6.2 in respect of each Weekday; and
  - (ii) which is equal to or less than the relevant Maximum Key Journey Time specified for every Passenger Train Slot consistent with each Key Journey of the type specified in Table 6.3;
- (b) paragraph 7.1(a) shall not apply in relation to any such amendment which is proposed by the Train Operator or effected pursuant to the order of an appeal body under Part D of the Network Code or any other competent tribunal; and
- (c) Network Rail shall not be in breach of paragraph 7.1(a) to the extent that the failure to Schedule any Journey Time in accordance with paragraph 7.1(a)(i) or (ii) is the result of any Network Rail Restriction of Use, Competent Authority Restriction of Use or Operator Restriction of Use (as these terms are defined in or for the purposes of Part 3 of Schedule 4).

**A binding authority: Extracts from “ORR’s determination of journey time protection for First ScotRail Ltd” [1<sup>st</sup> Feb 2010] [the “ScotRail case”]**

**“The model clause journey time protection provisions**

**44. The model passenger contract provides for three different types of journey time protection:**

- maximum journey times;
- maximum key journey times; and
- fastest key journey times.

These are all caps on the journey times that Network Rail may schedule a service in the timetable. The differences are explained below.

**45. Maximum journey times provide journey time caps for all services on a specified route with the same calling pattern. However, in advance of the development of a timetable, these caps are automatically amended to reflect any changes in sectional running times, station dwell times, performance allowances, engineering recovery allowances and any other allowances provided for in the Rules of the Route (RoR) or RoP. They are therefore a cap on the amount of pathing time which Network Rail can insert.**

**46. Maximum key journey times are similar to maximum journey times in that they provide journey time caps for all services on a specified route with the same calling pattern. However, as these are “key” journey times, Network Rail is not permitted to propose or agree to any changes to the RoR/RoP that would prevent it from scheduling a service within the maximum key journey time cap. Because maximum key journey times apply to a**



number of services, rather than just one service per day as is the case for fastest key journey times (see below), we expect there to be a reasonable degree of headroom included within the cap to ensure that there is not an undue constraint on Network Rail's flexibility to timetable the network on behalf of all users.

47. *Fastest key journey times apply only to one train per day, and therefore give the least flexibility to Network Rail. They are intended to protect the capability of the network by establishing the fastest time that a train can travel between set points on the network, subject to a very limited degree of flexibility. This time would not necessarily be achievable for all train slots, but gives the operator a "headline" journey time. Fastest key journey times would, for instance, be used for "flagship" intercity train slots. To exercise this right, the operator must bid for at least three slots on any weekday with the characteristics specified in the table. Network Rail can then choose which of the train slots should run within the fastest key journey time. In practice, these journeys would generally have minimal pathing time. As with maximum key journey times, Network Rail is not permitted to propose or agree to any changes to the RoR/RoP that would prevent it from scheduling a journey time within the fastest key journey time cap.*
48. *The difference between maximum journey times and the two types of "key" journey times is therefore relevant during the RoR/RoP process at the start of each timetable process. When it comes to timetabling the trains following establishment of the RoR/RoP, the protection works the same way for all three i.e. they must be timetabled within the specified journey times in accordance with the terms of the contractual protection."*

#### **"Journey times review notice process"**

51. *Virtually all rights in a track access contract are subject to the RoR and the RoP. In respect of the RoR, this is because rights should not unduly obstruct Network Rail's maintenance and renewal requirements. In respect of the RoP this is because it is quite likely that that certain allowances contained within them may need to change over the lifetime of a track access contract.*
52. *Among the very few rights that are not subject to the RoP is key journey time protection where Network Rail is prevented from proposing or agreeing to any amendments to the RoP which would prevent it from scheduling a key journey time. Because of the considerable constraint this places on Network Rail, key journey times would normally only be agreed for an operator's most commercially important services on key routes.*
53. *However, because it is envisaged that there may occasionally be a very good reason to change the RoP which would result in a breach of the journey time protection, or conversely, that the journey time protection should be tightened, e.g. in order to take account of line speed improvements, and the parties cannot agree this mutually, the model contract contains a process whereby either party can seek to amend any of the journey time protections in Schedule 5."*

#### **"ORR's approach to approving journey time protection"**

55. *We expect contractual journey time protection to contain a degree of flexibility so that Network Rail can provide for changes to successive timetables over the life of the contract, including accommodating future growth. We would usually expect the majority of journey time protection to be in the form of maximum journey times which are subject to the*

*RoP/RoR which include industry consultation, agreement and appeal procedures if necessary.*

56. *Because of the restrictions they place on Network Rail's flexibility in constructing the timetable, in our C&Ps [criteria and procedures] we say that we would not expect all journeys to be covered by key journey times. We would expect this level of protection to be given "to an operator's most commercially important services on key routes". These journey times should include a reasonable amount of headroom above the minimum achievable to afford Network Rail some flexibility in the design of the timetable.*
57. *We do not specify what we mean by "an operator's most commercially important services on key routes" but consider that they would be those services where there is a very strong relationship between journey time and passenger demand that makes it a commercial imperative for the operator to have contractual protection as extended journey times could have a significant adverse affect on the operator's revenue. On these services, journey time is a key factor in the competitiveness of rail against other modes of transport. This is particularly the case for intercity services where private or air transport can provide viable alternatives for customers"*

*"101. Our policy is that maximum key journey times should include a reasonable amount of additional time above the clean path time (i.e. the minimum achievable time) to afford Network Rail that same flexibility in the design of the timetable(in this [Scotrail] dispute we have referred to this flexibility as "headroom"). Under the model contract provisions, even with "key" journey times Network Rail can propose changes to the RoP, e.g. to extend sectional running times, as long as it can still timetable the service within the key journey time cap."*

*"110. ...in considering the services for which ScotRail has sought journey time protection we have had regard to the following principles:*

- (a) because of the constraints they place on Network Rail, key journey times should only be approved for services that are very commercially important (i.e. in terms of passenger revenue);*
- (b) other than in very exceptional circumstances we should not approve provisions in a bilateral contract that frustrate multilateral network code processes;*
- (c) we should not object to any of the protection that Network Rail is prepared to offer on the basis that we are broadly content with what is proposed."*

### **The Panel's findings of fact in respect of the Dispute**

8. A new Timetable for WCT accelerated services was introduced starting in December 2008. This Timetable had been evolved over the previous two years using a development Timetable to test the feasibility of meeting all Train Operators' requirements.
9. Over the same period a new Track Access Contract between Network Rail and WCT was developed and agreed. Central to the detail that was submitted to the ORR for approval under S 18 of the Railways Act 1993, were Firm Rights which were essentially derived from the implemented December 2008 Working Timetable, reinforced by a very detailed, and route-section specific, set of Maximum and Fastest Key Journey Times. The Panel notes that within the WCT Track Access Contract

- 9.1. the drafting of all the schedules (in particular Schedule 5 Table 6 'Journey Times', and paragraph 7.1) is consistent with the Template Passenger Track Access Agreement, but that
- 9.2. all WCT services have the benefit of "key" journey time protection whether in 'Table 6.2: Fastest Key Journey Times' or 'Table 6.3: Maximum Key Journey Times'; there are no services governed only by Table 6.1 Maximum Journey Times.
10. In parallel with the implementation of the WCT VHF Timetable, Network Rail had pursued two other initiatives, namely
  - 10.1. in support of the "Seven-day Railway" concept, the Efficient Engineering Access (EEA) protocol, agreed with the DfT., as a benchmark for the future extent of Restrictions of Use to be included into Rules of the Route, but not itself incorporated into the contractual framework of the Track Access Regime; and
  - 10.2. complementary proposals affecting those sections of route where four tracks are normally available, but where there is scope during reduced traffic hours (principally Saturday evening and Sunday morning) for all traffic to be moved over 2 lines (the 2 Track Timetable Railway) ("2TTR"), making the other two available for maintenance, including the use of High Output Track Machines.
11. 2TTR is not a new concept, but poses two challenges to the production of an Applicable Timetable:
  - 11.1. running times between key stations can be materially affected by
    - 11.1.1. whether the Fast or Slow lines have widely differing speed capabilities, and thus which are used; and/or
    - 11.1.2. whether the pairs of lines diverge, and are of differing length (e.g. Hanslope to Rugby via Weedon or Northampton) and therefore impose differing running times, and/or
    - 11.1.3. there are significant restrictions on scheduling trains at either end of the 2TTR sections (e.g. limitations on parallel moves, or requirements for wrong line running); and
  - 11.2. scope for faster trains to overtake slower ones is limited.

In consequence, each permutation of 2TTR requires the production of a different Timetable.
12. To address this problem Network Rail has proposed, and asserts it has had agreed by all Train Operators, that over those sections of route where 2TTR is to be a regular occurrence all trains should be timed according to running times and allowances geared to the slowest trains and the slowest routes, and that the one schedule should apply for all permutations of 2TTR. WCT. Any such exercise, however beneficial to the overall utilisation of the restricted section of route has the potential to affect most severely the Operator of the fastest trains.
13. WCT admits that no train by train check was made of whether the Train Slots in the December 2008 and May 2009 Timetables were consistent with its Firm Rights in the December 2008 Contract. Such a check was, however, undertaken of the Offers made in respect of WCT's Bids for the December 2009 Timetable, which identified that a significant number of Train Slots offered did not meet the Key Journey Times. Given the stage of development that the December 2009 Timetable had reached when the scale of these non-compliances were identified, WCT agreed that it would not formally contest them, but only on the understanding that Network Rail would ensure that such non-compliances would be addressed in the May 2010 Timetable. This reference arises because the Offers made to WCT in respect of the May

2010 Timetable proved, on checking against WCT's Firm Rights, to have comparable levels of non-compliance, and not to fulfil the undertakings that WCT believed Network Rail to have given.

14. the Parties are agreed that

- 14.1. as between the 2008/2009 and 2009/2010 Timetables there have been NO changes of consequence to either the Rules of the Plan or Rules of the Route;
- 14.2. WCT's bids for the May 2010 Timetable were all compliant with its Firm Rights, as to quantum and Key Journey Times, and that they were all internally conflict free (i.e. no instances where two WCT Bids were mutually incompatible); and
- 14.3. neither party had undertaken to measure the contractual compliance of the timetable offers issued at December 2008 or May 2009. Both parties further acknowledged that some of the breaches of the WCT Track Access Contract that were at issue in relation to the December 2009 and May 2010 timetable offers could potentially have been present in the Timetable applicable from December 2008.

**The Contentions of the Parties**

- 15. WCT contends that, in Table 6.2 and 6.3 Key Journey Times for first or last Weekday trains, and for services on Saturdays and Sundays are explicitly increased (by comparison with the generality of weekday Journey Times) to cater for engineering works, perhaps involving operation of a 2TTR schedule over those sections of route where such might apply. It follows therefore, that Offers for weekend services that exceed those already extended journey times both breach individual Firm Rights, and are specifically precluded by the Track Access Contract. Such Offers require certain allowances to be counted twice
- 16. WCT argued its case by reference to the administrative processes necessary to achieve the approval by the ORR of an application under Section 18 of the Railways Act, and by one specific provision in the signed Track Access Contract. In particular WCT drew the Panel's attention to statements made by Network Rail, in a succession of documents, that Network Rail would not require to extend Key Journey Times for the purpose of undertaking renewals or maintenance. Thus
  - 16.1. "Part 4.3 ("Adequacy") of our joint Section 18 application to the ORR that *"....additional time is allowed in the timetable to cover the effects of renewals work, with this additional time shown in the rights...."*. Furthermore, that *"....Overall, Network Rail is confident that the improvements in technology and the work already completed (to the WCML) together with journey time flex, will enable sufficient levels of engineering access...."*; [quotations from Annex 4 to WCT's opening Statement]
  - 16.2. in the Parties' joint response to the comments from Section 18 consultees this was further underscored;  
*"In respect of journey times, these generally have two minutes flex. Network Rail considers that this is sufficient to flex WCTL's services to accommodate other operators' trains without compromising overall journey times to any great extent. ... In addition, Network Rail's existing engineering allowances have been built into the contractual journey times. It is expected that, once the upgrade is complete and EEA is established, the amount of allowance will reduce, but the journey times will remain fixed, thereby effectively affording Network Rail an increase in flex."*; [quotations from Annex 3 to WCT's opening Statement]

- 16.3. in the ORR approval letter, dated 9<sup>th</sup> October 2009, these assurances from Network Rail were re-emphasised, and put into context

*"The parties said that, to deliver value for money to the taxpayer and for passengers to enjoy the full benefits of the upgrade, it was essential that the route performed as agreed with DfT as sponsor of the project. They believe that the level of specification of the rights they have agreed is necessary to deliver the Service Level Commitment (SLC) in the franchise. ...*

*Network Rail said that it believed that the rights sought still provided it with sufficient flex to enable future timetables to be developed without unduly constraining its ability to path other operators....*

*One of the constraints on Network Rail in offering a potentially more reliable timetable is Virgin's journey time protection. Although the journey time caps are tight, Network Rail said that the flexibility it retained was sufficient. In addition, Network Rail said that when compiling the journey time caps, it had used the existing engineering allowances. Network Rail believes that once the upgrade is complete, and Efficient Engineering Access is established, the amount of engineering allowance will decrease whilst the journey time caps will remain fixed." [quotations from Annex 2 to WCT's opening Statement]*

- 16.4. Accordingly WCT argued that, "Network Rail's obligations, with regards to delivering the contracted journey times, are clear. Whilst the Network Code and ROTR / ROTP form part of WCTL TAC; Paragraph 7 of Schedule 5 [**'Provisions applicable to Journey Time protection'**], and paragraph 7.1 "**Restriction on changes to Rules of the Route and Rules of the Plan'**"] also applies ..., and clearly states that because of the nature of the journey time protection afforded to WCTL, (which was agreed with Network Rail and approved by the ORR), the ROTR / ROTP processes are subordinate to such protection."
- 16.5. Specifically WCT contended that the failure to comply with the Key Journey Time for the Train Slots in dispute reflected a failure by Network Rail to respect the provisions of paragraph 7.1 ( "In relation to the Applicable Rules of the Route and the Applicable Rules of the Plan: (a) Network Rail shall not propose or agree to any amendments to the Applicable Rules of the Route or the Applicable Rules of the Plan which would prevent it from Scheduling a Journey Time in the Weekday, Saturday and Sunday Working Timetables which are equal to or less than the relevant Maximum Key Journey Time specified for every Passenger Train Slot consistent with each "Key" Journey of the type specified in Table 6.3..." In other words, WCTL "Key" Journey Time rights, (unlike MJT rights) can only be amended by ROTR / ROTP **outside**, in this case, the auspices of West Coast's two line railway constraints" [quotations from WCT's opening Statement]
17. **Network Rail**, whilst not contesting that the 100+ disputed Train Slots resulted in journey times that were not within the durations specified in WCT's Firm Rights, argued that other provisions of the Network Code, in particular the Decision Criteria (Condition D6), and another of the subparagraphs to paragraph 7.1 of Schedule 5 entitled Network Rail to flex WCT's Offers to durations in excess of those in its Firm Rights.
18. Specifically, Network Rail argued that paragraph 7.1 (c), exempts it from compliance with Key Journey Time provisions where there is a need to cater for Restrictions of Use;

*"In relation to the Applicable Rules of the Route and the Applicable Rules of the Plan:*

- (c) Network Rail shall not be in breach of paragraph 7.1(a) to the extent that the failure to Schedule any Journey Time in accordance with paragraph 7.1(a)(i) or (ii) is the result of*

*any Network Rail Restriction of Use, Competent Authority Restriction of Use or Operator Restriction of Use (as these terms are defined in or for the purposes of Part 3 of Schedule 4”.*

19. In its opening statement Network Rail asserts that, out of 118 non-compliant offers 88 are covered by this exemption (*“as indicated in the Network Rail submission to the Panel, on weekdays 4 of the 16 trains mentioned by WCTL are affected by Network Rail restrictions of use, on Saturdays 15 of the 22 trains mentioned by WCTL are affected by Network Rail restrictions of use, and on Sundays 69 of 80 trains mentioned by WCTL are affected by Network Rail restrictions of use”*).
20. In regard to the other 30 instances, Network Rail cites
  - 20.1. some specific Rights that it considers to have been wrongly documented in the Track Access Contract;
  - 20.2. some Train Slots that can be adjusted into compliance;
  - 20.3. instances where WCT's Train Slots have been flexed to accommodate the Train Slots of other Train Operators, and
  - 20.4. a specific instance where an adjustment has been necessary to a Northbound WCT service at Liverpool, to allow time for a Southbound WCT service to depart the same platform.
21. In respect of the 2TTR issue
  - 21.1. Network Rail's opening statement states that *“on Sunday mornings all trains are timed via Northampton to and from London Euston as shown in the Rules of the Plan. These diversions and other times when two track working, that is only using two of the four lines due to engineering work, has traditionally been left up to the signallers on the day to regulate and this had been the intention with the December 2008 timetable. Recently it has been decided as an industry to actually time the railway on two tracks to reduce delays; this move to a properly timed timetable has been successful.”*
  - 21.2. In its submission, this is further amplified, and justified in part by reference to two of the Decision Criteria, as in  
*“Network Rail with the agreement of the Train Operators decided to reduce the amount of unplanned delay during times of two track working between Euston and Rugby, between Rutherglen East Junction and Eglinton Street Junction on the approaches to Glasgow Central, between Stafford and Crewe, Dutton and Edge Hill and Balshaw Lane and Preston by actually timing the railway on a two track, slow line, basis for all operators. This decision was in accordance with Decision Criteria (e) maintaining, renewing and carrying out other necessary work on or in relation to the Network and (l) avoiding wherever practicable frequent timetable changes, in particular for railway passenger services. In relation to Decision Criteria (l) there are a number of occasions when it would be possible to time the trains to depart later than currently planned. For example departures from Euston on Sunday mornings and Sunday evenings could be planned to run via Weedon with a 15 minute time saving however on the occasions that the engineering work pattern requires a diversion via Northampton the train would have to depart earlier than advertised so the train maintained its path to destination. For this reason all trains are timed for two track operation and diversion via Northampton so passengers are not left stranded in the evening after missing the last train or facing a long wait for the next train on a Sunday morning”.*

22. Network Rail sums up its case in its opening statement with the proposition *"Whilst it might be possible to produce a new timetable within all the train operators' contractual rights, Network Rail is of the view that this would be hugely wasteful of resources and may ultimately prove impossible. As WCTL has been unwilling to negotiate slightly extended journey times for these trains, Network Rail has approached the ORR to ask them to give a journey time review notice for the WCTL TAC as allowed by paragraph 7.5 of schedule 5"*.

### **The Panel's findings of entitlement in respect of the Dispute**

23. During the course of exchanges at the hearing the parties were reminded that the Panel's must *"reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis"* (Rule A1.18). It follows that the Panel cannot take account of considerations for which the agreed Track Access Contract does not make provision. In particular,
- 23.1. whilst there may be provision (in Schedule 5 paragraph 7.5) for the Office of Rail Regulation to undertake a Journey Time Review, no such review has yet been initiated, and therefore the Panel must assess any case on the basis of the Firm Rights the Parties agreed, in their Section 18 submission, should be incorporated into the Track Access Contract, and that ORR approved;
- 23.2. by the same token, the Panel has been given no evidence of a provision that exempts a party from fulfilling those obligations, into which it has willingly entered, on the basis that it *"is of the view that this would be hugely wasteful of resources and may ultimately prove impossible."*
24. That said, the starting point for the Panel's considerations is that responsibility for best use of the Network, and for ensuring that it is the most efficiently renewed and maintained is, subject only to the overall approval of the ORR, the exclusive responsibility of Network Rail. To find therefore against Network Rail, the Panel would have to be satisfied that Network Rail
- 24.1. had materially misinterpreted its rights in respect of the execution of one of the procedures to which it is contracted through the Track Access Agreements and the Network Code, or that it
- 24.2. had frustrated a specific right of the appellant Train Operator, or that it
- 24.3. had made a capricious decision which did not take into account the facts of the case, the procedures in Part D, or the guidance embodied in Condition D6, the Decision Criteria.
25. In this reference the Panel was given, by each party, a list of services (the lists differed) about which the parties did not agree as to their degree of compliance with WCT's Firm Rights. The Panel considered that
- 25.1. it did not have the detailed information necessary to enable it to make such service by service determination;
- 25.2. there was scope for it to make a determination on the issues of principle, sufficient to permit the parties to determine the appropriate outcome for each disputed service, on the basis of their own deeper understanding of the specifics; and that
- 25.3. the issues of principle at stake are generally exemplified in the specific disagreements affecting the implementation of 2TTR between Euston and Rugby (the parties, when taxed with this last proposition, acknowledged that this was broadly the case) .
26. The Panel then addressed the arguments advanced by the Parties, regarding the respective force of sub-paragraphs 7.1(a) and 7.1(c) of Schedule 5, and the apparent "stand-off" between

- 26.1. WCT's claim that its Key Journey Times are protected by 7.1(a) from changes in the Rules of the Route/Plan, versus
- 26.2. Network Rail's claim that the existence of a Restriction of Use can, under 7.1(c), override that protection.
27. The Panel, taking cognisance of both the words that appear on the face of WCT's Track Access Contract, and the interpretation of the Key Journey Time concepts set down by ORR in paragraphs 44 to 48 of the "ScotRail Case", concluded that it required to clarify
- 27.1. how far the discretions in paragraph 7.1 might be differentiated in both effect and force; and
- 27.2. whether either party has construed one of the sub-paragraphs incorrectly, and, if so, what that implies for their case.
28. The Panel found the interpretation in respect of subparagraph 7.1(a) to be comparatively straightforward, subject to taking into account the following definitions, some of which are peculiar to this Track Access Contract, but as such are complementary to (i.e. not at odds with and therefore overridden by) those in the Network Code thus

<b>Applicable Rules of the Route</b>	<i>"means the Rules of the Route in force in respect of the Routes on the Principal Change Date 2008, as from time to time amended or replaced under Part D of the Network Code"</i> [WCTL –Front End Consolidated to 5 <sup>th</sup> Supplemental Clause 1.1 Definitions]
<b>Applicable Rules of the Plan</b>	<i>"means the Rules of the Plan in force in respect of the Routes on the Principal Change Date 2008, as from time to time amended or replaced under Part D of the Network Code"</i> [WCTL –Front End Consolidated to 5 <sup>th</sup> Supplemental Clause 1.1 Definitions]
<b>"Scheduled"</b>	<i>"means, in relation to the quantum timing or any other characteristic of a train movement, that quantum timing or other characteristic as included in the applicable Working Timetable"</i> [WCT TAA Schedule 5 Part B]

29. In response to questions, the Parties had agreed that, in practice, no changes to either the Applicable Rules of the Plan, or the Applicable Rules of the Route, had been either proposed or agreed

*"which would prevent [Network Rail] from Scheduling a Journey Time in the Weekday, Saturday and Sunday Working Timetables:*

- (i) which is equal to or less than the Fastest Key Journey Time specified for at least one Passenger Train Slot for each of the Key Journeys specified in Table 6.2 in respect of each Weekday; and*
- (ii) which is equal to or less than the relevant Maximum Key Journey Time specified for every Passenger Train Slot consistent with each Key Journey of the type specified in Table 6.3;"*

and that therefore neither the Rules of the Route nor the Rules of the Plan for the May 2010 Timetable should have impeded the offering of Train Slots compliant with WCT's Firm Rights, including in respect of Key Journey Times. In particular it was not evident to the Panel that the



various time values cited in the notes of the meeting of 18<sup>th</sup> August 2009, **HOBc discussions WCML South** [see 6.3.3 above], which appeared to have been used to compile the Euston to Rugby 2TTR had been either agreed to by WCT, or formally incorporated into the Rules of the Plan.

30. Given the extent of WCT's Table 6 protections, the view of ORR in the Scotrail case, appears decisive
46. *Maximum key journey times are similar to maximum journey times in that they provide journey time caps for all services on a specified route with the same calling pattern. However, as these are "key" journey times, Network Rail is not permitted to propose or agree to any changes to the RoR/RoP... and*
48. *The difference between maximum journey times and the two types of "key" journey times is therefore relevant during the RoR/RoP process at the start of each timetable process. When it comes to timetabling the trains following establishment of the RoR/RoP, the protection works the same way for all three i.e. they must be timetabled within the specified journey times in accordance with the terms of the contractual protection. "*
31. In the view of the Panel, these findings of the ORR, and the wording in Schedule 5 paragraph 7.1(a) are wholly consistent. They give to the two categories of Key Journey Time an extra level of protection, the practical effect of which is that such discretionary allowances (e.g. such as those discussed at the **HOBc discussions WCML South** meeting) should not be incorporated into WCT Offers where to do so would break the Key Journey Time commitments.
32. That said, and acknowledging that WCT is privileged in respect of the extent of its Journey Time protections, the WCT Track Access Contract does incorporate paragraph 7.1(c) into its text, and the Panel has to consider that this is there by design, and to cater for "real" contingencies.
33. Subparagraph 7.1(c) is also, taken on its own, fairly explicit: "*Network Rail shall not be in breach of paragraph 7.1(a) to the extent that the failure to Schedule any Journey Time in accordance with paragraph 7.1(a)(i) or (ii) is the result of any Network Rail Restriction of Use, Competent Authority Restriction of Use or Operator Restriction of Use (as these terms are defined in or for the purposes of Part 3 of Schedule 4)*"[emphasis added]
34. The relevant definitions are:

<b>"Restriction of Use"</b>	<p><i>means in respect of any day, any restriction of use of all or any part of the Routes (other than one caused by a Recovery Allowance which was contained in the Applicable Rules of the Plan relevant to that day notified to each Bidder on or before the end of the Drafting Period under Part D of the Network Code) which results in:</i></p> <p><i>(a) a difference between the Applicable Timetable on that day as compared with the First Working Timetable in respect of that day: and/or</i></p> <p><i>(b) a difference between the First Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day"</i>  [WCTL TAA: Schedule 4 "Part 3" Definitions]</p>
<b>Network Rail Restriction of Use</b>	<p><i>"means any Restriction of Use other than an Operator Restriction of Use" "</i> [WCTL TAA: Schedule 4 "Part 3" Definitions]</p>

<b>Restriction of Use Day</b>	<i>"means a day on which a Network Rail Restriction of Use is taken or deemed to be taken" [WCTL TAA: Schedule 4 "Part 3" Definitions]</i>
<b>"Working Timetable"</b>	<p><i>"means the Timetable which Network Rail is obliged to draw up pursuant to Condition D1.6.1" [Network Code condition A1.2]</i></p> <p><b>Condition D1.6 Working Timetable</b></p> <p><i>"1.6.1 Network Rail shall draw up a timetable showing, so far as reasonably practicable, every train movement on the Network, including:</i></p> <ul style="list-style-type: none"> <li><i>(a) every service for the carriage of passengers by railway, every service for the carriage of goods by railway, every Ancillary Movement and every other Service;</i></li> <li><i>(b) the times of arrival and departure of trains at origin and destination, at every intermediate stopping point and at appropriate passing points; and</i></li> <li><i>(c) all relevant timing allowances,</i></li> </ul> <p><i>as they shall have been amended pursuant to Part H and including goods train planning publications and documents detailing platforming arrangements.</i></p>
<b>"Flexing Right"</b>	<p><i>means a right, exercisable by Network Rail, either</i></p> <ul style="list-style-type: none"> <li><i>(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</i></li> <li><i>(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;</i></li> </ul>

35. Here the Panel finds that, in relation to WCT's very specifically protected Firm Rights, and Network Rail's rights to implement Restrictions of Use, the following considerations apply, and derive from the operation of all the procedures contemplated in Part D of the Network Code and the incorporated Rules of the Plan, and Rules of the Route:

35.1. Restrictions of Use are specific single events, each catering for particular work. They can be incorporated into the Working Timetable using the Rules of the Route consultation process as laid down in Conditions D2.1 **Review of the Rules of the Route/Rules of the Plan**, or D2.2 **Possession Strategy Notice**, or D4.8 **Supplemental Timetable Revision Process**, all of which processes are subject to challenge by Train Operators;

35.2. the outcome of such processes can be that

35.2.1. the work is be undertaken within the span of a Standard Possession Opportunity (Section 4 of the Rules of the Route);

- 35.2.2. the work requires possessions that exceed the Standard Possession Times and are detailed in Section 5 Possession Strategy and/or Section 7 Register of Possessions;
- 35.3. individual Restrictions of Use established in accordance with the due processes and incorporated into the Applicable Rules of the Route, may require rescheduling of WCT trains, and such rescheduled Train Slots need not, in accordance with the terms of Paragraph 7.1(c), comply with the Key Journey Time provisions in Table 6;
- 35.4. in the absence of any specific Restriction of Use (which may include a recurring Restriction of Use), extending WCT's Journey Times beyond the limits defined in Table 6 (e.g. to accommodate a standard 2TTR) has no contractual sanction, and is therefore a breach of WCT's rights.
36. The Panel considers that Network Rail has not, in this instance, and in relation to its advocacy of the particular form of 2TTR, properly understood the function of the Decision Criteria, or the limits of Flexing Rights. Thus
- 36.1. the Decision Criteria only come into any force in those circumstances explicitly contemplated by the Network Code, where there is the potential need for Network Rail to exercise its discretion in relation to possible conflicts of priorities, for example
- 36.1.1. as between the Firm Rights of two or more Train Operators, as in Conditions D3.2, or D4.5; or
- 36.1.2. as between the Firm Rights of any Train Operator and those of Network Rail, as in Condition D2.1 or D4.8.
- In either case, recourse is to be had to the Decision Criteria as providing the benchmark for deciding which of several permissible courses of action is the better justified. The Decision Criteria cannot be prayed in aid as a reason for initiating a new policy, or for circumventing provisions within the Track Access Contract.
- 36.2. a Flexing Right is not available other than in the circumstances specifically contemplated in the definition of the term, namely
- 36.2.1. in preparation of the First Working Timetable or in responding to a Spot Bid, in which case limited to options that are "*consistent with the Firm Rights (if any) of the Bidder*"; or
- 36.2.2. where there may be cause to vary an accepted offer, to comply with directions from an Appeal body (ADP or ORR), to accommodate certain kinds of special passenger service, or
- 36.2.3. to accommodate a Restriction of Use included in the Rules of the Route, where a Train Operator has failed to bid in accordance with Condition D4.8.3.
37. For all the foregoing reasons, whilst the Panel, as "*a knowledgeable peer group with relevant railway experience*" [ADR Rule A1.3(a)], might understand the potential benefits of a single, consistent 2TTR for the duration of the May 2010 Timetable, as making best use of limited track capacity, reducing the workload in altering the Timetable Week, and giving constant expectations to passengers, it finds that such an initiative, where unrelated to agreed Restrictions of Use, is directly prejudicial to the Firm Rights of WCT.

## The Panel's Determination

38. The Panel therefore determined, that, in respect of each of the issues raised by the parties, as follows:

- (a) ***“Network Rail, in relation to those Firm Access Rights listed as non-compliant, is reasoned to be in Breach of WCTL Schedule 5 Track Access Agreement”;***
- (b) ***“Network Rail [should] be directed to resolve ALL those non compliant services listed, bringing them back to within their contractual Maximum or Fastest ‘Key’ Journey Time(s)”.***

38.1. Except where Network Rail can demonstrate, on a case by case basis, that there are such specific circumstances as are contemplated by WCT Schedule 5 paragraph 7.1(c), namely a Restriction of Use that has been incorporated into the Applicable Rules of the Route

38.1.1. it is bound by the provisions of WCT Track Access Contract Schedule 5 paragraph 7.1(a), including in respect of the Key Journey Time Firm Rights with which all Offers of Train Slots should comply and therefore

38.1.2. is precluded, by those same provisions, from proposing for incorporation into the Applicable Rules of the Plan, or Applicable Rules of the Route, any amendments that, would prevent it from:

scheduling a Journey Time which is equal to or less than the Fastest Key Journey Time in respect of at least one Passenger Train Slot for each of the Key Journeys specified in Table 6.2 in respect of each Weekday; and

which is equal to or less than the Maximum Key Journey Time specified for every Passenger Train Slot consistent with each Key Journey of the type specified in Table 6.3; and

38.1.3. should be taking all necessary steps to ensure that only Train Slots compliant with WCT's Firm Rights are incorporated into the Working Timetable.

38.2. Where a current Offer does not comply with a Key Journey Time provision at the behest, or with the acquiescence, of WCT, Network Rail is not absolved from the need to achieve compliant Offers, but the Panel would accept that this might be a matter of lower priority.

**Network Rail asked the Panel to determine that**

- (a) ***Network Rail has provided paths during the times of agreed restriction of use (in the Rules of the Route) in accordance with the decision criteria (e) and (f).***

38.3. For the reasons set out above, the Panel finds that except where Network Rail can demonstrate on a case by case basis that paragraph 7.1(c) of WCT Track Access Contract Schedule 5 applies, Network Rail has not adequately complied with the Firm Rights of WCT, and that the reasons given for that non-compliance reflect an imperfect understanding of the relevant provisions of the Track Access Contract;

- (b) ***That Network Rail is correct to approach the ORR for a Journey Time Review Notice to amend the relevant journey times in the contract.***

38.4. Network Rail is correct that, under the terms of Paragraph 7.5 of Schedule 5 of the Track Access Contract, the ORR has the option of issuing a Journey Time Review notice. There is no explicit provision for any party to prompt the ORR into issuing such a notice; the wisdom or grounds for initiating such a prompt is a matter exclusively for Network Rail, and not therefore a matter for the Panel's consideration.

39. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

A handwritten signature in black ink, appearing to read 'Bryan Driver', with a stylized, cursive script.

**Bryan Driver**  
**Panel Chairman**

26<sup>th</sup> April 2010