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**TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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**Determination in respect of reference TTP384**  
(following a hearing held at Eversholt Street, Euston on Tuesday 29 March 2011)

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**Appendix 2**

“Performance issues identified in paragraph 24 of the ORR’s letter of 24 November 2010”



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(following a hearing held at Eversholt Street, Euston on Tuesday 29 March 2011)

**Hearing Chair:** Suzanne Lloyd Holt

**The Panel:**

Neil Sutton (First ScotRail) - elected Panel member for Franchised Passenger Class, Band  
1

Robert Holder (First Greater Western) - elected Panel member for Franchised Passenger  
Class, Band 1

Nigel Oatway (EWS International) - elected Panel member for Non Passenger Class, Band  
2

Matthew Allen (Network Rail) - appointed Panel member for Network Rail

**Parties to the dispute:**

For First Capital Connect Ltd ("FCC")

John Beer	Access Contracts Manager
Paul French	Head of Planning
Laura Dunley	Commercial Director

For Network Rail Infrastructure Limited ("NR"):

Fiona Dolman	Customer Relationship Executive (FCC)
Paul Hebditch	Programme Manager (Operations & Customer Services)
Richard Taylor	Acting Customer Relationship Executive (Southern)

For Southern Railway Ltd ("Southern")

Kai Hills	Head of Franchise and Access Contracts
Dave Walker	Head of Train Specification and Planning

**In attendance**

Tony Skilton (Committee Secretary)

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**1 INTRODUCTION AND JURISDICTION**

- 1.1 This dispute arises out of a complaint by FCC relating to NR's Offer of the First Working Timetable in respect of the Subsidiary Change Date 2011. The complaint related originally to the offer to Southern of Train Slots to enable the operation of a fourth fast train each hour between London Victoria and Brighton (and vice versa) during the Monday to Friday "off-peak" and all day Saturday periods. By the date of the Hearing, NR had advised that Southern had submitted a Spot Bid to remove the Train Slots in question from the Subsidiary Change Date and would seek to implement them, instead, from 11 September 2011.

By the date of the Hearing, Southern had also withdrawn its proposal to operate the fourth train on weekdays in the 2011 Subsidiary Timetable. The subject matter remaining in dispute was therefore limited to the fourth train which Southern proposed to operate on Saturdays in the 2011 Subsidiary Timetable from 17 September 2011.

- 1.2 The Panel was satisfied that the matter was one which should be properly be heard by a Timetabling Panel, meeting under the terms of Network Code Part D, as all matters in question arose because a "*Bidder is dissatisfied with [a] decision of Network Rail made under this Part D*" - D5.1.1.

- 1.3 Two matters arose at the commencement of the Hearing. The first was of a procedural nature. In NR's single party submission dated 21 March 2011, NR had responded to FCC's detailed explanation of the issues in dispute by responding simply to a number of FCC's points as "*not relevant to SO services*" without seeking to explain why those arguments were not so relevant. In an endeavour to clarify their arguments, FCC submitted a further short paper on 28 March and asked that I exercised my discretion and admit that list of comments on NR's rebuttals. I referred the Hearing to Access Dispute Resolution Rule H44:

*"The Hearing will be chaired by the Hearing Chair who may, in his absolute discretion make any order in respect of procedure at the Hearing which he considers appropriate including whether to admit additional evidence (including oral evidence) from any party and the degree to which weight should be given to such additional evidence".*

It seemed to me that the additional short paper put in by FCC was helpful to the parties and to the Panel and on the basis that, in my judgment, no-one was prejudiced by its inclusion, I exercised my discretion to admit those additional FCC comments in evidence.

1.4 The second issue which arose at the commencement of the Hearing was the extent to which ORR's November 2010 correspondence relating to Access Rights on the Brighton line was relevant to this Hearing. My tentative direction at the outset of the Hearing was that it was not and I confirm that view at paragraphs 6.1 and 6.2 below.

1.5 The abbreviations used in this Determination are as set out on pages 1 and 2 hereof or as specified in the text below.

## **2 BACKGROUND**

2.1 As appears from the submissions of the parties - see for example paragraph 5.2 of FCC's single party submission dated 4 March 2011 - the First Working Timetable Offer in respect of the Subsidiary Change Date 2011 was issued on 19 November 2010 and included Train Slots to enable Southern's aspiration to operate a fourth fast train each hour, in each direction, between London Victoria and Brighton during Monday to Friday "off-peak" and all day Saturday periods. Prior to the hearing:

2.1.1 On 3 February 2011 NR advised FCC that Southern had submitted a Spot Bid to remove the Train Slots in question from the Subsidiary Change Date and would seek to implement them, instead, from 11 September 2011.

2.1.2 Prior to the Hearing, all parties were informed that the Bid to run the Monday to Friday "off-peak" services had been withdrawn and accordingly the only issue before the Panel was whether or not NR should be directed to withdraw their offer to Southern of Saturday Train Slots between Brighton and London Victoria for the fourth fast train per hour. FCC's submission was essentially that NR has incorrectly applied the Decision Criteria at Part D6 of the Network Code.

2.2 As part of the background to the present dispute, it is relevant to mention an earlier decision of a Timetabling Panel (TTP356/375) heard on 23 August 2010. In the Determination of that dispute, the Hearing Chair determined that the Offer of the First Working Timetable - Condition D3.2.7 of the Network Code - should stand. FCC appealed that decision under Condition M6.1 of the Network Code. That appeal was subsequently withdrawn following the ORR's decision not to approve access rights required by Southern to operate the aspirational fourth fast train per hour between London and Brighton ("the Fourth Train"). I refer further to the decision of the ORR at paragraph 6.1 below.

## **3 RELEVANT PROVISIONS OF THE NETWORK CODE**

3.1 The provisions of the Network Code in issue in this reference are, principally:

3.1.1 D3.2.2 Compilation of the First Working Timetable

3.1.2 D3.2.7 Offer of the First Working Timetable

3.1.3 D3.2.8 Acceptance of the First Working Timetable

3.1.4 D6 Decision Criteria

3.2 The relevant extracts are set out at Appendix 1 to this Determination.

## 4 SUBMISSIONS

4.1.1 Before I turn to a review of the submissions of the parties, it is right that I record at this point that whilst the original parties to the dispute were FCC and NR, at an early stage in the proceedings, Southern indicated their wish to declare themselves a Dispute Party and this was accepted.

4.1.2 While certain parts of the submissions and evidence will specifically be referred to in the course of this Determination, I have taken into account all of the written and oral submissions and evidence of the parties in reaching my decision.

4.1.3 The written material provided to the Panel was as follows:

4.1.3.1 Sole submission from FCC, dated 4 March 2011;

4.1.3.2 Sole response from Southern, dated 18 March 2011;

4.1.3.3 Sole response from NR, dated 21 March 2011;

4.1.3.4 Response document from FCC provided on 28 March 2011 re certain issues raised in the sole response of NR listed under 4.1.3.3 above;

4.2 FCC's principal arguments were as follows:-

4.2.1 FCC's arguments were extensively canvassed in their written submissions referred to under 4.1 above and in response to points of clarification put to them at the Hearing by Panel members and by me but essentially, those arguments relate to (1) the effect on service reliability and performance of the acceptance by NR of Southern's Bids for the Fourth Train, and (2) concerns about Rules of the Plan issues (3) the way in which the Decision Criteria have been applied by NR. I deal with each of those points in turn.

4.3 Performance/Service Reliability

4.3.1 We are told - see for example paragraph 7.11 of FCC's single party submission - that following the ORR's decision letter of 24 November 2010 and a subsequent meeting to understand the reasoning behind the ORR's decision, NR commissioned further performance modelling. That modelling took the form of a Railsys report dated 28 January 2011. It is fair to say Panel members and I found that report of quite considerable assistance. The modelling was on the following basis:

*"the May 2010 timetable was used as a base case against which the performance of the December 2010 and May 2011 timetables were compared. A typical Wednesday from each timetable was modelled, although only the off-peak and shoulder-peaks (08:30 - 17:30) were assessed"* - see page 3 of the Railsys report.

4.3.2 Relevant extracts from the Railsys report include the following:

*“the lateness of all three timetables remains reasonably consistent prior to Windmill Bridge Junction, with May 2011 increasing from this location all the way through to Brighton. This is due to the extra Southern services being run between Victoria and Brighton that merge into traffic from Windmill Bridge Junction. This is consistent with the delay results. Both May 2010 and December 2010 follow a similar pattern after Windmill Bridge Junction although the December 2010 increases more sharply on the Brighton mainline approaching Brighton. This is due to less space around the paths in December 2010 as explained in Section 7.1.1” - page 26*

*“By introducing one extra train per hour, in each direction, fifteen extra Southern services in total between London Victoria and Brighton, the May 2011 timetable performs measurably worse than the May 2010 and December 2010 timetables in terms of both delay and punctuality. Under nominal simulation and perturbed simulation the overall delay increases and the punctuality decreases”. - page 30*

- 4.3.3 In support of their expressed concern about the adverse effect on performance of the introduction of the new train, FCC also produced in evidence, at appendix 6 to their submission, the paper which they had submitted to ORR opposing Southern’s application for the relevant access rights.

- 4.3.4 In that paper, FCC submitted as follows:

*“It is also one of the worst performing routes in the London commuter network, with both the Southern and FCC Passenger Performance Measure (PPM) being around 85%, far below the industry average.*

*This is clearly demonstrated by the chart on the following page. This demonstrates that with few exceptions the worst performing service groups (shown in red) are those of Southern and FCC that have trains operating on the London-Brighton route. This demonstrates the poor level of performance on the BML when compared to the rest of London and the Southeast.*

*These poor levels of performance reflect the existing congestion as well as the complexity of the route. Whilst Network Rail have an overall objective to deliver PPM of 93% across London and the Southeast by the end of CP4, we believe any further increase in services will exacerbate the current performance issues and make this target even more challenging to achieve” - pages 1 and 2.*

- 4.3.5 In that paper, FCC also commented on compliance with Rules of the Plan:

*“FCC agrees that there is an element of non-compliance already within the BML timetable and that timetables have not always been fully compliant with RotP. However we believe that this practice should not establish an automatic right to continue and extend non-compliance when performance issues are identified” - page 12*

#### 4.4 Rules of the Plan issues.

FCC referred to a number of non-compliances as identified at paragraph 7.22 of their submission: essentially, they adopted what had been said by ORR in their Access decision dated November 2010.

#### 4.5 Application of Decision Criteria

- 4.5.1 In relation to Criterion D6(a) it was FCC's submission that the new train is not in fact an efficient and economical development of the network. They submitted alternatives, such as strengthening, should be considered and that the impact on congestion and performance should be taken into account. They argued that the overall assessment under this Criterion should be neutral or negative.
- 4.5.2 In relation to Criterion D6(b), FCC submitted that the Sussex RUS at it stood identified a gap and that the Fourth Train proposal made it more difficult to fill that gap.
- 4.5.3 In relation to Criterion D6(c), FCC pointed out that Southern had confirmed that the Fourth Train was not part of their Franchise Service Level Commitment and that it was a commercial timetable development. In their submission Criterion D6(c) was not relevant.
- 4.5.4 In relation to Criterion D6(d), FCC argued that the Fourth Train would have adverse performance implications and this Criterion should therefore be rated as strongly negative.
- 4.5.5 In summary, relying on the alleged failure by NR properly to take account of performance implications and the Rules of the Plan, and correctly to apply the Decision Criteria, FCC asked that NR be directed to withdraw the offer to Southern of Saturday Train Slots between Brighton and London Victoria for the fourth fast train per hour.

#### 4.6 NR's position was argued as follows:

- 4.6.1 It was NR's view that the ORR's November 2010 letters regarding an Operator's Access Rights Application should not be taken into account at the Panel stage of a dispute hearing within Part D of the Network Code. NR asserted that it had correctly applied the Decision Criteria in the acceptance of the Train Slots Bid by Southern.
- 4.6.2 NR underlined their understanding that Part D 3.2.1(d) does not require an operator to have firm rights for paths submitted in their Bid. NR accepted that rights need to be properly established prior to the operation of services on the network.
- 4.6.3 In relation to a number of submissions made by FCC - specifically 7.5, 7.6, 7.7, 7.8, 7.13, 7.14, 7.15, 7.17, 7.18 and 7.19, NR asserted that FCC's arguments were not relevant to Saturday services. They did not however explain in their submission why they took that view.
- 4.6.4 NR further submitted that they were satisfied that the benefits that the additional capacity the Saturday services provided, outweighed the potential

performance impact they may import upon the timetable. On that basis, NR asserted they had applied the Decision Criteria correctly, namely that they had given greater weight to Criterion 6(a) than to Criterion 6(d).

4.6.5 Accordingly, NR invited the Panel to determine that NR's Offer to Southern of Saturday Train Slots between Brighton and London Victoria was correct.

4.7 Southern's position was argued as follows:

4.7.1 Southern did not accept FCC's argument that the Fourth Train was not needed and Southern could better strengthen existing services to provide additional capacity on them. Southern asserted that the Fourth Train was proposed to provide passengers with access to more and faster services and to an alternative London destination to that of London Bridge namely London Victoria. Southern observed that, in their view, passengers who travel on Saturdays do so overwhelmingly for leisure rather than for business, making the point that London Victoria as a more attractive destination than London Bridge is particularly relevant in relation to Saturdays.

4.7.2 Southern also rejected FCC's argument that the Fourth Train was designed to be primarily abstractive of FCC's revenue and therefore potentially failing to satisfy Decision Criterion D6(o). This argument was not canvassed in any detail at the Hearing and effectively was not pursued.

4.7.3 Further, Southern contested FCC's argument that the Network (specifically the BML) has insufficient capacity, is already too congested and/or performance is too poor for it to be proper that the Fourth Train should be timetabled. Southern argued that the likely performance impact resulting from the introduction of the Fourth Train on Saturday is minimal. They made the point that punctuality is usually higher on Saturdays than on weekdays. They asserted that the benefits from the introduction of additional services are likely to be significant and will far outweigh any performance impact.

4.7.4 Further, Southern refuted FCC's assertion that inadequate mitigation measures had been planned by NR Southern and other parties using the BML to enable proper timetabling. Southern's position was that they had a robust project methodology in place for the management of timetable change. In support of that contention they referred to their representations to ORR in support of their Track Access application (their Appendix 1) and to their mitigation initiatives (their Appendix 5). Examples cited included enhanced turnarounds at Brighton and modified paths.

4.7.5 In relation to application of the Decision Criteria, Southern's position was this. Southern agreed that the primary Decision Criteria to apply in this case are those at D6(a) and D6(b). It was Southern's view that greater weight should be given to Decision Criterion D6(a) than to Decision Criterion D6(d). They said that Decision Criterion D6(a) is all about "*sharing the capacity of the network*". In their submission, accepting Southern's bid is an appropriate sharing of capacity.

4.7.6 Southern further submitted that Decision Criterion D6(d) is about maintaining and improving service reliability. In their submission, the



extent of performance issues relating to the introduction of a Fourth Train on Saturdays are minimal and insignificant. They asserted that service reliability would not be affected by accepting Southern's bid and referred to the previous operation of a number of trial non-passenger carrying "fourth train" services to test their assumptions in this regard.

- 4.7.7 In relation to FCC's assertions regarding breaches of the Rules of the Plan (now known as the Timetable Planning Rules), those were incorrect. It was Southern's position that there was only one instance referred to by FCC which might be considered a breach of the Rules and, in Southern's submission even that instance should not be considered a breach. As appears below, the Rules of the Plan issues were extensively discussed and clarified in the course of oral exchanges at the Hearing.

## **5 ORAL EXCHANGES AT THE HEARING**

- 5.1 Having studied the various submissions of the parties as listed at paragraph 4.1.3 above and having listened carefully to their opening statements, Panel members and I sought clarification on a number of matters arising out of those submissions and statements. Although the parties' answers to questions were not put as sworn evidence, I have taken the view that the Panel and I were entitled to regard them as true statements provided to assist the Hearing and I have therefore taken them into account when reaching my determination. The following specific points were clarified:

- 5.1.1 The Panel specifically sought clarification in relation to Rules of the Plan breaches. At the Hearing we referred to, and in this Determination I also refer to, annex 1 to Southern's submission which lists a number of bullet points taken from the ORR's access rights decision letter dated 24 November 2010. In my judgment, it was helpful and appropriate to use that list of bullet points to obtain clarity and consensus from the parties as to what were and were not acknowledged to be Rules of the Plan non-compliances. A copy of that annex 1 is appended to this Determination at Appendix 2. The position emerged as follows:

- 5.1.1.1 All parties agreed that there is no issue in relation to bullets 1, 4, 7 and 8;
- 5.1.1.2 In relation to bullets 2 and 9 it was agreed that these were technical non-compliances only and not relevant to the Fourth Train;
- 5.1.1.3 Bullets 5 and 6 are non-compliances with the Rules of the Plan. In both cases work has apparently been done by Southern and NR which has improved the position which is better than before, but still non-compliant. The bullet 6 non-compliance is historic but does not apply to the Fourth Train.
- 5.1.1.4 This left bullet 3 in respect of which there was disagreement between the parties as to the interpretation of the Rules of the Plan. FCC's interpretation is that there is a non-compliance which does affect the Fourth Train. There was a clear difference of interpretation. Southern argued that if a down train passes over Keymer Junction (where there is not a

station) and the previous stop was at Wivelsfield, the train is a fast train and a two minute headway applies behind it. FCC's interpretation was the opposite - given the close proximity of Wivelsfield Station to Keymer Junction, such a train would be a slow train so under the Rules of the Plan a four minute headway applies behind it.

The essential point here is the parties all acknowledged there were already existing non-compliances.

- 5.1.2 In answer to questions from the Panel as to where NR derives its authority to offer a train path which contains non-compliances, the response from NR was that it was the way in which they interpreted the Rules of the Plan and Condition D3.2.2.(b) of the Network Code which NR believed gave them some latitude in adjusting the terms of the Rules of the Plan.
- 5.1.3 In answer to a Panel question commenting that no passenger numbers have been provided to the Hearing but that if there was demand, should not the formation of the existing trains be strengthened. Southern's response was that their aim was to grow the size of the market. This would be generated by improving frequency and journey times rather than by strengthening existing formations.
- 5.1.4 In relation to what priority is given to the Fourth Train under the terms of Condition D3.2.1, NR responded that the Fourth Train was considered to be last priority on the basis it had no contractual rights and was not advised to Network Rail on or before the Priority Date (Condition D3.2.3(d)).
- 5.1.5 In relation to Panel questioning on the terms of the Sussex Route Utilisation Strategy, it was FCC's position that the Sussex RUS as it stands at the moment has identified a gap and the Fourth Train proposal makes it more difficult to fill that gap. NR countered that they did not see anything in the RUS as being a clear statement which would preclude the introduction of this service. NR further confirmed, in relation to Decision Criterion D6(b), they regarded that Criterion as neutral.
- 5.1.6 In relation to Decision Criterion D6(c) (compliance with contracts/franchise agreements) Southern were asked whether the Department for Transport approved the operation of the Fourth Train. Southern's response was that the Fourth Train was not a requirement of their Service Level Commitment but the Department for Transport were aware of its proposed introduction and had not objected. FCC made the point that, equally, the Department for Transport has not invited FCC to help run the additional train by accepting any timing adjustments.
- 5.1.7 In the course of questioning, NR acknowledged that the Railsys report was relevant to Saturday operations. It emerged that FCC had asked NR to undertake a "Saturdays Only" Railsys analysis but NR had not commissioned one.
- 5.1.8 In response to a question to NR as to why they had not changed the Rules of the Plan to reflect the various Brighton line concerns, NR responded they were in the process of doing that now.

5.1.9 NR were asked what was happening to mitigate performance risks in light of the Railsys report. NR's response was that they had held risk workshops around the construction of the "Saturday Only" service.

5.1.10 There was detailed and careful questioning from the Panel on precisely which trains were the new fourth trains and over the lunch adjournment the parties were requested to prepare for the Panel an agreed form of the timings of the disputed Fourth Train in each direction. What emerged was that the relevant Fourth or new train as at September 2011 will be the xx21 from Victoria and the xx54 from Brighton which were acknowledged as currently constituting the additional "third train" introduced in the December 2010 Timetable.

5.1.11 It appeared there were subsisting non-compliances. The response from Southern was that if everyone kept to the Rules of the Plan, trains would never pass at Haywards Heath.

5.2 Those were the arguments and clarifications put to the Panel.

## 6 ANALYSIS

I now turn to my consideration and analysis of the arguments put by the parties.

6.1 Before I proceed with that analysis, it is right that I should give my judgment on the extent to which, if at all, the decision of ORR in its Access Rights decision letter dated 24 November 2010 is relevant to and/or binding upon the considerations of this Timetabling Panel Hearing.

6.2 In that letter, addressed to NR and Southern, ORR confirmed that it would not be approving Access Rights for certain additional services between London Victoria and Brighton. That decision was in response to a proposed agreed amendment to Southern's Track Access Contract as submitted by NR and Southern to the ORR for approval pursuant to Section 22 of the Railways Act 1993. Accordingly, when reaching its decision, ORR was exercising its statutory powers. ORR was specifically not exercising its appeal jurisdiction under Part M of the Code. A decision by ORR exercising its appellate jurisdiction would of course be binding on a Timetabling Panel. That is not the position here and whilst therefore it was of course open to the parties, and indeed helpful to the Panel, to submit to the Panel evidence previously submitted to ORR in the context of the Access Rights dispute, the ORR November 2010 decision is, in my judgment, not binding on this Panel. Support for that view is to be found in ORR's appeal decision against Determination ADP23 and in particular at paragraph 42 of that appeal decision:

*".....ORR's appeal jurisdiction under Part M of the Code arises contractually and not as a result of ORR's general regulatory function. In light of this, ORR does not accept that it should apply its S.4 duties when interpreting Condition J.7 of the Code and instead considers that it should apply the usual legal rules of contractual interpretation".*

6.2 As to relevance, the Panel and I did not have before us all the material available to the ORR when making its Access Rights decision and in the absence of all that evidence, we are not really assisted by the conclusion arrived at. Such evidence in

that dispute as has been disclosed to this Panel has been viewed on its merits and given such weight, if any, as is appropriate.

6.3 It was plain from the submissions of the parties and indeed from what emerged in the course of the oral exchanges at the Hearing that FCC's concerns fell essentially into three areas:

6.3.1 Concerns that the Fourth Train would add unacceptably to congestion and have an adverse effect on performance;

6.3.2 Concerns about whether NR have correctly applied the relevant Rules of the Plan;

6.3.3 Concerns that NR have not correctly applied the relevant Decision Criteria.

I deal with each of those issues in turn.

6.4 Performance and related issues

6.4.1 Essentially, and to reiterate the point, it was FCC's contention that the proposals for the Fourth Train would increase congestion and risks to performance. In support of that concern, FCC rely on the January 2011 Railsys report as at paragraph 7.13 of their submission. FCC reiterated and expanded on those concerns in their appendix 6 to their submission which was their paper presented to ORR in the context of the Access Rights dispute and which dealt with their contentions as to adverse effect on performance of the introduction of the Fourth Train. I have considered carefully the responses made by NR and by Southern, by NR in their written submission and by Southern in theirs, in particular taking account of Southern's appendix 1 which was their paper making their representations to ORR in the context of their Track Access application. I have considered, in particular, the mitigation proposals put forward by Southern (their appendix 5) and the performance assessment at appendix A to NR's submissions in reference TTP356 & 375 as referred to at paragraph 5.6 of NR's submission. In my judgment, NR have not sufficiently responded to FCC's expressed concerns sufficiently to enable those concerns to be allayed. Accordingly, those concerns remain live and are to be taken into account when reaching my Determination.

6.5 Rules of the Plan Issues

Essentially, it was FCC's submission that the addition of the Fourth Train would add to the levels of Rules of the Plan non-compliances on the Brighton to Victoria route and so increase the risks to performance - see for example paragraph 7.20(c) of FCC's submission. Given its importance, I have annexed at appendix 2 to this Determination what appears as annex 1 to Southern's submission, a document entitled "*Performance Issues Identified in Paragraph 24 of the ORR's letter of 24 November 2010*".

In the course of the Hearing, each of those bullet point non-compliances was discussed with the Panel and I have set out at paragraph 5.1.1 the areas where the parties were not able to agree, in particular in relation to bullet point 3. The Panel and I were not asked to determine the issue but it seemed to us, reading the extract on Headways provided at page 2 of that document that the words "*if in*

*doubt apply the use of the "slow" headway" provided the answer and that there was therefore a non-compliance.*

As appears from paragraph 5.1.2 above, it was NR's submission that the effect of Condition D3.2.2(b) was to give it certain flexibility in relation to the applicable Rules of the Plan. In the light of this very clear divergence of views, I have reviewed very carefully the provisions of that Condition D3.2.2 and indeed have sought assistance from the provisions of the new Part D which is to apply to the preparation of the timetable commencing on 11 December 2011 and of subsequent timetables, to which I refer below.

D3.2.2 as currently in force and applicable to the present dispute provides as follows:

*"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 Rail'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 Routes and the applicable Rules of the Plan...."*

Applying those provisions, in my judgment what NR had to do was, against the backdrop of the Rules of the Plan, try to balance their own and the aspirations of each Bidder. Put another way, the First Working Timetable is to take account of the applicable Rules of the Plan.

It emerged in submissions and in questioning at the Hearing that there were subsisting non-compliances and it was FCC's contention that, when allocating Train Slots, NR should not seek to introduce further non-compliances to those already existing. Based on the evidence presented to the Hearing, it is not clear to me that the Slots offered do take 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 Plan"*. [my emphasis] In other words, I do not consider that on the evidence presented NR have balanced sufficiently the aspirations of Southern and its own aspirations as expressed in the applicable Rules of the Plan particularly as the non compliances introduced by Network Rail are not actually expressed in the Rules of the Plan in any case. It follows that, in my judgment, the provisions of Condition D3.2.2 do not give NR the flexibility they have sought to argue for in relation to the Rules of the Plan.

In that connection, I draw some support from the new Part D and in particular, from the provisions of Condition D4.2.2(a) which provides as follows:

*"Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it.....subject to the following principles:*

- (a) A New Working Timetable shall conform with the Rules ["the Timetable Planning Rules and the Engineering Access Statement"] applicable to the corresponding Timetable Period;"*

I note in particular the use of the prescriptive “shall conform” which, in my view, lends weight to the construction I have placed on D3.2.2(b) namely the lack of flexibility there contained.

Accordingly, in my judgment, NR have failed to comply with the requirements of Condition D3.2.2.

#### 6.6 Application of Decision Criteria under Condition D6

The parties were agreed that the primary Decision Criteria for consideration in this case were those at D6(a) (sharing capacity and securing the development of the Network in the most efficient and economical manner) and D6(d) (maintaining and improving levels of service reliability). FCC also referred in their submissions to Decision Criterion D6(o) (taking into account the commercial interest of existing and potential operators in a consistent manner) but made no submissions on that Criterion at the Hearing. Neither Southern nor NR dealt with Criterion (o) in their submissions. Since none of the parties has addressed us in any detail on this Criterion, I do not propose to comment further on it here.

FCC in their submission also make a passing reference to Decision Criterion (b) (seeking consistency with any current Route Utilisation Strategy....) but presented no specific written evidence on the issue. As appears from paragraph 5.1.5 above, it would seem from answers to questioning at the Hearing that the terms of the Sussex RUS are of no particular assistance to this Determination. Accordingly, the crucial issue which emerges is the relative weight to be applied as between Decision Criterion (a) and Decision Criterion (d).

Criterion D6(a) refers to:

*“sharing the capacity, and securing the development, of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network;”*

Criterion D6(d) refers to:

*“maintaining and improving the levels of service reliability;”*

Panel members and I had, at the Hearing, a significant body of evidence produced by FCC which shed doubt on whether the addition of the Fourth Train would indeed maintain and improve levels of service reliability. That evidence was persuasive and was nowhere satisfactorily challenged by NR or Southern. Further, bearing in mind that the Train Slots bid for relate to “Saturdays Only” over a three month period from 17 September 2011 to 10 December 2011, so there is no obvious benefit under Criterion (a) particularly in relation to summer Saturday traffic means that, in my judgment, Criterion (a) carries less weight than Criterion (d).

The weight to be accorded to, respectively, Decision Criterion (a) and Criterion (d) is significant in this dispute and I have weighed very carefully the submissions of the parties and the evidence available. Given the very clear evidence presented by FCC to the effect that the introduction of the Fourth Train would have adverse reliability and performance consequences for all route users, and given that I

accept that evidence, it seems to me that NR should correctly have given greater weight to Decision Criterion (d).

In summary, taking into account (1) the weight of evidence in support of the expressed concerns about the effect on performance of the addition of the Fourth Train and (2) the way in which in my judgment the Decision Criteria are to be applied, I take the view that, even if I am wrong on the Rules of the Plan non-compliance issue, my conclusions in relation to (1) and (2) are sufficient to enable me to conclude that FCC's appeal should here succeed.

- 6.7 Before I proceed to my Determination, it is appropriate that I comment on the conduct of the parties. In relation to the submission prepared by NR, I had occasion to remind them of the provisions of Access Dispute Resolution Rule H21(b)(ii)(F)(2) which provide clearly that any documents referred to in a submission are to be annexed. In addition, and as I mentioned at the Hearing, Panel members and I had found the general lack of cross-referencing in the submission documentation unhelpful. I do encourage parties to try and assist Panel members and the Hearing Chair by explaining clearly why an appendix has been included and cross-referencing where appropriate. That said, all the parties conducted themselves in a constructive and helpful manner at the hearing itself and Panel members and I have done the best we can on the basis of the evidence available

## 7 DETERMINATION

Having considered carefully the submissions and evidence as set out in paragraphs 4 and 5 and based on my analysis of the legal issues as set out in paragraph 6

### I DETERMINE:

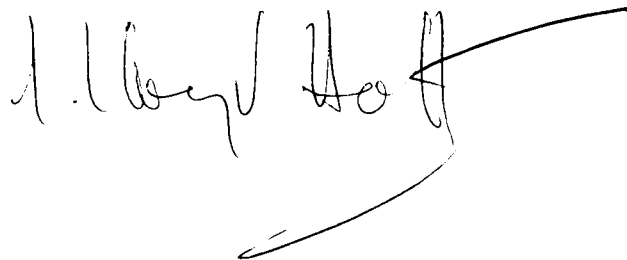
- 1 Network Rail be directed to withdraw the offer to Southern of the Saturday Train Slots between Brighton and London Victoria.

I confirm that, so far as I am aware, this determination is legally sound and appropriate in form.

Suzanne Lloyd Holt

Hearing Chair

2011 April 2011

A handwritten signature in black ink, appearing to read 'S. Lloyd Holt', with a long horizontal stroke extending to the right.

## APPENDIX 1

### *D3.2.2 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 Rail'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.

### *D3.2.7 Offer of the First Working Timetable*

Network Rail shall, on or before the last day of the Finalisation Period, provide to each Bidder, and to each Qualified Person who has (or on whose behalf another person has) first agreed to pay the reasonable costs of Network Rail in providing that information:

- (a) the Working Timetable which shall show:
  - (i) in respect of Principal Change Date, those Train Slots which Network Rail has decided to include in the Working Timetable commencing on that Principal Change Date; and
  - (ii) in respect of a Subsidiary Change Date, those Train Slots which Network Rail has decided to include in the Working Timetable commencing on that Subsidiary Change Date; and
- (b) details of those Train Slots which Network Rail has decided not to include in the Working Timetable.

### *D.3.2.8 Acceptance of the First Working Timetable*

A Bidder shall, in respect of

- (a) the Working Timetable notified in accordance with Condition D.3.2.7(a); or



- (b) the Train Slots notified in accordance with Condition 3.3.7(b) and any other Train Slots which the Bidder believes should have been notified in accordance with Condition D3.2.7.

within 10 Working Days of receipt of the notification advise Network Rail of any Train Slots which it disputes and will be the subject of a reference to the relevant ADRR Panel. Network Rail's decisions in respect of those Train Slots not so advised by the Bidder shall be deemed to have been accepted by the Bidder and may not be the subject of a reference to the relevant ADRR Panel or the Office of Rail Regulation pursuant to Condition D5.

#### **CONDITION D6 - DECISION CRITERIA**

The Decision Criteria consist of the necessity or desirability of the following (none of which necessarily has priority over any other):

- (a) sharing the capacity, and securing the development of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network;
- (b) seeking consistency with any current Route Utilisation Strategy which is either (i) published by the Strategic Rail Authority or the Department for Transport before 31 May 2006, or (ii) established by Network Rail in accordance with its Network Licence;
- (c) enabling a Bidder to comply with any contract to which it is party (including any contracts with their customers and, in the case of a Bidder who is a franchisee or franchise operator, including the franchise agreement to which it is a party), in each case to the extent that Network Rail is aware or has been informed of such contracts;
- (d) maintaining and improving the levels of service reliability;
- (e) maintaining, renewing and carrying out other necessary work on or in relation to the Network;
- (f) maintaining and improving connections between railway passenger services;
- (g) avoiding material deterioration of the service patterns of operators of trains (namely train departure and arrival frequencies, stopping patterns, intervals between departures and journey times) which those operators possess at the time of the application of these criteria;
- (h) ensuring that, where the demand of passengers to travel between two points is evenly spread over a given period, the overall pattern of rail services should be similarly spread over that period;
- (i) ensuring that where practicable appropriate provision is made for reservation of capacity to meet the needs of Bidders whose businesses require short term flexibility where there is a reasonable likelihood that this capacity will be utilised during the currency of the Timetable in question:

- (j) enabling operators of trains to utilise their railway assets efficiently and avoiding having to increase the numbers of railway assets which the operators require to maintain their service patterns;
- (k) facilitating new commercial opportunities, including promoting competition in final markets and ensuring reasonable access to the Network by new operators of trains;
- (l) avoiding wherever practicable frequent Timetable changes, in particular for railway passenger services;
- (m) encouraging the efficient use of capacity by considering a Bidder's previous level of utilisation of Train Slots;
- (n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Rules of the Plan; and
- (o) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.

In its consideration of paragraph (d) of this Condition D6, Network Rail shall not be entitled to determine that its Restrictions of Use of any part of the Network shall be as contemplated by any relevant maintenance contract by reason only of the terms and conditions of that contract. In this paragraph, "relevant maintenance contract" is a contract which Network Rail shall have entered into, or shall intend to enter into, with any person for the maintenance, renewal or the carrying out of any other work on or in relation to the Network.

## **APPENDIX 2**

Performance issues identified in paragraph 24 of the ORR's letter of 24 November 2010

## Annex 1

### Performance issues identified in paragraph 24 of the ORR's letter of 24 November 2010

#### ORR Paragraph 24 bullet 1

- 1 The XX.06 and XX.36 Victoria – Brighton conflict does not exist. In fact the Victoria – Brighton trains use platform 2 not platform 3 at East Croydon and have done for a number of years. The XX.06 and XX.36 depart 2 minutes ahead of the FCC trains in platform 3, but then continue non-stop to Brighton (whilst FCC stops at Gatwick Airport, Haywards Heath and Brighton). There is therefore no breach of the Rules. The ORR's view was based on a typographical error in a single spreadsheet rather than a review of the working timetable (attached at Appendix 4).
- 2 It is also pertinent to note that the XX.06 and XX.36 are existing services that have incorporated in the timetable for many years. This part of the ORR's decision letter was therefore irrelevant to the 4th train proposals.

#### ORR Paragraph 24 bullet 2

- 3 The analysis of the XX.17 and XX.47 Victoria – Littlehampton/Eastbourne issues at Haywards Heath is correct. As the ORR noted, 4 minutes is not necessarily appropriate. In this case the 2 minutes is a reduction compared to the previous timetable.
- 4 However, it is pertinent to note that this exact approach has applied since the December timetable change to the 3rd train (XX.21 from Victoria) without material problems arising. As Southern has previously set out, the Working Timetable often contains instances in which the Rules are not strictly complied with (see Appendix 1).
- 5 Southern notes that paragraph 22 of the ORR's letter of 24 November 2010 states "...Any non-compliance [with the Rules] should be reviewed and, other than in exceptional cases, the Rules amended if they are found to be incorrect or the timetable amended if the Rules are found to be correct". FCC's arguments are based on an assumption that the Rules are correct, which leads it to conclude that the timetable should therefore be amended (to remove the 4th train). In Southern's view in this instance it is not correct to make the assumption that FCC has made. This is a clear instance in which the Rules should be amended to keep pace with a timetable that works in practice.

#### ORR Paragraph 24 bullet 3

- 6 The description of the FCC service by the ORR as "*effectively being a slow train*" was not correct. There has been a long debate on the correct interpretation of this rule for the Sussex route, but the key factor is in the last bullet of section 5.2.1 of page 119 of the Rules in force for the May 2011 timetable which states:

## 5.2 Headways

### 5.2.1 Headway Values

- All times are in minutes. All routes are shown.
- Where track circuit block (TCB) signalling applies, the standard headways for each route are shown, together with any exceptions.
- "AB" indicates locations where absolute block signalling applies: here the headway is to be calculated from the transit time of the first of each pair of trains running between the consecutive block posts being considered. To the transit time shall be added 2 minutes to allow for signallers' actions. Exceptions are shown as AB (Absolute Block) and appear together with the actual headway value to be used, which includes the allowance for signallers' actions. Where there is an intermediate block signal, the absolute block section concerned shall be between this signal and the next block post in advance.
- Single lines and other forms of signalling are shown, together with any values applicable, where they occur..
- Where headways are shown as being "fast" or "slow" these descriptions refer to the service that the path is following i.e. Fast is a non stopping service and Slow is a stopping service. The headway value does not refer to running lines. The "slow" headway should be applied to a service following a preceding service which stops at either a station or any other location for operational reasons. The "fast" headway should be applied to a service following a preceding service which does not stop at that location. Immediately the preceding service stops at any location for any reason, the following service headway should be amended to the "slow" value. If in doubt apply the use of the "slow" headway.

- 7 The FCC XX.54 does not stop at Keymer Junction and so, as the fourth sentence in section 5.2.1 makes clear, at this timing point the "Fast" two minute rule applies. In any case, the XX.54 Bedford – Brighton is a Down train whilst the XX.50 Ore Victoria crosses behind 2 minutes later which complies with the Junction Margin rule.

ORR Paragraph 24 bullet 4

- 8 The XX.24 Bedford to Brighton passes Keymer Junction at XX.31½ in the Down direction. The XX.58 Eastbourne – Victoria crosses behind. This is not a Headway non-compliance as the trains are heading in opposite directions. As the headway rule in the Sussex Route Rules specifically refers to "*the path [the train] is following*" the ORR is not correct to suggest that the headway value applies. Instead the correct rule at Keymer Junction is the Sussex Side "Standard Values" shown on page 217 of the Rules for Junction Margins which states:

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**Standard Values - Sussex Side**

All times shown are in minutes. Where adjustments to sectional running times are shown, the value must be added to the normal SRTs shown in B Plan. Negative adjustments are specially identified.

Minimum station allowances are the minimum practical for the particular type of stock. These are shown with exceptions being listed by line of route where applicable.

Peak is defined as services arriving in London 0700 to 0959 and departing London 1700 to 1859

**Southern Measurement Train (SMT) – Eurailscout**

	Minutes	Notes
Minimum Turnround	7	
Standard Turnround	10	
Drivers PNB	30	Minimum allowance and must be taken between 2 <sup>nd</sup> and 4 <sup>th</sup> hours after leaving the depot. There can be no more than 5 hours between PNBs. If the PNB includes a turnround or reverse move this requires a 40 minute minimum
Maximum Shift Length	540	9 Hours
Recording must take place in daylight hours between 07.45 and 15.45. Transit moves are permitted outside these hours		
Platform sharing is permitted at Stations where it is permitted for other trains		

**Connectional Allowance** 5

**Dwell Time** ½  
Trains terminating and then running ECS in the same direction 1

<b>Junction Margins</b>		<b>Margin</b>
Between all conflicting moves		2
Resetting of route for a departing service following the arrival of a conflicting inwards service		1
Re-occupation of platforms when a change of direction or a conflicting move is involved		3
<b>Generic Rolling Stock Classes</b>		
<b>Train Class</b>	<b>TrainPlan timing load and ROTP values</b>	
Class 171	Class 170	
Class 375 and 377	Class 375	

- 9 The Junction Margin required between conflicting moves is 2 minutes and the gap between the XX.24 Bedford – Brighton and XX.58 Eastbourne – Victoria at Keymer Junction is 2½ minutes, which is compliant with the Rules.

ORR Paragraph 24 bullet 5

- 10 This issue has been revised for the May 2011 timetable. The XX.12 London Bridge – Brighton stops at Preston Park at XX.11½, the XX.21 Victoria – Brighton passes at XX.14½ (3 minutes behind), but then has 4½ minutes approaching Brighton. The platforming of this train has also been changed so that it has a 32 minute turnaround forming the XX.54 departure back from Brighton to Victoria. Following 4 minutes behind is the XX.17 Victoria – Littlehampton which stops at Preston Park and then the XX.27 London Bridge – Brighton FCC service passing at XX.22. This means that there is a 7½ minute gap between the XX.21 passing Preston Park and the next FCC train also continuing to Brighton which seems a robust gap. Clearing the 4½ minute pathing time for the XX.21 outside Brighton suggests that this train will in practice almost always arrive early. This part of the proposal has therefore been made fundamentally more robust.

#### ORR Paragraph 24 bullet 6

- 11 This issue has been improved for the May 2011 timetable by adding 1 minute of performance time to FCC services approaching Preston Park. This means that the headway between the XX.17 Victoria – Littlehampton and XX.27 London Bridge – Brighton is now 3½ minutes (from XX.18½ to XX.22). Since the Littlehampton service diverges after Preston Park towards Hove this is hardly a serious performance risk. It is also critical to note that the Littlehampton, London Bridge – Brighton and the following Victoria – Brighton trains have all run for many years.

#### ORR Paragraph 24 bullet 7

- 12 The issue here is the same as the one discussed above in relation to bullet 4. The trains in question are running in opposite directions. In this case the Victoria – Littlehampton service stops at Preston Park at XX.18½ and the Haywards Heath – Littlehampton service passes Preston Park at XX.48½ (from May 2011 XX.49½). However, the XX.19 and XX.49 are Brighton to Victoria trains running in the opposite direction. As these are in opposite directions the Headway rule does not apply. It is clear from the following extract from that Preston Park does not have a specific junction margin and so the “Standard Values” shown above apply:

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### **Preston Park**

#### **Dwell Time**

1 minute total shall be allowed for all peak services.

#### **Station Working Requirements**

Lovers Walk T&R.S.M.D to Preston Park – 5 minutes.  
Preston Park to Lovers Walk T&R.S.M.D – 5 minutes.

#### **Simultaneous moves not permitted**

Up train departing Platform 1  
Down train arriving Platform 1  
Down train departing Platform 1 towards Down Main

Up train arriving Platform 2  
Up train arriving Platform 2  
Down train arriving Platform 2

#### **Limit of Shunt**

Down Main (clear of T425)

#### **Length Limit**

12

- 13 The lack of a junction margin means that the standard value of 2 minutes applies. So, for example, where the XX.48½ passes in the down direction the gap is 2½ minutes before the Brighton – Victoria passes at XX.51. This is perfectly compliant with the Rules.

ORR Paragraph 24 bullet 8

- 14 The issue of turnaround times at Brighton has been resolved so that the XX.22 arrival will now form the XX.54 departure (32 minute turnaround) and the XX.52 arrival will now form the XX.24 departure (32 minute turnaround). This clearly resolves the ORR's concern as the turnaround times are considerably longer than either the existing Southern or FCC services at Brighton.

ORR Paragraph 24 bullet 9

- 15 This issue is, in part, due to a change made by FCC to call its own services at Three Bridges. Clearly FCC does not consider this rule to be material to performance as they made changes with exactly the same effect in December 2010. The reoccupation of platforms at Victoria on a sub 4 minute basis occurs regularly in the current timetable (and back as far as at least the 2001 timetable). For example in the Down direction FCC's own XX.24 Bedford – Brighton trains follow Southern's XX.36 from Victoria at 2½ minute headways from Stoats Nest Junction and 3 minute reoccupations at Gatwick. Equally in the up direction FCC themselves changed their timetable in December 2010 to reduce the headway involved:

So before December 2010 1T24 12.34 Brighton to Bedford stopped at Gatwick Airport but not Three Bridges:

- 1T24 arrived Gatwick in the May 2010 timetable at 12.59½ in platform 4 and departed 13.01
- 1U73 departed 13.05 from platform 1 to Victoria
- This was a gap of 4 minutes

From December 10 FCC times were different because they stop at Three Bridges and this train runs slightly later so:

- 1T24 arrives Gatwick at 13:00 in platform 4 and departs 13.01½
- 1U73 departs 13.05 from platform 1 to Victoria
- This is a gap of 3½ minutes.