
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of disputes references TTP493, TTP494 and TTP495

(following a hearing held at 1 Eversholt Street, London on 18 September 2012, adjourned to 24 September 2012 and reconvened on 12 November 2012)

The Panel:

Peter Barber Hearing Chair

Members appointed from the Timetabling Pool

Robert Holder	elected representative for Franchised Passenger Class, Band 1
Jason Lewis *	elected representative for Non-Franchised Passenger Class
Nick Gibbons	elected representative for Non-Passenger Class, Band 1
Paul Thomas	appointed representative of Network Rail

The Dispute Parties:

For Grand Central Railway Company Ltd ("**Grand Central**" or "**GC**")

Chris Brandon	Head of Systems, Alliance Rail Holdings Ltd (" Alliance ")
Chris Hanks	Head of Development, Alliance
Jonathan Cooper	Head of Compliance, Alliance
Ian Yeowart	Managing Director, Alliance

For Network Rail Infrastructure Ltd ("**Network Rail**" or "**NR**")

Andy Lewis	Operational Planning Project Manager – LNE Route
Matthew Allen	Operational Planning Manager – National
Daniel Grover **	Customer Manager – First Hull Trains & Grand Central

Interested party:

For East Coast Main Line Company Ltd ("**East Coast**" or "**EC**")

Shaun Fisher	Head of Operational Planning
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In attendance:

Tony Skilton	Secretary, Access Disputes Committee (" ADC ")
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* See 2.8 and 2.12 below

** See 2.12 below

Table of contents

1	Introduction, substance of dispute and jurisdiction	page 2
2	Background, history of this dispute process and documents submitted	page 2
3	Relevant provisions of the Network Code and other documents	page 6
4	Submissions made and outcomes sought by Dispute Parties	page 7
5	Oral exchanges and analysis of issues and submissions at the Hearings	page 23
6	Decisions and conclusions	page 48
7	General observations	page 54
8	Determination	page 56
Annex 1	Network Code, Part D – Extracts from Conditions D1.1.11 and D2.3.6 to D4.2.2	page 58
Annex 2	The Decision Criteria – 19 July 2011 version	page 62
Annex 3	The Decision Criteria – 16 March 2012 version	page 64
Annex 4	Extracts from Railways Infrastructure (Access and Management) Regs 2005	page 65
Annex 5	Correspondence concerning disclosure of documents	page 66
Appendix	Consolidated Transcript of the Hearing Proceedings for TTP493, TTP494 and TTP495 on 18th and 24th September and 12th November 2012	

1 Introduction, substance of dispute and jurisdiction

- 1.1 In this determination the abbreviations used are as set out in the list of parties above, in this section 1 and otherwise as specified in the text of the determination.

"ADRR" means the Access Disputes Resolution Rules

"ORR" means the Office of Rail Regulation

"PDNS" means a Priority Date Notification Statement

"Rights" means Firm or Contingent Contractual Rights as defined in Part D of the Network Code, either granted or applied for in accordance with a train operator's Track Access Agreement

"SX" means Saturdays excepted, i.e. Mondays to Fridays

"SO" means Saturdays only

"Timetable" or "New Working Timetable" means the New Working Timetable Publication for introduction in December 2012

"Parties" means the Dispute Parties and the Interested party

- 1.2 These three disputes arise out of events occurring and decisions made in the course of the bid and offer procedure conducted between Grand Central, an open access passenger operator, and Network Rail under Part D of the Network Code, in preparation for the compilation of the Timetable. The three disputes are connected and were registered by the ADC Secretary as TTP493, TTP494 and TTP495. Pursuant to ADRR B20, on 12 July 2012 the Allocation Chair ordered that the disputes should be heard together on the grounds that they concerned the same or similar subject matter and that it would be in the interests of efficient and fair resolution to do so.

- 1.3 The disputes concern the following matters:

TTP493 - the alleged failure of Network Rail to adhere to required timescales for producing the Timetable, as regards GC's proposed service 1A68 1518 (SX) Sunderland to London Kings Cross (and complementary return and SO services), resulting in NR's rejection for inclusion in the Timetable of GC's Access Proposal for these services;

TTP494 - Network Rail's rejection for inclusion in the Timetable of GC's Access Proposal for service 1D72 (apparently mistakenly referred to in GC's written sole reference as 1D81) 1608 (SX) London (Kings Cross) to Wakefield Kirkgate, allegedly due to NR's favouring East Coast's conflicting Access Proposal for service 1B88 1608 (SX) London Kings Cross to Newark; and

TTP495 - Network Rail's rejection for inclusion in the Timetable of GC's Access Proposal for service 1N93 1323 (SX) London Kings Cross to Sunderland, allegedly due to NR's favouring GB Railfreight's conflicting Access Proposal for service 6N50 1106 Maltby Colliery to Tyne Coal Terminal which had been bid as a Train Operator Variation.

- 1.4 I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with ADRR Chapter H to hear an appeal under the terms of Network Code Condition D5.
- 1.5 In its consideration of the parties' submissions and its hearing of the disputes, the Panel was mindful that, as provided for in Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

2 Background, history of this dispute process and documents submitted

- 2.1 GC originally notified its dispute of NR's apparent decisions on all three matters on 2 July 2012. The reference was duly notified by ADC to other potentially interested parties including East Coast, and it was initially proposed that a Timetabling Panel would hear the disputes on 9 August 2012. The Hearing Chair appointed for that date asked that a sole reference document for the three disputes be provided by Grand Central in the interest of seeking clarity of argument and also to facilitate early publication in anticipation that other Resolution Service Parties might

wish to participate in the proceedings. Network Rail was asked also to provide a sole reference document in response.

- 2.2 In the event, the hearing did not proceed on 9 August but was deferred at Network Rail's request, with Grand Central's agreement, because they were still in dialogue regarding the issues and also because of relevant regulatory outputs being anticipated imminently from ORR in relation both to Rights applied for by various train operators and to a Competition Complaint previously brought by Alliance against NR. With time passing, the Dispute Parties wished to proceed to a hearing and the dispute was reinstated at Grand Central's request, ORR having indicated its position on the Rights applications but not on the Competition Complaint.
- 2.3 A new hearing date was arranged for 18 September 2012, which necessitated a change of Hearing Chair. On appointment I consented to the Dispute Parties continuing to provide sole reference documents. By this time GC had notified a further dispute with NR which had been registered by ADC as TTP518. In the interests of efficiency, TTP518 was listed by ADC to be heard on the same day as the already consolidated disputes TTP493, 494 and 495, since it involved the same Dispute Parties GC and NR and their respective representatives and raised analogous issues of compliance with Part D of the Network Code.
- 2.4 The sole reference document from Grand Central was received on 28 August 2012 with some supplementary material following on 31 August. The response statement from Network Rail was received on 10 September. These documents from the Dispute Parties were made available to other potentially interested parties in accordance with established arrangements under the ADRR. East Coast subsequently opted to be represented at the hearing as an "Interested party" in relation to dispute TTP494.
- 2.5 In its submission, Grand Central referred to roles played in the timetabling process by its associated company Alliance and provided various items of correspondence involving that company. On 11 September (and following an earlier preliminary indication of the requirements), I issued a Directions Letter which called upon Grand Central to clarify its legal relationship with Alliance and the roles of GC and Alliance respectively in relation to the documents submitted by GC and the facts recorded in them (in relation to TTP518 as well as TTP493-5) and to provide certain other clarifications and information, including a chronology of events in relation to TTP493-5 and further supporting correspondence and other material. Network Rail was invited to comment on the further information so provided and this exercise was completed within the timescale set, on 14 September.
- 2.6 In accordance with ADRR H18(c), following receipt of the Dispute Parties' submissions, I reviewed them to identify any relevant issues of law and on the afternoon of 14 September the other Panel members and the Dispute Parties were informed that I did not consider there to be any overarching issues of law arising out of the submissions. I also noted that there were some issues of contract interpretation which, being of mixed fact and law, were the substance of the disputes to be determined.
- 2.7 The hearing commenced on 18 September 2012. TTP518 was taken first and was concluded that morning (with the determination being issued on 17 October 2012). TTP493-5 then commenced that afternoon. The Dispute Parties made oral opening statements in relation to all three disputes and were then questioned by the Panel. A transcription was made of the hearing proceedings, which included Declarations of Interest by members of the Panel.
- 2.8 It proved not practicable to complete the hearing proceedings on the afternoon of 18 September as lines of questioning were not concluded on that day, necessitating an adjournment. Of dates considered for reconvening without undue delay, 24 September proved the least inconvenient although it precluded one Panel member – Jason Lewis – from attending, due to a prior diary commitment. I was satisfied that the Panel would nevertheless remain quorate within ADRR H17; neither Dispute Party demurred and it was noted that any particular "open access" interests could still be represented by the Non-Passenger Class member of the Panel.
- 2.9 The adjourned hearing accordingly reconvened on 24 September 2012. Certain additional evidence which had been requested of Grand Central during the course of the 18 September

session was provided in readiness for the reconvened session. The hearing proceeded with further questioning of the Parties by the Panel, including some extended general debate as to the correct interpretation of certain critical provisions of Part D of the Network Code. In the event, several issues emerged on 24 September which necessitated the provision of further additional information by the Dispute Parties to substantiate their respective contentions.

- 2.10 5 October 2012 was set for completing exchange of the further material sought from the Dispute Parties and of applicable comments (including an invitation for East Coast to contribute observations). This exercise was completed within the timescale set. As the exchange of information and associated views of the Parties gave rise to certain fresh considerations, the Panel decided that the hearing should again be reconvened to enable some specific matters to be examined further by direct questioning of the Parties rather than in correspondence. I issued a summary of the issues arising out of the proceedings up to that point and the further information now provided by the Parties, which the Panel intended to be dealt with at the further reconvened hearing. These issues were communicated by ADC to the Parties on 23 October 2012. (The further material provided and the issues arising out of it are summarised in Section 4 below, Submissions of the Dispute Parties, at paragraph 4.14.3.)
- 2.11 Meanwhile on 17 October 2012, Alliance (presumed in this respect, at least, to be acting as agent for GC) had submitted a formal request for disclosure of various PDNS documents by Network Rail, asserting that it was in Network Rail's gift to share the information and that refusal hitherto to provide on the part of Network Rail did not give any comfort that Network Rail was correctly managing the relevant part of the process. Alliance stated that it sought the documents in order to determine the extent of Flex that Network Rail had at its disposal and to determine levels of priority under Network Code Condition D4.2.2. After conferring with the Panel members, I concluded that I should reject the request to order disclosure and this also was advised to the Alliance and the Dispute Parties on 23 October 2012. The text of the application from Alliance and my reasoned decision are appended as Annex 5.
- 2.12 After arranging and rearranging several possible dates for reconvening, and delayed by the non-availability of necessary participants, 12 November eventually proved the least inconvenient, although it again precluded Jason Lewis from attending and Daniel Grover (Network Rail) was also unable to be present. Network Rail did not consider this absence to be detrimental to its position.
- 2.13 The hearing accordingly reconvened for the second time on 12 November 2012, in relation to all three disputes. Following further extensive questioning by the Panel on the issues which I had previously notified, the Dispute Parties were given opportunity to make closing submissions and East Coast as an interested party (in relation to TTP494) was also afforded the opportunity to comment on the matters.
- 2.14 At the conclusion of the hearing on 12 November, having conferred with the other members of the Panel, I summarised the substance of my determination of the dispute, including its outcomes and the reasons for them, in an oral statement given *extempore*, as confirmed at the end of this written Determination. Immediately following this statement, East Coast raised an enquiry as to the consequences for its conflicting service the subject of TTP494 and the Panel addressed this.
- 2.15 On 5 December 2012 I issued a preliminary written record of the determination as given in the oral statement referred to above. I noted then that a full written determination of the disputes, including the content required under the Rules, would be published as soon as was practicable.
- 2.16 The reason for publishing the preliminary record was that it had been drawn to my attention by the ADC that on 23 November 2012 Grand Central had submitted a Notice of Dispute (registered by the ADC as dispute TP529) alleging, among other things, that Network Rail had failed to comply with the Panel's ruling in dispute TTP494. ADRR H16 requires the Hearing Chair, where appropriate, to adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and significance. In view of the subsequent related dispute notified by Grand Central, and in order to assist the Parties to arrange their business accordingly, I considered it necessary and expedient to adapt the

dispute procedure so as to provide the Parties with a written confirmation at least of the decisions and conclusions already reached and announced.

- 2.17. The intention of the preliminary record therefore was to promote clarity and transparency as to the substance of the determination and its outcomes, and to do so more expeditiously than the complexity and volume of the matters raised and material produced in the course of the three days of dispute hearings permitted for production of a full written determination.
- 2.18. On 11 December 2012 Network Rail submitted to ORR a Notice of Appeal against the Decision of the Timetabling Panel in dispute TTP494. The Notice of Appeal explained that Network Rail was not clear whether the preliminary written record of the determination in TTP 594 was to be treated as the determination for the basis of the timetable for submitting an appeal pursuant to Part M of the Network Code. ORR responded by letter dated 17 December 2012 to Network Rail (subsequently annexed to Network Rail's sole reference document in TTP529), stating that ORR did not consider that the preliminary record of determination constituted the Timetabling Panel's written reasoned determination of TTP494 under Network Code Condition D5.2.1, and that Network Rail could not refer the matter to ORR until it was in receipt of this.
- 2.19. The submissions of the Dispute Parties in dispute TTP529 were duly received by 21 January 2013 by way of sole reference documents and the hearing was set for 29 January 2013, with the same Hearing Chair and Panel as for TTP493-5 (as requested by Grand Central in its Notice of Dispute). By the ADRR, I was required to review dispute TTP529 following submission of statements of case to identify and itemise in written form for consideration by the Panel and the Dispute Parties any relevant issues of law raised by the dispute. Having reviewed the submissions I considered that dispute TTP529 did raise relevant issues of law, or mixed fact and law, being largely issues of interpretation of Part D of the Network Code and Chapter H of the ADRR. These were as follows:
 - 2.19.1. Whether Network Rail was in breach of the Network Code by not implementing the determination reached by the Timetabling Panel for Timetable dispute TTP494.
 - 2.19.2. Whether Network Rail was in breach of the Network Code by offering the 1608 (SX) London Kings Cross - Newark Northgate service to East Coast, which precluded Network Rail from implementing the TTP494 determination.
 - 2.19.3. Whether a determination had yet been made in TTP494.
 - 2.19.4. Whether Grand Central's appeal in TTP529 demonstrated no valid cause of appeal on the basis that no determination had yet been made in TTP494.
 - 2.19.5. Whether ORR's letter of 17 December 2012 to Network Rail, in stating that ORR did not consider the Preliminary Record of Determination constituted the Timetabling Panel's written reasoned determination of TTP494 under Network Code Condition D5.2.1, was itself a ruling of ORR binding on the Dispute Parties and the Panel under Network Code Condition D5.5.1 for the purposes of TTP529.
- 2.20. In my notification of the issues to the Panel for TTP529 I noted that I considered these to be difficult issues, in particular that of whether or not a determination had yet been made at all in TTP494. I noted that in issuing the oral determination at the end of the final day's hearing of TTP494, and in confirming this by the preliminary written record, it had been my clearly stated intention that this should serve as a determination of TTP494 capable of implementation or (if necessary) appeal, and that I regretted this had not been sufficiently clear as to be immune from challenge by the Dispute Parties or question by ORR. On the basis of the Dispute Parties' submissions received in TTP529 and ORR's letter of 17 December 2012, and without in any way prejudging the outcome, I noted that I believed this was at best a finely balanced issue which could be strongly argued either way if TTP529 were to proceed to a hearing, and one which would probably produce an unsatisfactory outcome whichever way the decision were to go, in failing to provide a timely resolution of the underlying practical timetabling conflict the subject of TTP494.

- 2.21 I have therefore proposed, with the Panel's agreement, that I should attempt to put the matter beyond doubt by expediting completion of an unambiguously final determination of TTP494 (as well as TTP493 and TTP495), in the following way. The delay in completing a full 'written reasoned determination' of TTP493-5 has been occasioned mainly by the unavoidably drawn out exercise of summarising the complex evidence, Q&A oral exchanges and analysis of issues and submissions recorded in the very lengthy transcription made of the three days' hearings. I have concluded, however, that it is possible to curtail this exercise by issuing a suitably expanded version of the preliminary record of determination (including a summary of the Parties' submissions and an abbreviated summary of the arguments and conclusions reached in the course of the oral exchanges), and by taking the unusual step of appending to it a Consolidated Transcript of the hearings (the complete original, without any editing or correction) in order to supply the required content as to the evidence, oral exchanges and analysis of conclusions, instead of continuing to take the time to try to complete a full narrative summary and digest of all this as it took place in the course of the three days' hearings.
- 2.22 This is not the form in which I would have preferred to issue the determination but it is the most practical and timely solution in the circumstances that have arisen. I would be willing in due course to complete my entire summary and digest of the full transcription made of the hearings, and to issue this by way of supplementary guidance if considered useful to the Parties, since many issues have arisen which could benefit from further analysis and guidance, as acknowledged by both Dispute Parties in the course of the hearings. Any such supplementary guidance, if issued, would be for information only and would in no way affect, alter or form part of this final determination.
- 2.23 Accordingly, that is the form in which this determination is now issued, incorporating the full Consolidated Transcript of the three days' hearings as contained in the Appendix. This therefore constitutes the Timetabling Panel's full written reasoned determination of disputes TTP493, 494 and 495 under Network Code Condition D5.2.1. I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this determination.

3 Relevant provisions of the Network Code and other documents

- 3.1 The version of the Network Code in force from 19 July 2011 was applicable to matters to be determined in these disputes until 16 March 2012, after which the version of the Network Code in force from that date became applicable.
- 3.2 The provisions of the Network Code in issue in all three disputes are, principally, the following Conditions:
- 3.2.1 D2.4, Submission of Access Proposals by Timetable Participants – before and after the Priority Date at D-40
 - 3.2.2 D2.5, Content of an Access Proposal
 - 3.2.3 D2.6, Timetable Preparation – D-40 to D-26
 - 3.2.4 D2.7, New Working Timetable Publication – D-26
 - 3.2.5 D3.6, Timetable Variations by consent
 - 3.2.6 D4.2, Decisions arising in the preparation of a New Working Timetable
 - 3.2.7 D4.6, The Decision Criteria

The relevant extracts of the Network Code are set out at Annexes 1 and 2 to this Determination. References in this Determination to a numbered "Condition" are to that

Condition of Part D of the applicable version of the Network Code (except where stated otherwise).

- 3.3 The following definitions under the Network Code are particularly relevant to all three disputes:

“Access Beneficiary” means a train operator or Access Option Holder who is party to an Access Agreement (*following the definition in Condition A1.2 of the Network Code*)

“Access Proposal” means a written proposal in which a Timetable Participant must set out its requirements in respect of the New Working Timetable, in the circumstances set out in Condition D2.4.1 (*definition in Condition D1.1.11 of the Network Code, referring to Condition D2.4.1, set out at Annex 1*)

“Potential Access Party” means any person who proposes in good faith to enter into an Access Agreement or become an Access Option Holder provided that such person has first undertaken to Network Rail to be bound by the relevant provisions of the Network Code and the ADRR (*definition in Condition A1.2 of the Network Code*)

“Timetable Participant” means (a) an Access Beneficiary; or (b) a Potential Access Party (*definition in Condition D1.1.11 of the Network Code*)

- 3.2 Regulations 16(6) and 16(7) of The Railways Infrastructure (Access and Management) Regulations 2005 are relevant to one of the issues in TTP494. The relevant extracts are set out in Annex 3.

4 Submissions made and outcomes sought by Dispute Parties

- 4.0 As far as possible the Dispute Parties' submissions are summarised below separately in relation to each of the three disputes, but it should be noted that on several aspects their submissions (in both the sole reference documents and the oral statements at the hearing) overlapped two or all three disputes. Much of the material referred to on each dispute was relevant to one or both of the others, particularly regarding the Grand Central services the subject of the disputes, the alleged conflicting services of other operators and the steps taken by Network Rail in the course of the Timetable preparation process. The oral submissions as made at the hearings are also recorded in full in the Consolidated Transcript appended to this determination.

TTP493

4.1 TTP 493 GC Submissions

Grand Central's principal submissions on TTP493 were as follows:-

TTP493 GC Opening Statement

- 4.1.1 In its oral opening statement at the hearing Grand Central said it had brought this dispute on the basis of Network Rail's incorrect interpretation of Conditions D2.4.3 and 2.4.4 of the Network Code and an e-mail to GC from NR dated 14 April 2012 which stated clearly that various services, including in particular (for the purposes of this dispute) 1A68 1518(SX) and 1N93 1323(SX) (known collectively as the GC 5th path aspiration) between London Kings Cross and Sunderland) bid for in GC's PDNS, being additional to the current services detailed in GC's Track Access Agreement and which GC had been discussing with NR with a view to proving their validity, would no longer be worked on by NR until after the Timetable Offer Date. NR's e-mail said:

“As we are now in the middle of validating the December 2012 timetable the only option we have left is to revisit this path, and any alternative solutions you may have, after the December 2012 offer on June 8th.”

- 4.1.2 GC said it reluctantly complied with this e-mail and on 30 April a letter was sent to NR outlining this and a number of other concerns. The matter was escalated to NR's local Customer Relationship Executive team to resolve and a meeting was held between GC and NR on 2 May to discuss these concerns. No action was taken and there had been no further response from NR on these points until this dispute was raised.
- 4.1.3 GC said it had been aware that as soon as NR advised that a path bid for could not be accommodated in the Timetable, a revised Access Proposal could have been submitted under Condition 2.4.7. However, the effect of the statement in NR's e-mail was that GC's planner sought to comply with NR's guidance and so did not submit a revised Access Proposal until after 8 June, the Timetable Offer Date. As a result of that statement, the additional services which GC had bid for had to fit around all other offered bids in the Timetable. GC's planner worked closely with NR's planners immediately after the Timetable Offer Date to try to identify a possible alternative path, but nothing satisfactory could be accommodated at that stage.
- 4.1.4 GC noted that NR's response to GC's sole reference document as regards TTP493 contradicted the statement made in NR's e-mail of 14 April. It stated:

"If an alternative Access Proposals (sic) other than the existing Priority Date Notification Access Proposals, had been received Network Rail would have gone back to working on the Grand Central PDNS Access Proposal before working on any Access Proposal made post D-26."

TTP493 GC Sole Reference Document

- 4.1.5 GC's sole reference document advanced these points in greater detail. It noted that GC had been operationally and commercially severely disadvantaged by NR's refusal to progress its Access Proposal in accordance with Condition D2.4.3 (Part D). NR had conducted some work on reviewing GC's bid; however GC submitted an annotated version NR's 14 April showing further areas GC maintained that NR should have investigated instead of declining to undertake further work by advising GC that they would "revisit this path" after the offer date on June 8th (D-26).
- 4.1.6 GC said Condition D2.4.4 gave priority to those services that were submitted by D-40 and considered that in issuing this e-mail Network Rail had deliberately chosen to ignore the Network Code. The impact of this approach had meant that Grand Central had had to develop its paths around the paths already offered in the Timetable. The statement in NR's e-mail not only ignored paragraph D2.4.4 but also chose to ignore Conditions D2.4.7 and D2.4.3. The latter stated that "Network Rail must notify the Participant of this fact [that an Access Proposal as submitted cannot be accommodated in the Timetable], as soon as possible after it has become aware of it, so that the Timetable Participant has the opportunity to submit a further Access Proposal", and "Access Proposals may be submitted up to D-26".
- 4.1.7 GC considered the statement in the e-mail indicated that NR was not willing to conduct any further work until after D-26, a clear breach of the Network Code. As a result GC was left to bid into "white space" after the offer date with an alternative solution. The only solution available after the offer date was a service which could not follow the required calling pattern, a 1447 Hartlepool to London Kings Cross service. This service had a significant operational and commercial impact on GC. In that the previous London Kings Cross departure was now unable to run through to Sunderland as the unit was required to operate the 1447 from Hartlepool.
- 4.1.8 As a result of Network Rail not correctly applying the Network Code, GC maintained it was at a commercial disbenefit and its revenue would be impacted for the coming Timetable.

4.2. TTP 493 GC Outcomes sought

Grand Central sought the following outcomes regarding TTP493:

- 4.2.1 In its oral submission at the hearing GC asked the Panel to confirm that NR's e-mail statement and actions placed NR in breach of the Network Code by refusing to consider Access Proposals other than after D-26, the Timetable Offer Date. GC confirmed it was seeking for NR to re-examine the 1A68 1518 (SX) departure from Sunderland utilising its flex under the Network Code to full effect and that it also sought assurances that NR would not impose arbitrary new timescales in the development of any future Working Timetables.
- 4.2.2 GC's sole reference document asked the Panel to determine that NR did not adhere to the timescales as set out in the Network Code Part D and in doing so disadvantaged GC in the timetable process.
- 4.2.3 GC's sole reference document sought the following remedies:
- (a) Network Rail is to re-examine the 1518 departure from Sunderland utilising its flex under the Network Code to full effect (including its rights to vary clock face departures); and
 - (b) Network Rail must not impose arbitrary new timescales that impact upon the creation of the New Working Timetable.

4.3 TTP 493 NR Submissions

Network Rail's principal submissions on TTP493 were as follows (there being some unavoidable overlap between NR's submissions on the three disputes):-

TTP493 NR Opening Statement

- 4.3.1 In its oral opening statement at the hearing NR said the key element of the matter referred to the Panel's attention under TTP493 was NR's decision to reject Grand Central's new Access Proposals for 1A68, the 1518 Sunderland to London Kings Cross, and 1N93 1323 London Kings Cross to Sunderland on 14 April 2012, midway through the Timetable Preparation Period.
- 4.3.2 NR said that in terms of adherence to the Network Code, with the exception of delivering a Prior Working Timetable in a correct format, NR believed it had acted properly, reasonably and in the best overall interests of the industry. The Network Code was the recognised tool that NR must use to support its decision-making as to how the Rights and new Access Proposals of Timetable Participants were incorporated within the New Working Timetable. NR was effectively accountable for translating customer requirements for access to the network into a safe and reliable timetable plan. The effective execution of this process, and hence the production of a robust timetable, was critical to efficient use of timetable capacity and the industry's delivery of train performance plans.
- 4.3.3 NR confirmed it recognised its obligation to be compliant with its network licence and the cross-industry Track Access Agreements in respect of the production of a National Rail Timetable, and the timetabling process outlined in Part D of the Network Code.
- 4.3.4 NR said that after taking a view that a significant amount of work had taken place on GC's Significant Change document first of all, and then the Priority Date Notification Statement, all of which had failed to find pathing solutions at that time, the decision was taken on 14 April to halt any further work on the existing GC PDNS as the continued optioneering of these trains was now beginning to add a significant risk in terms of NR's delivery of the remaining amount of validation and the delivery of other Timetable Participants' PDN submissions.

TTP493 NR Sole Reference Document

- 4.3.5 NR's sole reference document advanced these points in greater detail. In its summary

NR said the matter in dispute under TTP493 was NR's decision to reject Grand Central's new Access Proposal for 1A68 1518 Sunderland to London Kings Cross and 1N93 1323 London Kings Cross to Sunderland on 14 April 2012 midway through the Timetable Preparation Period. GC claimed that NR had failed to adhere to the Part D timescales for the preparation of the Timetable. NR disagreed with this description of the subject matter. GC had misinterpreted the requirement for NR to notify Timetable Participants as early as possible of Access Proposals which could be accommodated in the New Working Timetable (Condition D2.4.7). NR also disagreed with GC's interpretation of Conditions D2.4.3 and D2.4.4, maintaining that these Conditions outlined the order in which NR must review new or amended Access Proposals between D-40 and D-26 as the Timetable was developed.

- 4.3.6 NR said that in accordance with Condition D2.4.7, on 14 April 2012 it advised GC that the paths for 1A68 and 1N93 could not be made to work and that these were now rejected. At this point in time in the Timetable preparation period NR had to move its focus to remaining validation of the Timetable. NR said it had spent a significant amount of time looking for flexing solutions for the paths of 1A68 and 1N93. It considered the applicable priority for the access proposals for 1A68 and 1N93 as that under Condition 4.2.2(iii).

- 4.3.7 NR's sole reference document distinguished three classes of issues in TTP493 that it considered arose out of GC's sole reference document, and stated why it believed the arguments raised by these issues taken together favoured NR's position.

TTP493 Issues where NR accepted GC's case

- 4.3.8 NR said GC's bid for an additional return service to Sunderland was rejected during the timetable process due to significant issues with the proposed path which could not be overcome. At this point in its sole reference document NR included detailed references to a number of services allegedly conflicting with those bid for by GC.

TTP493 Issues where NR qualified or refuted GC's case

- 4.3.9 NR accepted that GC's bid was rejected early in the timetable process but did not accept GC's interpretation of the 14 April 2012 NR e-mail. NR maintained that this e-mail informed GC of NR's decision to reject GC's service, thus fulfilling NR's obligation under Conditions D2.4.6 and 2.4.7 to notify a Timetable Participant as soon as possible, once NR was aware of an Access Proposal which could not be accommodated within the Timetable.

TTP493 Issues not addressed by GC that NR considered should be taken into account as material

- 4.3.10 NR maintained that the decision to postpone further work on the paths for 1A68 SX 1518 was taken due to the requirement to complete remaining timetabling works in connection with preparation of the Timetable which in accordance with Condition D4.2.2 had a higher priority than 1A68 SX 1518. This position was entirely consistent with Condition D2.4.4. If alternative Access Proposals other than the existing PDNS Access Proposals had been received, NR would have gone back to working on the GC PDNS Access Proposal before working on any Access Proposal made post D-26.
- 4.3.11 Once the New Working Timetable was offered on 8 June 2012, NR commenced further work with Alliance and identified and offered GC alternative 5th path services.

TTP493 Why NR believed the arguments raised by the above three classes of issues taken together favoured NR's position

- 4.3.12 Network Rail believed that further work on GC's Access Proposal during the Timetable Preparation Period would have negatively affected the delivery of the New Working Timetable, as communicated in NR's e-mail of 14 April 2012. This position was entirely consistent with Condition D2.4.4 of the Network Code. If an alternative bid, other than

the existing Priority Date Notification bid, had been received, NR would have given consideration to this bid accordingly.

- 4.3.13 GC did not have any contractual rights for the new access proposal for 1A68 1518 Sunderland to London Kings Cross and 1N93 1323 London Kings Cross to Sunderland. These new Access Proposals from GC conflicted with a number of other services with rights within the New Working Timetable. Having investigated opportunities for flex, NR had been unable to find a suitable timetabling alternative.

4.4 TTP 493 NR Outcomes sought

In concluding its sole reference document, Network Rail stated that it sought the following determination regarding TTP493, with no separate remedies requested:

- 4.4.1 As regards matters of principle: that Network Rail has complied with Part D of the Network Code.
- 4.4.2 As regards specific conclusions deriving from those matters of principle: that Network Rail was correct to decide to reject the Access Proposal for 1A68 Sunderland to London Kings Cross during the New Working Timetable Preparation Period. Grand Central is to be directed to accept their 5th path as 1A66 14 47 (SX) Hartlepool to London Kings Cross as offered by Network Rail.

TTP494

4.5 TTP 494 GC Submissions

Grand Central's principal submissions on TTP494 were as follows:-

TTP494 GC Opening Statement

- 4.5.1 In its oral opening statement at the hearing Grand Central said this dispute identified that Network Rail had incorrectly applied the provisions for the creation of a Prior Working Timetable and failed properly to allocate paths in accordance with Condition D4.2.2. The Prior Working Timetable was an important part of the process that led to the creation of a New Working Timetable. Its purpose was to allow NR to manage network capacity efficiently and have clarity on what paths may not have Access Rights. It was therefore vital that Network Rail used due diligence in creating a Prior Working Timetable and did not just issue the previous Working Timetable.
- 4.5.2 GC said that from NR's response to GC's sole reference document (i.e. NR's own sole reference document), it appeared that NR was not certain whether it had actually issued a Prior Working Timetable. NR's response stated:
- "Had a Prior Working Timetable been published, Network Rail does not agree with the assumption made by Grand Central that this would have excluded the 1B88 SX 1608 Kings Cross to Newark Northgate."
- However, the next paragraph of NR's response acknowledged that a Prior Working Timetable was issued. GC maintained that NR issued this on 27 January 2012. The timescales in which it was created would have ruled out any review of Access Rights not utilised or paths operating without Access Rights.
- 4.5.3 GC did not accept the view put forward by NR that it was right to issue a Prior Working Timetable that contained the 1608 Kings Cross to Newark, an East Coast service. This was not the path East Coast wanted in its Priority Date Notification Statement nor is it what GC wanted. GC asserted that NR had not justified the inclusion of this train to Newark.
- 4.5.4 GC said that in its response NR had identified that both the East Coast 1608 and the

Grand Central 1608 were dealt with in accordance with Condition D4.2.2(iii) and applied the Decision Criteria. GC asserted that this application of Condition D4.2.2(iii) was incorrect. The East Coast Access Proposal did not contain all the information required to make it a compliant bid and, in addition, it included alternative proposals which effectively conflicted with each other. NR should have requested a revised Access Proposal under Condition D2.4.7. Had NR followed the process with East Coast properly, then the revised Access Proposal of East Coast would have received a priority under Condition D4.2.2(iv) and not (iii). GC received the correct priority under Condition D4.2.2(iii). East Coast therefore had a lower priority bid, but NR had treated the Access Proposals with the same priority.

- 4.5.5 In another paragraph of its response, GC noted, NR stated that:

"Network Rail took a collaborative approach with the operators in terms of progressing these [new] proposals...New aspirations or amended aspirations that required any further information that was not evident in their Priority Date Notifications were discussed with operators initially rather than being rejected."

GC maintained that if NR had applied the Network Code correctly rather than adopt a "collaborative" approach, then East Coast would have had to have submitted a revised Access Proposal, and that in any event, GC had a higher priority under paragraph Condition D4.2.2.

- 4.5.6 Finally, in another paragraph of NR's response, it was stated that:

"Grand Central is not disputing Network Rail's application of the Decision Criteria to decide between competing bids for the same timetabling slot.

GC pointed out that this statement was incorrect. The evidence of GC's dispute of the application of the Decision Criteria could be seen from letters from Alliance to Network Rail on 27 April 2012 (annexed to GC's sole reference document), and in GC's sole reference document where it was expressly stated that application of the Decision Criteria was incorrect. However, GC maintained, the point was that Network Rail had not applied the Network Code in [the correct] manner and so the application of the Decision Criteria was irrelevant.

TTP494 GC Sole Reference Document

- 4.5.7 GC's sole reference document advanced these points in greater detail. It noted that this dispute was brought on the basis that Network Rail had rejected Grand Central's bid for 1D81 (SX)1608 London Kings Cross to Wakefield Kirkgate service, in favour of the East Coast 1608 London Kings Cross to Newark Northgate. At the time of bidding neither operator held access rights for these proposed services.
- 4.5.8 GC maintained that NR should have removed the 1608 East Coast service to Newark from the Prior Working Timetable in accordance with Condition D2.1.6, as there was no expectation that the rights would be held by East Coast. East Coast had formally applied to ORR for access rights to support a London to York service not a Newark service. An amended application for rights to Newark was sent out for consultation by the ORR on 11 April 2012.
- 4.5.9 GC said that by NR allowing the 1608 service to remain in the Prior Working Timetable, GC was immediately seriously disadvantaged in the timetable process. GC drew attention to the response to a related complaint issued by NR, in which NR clearly stated that it believed a Prior Working Timetable had not been issued and that "[GC] would not have been in a better position had it had a Prior Working Timetable".
- 4.5.10 GC believed that NR had no intention of issuing a Prior Working Timetable. Indeed, GC said, it remained apparent that some areas of NR still thought no such timetable had been issued. If this was the case then NR had clearly ignored Condition D2.3.6 whereby Network Rail was required to provide a Prior Working Timetable no later than

D-45. However, when pressed by [GC], a copy of the previous Working Timetable had been issued with no appropriate work undertaken to ensure that a correct Prior Working Timetable was issued in accordance with Condition D2.1.6.

- 4.5.11 GC believed that Network Rail did not correctly follow the Network Code as it allowed East Coast to bid for both a 1608 London Kings Cross to York path and a 1608 London Kings Cross to Newark path. There was a material difference between the paths depending on whether the service ran to York or to Newark; specifically, terminating at Newark requires a crossing move to Platform 3. As a result both services conflicted with each other and so the Access Proposals should have been dealt with in accordance with Conditions D2.4.6 and 2.4.7. Network Rail had failed to do this; if it had correctly followed the Network Code it should have notified East Coast that the paths conflicted and East Coast could have submitted a revised Access Proposal.
- 4.5.12 In addition, GC believed that NR had not applied the Network Code correctly in relation to the PDNS submitted by East Coast. This PDNS was deficient in that it did not include content required in a valid Access Proposal as dictated by Condition D2.5.1, according to which an Access Proposal needs to include; "the intermediate calling points" and "the railway vehicles or the timing load to be used". The East Coast PDNS clearly stated that "These changes have not been included in the electronic PIF or the Rolling Stock diagrams which accompany this document." GC would therefore have expected this information to be contained in the PDNS document but this was clearly not the case. Because of this, GC asserted, the bid was incomplete at the Priority Date. The detail required in the East Coast Access Proposal was not submitted until after the Priority Date.
- 4.5.13 As a result of these alleged failures of NR to follow the Network Code, then under Condition D4.2.2 GC believed that the East Coast bid should have been prioritised in accordance with Condition D4.2.2 (d) (iv) and that the GC bid should have been prioritised in accordance with Condition D4.2.2 (d) (iii), giving the GC bid higher priority than the East Coast bid.
- 4.5.14 GC maintained that NR's failures to follow the Network Code as previously detailed, led NR to believe that the application of the Decision Criteria was required to determine whether to offer the GC or the East Coast service. This application of the Decision Criteria (which in itself GC asserted was incorrect) was irrelevant. As the GC service was bid compliantly at the Priority Date and an application for Rights had been made, Condition D4.2.2 (d) (iii) applied to this service.
- 4.5.15 Since NR's decision to reject GC's service, GC has continued to work with NR with the hope of finding an alternative solution. GC had identified a fully compliant path departing London at 1552. NR had since rejected this path on the grounds of an unsubstantiated performance assessment. It was important to note that NR had not undertaken any performance analysis on the 1608 service for which an offer to East Coast was made.
- 4.5.16 An application had been made to the ORR (7th Supplemental Agreement) for this additional West Yorkshire service. Whilst an initial indication of a decision had been received from the ORR, no formal decision had been received. Should rights for an additional West Yorkshire service be awarded, GC considered that it would be at a significant commercial disbenefit as a result of Network Rail not correctly applying the Network Code.

4.6 TTP 494 GC Outcomes sought

Grand Central sought the following outcomes regarding TTP494:

- 4.6.1 In its oral submission at the hearing GC said it was seeking that NR apply the correct priority in creating the New Working Timetable and that Network Rail path the 1608 Kings Cross to Wakefield Kirkgate service as originally bid. In addition, GC said it was important that Network Rail in future complied with its obligations under the Network

Code in relation to the Prior Working Timetable. Grand Central sought assurances that the Prior Working Timetable would not be just a re-issue of the most recent Working Timetable.

4.6.2 GC's sole reference document asked the Panel to determine:

- (a) that Network Rail did not correctly issue a Prior Working Timetable in accordance with the Network Code and in so doing disadvantaged Grand Central in the timetable process; and
- (b) that Network Rail incorrectly prioritized the bids from Grand Central and East Coast and the bid submitted from Grand Central should have been given higher priority in the bidding process; and
- (c) that Network Rail unnecessarily and incorrectly applied the Decision Criteria in making the timetable offer; and
- (d) that Network Rail should have formally offered the 1608 path to Grand Central as opposed to East Coast as part of the timetable process.

4.6.3 GC's sole reference document sought the following remedies:

- (a) Network Rail to adhere to its obligations under the Network Code in relation to issuing a Prior Working Timetable and how it assesses bids in accordance with Condition D2.1.6; and
- (b) Network Rail to path the 1608 London Kings Cross to Wakefield Kirkgate service as originally bid for by Grand Central in its PDNS for the December 2012 timetable. Network Rail must utilize its flex under the Network Code to full effect (including its rights to vary clock face departures).

4.7 TTP 494 NR Submissions

Network Rail's principal submissions on TTP494 were as follows (there being some unavoidable overlap between NR's submissions on the three disputes):-

TTP 494 NR Opening Statement

- 4.7.1 NR commenced its oral opening statement at the hearing by saying that the Prior Working Timetable had been, until December 2012, something that had never really been requested by any other operator or in turn provided by NR. However, NR continued, as GC rightly highlighted, NR should have been in a position to provide this document to ensure full compliance with the Network Code and the associated Production Schedule. NR said it did actually provide a Prior Working Timetable of sorts, which was effectively a Working Timetable, but it had been reminded on a couple of occasions that that was not actually the format that was expected.
- 4.7.2 NR said remedial action had actually been put in place relatively quickly and for the May 2013 timetable a submission had been made to operators on 7 July 2012 in the requested format. In light of this, NR maintained, we must not lose sight of the original stance taken by NR that provision of a Prior Working Timetable would not have affected any of the decisions taken on the structure of the Timetable which was subsequently compiled.

TTP 494 NR Sole Reference Document

- 4.7.3 NR's sole reference document advanced these points in greater detail, together with several further points. It commenced by confirming that the matter in dispute under TTP494 was NR's failure to issue at D-45 the Prior Working Timetable. Network Rail understood that GC believed that the issue of a Prior Working Timetable would have supported its new Access Proposal for 1D72 1608 Kings Cross to Wakefield Kirkgate.

- 4.7.4 In its summary NR said that at D-40, the Priority Date for the Timetable, GC had applied for 1 new path in each direction (commonly referred to as the 5th path) between London Kings Cross and Sunderland and, 'as Alliance Rail Holdings', made a new access proposal for 1 new path from Kings Cross to Wakefield Kirkgate via Leeds. NR listed the new trains requested by GC, noting which of these had been submitted as GC and which had been submitted as Alliance.
- 4.7.5 NR noted that also at D-40, East Coast had applied for a number of services between London Kings Cross and Newark, and listed these. The East Coast Priority Date submission had the caveat that if paths were to be made available that would facilitate the extension of these services to York then that would be EC's first priority but they realised that this was unlikely and would settle for a default position of the existing Kings Cross to Newark paths.
- 4.7.7 NR said Alliance's 1D72 (SX) Kings Cross to Wakefield Kirkgate aspiration was a direct clash with an aspiration of East Coast who also sought an continuation of the existing 1B88 Kings Cross to Newark Northgate path or if possible, an extension of this path to York. EC's rights for its existing Kings Cross to Newark Northgate service were due to end in December 2012. Both Alliance's 1D72 and EC's 1B88 sought to make use of a 1608 intercity passenger path departing from Kings Cross.
- 4.7.8 NR maintained that the new Access Proposals that it received from GC for the December 2012 Timetable period were pre-empting the abilities of future infrastructure enhancements planned on the East Coast Main Line during CP4. The capacity to reliably deliver a 6th off peak long distance intercity path in each hour without impacting overall performance of the route did not currently exist. NR had reviewed alternatives for Alliance, looking at options which included a 1552 SX long distance intercity path departing Kings Cross. A performance assessment of the path had determined that the path was not operationally reliable and was a performance risk.
- 4.7.9 NR said it had a series of performance and infrastructure capacity enhancement schemes planned for delivery throughout 2013 and 2014. These included Hitchin Flyover, Joint Line Upgrade, Shaftholme Flyover, Peterborough Station Upgrade and Alexandra Palace / Finsbury Park enhancements. The combinations of these schemes in December 2014 would improve the performance of the timetable and unlock the capacity for 8 peak and 6 off peak long distance passenger paths on the ECML.
- 4.7.10 A recommendation to Network Rail from the May 2011 Lessons Learned ECML timetable report had been that work needed to start earlier on new timetable aspirations and should better distribute the planning workload (the May 11 timetable development had suffered by having only a single Network Rail lead planning the new timetable). For the development of the December 2012 Timetable Network Rail said it had taken advantage of the new Network Code Part D steps for the Significant Timetable Change. Between D-55 and D-40 NR had nominated a lead planning expert in the team to work closely with GC to develop its initial submissions for its PDNS. This collaborative approach continued after GC submitted its PDNS at D-40.
- 4.7.11 NR accepted it had failed to present a Prior Working Timetable at the start of the December 2012 Timetable Preparation period. However it was NR's view that the advanced work with all Timetable Participants had gone some way to mitigating against this.
- 4.7.12 NR noted that steps had now been taken to ensure that at the start of future timetable preparation periods the industry was issued with a Prior Working Timetable. On 7 July 2012 Network Rail provided in accordance D2.3.6 a Prior Working Timetable for the May 2013 subsidiary timetable change date.
- 4.7.13 With the exception of the publication of the Prior Working Timetable Network Rail maintained that all other Network Code timescales, conditions and priorities had been correctly executed in connection with the December 2012 Timetable Preparation

Period.

4.7.14 NR said that at all times during the Preparation Period for the New Working Timetable it had used D4.2.2 and D4.6, the Decision Criteria (in connection with clauses D2.4 and D2.5), to prioritise the conflicting Access Proposals. Practically the approach that NR had taken was as follows:

4.7.14.1 NR had prioritised applications submitted for the December 2012 Timetable in accordance with Condition D2.4 and certain Conditions laid out in D4.2. Applications submitted in accordance with the Priority Date notification at D-40 were given preference over those submitted after D-40 and before D-26. Applications submitted after D-40 would not be accepted in to the Timetable ahead of a submission made at D-40 unless there was reason to believe NR would not be able to facilitate a Timetable Participant's D-40 aspiration.

4.7.14.2 In these instances, Part D4.2.2 had been reviewed for clarification (as was the case with the acceptance of the GB Railfreight Train Operator Variation for 6N50 which was accepted in to the Timetable under Condition D4.2.2 (iv) (A)). This was after NR had reasonable expectation that the Grand Central service, 1N93, which did have higher priority and fell in to D4.2.2(iii), could not be facilitated.

4.7.14.3 In instances where a pathing solution was not possible for clashing services with the same rights, NR had used Condition D4.6, The Decision Criteria, to make an informed decision on which service NR would include within the Timetable.

4.7.14.4 With regard to the content of an access proposal, as required under Condition D2.5, NR said it took a collaborative approach with operators in terms of progressing these proposals, with existing paths not requiring any changes either being rolled over or submitted via an electronic download submitted by operators. New aspirations or amended aspirations that required any further information that was not evident within their Priority Date Notifications were discussed with operators initially rather than being rejected.

4.7.15 In the same way as for TTP493, NR's sole reference document distinguished three classes of issues from TTP494 that it considered arose out of GC's sole reference document, and stated why it believed the arguments raised by these issues taken together favoured NR's position.

TTP 494 Issues where NR accepted GC's case

4.7.16 Network Rail accepted that improvements needed to be made to comply with Conditions D.2.1.6 and D.2.3.6, in connection with the New Working Timetable. Both Alliance and East Coast had submitted competing bids for the 1608 path from Kings Cross. At the time of bidding, neither party held contractual rights for these services. Later in the timetabling process, after careful consideration of the Decision Criteria, Network Rail had chosen to offer a path to East Coast's aspiration (sic) in its timetable offer on 8 June.

TTP 494 Issues where NR qualified or refuted GC's case

4.7.17 NR said GC's PDNS for the December 2012 did not include an aspiration to use the 1608 path from Kings Cross. The conflicting Access Proposals for the 1608 path from Kings Cross were in the Alliance and East Coast PDNSs.

4.7.18 NR did not accept that it had not applied the Network Code correctly when considering competing Access Proposals from Alliance and East Coast. Had a Prior Working Timetable been published NR did not agree with the assumption made by GC that this would have excluded the 1B88 SX 1608 Kings Cross to Newark Northgate.

- 4.7.19 Condition D 2.1.6 of the Network Code did not impose an obligation on NR to delete train slots for which there was no current access right. The terms of this clause stated that Network Rail “may delete any Train Slots in respect of which it believes, acting reasonably and after consultation with the relevant Timetable Participant...that the relevant Timetable Participant, or its successor, will not have the necessary access rights...” In any event, at the time that the Prior Working Timetable was submitted to Alliance, NR had a reasonable belief that rights to operate a 1608 path from Kings Cross (at least as far as Newark Northgate) would exist.
- 4.7.20 NR maintained that contrary to the assertions by Alliance, the bids from East Coast and Alliance had had the same prioritisation under Condition D4.2.2, namely D4.2.2(iii), and consequently the Decision Criteria had had to be applied.
- 4.7.21 Network Rail did not accept that it had not applied the Network Code correctly in relation to East Coast's PDNS or that the PDNS was invalid. Both Alliance and East Coast had greater aspirations for the December 2012 timetable than subsequently had been able to be accommodated and following a request from ORR, NR had carried out work to ascertain the likelihood that these could be met. NR had communicated the outcome of this assessment on 7 February 2012 making it clear that they could not be achieved.
- 4.7.22 NR accepted the issue made by GC in its addendum to TTP494 regarding some Timetable Planning Rules discrepancies within the schedule. NR was actively seeking to eliminate all such discrepancies contained within schedules at the earliest available future timetable. However, it had to be noted that during the two years this service had been in operation no performance risk had been highlighted and no adverse performance impact had been noted by NR or other ECML users.

TTP 494 Issues not addressed by GC that NR considered should be taken into account as material

- 4.7.23 Network Rail had implemented a new procedure to issue the Prior Working Timetable as part of the standard timetable process.
- 4.7.24 Grand Central was not disputing Network Rail's application of the Decision Criteria to decide between competing bids for the same timetabling slot. On the basis that Network Rail was correct in determining that these bids had equal priority there could be no further criticism of Network Rail in this regard.

TTP 494 Why NR believed the arguments raised by the above three classes of issues taken together favoured NR's position

- 4.7.25 NR said the decision to include the 1608 1B88 (SX) London Kings Cross to Newark ahead of the 1608 1D72 (SX) London to Wakefield Kirkgate had been taken after an evaluation of the Decision Criteria. This decision had been supported by 'the Considerations' (a), (b), (c), (d), and (e) which in NR's opinion were all weighted in favour of East Coast.
- 4.7.26 This decision had been communicated to all parties on 30 April 2012 and was intended to inform operators of the decision NR had made regarding which services it would include within the Timetable. It was not a decision made to in any way prejudice the outcome of any supplemental rights applications.
- 4.7.27 As previously set out, ORR had indicated that it intended to agree the rights for East Coast for this service (as detailed in an e-mail from ORR to East Coast on 17 August 2012).

4.8 TTP 494 NR Outcomes sought

In concluding its sole reference document, Network Rail stated that it sought the following determination regarding TTP494, with no separate remedies requested:

- 4.8.1 As regards matters of principle: that Network Rail had correctly prioritised the competing bids from East Coast and Alliance (sic).
- 4.8.2 As regards specific conclusions deriving from those matters of principle: that Network Rail is unable to offer Alliance the 1608 departure from London Kings Cross (not a Grand Central request), noting that Network Rail has been instructed by ORR to enter into a Supplemental Agreement with East Coast for the 1608 path departing London Kings Cross.

TTP495

4.9 TTP 495 GC Submissions

Grand Central's principal submissions on TTP495 were as follows:-

TTP495 GC Opening Statement

- 4.9.1 In its oral opening statement at the hearing Grand Central said the issue in dispute here was the way in which NR had prioritised Access Proposals in the Timetable process between weeks D-40 and D-26. GC had submitted a compliant Access Proposal at the Priority Date for 1N93 as the 1323 London Kings Cross to Sunderland. One reason Network Rail had rejected this service was because there was a conflict with GB Railfreight's proposed service 6N50 (1106 Maltby Colliery to Tyne Coal Terminal).
- 4.9.2 6N50 did not appear in the Prior Working Timetable issued by Network Rail. This service was bid for as a Train Operator Variation. This was confirmed by NR in a letter to Alliance on 22 May 2012, in which it was stated: "We have received a spot bid from GBRf for an additional train in the Dec 2012 timetable." This train was 6N50.
- 4.9.3 NR's offer letter to Grand Central listed that 1N93 was rejected because it conflicted with 6N50. However, GC maintained, as a Train Operator Variation it did not have a higher priority than a compliantly bid Grand Central Access Proposal submitted at the Priority Date.
- 4.9.4 Regarding Network Rail's response to GC's sole reference document (i.e. NR's own sole reference document), GC commented that in one paragraph, NR stated in relation to 6N50 that "this was not the reason for rejection of the bid". This assertion was repeated in the following paragraph. However, NR's offer letter issued to GC clearly rejected 1N93 because of conflict with 6N50.
- 4.9.5 GC also commented that in its response, NR stated that "at no point has 6N50 incorrectly been given a higher priority than it should have during the New Working Timetable preparation." This statement was incorrect as 6N50 appeared in the earliest versions of the New Working Timetable, despite not having been bid for at the Priority Date and not having Firm Access Rights.

TTP495 GC Sole Reference Document

- 4.9.6 GC's sole reference document advanced these points in greater detail. It noted that this dispute arose over the interpretation made by NR that "Train Operator Variations" could be included in the New Working Timetable before D-26. GC maintained that NR had failed to correctly prioritise GC's Access Proposals in accordance with Condition D4.2.2 leading to a rejection of GC's bid for 1N93 (SX) an additional 1323 London Kings Cross to Sunderland service.

- 4.9.7 GC said NR had rejected this service as there was no path available on the Durham Coast due to a clash with 6N50 (SX), the 1106 Maltby Colliery to Tyne Coal Terminal operated by GB Railfreight. 6N50 did not appear in the Prior Working Timetable issued by Network Rail, but was bid for as a Train Operator Variation. GC noted the letter from NR to Alliance on 22 May 2012 which stated "we have received a spot bid from GBRf for an additional train in the Dec 2012 timetable".
- 4.9.10 GC said Alliance, as part of its PDNS, had also bid for an additional London Kings Cross to Sunderland service with a departure time of 1323. Again, this path was had been rejected early in the process due to a number of conflicts with other services. Alliance believed that several of these conflicts were easily resolved and details of this were included in an annex to the sole reference document. This also clearly showed the identified conflict with the Train Operator Variation 6N50. Moreover NR's final offer letter to GC indicated that a reason for rejecting the path was the conflict with 6N50.
- 4.9.11 GC maintained that NR had clearly given higher priority to 6N50 as a Train Operator Variation than GC's bid for 1N93 submitted in accordance with Condition D2.4.4. NR should have given priority to bids made at the Priority Date. GC said it appeared that Network Rail had accepted bids made as Train Operator Variations into the New Working Timetable prior to D-26.

4.10 TTP 495 GC Outcomes sought

Grand Central sought the following outcomes regarding TTP495:

- 4.10.1 In its oral submission at the hearing GC said the issue to be confirmed by the Panel was to ensure Train Operator Variations bid for after the Priority Date did not receive a higher priority than bids for services enjoying Firm Rights and bid compliantly at the Priority Date.

- 4.10.2 GC's sole reference document asked the Panel to determine:

- (a) that Network Rail did not correctly issue a Prior Working Timetable in accordance with the Network Code and in so doing disadvantaged Grand Central in the timetable process; and
- (b) that Network Rail incorrectly gave priority to a Train Operator Variation as opposed to a compliant bid. As a result Network Rail is in breach of the Network Code and disadvantaged Grand Central in the timetable process.

- 4.10.3 GC's sole reference document sought the following remedies:

- (a) Network Rail is to put in place a process for managing Train Operator Variations that does not lead to them being prioritized higher than rights bid for at the Priority date; and
- (b) Network Rail is to path the 1323 London Kings Cross to Sunderland service as originally bid for by Grand Central in the PDNS for the December 2012 timetable. Network Rail must utilize its flex under the Network Code to full effect (including its rights to vary clock face departures).

4.11 TTP 495 NR Submissions

Network Rail's principal submissions on TTP495 were as follows (there being some unavoidable overlap between NR's submissions on the three disputes):-

TTP 495 NR Opening Statement

- 4.11.1 In its oral opening statement at the hearing NR said that in terms of correctly prioritising new Access Proposals during the Timetable Preparation Period, it believed it had correctly followed the requirements of Condition D4.2.2 to determine which Timetable Participant's new Access Proposals should be included in the Timetable.
- 4.11.2 NR explained in summary that 6N50 had not been the reason for rejecting GC's 1N93 service. NR said it only made the decision to progress 6N50 when it formed a view that 1N93 could not be pathed due to numerous existing clashes on the ECML and NR had then to look at the next level of priorities as described in the Network Code and progress 6N50 accordingly.

TTP495 NR Sole Reference Document

- 4.11.3 NR's sole reference document advanced these points in greater detail, together with several further points. It commenced by confirming it understood that the matter in dispute under TTP495 was NR's failure to correctly prioritise Access Proposals during the Timetable Preparation Period. However NR disagreed with the description of the subject matter. The Access Proposal for 1N93 1323 King's Cross to Sunderland was rejected due to 5 other timetable conflicts, and having had to reject 1N93, NR did not have any grounds by which to reject 6N50 1106 Maltby Colliery to Tyne Coal Terminal.
- 4.11.4 In its summary NR said that at D-40, the Priority Date for the Timetable, GC had applied for (among others) 1 new path in each direction (commonly referred to as the 5th path) between King's Cross and Sunderland, the principal service referred to being 1N93 SX 1323.
- 4.11.5 As noted in reference to TTP493, NR had prioritised applications submitted for the Timetable in accordance with Condition D2.4 and certain conditions laid out in D4.2. Applications submitted in accordance with the Priority Date notification at D-40 were given preference over those submitted after D-40 and before D-26. Applications submitted after D-40 would not be accepted in to the Timetable ahead of a submission made at D-40 unless there was reason to believe NR would not be able to facilitate a Timetable Participant's D-40 aspiration.
- 4.11.6 In these instances, Condition D4.2.2 was reviewed for clarification, and this was the case with the acceptance of the GB Railfreight Train Operator Variation for 6N50 which was accepted in to the Timetable under Condition D4.2.2 (iv) (A). This, said NR, was after it had formed a reasonable expectation that the Grand Central service 1N93, which did have higher priority and fell in to Condition 4.2.2(iii), could not be facilitated.
- 4.11.7 As already noted in relation to TTP493, in accordance with Condition D2.4.7, on 14 April 2012 Network Rail advised GC that the paths for 1A68 and 1N93 could not be made to work and that these were now rejected. At this point in time in the Timetable Preparation Period Network Rail had to move its focus to remaining timetable validation of the Timetable. Network Rail had spent a significant amount of time looking for flexing solutions for the paths of 1A68 and 1N93.
- 4.11.12 Network Rail considered the applicable priority for GC's Access Proposals for 1A68 and 1N93 as 4.2.2 (iii) within Network Code Part D
- 4.11.13 In the same way as for TTP493 and 494, NR's sole reference document distinguished three classes of issues from TTP495 that it considered arose out of GC's sole reference document, and stated why it believed the arguments raised by these issues taken together favoured NR's position.

TTP 495 Issues where NR accepted GC's case

- 4.11.14 GC's bid for an additional 1N93 1323 Sunderland to Kings Cross service, was rejected.

- 4.11.15 NR accepted that there was a clash with 6N50 which was operated by GB Railfreight and that this did not appear in the Prior Working Timetable. However, this was not the reason for rejection of the bid.

TTP 495 Issues where NR qualified or refuted GC's case

- 4.11.16 NR repeated that 6N50 was not the reason for the rejection of GC's Access Proposal for 1N93 1323 Sunderland to King's Cross. This service was the last of five clashes highlighted and the previous four were highlighted within the correspondence on 14 April previously referred to. NR listed the services it said conflicted.
- 4.11.17 NR noted that it had already spent a substantial amount of time working on GC's new Access Proposals during the Significant Change Period and after the Priority Date Notification Statement. This included the provision of a dedicated Network Rail planner to work closely with GC investigating potential pathing solutions. Despite this NR had still been at a stage where it could not alter these paths so that they worked, within the preparation period of the Timetable.
- 4.11.18 Network Rail continued to work with GC after the offer of the Timetable. Alternative paths for 1A68 and 1N93 were eventually offered to GC and the ORR has indicated it is minded to approve rights for these new trains.

TTP 495 Issues not addressed by GC that NR considered should be taken into account as material

- 4.11.19 Under this heading NR repeated that at no point had 6N50 incorrectly been given a higher priority than it should have during the Timetable Preparation. As the GC 1N93 path was not possible for multiple reasons, NR said it did not have priority in accordance with Condition D4.2.2. When NR had reasonable doubt that it would be able to facilitate a path for this service it became clear that the GB Railfreight path 6N50 could be included in the timetable under Condition 4.2.2 (d) (iv) (A).

TTP 495 Why NR believed the arguments raised by the above three classes of issues taken together favoured NR's position

- 4.11.20 NR noted that GC did not have any contractual rights for its new Access Proposal for 1N93 1318 Sunderland to King's Cross (SX). This access proposal from GC conflicted with a number of other services with rights within the Timetable. Having investigated opportunities for flex, NR was unable to find a suitable timetabling alternative.
- 4.11.21 NR noted that despite a substantial amount of collaborative work between NR and GC throughout the Significant Change Period and the first 7 weeks of the Priority Date notification period, NR was still in a position where paths could not be found.
- 4.11.22 The position NR was in after the work on 14 April referred to, led NR to make the decision that any further investigation of flexing options would lead to a situation where the timetable would need to be 'unpicked' again and the delivery of the full Timetable could be compromised.

4.12 TTP 495 NR Outcomes sought

Network Rail sought the following outcomes regarding TTP495:

- 4.12.1 In its oral submission regarding TTP495 at the hearing NR stated, in a conclusion apparently applicable to all three disputes, that its main responsibilities were to operate, maintain and renew the network in order to satisfy the reasonable requirements of users of railway services and funders. An efficient and effective timetabling process focused on capability and network capacity and performance was crucial to the industry's success. Network Rail asked the Panel to determine that the correct decisions had been made by NR which impacted Grand Central during NR's compilation of the December 2012 New Working Timetable.

- 4.12.2 In concluding its sole reference document, NR stated that it sought the following determination regarding TTP495, with no separate remedies requested: that Network Rail was correct to decide to reject GC's Access Proposal for 1N93 1323 London Kings Cross to Sunderland during the New Working Timetable Preparation Period. Grand Central is to be directed to accept its 5th path as 1N93 1253 (SX) London Kings Cross to Sunderland as offered by Network Rail.

4.13 TTP 494 East Coast (Interested Party) observations

- 4.13.1 At this stage EC wished only to observe briefly that it disagreed with GC's claim that EC's Priority Date Notification Statement was invalid, and it had supported the NR view in its response document.

4.14 TTP 493-5 Further Information provided by Dispute Parties and Issues Arising

- 4.14.1 At the end of the first day's hearing on 18 September 2012 Grand Central was requested to provide further evidence, in advance of the adjourned hearing on 24 September, supporting beyond doubt that up to (but not beyond) the Priority Date of 2 March 2012 it was the intention of Alliance to apply to ORR for certain rights on the ECML and that there was bona fide expectation in submitting the relevant bids to NR that Alliance would obtain those rights.

- 4.14.2 The material requested was supplied within the required timescale. At the second day's hearing on 24 September, I summarised the outstanding issues and the Parties were questioned on these issues by the Panel. No further written material was produced on that day.

- 4.14.3 At the end of the second day's hearing both Dispute Parties were requested to provide further information to the Panel as follows:

For TTP493

Network Rail to provide evidence that the requested retiming of Grand Central's train 1A67 to depart Bradford for Kings Cross at 1522 instead of 1537 was outside of the contractual departure time range of 1530 to 1600 and therefore not within the limits of contractual Flex.

Network Rail to provide an analysis in contractual terms to explain which of trains 1E18, 1Q19, 1Q42, 2P79, 2Y87, 4L28, 6L59 had contractual priority over both the 1518 SX Sunderland to Kings Cross path which Grand Central bid for and the proposed variation to enable 1A67 to run earlier (departing Bradford at 1522) which would have removed conflict between Grand Central's two pathing aspirations.

Network Rail to provide evidence as to the extent that Grand Central was given written notification up to and including the date of publication of the New Working Timetable (8 June 2012) in respect of contractual priority of other services which precluded paths being offered to Grand Central.

For TTP494

With regard to the letter of 30 April 2012 from Network Rail to Grand Central/Alliance concerning application of the Decision Criteria:-

- Network Rail to set out its view as to how it decided the matter in relation to achieving the Objective (Condition D4.6.1) and how its assessment of the Considerations as expressed in the letter of 30 April 2012 fitted with this (Conditions D4.6.2 and D4.6.3).

- Grand Central/Alliance to set out its view on how the Objective should have been applied, to comment on Network Rail's assessment of the Considerations as expressed in the letter of 30 April 2012 and to say whether the Objective was achieved (Conditions D4.6.1 - 4.6.3).

Network Rail to provide evidence that East Coast provided details of its intended rolling stock deployment when submitting notification of significant changes to its Services.

For TTP495

Network Rail to provide a statement setting out the contractual position of trains 6H33, 6H44, 6E84 and 1S45 and stating whether whatever ability existed to Flex those services in order to accommodate Grand Central's bid was examined and exhausted.

4.14.4 Timescales were set for the provision of this information and responses to it by each of the Dispute Parties and East Coast, and the material and responses requested were supplied within their respective required timescales. The further material provided gave rise to certain fresh considerations and the Panel decided that the Hearing should again be reconvened to enable particular issues to be examined further by direct questioning of the Dispute Parties rather than in correspondence. I issued a statement to the Panel and the Parties identifying these issues as follows:

- For TTP 494, the nature of the relationship or distinction between Alliance's and Grand Central's respective bids before and after the Priority Date, taking into account (among other things) Regulations 16(6) and 16(7) of The Railways Infrastructure (Access and Management) Regulations 2005.

- For TTP494, some specific points of difference between Grand Central and Network Rail as to the rationale and methodology for application of the Decision Criteria to resolve conflicts between service bids.

- For TTP 493 & 495, some specific points of difference between Grand Central and Network Rail as to the rationale and methodology for prioritising and flexing conflicting service bids.

- For TTP 493 & 495, the data necessary to an evaluation of whether Rights have been Exercised, for the purpose of prioritising and flexing conflicting service bids.

- For TTP 493, 494 & 495, the timescales within which Network Rail is contractually required to assess and apply an appropriate rationale and methodology both for application of the Decision Criteria and for the purpose of prioritising and flexing conflicting service bids, taking into account the possibility of retrospective justification.

4.14.4 At the third day's Hearing on 12 November 2012, I again summarised the outstanding issues and the Parties were extensively questioned on these issues by the Panel. No further written material was produced on that day.

5 Oral exchanges and analysis of issues and submissions at the Hearings

5.1 After considering the written submissions and statements of the Dispute Parties as listed and summarised in sections 2 and 4 above, and having heard the Parties' further submissions in their opening statements on the first day's hearing as summarised in section 4 above, I and the other members of the Panel questioned the Parties' representatives variously during all three days' hearings in order to clarify a number of points arising out of their submissions. In line with the practice adopted at previous Timetabling Panel Hearings, although the individuals' answers to questions were not taken as sworn evidence (in common with the Parties' written submissions, statements and further information provided), I consider that we are entitled and indeed (in the absence of any indication to the contrary) obliged to accept them as true and accurate statements. Accordingly I have taken them into account in reaching this determination.

5.2 As previously noted and for the reasons outlined in paragraph 2.21 above, in order to supply the detail of the complex Q&A and debate which took place on each issue, and of the analysis and conclusions which were reached sequentially at various stages in the course of the three days' hearings, rather than taking the further time necessary to complete a full digest of this

here, I refer to the full Consolidated Transcript of the Hearing Proceedings for TTP 493, 494 and 495. This is contained in the Appendix to and constitutes an integral part of this determination, and references below to "the Transcript" are to it as so appended. Save for the excision of some sections concerned solely with administrative arrangements during the hearings, the Transcript is unedited and uncorrected (even as to typographical errors), in order to avoid any further delay in the issue of this determination that would otherwise be incurred by the process of editing it fully. Though very substantially accurate, the Transcript accordingly must be read with an anticipation of a few inapposite words and other minor errors that can be clearly recognised, from their context, to have been misheard and therefore incorrectly transcribed by the stenographer.

5.3 In an attempt to assist by providing at least some signposting through the Transcript I have listed, below, the headings of the principal issues dealt with on each day, in order to identify the particular themes or topics explored in Q&A, and I have briefly summarised the analysis undertaken of issues and submissions, including various provisional conclusions reached along the way and expounded at the beginning and various other stages of each day's hearing. I note some points of general application here:

5.3.1 Due to the considerable volume of material produced by the three days of Q&A sessions, as recorded in the Transcript, these issues and analysis are summarised here only according to the chronological sequence in which they took place, rather than grouped separately in relation to each of the three disputes or by discrete lines of inquiry. As frequently noted below, these summaries are not self contained but must be read together with the full Transcript, to which they are intended as a guide.

5.3.2 As was the case with the Dispute Parties' submissions, it will be appreciated from the Transcript that on several aspects the issues pursued in Q&A of necessity overlapped two or all three disputes, with much of the material referred to on each dispute proving relevant to one or both of the others. Again, this overlap covered particularly the specific Grand Central services at the centre of the disputes, the alleged conflicting services of other operators, and the steps taken by Network Rail in the course of the Timetable preparation process. It also proved necessary on several occasions to revisit issues previously dealt with, resulting in a fair degree of repetition.

5.3.3 Finally, it is fair to acknowledge that the summaries below pay fuller attention to the arguments and issues arising in TTP494 than those in the other two disputes, TTP493 having subsequently proved the most contentious result and the one which has given rise to an attempted appeal by NR and GC's subsequent claim in TTP529.

Day 1, 18 September 2012

TTP 493-5 Relationship between Grand Central and Alliance

5.4 On the first day's hearing (in the afternoon of 18 September 2012 after hearing TTP518 that morning) we commenced by revisiting the issue – as explored in TTP518 – of the relationship between Grand Central and Alliance, and the role each had taken in relation to the subject matter of each of the three disputes. I had sought clarification in the Directions letter and had received a response and comments from both GC and NR. All the Parties had confirmed their assent to the proposition that, for the purposes of TTP518 at least, all relevant correspondence and interaction regarding the timetabling process had been made solely by Alliance acting as agent for Grand Central, the rights holder under the relevant Track Access Contract; and that there was no qualification to that proposition as regards Alliance's capacity to act on behalf of GC or the possibility of Alliance being considered to have been acting in its own right, or otherwise. In consequence it had been accepted for the purposes of TTP518 that Alliance and GC were to be regarded as one and the same, and that, in order to simplify the proceedings, reference need be made only to GC as the Dispute Party, notwithstanding that some actions had been taken by Alliance as agent on behalf of GC.

5.5 For TTP 493-5 we understood from the information previously given by GC and responded to by NR, that the position was accepted for the most part to be the same as for TTP518, namely

that, in effect, Alliance and GC were to be regarded as interchangeable, Alliance having acted in its dealings with NR purely as disclosed agent for GC. So notwithstanding some confusing language used in the GC submissions as to who was doing what, we believed that effectively we should be talking about GC for the most part. However I noted, from what had been said in GC's information and chronology of events provided, that there also appeared to be some element of Alliance having acted in its own right, in relation to one of two bids made at the same time. GC confirmed this was correct, but that it was in relation to TTP494 (only), and explained the background.

- 5.6 The ensuing discussion is recorded in the Transcript. Following this we deferred further consideration and reaching a conclusion on the respective roles of and relationship between Alliance and GC and their consequences for the disputes, pending an evaluation of the contractual position regarding the various bids made.

TTP494 Contractual priorities of bids and meaning of 'expectation' of rights

- 5.7 After a break we commenced with TTP494 as having distinct characteristics including being covered by an application for a discrete Supplemental Agreement. This dispute had been characterised in GC's submissions as based on NR's alleged failure to issue an accurate or complete Prior Working Timetable on time or possibly at all. However it was clear that the central issue, as in the other two disputes, concerned NR's rejection of a specific path or train slot (or in some cases slots) bid for in a particular way as part of the timetabling process. I therefore first sought the Parties' respective views on the contractual priorities that those bids had, and how those matched up against allegedly conflicting bids or proposals, with a view to discerning what were the relevant strict contractual entitlements, with issue of the Prior Working Timetable being germane in this context only insofar as it had or had not affected that priority.
- 5.8 For TTP494 therefore GC was asked to explain in more detail what it thought was its priority in respect of the relevant slots bid for, and why, and then what it thought was East Coast's priority, as being the relevant conflicting bid. GC's submissions had placed its priority as falling under Condition D4.2.2(d)(iii) (which was, and in this determination is, referred to generally as 'Level (iii)') but this Condition as drafted appeared to cover only bids made with expectations of Rights. We therefore wanted to know why GC thought its bids were Level (iii) and what its 'expectations' were based on.
- 5.9 The ensuing discussion is recorded in the Transcript. Much time was spent exploring the implications of the wording of Condition D4.2.2(d)(iii) and the meaning of "expectation" which proved somewhat obscure. The crux of the matter was that what the contract (via Condition D4.2.2(d) of the Network Code) required in order to accord Level (iii) priority to a bid was not just a bare expectation of Rights in the sense that the Timetable Participant simply said it had an expectation of Rights, but an expectation of Rights which both (1) had been 'exercised', and (2) satisfied the following specific proviso: "...that Network Rail considers, acting reasonably, they will be Firm or Contingent Rights in force during the timetable period ...". This proviso, of itself, foresaw at least the theoretical possibility of a situation where Network Rail might consider (acting reasonably) that, even though there was an expectation on the part of the Timetable Participant, nevertheless those Rights would not be Firm or Contingent Rights in force during the Timetable Period.
- 5.10 The discussion included whether, irrespective of the precise wording, all bids made on or before the Priority Date must of necessity be considered under Level (iii) simply because nothing else was available under Condition D4.2.2(d). Following this we concluded provisionally that GC's case on this issue was that its bid had Level (iii) priority not merely because there was no other Level available but because, as a fact in these particular circumstances, GC did have an expectation which NR, acting reasonably, could have shared, because of the actual dialogue and consultation that had taken place before the submission of the PDNS.

TTP494 Meaning of 'expectation' of rights in context of bidder change (Alliance to Grand Central) and its effect on bid priority

- 5.11 The discussion so far on expectation of rights and its effect on bid priority had centred on TTP494, which was the dispute in which it appeared that the relevant actual bid as at the offer

date had been made by Alliance, not Grand Central. Questioning then turned to whether the Dispute Parties considered that this aspect made a difference to the effect of a bidder's "expectation" in the sense in which we had just characterised it as based on fact and circumstance, for the purposes of applying Condition D4.2.2(d); and whether, if it was Alliance that had submitted the relevant bid in its PDNS, it was Alliance that had created the necessary expectation in Network Rail, acting reasonably, by the de facto dialogue and consultation that had previously taken place.

- 5.12 The ensuing discussion is recorded in the Transcript. It was confirmed that the bid as at the Priority Date had been Alliance's but that after the Priority Date it had been decided that it should be pursued as a Grand Central bid, and that a S22A application accordingly had been made by GC. GC was invited to provide (at a later stage) whatever evidence it could, up to the Priority Date, of dialogue and consultation with Network Rail, supporting the contention that it would have been clear beyond doubt that obviously Alliance, as the submitter of the bid, was *bona fide* in the game and not just a one-off, and therefore that Alliance had a reasonable expectation that it would have the relevant Rights in its own right as Alliance, and that this meant there was an expectation that a Section 17 or 18 application to ORR would be submitted in due course by Alliance for Alliance.

TTP494 Meaning of 'expectation' of rights where there is more than one bidder with the same apparent 'expectation' and where NR appears to have doubts as to deliverability of all bids

- 5.13 Questioning then turned to Network Rail's view on the effect of this sequence of events on Alliance's and GC's respective expectations of rights as at the Priority Date and thereafter; and also to the issue of whether there was, as a fact, sufficient dialogue and consultation in the period leading up to the Priority Date between Alliance/GC and NR to create a reasonable expectation that one or other of Alliance/GC would be successful in getting Rights to the slot bid for, notwithstanding that in February NR had been writing to ORR saying it would never happen because it was too difficult.
- 5.14 The ensuing discussion is recorded in the Transcript. It concluded with my asking (still trying to facilitate a working interpretation of the difficult proviso in Condition D4.2.2(d)(iii)) if, where there was more than one bidder for the same slot or at least for conflicting versions of the same slot, NR thought it could have an "expectation" simultaneously in respect of both bidders that they would be accorded Firm Rights, because the corporate state of mind of Network Rail was that there was at least a probability that one of them would get the slot but it was not known which, as at the stage of the bid. I asked if that was the right way of looking at how Level (iii) priority operated and why both Dispute Parties appeared to believe that every bid came in as a default at Level (iii).
- 5.15 NR agreed that this was the case, though it wished it were not so. NR acknowledged that it had particular concerns on this whole issue, which had been aired internally within NR and could be shared at this Hearing, that when NR was presented with bids for competing paths in respect of which there were no Rights established, then NR was simply looking for a timetable solution. The most flexible slot features that NR could address when looking for a solution were where there were no journey times, no windows for departures; and no station stops that needed to be complied with, so giving the most flexible time for NR to take a new train bid and work it into the timetable if possible. However NR recognised that it did not have a good understanding of what brought the best value in terms of efficiencies, value for money and the like. When NR received two competing timetable bids for the same slot, NR acknowledged that there was a gap in the linkage between some of NR's business planning and the decisions that it was being asked to try to make in the timetable.
- 5.16 I concluded that although at the time NR would not have been thinking precisely in the terms in which I had just expressed its process, nevertheless in effect NR was now confirming the view that, somehow or other, it was necessarily possible to have more than one bid at Level (iii) priority. The proposition thus reached was that, by definition, every bid received that had at least some necessary (but undefined) degree of gravitas and sense in the first place, must come in at Level (iii) because that was all there was, notwithstanding the slightly unfortunate wording of that proviso with the word "expectation". The expectation was that, somehow, NR would work it out, and this was how the position was arrived where it was possible to have

more than one bid, and therefore a conflict of bids, at Level (iii). That was the point at which the Decision Criteria came into play, to resolve the conflict. GC and NR both assented to the proposition in this form.

TTP494 East Coast view of interpretation of 'expectation' of rights and its effect on EC's bid

- 5.17 GC confirmed it would proceed to contend that, even on the interpretation now reached, here it actually was doubtful whether East Coast's bid had been correctly accorded Level (iii) priority; and further, even if EC's bid had been correctly prioritised and the Decision Criteria had therefore become relevant, there was still a further debate to be had about the correct application of the Decision Criteria in this case. Before proceeding to examine this contention I invited East Coast's views, as an interested party not a Dispute Party, on the interpretation we had reached of Condition D4.2.2(d)(iii) in order to try to make it workable, bearing in mind that we would be proceeding to consider EC's bid in the light of this interpretation.
- 5.18 The ensuing discussion is recorded in the Transcript. EC confirmed it believed that the position we had reached was right and that the whole issue hinged on an interpretation of the word "expectation" and what should be deemed a real expectation by Network Rail. EC thought it was right to deem an expectation that provided a path could be found, then the Rights would follow, notwithstanding that on some occasions, including GC's bid in this case, ORR for various other reasons (i.e. not connected with pathing) at a later stage might reject the Rights. EC therefore supported the interpretation of "expectation" which we had arrived at (which I still regarded as somewhat forced) and which had been acceded to by both GC and NR.
- 5.19 It was at this point on 18 September, it being late in the day, that we agreed to adjourn the Hearing for continuation on another date.

Day 2, 24 September 2012

TTP 493-5 Recap of previous Hearing

- 5.20 At the start of the adjourned Hearing, before recommencing Q&A, I took the opportunity to recap the position and conclusions reached at the initial half day's Hearing. We had had the submissions from both Dispute Parties on all three disputes and we had started the Q&A on TTP494, the GC bid for the 5th Sunderland path, where, effectively, the conflicting path was that of East Coast. Q&A at the initial day's Hearing had drilled into two issues: the first was the effect of the relative identities of Alliance versus Grand Central as the bidder for and prospective holder of and operator of Rights. We wanted to revert to this issue in the light of having looked at all the material again. The other issue, on which much time had been spent, was the precise correct interpretation of the relevant version (March 2012) Condition D4.2.2(d)(iii), which we had established was different from the previous version of Condition D4.2.2 overall, as regards the whole way in which levels of bid priority were expressed. We had been examining closely the current language of (d)(iii), with a view to determining eventually which of Alliance/Grand Central on the one hand and East Coast on the other had which level of priority as at the Priority Date.
- 5.21 We had identified a problem of interpretation with this version of Condition D4.2.2(d)(iii), in that it contained a proviso at the end which, in order to accord a Level (iii) priority to a bid as at the Priority Date, required Network Rail (acting reasonably) to consider that a bidder's expectation of rights would be Firm or Contingent Rights in force during the Timetable Period. We had taken "will be Firm Rights" to mean "will be acquired in due course through the relevant application to ORR". We had become stuck on the interpretation, in effect, of what a reasonable "expectation" might be, the difficulty being that the word "expectation" in its natural meaning means believing there is a probability (which I had characterised as being 51%) that the necessary Rights will be granted. The difficulty of that natural meaning of "expectation" was that if it had to be a probability then because, by definition, only one person could have a probability, Network Rail could have a reasonable expectation that only one bidder would get a particular path if there were more than one applicant for it. However the evidence and account of all parties at the Hearing was that one way or another, in order to make the system work,

bids which were made by 'serious' bidders had to come in at Level (iii) priority because there was nowhere else for them to go, as at the Priority Date.

- 5.22 We had considered this conundrum and concluded that, in order to make these words work, it was necessary to construe "expectation" as meaning an anticipation not of a probability but of a possibility that the necessary Rights would be granted. This meant that logically Network Rail could then have a reasonable expectation, as at the Priority Date, that there was a possibility of more than one bidder getting Rights to the path bid for, and that the way in which that possibility could become resolved in favour of one particular bidder was something that happened after the Priority Date. I noted that we had reached that conclusion on the basis of the legal principle of interpretation which favours construction of all parts of a contract so that they mean something, rather than so that they mean nothing at all. This applied rather than a principle of interpretation based loosely on custom and practice, because the latter was inapplicable in this case owing to the recent change in version of Condition D4.2.2(d)(iii) to include the troublesome proviso which effectively repeated the proviso in (d)(ii). The previous version of Condition D4.2.2 had been constructed in a different way so that (d)(iii) clearly could admit any serious bidder.
- 5.23 We had therefore requested, and in the interim had received, evidence from Alliance/Grand Central to support the contention that, on that basis, Network Rail could have had a reasonable anticipation that there were serious bidders that were interested or probably interested in this path and therefore there was a sensible possibility of one of them eventually getting it.
- 5.24 I outlined that, sticking with TTP494 and still in Q&A, we had now to proceed to consider the application of that test to the East Coast bid to see where that put it in the order of priority. We would then need to go back to considering the effect on the whole issue in TTP494, of the failure to issue or late issue of a Prior Working Timetable. Then, still on TTP494, we would need to return to the issue of who actually was the bidder and the operator as between Alliance and Grand Central, and whether that affected the position and the level of priority. Then we would have to turn to TTP493 and 495.

TTP494 Application of 'expectation' of Rights test, and other Part D requirements as to content of Access Proposals, in determining priority of East Coast bid

- 5.25 On the basis of the test just enunciated as to the meaning of Condition D4.2.2(d)(iii), questioning turned to how applying that test should have placed East Coast's bid. GC's submissions had broadly asserted that in other respects EC's bid was non-compliant and therefore should not have been accorded Level (iii) priority, and GC were asked to elaborate on that. After some initial confusion as to whether we were talking about rights to a particular level of bid priority or Rights as ultimately granted by ORR, GC clarified that the main respect in which it considered EC's bid deficient was not so much because it did not have an expectation of Rights, in the sense we had been talking about, but because it had not included in its PDNS specific or complete information as to the rolling stock intended to be used, contrary to Condition D2.5.1(e) which required "the railway vehicles or Timing Load to be used" to be included in the content of a complete Access Proposal.
- 5.26 The ensuing discussion is recorded in the Transcript. At one point it became apparent that there were additional possible limbs to the argument that EC's bid had been deficient in not including details of rolling stock. First, it could be said that this defect in content (if proved), resulting in the bid not constituting an Access Proposal in accordance with Condition D2.5, would effectively mean that the expectation of Rights had not been "Exercised", within part (a) of that term as defined at the beginning of Part D, so that it could not have fallen into Level (iii) priority in the first place, i.e irrespective of whether it satisfied the proviso as to expectation of Rights in Condition D4.2.2(d)(iii). Secondly there was an issue regarding a lack of clarity as to what paths or services EC had actually bid for, which in turn affected whether its bid could properly be considered as a Rolled Over Access Proposal and therefore as potentially falling within part (b) of the term "Exercised" as defined at the beginning of Part D, so that again it could not have fallen into Level (iii) priority.
- 5.27 GC believed that the main bid expressed in EC's PDNS, as submitted on the Priority Date, was to amend its existing service to extend its (current) Newark trains to York and to run some

additional trains to York. Therefore GC asserted that EC's actual bid was for trains to York, which would have excluded it from being a Rolled Over Access Proposal because the rolling stock proposed to York was different from what was currently operated (to Newark). After considerable (and sometimes circular) discussion with both Dispute Parties on this issue it became clear that the real potential problem with EC's bid was that it had actually been expressed as two mutually exclusive bids in the alternative. 'Plan A', as it came to be characterised, had been for the York extension with additional services; 'Plan B' had been for the maintenance of EC's existing Newark services. NR's approach to this appeared to have assumed that it was not material, in the light of NR's knowledge of EC's prior service and rolling stock plan and in the general interest of finding a workable solution.

- 5.28 Further extensive discussion ensued, as recorded in the Transcript, much of it centered round the content and terminology of EC's PDNS regarding rolling stock. In the course of this I reminded NR that we had touched earlier on the extent to which it might wish to argue, if at all, that considerations of practicality/getting to a result/common sense/acting in the best interests of the industry/compliance with NR's licence obligations, and so on, could somehow, as a matter of legal interpretation, qualify or override the obligation to stick with the letter of the contract and the relevant rights and obligations under that. NR confirmed my previous understanding that this was an argument it did not wish to advance, having already been invited and declined to do so, and acknowledging that it would have needed something more to support it. NR agreed that, notwithstanding everyone's wish to arrive at practical, pragmatic solutions for all these kinds of disputes, practicality was not asserted in any sense to override the strict contractual position. NR accepted the eventual conclusion, therefore, that in having accorded Level (iii) priority to and offered EC the 'Plan B' (Newark) service notwithstanding the inherent uncertainty of the alternative form in which it had been bid, NR had strayed outside the letter of the contract as implemented by the particular document, the PDNS, in order to get to a workable industry overall favourable solution.
- 5.29 EC was again invited to comment and the Dispute Parties responded, and this is recorded in the Transcript. EC's position was that, having applied to ORR for Rights corresponding to its bids regarding Newark/York, it had still not received an indication one way or the other by the Priority Date, so that as at the decision day it had to hedge its bets and submit its bid in the form of a Plan A or alternatively Plan B. However EC stopped short of arguing that this lack of timely clarity from ORR of itself had the effect of preventing its Plan A or alternatively Plan B bid being characterised as non-compliant because of not ultimately being sufficiently specific as to the rolling stock detail (which was the point at the core of the particular issue under discussion). GC's argument was that it/Alliance had had both a Plan A (GC) and Plan B (Alliance) and had had the same problem with lack of timely indication of an outcome from ORR, but that their (or at least, Alliance's) bid had contained the necessary contractual content in all its specificity because they had elected for one option (Alliance) rather than the other.
- 5.30 There followed further discussion, as recorded in the Transcript, as to whether EC's bid was rightly to be regarded as outside Level (iii) priority because it had been a bid for mutually exclusive alternatives and if so, whether it could have been saved in some other way, by being a Rolled Over Access Proposal. It was concluded that it should be so regarded and was not otherwise saved. NR observed that it would take some learning from this, that in effect it was not tenable for a bidder to put an 'either/or' option into a PDNS, and that this was an element of leadership that NR should be putting out to the industry. GC observed that these issues would arise only where there was a conflict of aspirations where more than one operator wanted to pass, because if there were no other aspirant, it would not actually matter because an operator could bid at any time if it were just looking for capacity. But, GC said, this was one of the issues that all the Open Access operators had found, that the 'senior operators' on the network did hedge their bets quite often to try to take up the opportunity for any capacity that arose on the network in order to prevent access, and this was a serious barrier to entry. ORR had mentioned it on a couple of occasions in some of its output.
- 5.31 Some brief discussion also followed at this stage, as recorded in the Transcript, as to the relevance or effect of the Prior Working Timetable having been provided on time, in sufficient form or not at all. TTP494 had been characterised in both Dispute Parties' oral opening submissions as being primarily a dispute about the rights and wrongs of NR having produced or failed to produce the Prior Working Timetable. The Parties concluded that this issue was no

longer relevant to TTP494, EC's bid having been identified as being an intent to vary the existing timetable and therefore not a Rolled Over Access Proposal.

TTP494 Priority to be accorded to the respective EC and GC bids if either was outside Level (iii) as at the Priority Date.

- 5.32 As recorded in the Transcript, in the ensuing discussion the Dispute Parties agreed that a bid which was non-compliant as at the Priority Date and was therefore some way amended after that date so as to avoid or remove the non-compliance, fell to be treated as a Level (iv) priority bid as being in effect a new bid that materialised between D-40 and D-26 in its final manifestation. Such a bid was not to be treated merely as a Train Operator variation or spot bid.

TTP494 Effect of the change of identity from bidder to operator between Alliance and Grand Central

- 5.33 This issue had been partly explored at the outset of the first day's hearing but had been deferred for further consideration following the evaluation of the contractual position regarding the various bids made, which had now taken place. The issue concerned the potential hurdle of the change from the submission of the relevant PDNS and previous documents by, and with priority sought for, Alliance, to the related Rights subsequently being sought for and arguably accorded to and operated by GC. The further discussion on this point is recorded in the Transcript. Alliance confirmed that in consultations before the Priority Date it had not been advised by NR one way or the other as to the merits of Alliance and/or GC submitting bids in an 'either/or' form. Alliance had just been advised to submit a compliant bid, which it maintained that it had done.

TTP494 Non-compliance of EC bid with Timetable Planning Rules

- 5.34 GC noted that it had raised this issue in the addendum to its Sole Reference Document for TTP494. Its assertion was that under Condition D2.4.6(a), the actual path bid for EC's 1B88 1608 Newark service was non-compliant with the Timetable Planning Rules, in having some insufficient headway, so that that bid by EC should have actually been rejected by NR and a Revised Access Proposal requested, but it was not. The ensuing discussion is recorded in the Transcript. NR had already accepted that it was correct factually that a relevant headway was too short. Abandoning a faint suggestion that proof of human error in dealing with the process might make a difference to the outcome, NR accepted the conclusion that this particular factual departure from the Timetable Planning Rules made the bid non-compliant within the terms of Condition D2.4.6(a) and therefore not Level (iii) priority within the terms of Condition D4.2.2(d). It had previously been established that, if not accorded Level (iii) priority, it should have been Level (iv) because what happened afterwards was effectively a revised bid which happened between D-40 and D-26.

TTP494 Effect of Alliance's Access Proposal having the expectation that Rights would be granted to the legal entity which made the proposal

- 5.35 Having established that Alliance's bid had probably attracted Level (iii) priority in its own right as at the Priority Date, questioning reverted again to whether it had passed the test of making its bid with the expectation that Rights would be granted to the same legal entity which made the proposal. The ensuing discussion is recorded in the Transcript.
- 5.36 In summary it was confirmed by Alliance that it had submitted the PDNS with the intention of operating the service itself, but utilising Grand Central's rolling stock and traincrew. The PDNS had identified the rolling stock as Class 180, which was Grand Central's rolling stock that would have been utilised on that route. Although the PDNS was not specific that it was Grand Central's 180 rolling stock, from its knowledge of the only other 180 rolling stock operators NR could not but have necessarily inferred that the 180 rolling stock referred to could only be Grand Central's.
- 5.37 However, although NR might have known and taken into account that, if successful, Alliance would operate the service using rolling stock which it would somehow get on whatever basis from Grand Central, GC could not assert that NR would have known that, if successful, Alliance

would have intended somehow or other, through whatever legal mechanism, to transfer the right to operate, achieved through the bidding process, to Grand Central to implement. The conclusion was therefore reached that Alliance/GC could not get over the hurdle created by the fact that the bid was made by a different legal entity than the bid was taken forward with after the Priority Date.

- 5.38 The problem with this particular set of facts was that the Timetable Participant which NR, as at the Priority Date, might have considered, acting reasonably, would obtain Firm Rights, was Alliance, whereas in fact, it was not Alliance's Rights which had or could become Firm Rights, but GC's Rights. The relevant Timetable Participant, as at the Priority Date, was Alliance and even if as at that date, theoretically, Alliance's bid had achieved Level (iii) priority, it had lost that priority because after the Priority Date it had not proceeded with the bid which got that priority. It was GC's, another Timetable Participant's, bid that had been taken forward, starting effectively at 5 March when GC had said it triggered the Section 22A process.
- 5.39 GC observed that this could have implications for every other bid made in circumstances which involved a change of ownership of some rights. I noted in response that there might indeed be all sorts of repercussions because there were all sorts of different permutations of this kind of particular factual set of circumstances where there could be a change before and after, some of which, on the face of it, might not throw up this hurdle and some of which might. However GC frankly and honestly confirmed that in this case there was no expectation at the Priority Date that this service would be operated by anybody other than Alliance, using Grand Central rolling stock. I therefore confirmed my provisional conclusion that this was a bar to GC having acquired Level (iii) priority.
- 5.40 That being the case, and matching it with the provisional conclusion that neither did East Coast's bid have Level (iii) priority, for the combination of reasons previously discussed, the result had already been established that both GC and EC had Level (iv) Rights. This conflict should therefore have been resolved by application of the Decision Criteria. It made no difference to the correct evaluation of priority as at the Priority Date, that both GC and EC had subsequently applied to ORR for the relevant Rights which would support their path and that EC's S22A application had been successful whereas GC's had not (but was still subject to possible appeal).

TTP494 Nature and effect of non-compliance of EC bid with Timetable Planning Rules

- 5.41 Before turning to application of the Decision Criteria, however, questioning reverted to the nature and effect of the alleged non-compliance of EC's bid with the Timetable Planning Rules. The ensuing discussion is recorded in the Transcript.
- 5.42 A consensus emerged in this discussion that there were two separate issues to be considered, on the one hand as to the bid being compliant and on the other hand as to the offer being compliant. The offer was expected to be compliant with all the Timetable Planning Rules, including headways and junction margins. The bid was expected to be self-consistent with the Rules, so taking a path in its own right, but external non-compliance of the bid with the Rules was not fatal, it did not invalidate the bid because there was always the possibility of NR, through Flex (i.e. contractually), or flex (i.e. extra-contractually) bringing it back within the Timetable Planning Rules at the stage of making the offer. NR confirmed it did not think there was an onus on a Timetable Participant to make a bid with necessarily all the right allowances in it; it thought the whole onus was on Network Rail, when it did its validation, to make sure it corrected those kinds of things.
- 5.43 It therefore resulted that, whatever else were their problems under priority Level (iii), neither EC's nor Alliance/Grand Central's bid (the latter having its own small non-compliance with a station dwell time) were vitiated by a technical non-compliance with the Timetable Planning Rules, because that was not how the system worked. However the offer made by NR to EC, in accepting what was bid for, had been non-compliant. There amounted to, in effect, a procedural step and obligation incumbent on NR to observe, as the operator of the process, which fell somewhere between determining the relative priorities of bids, and applying the Decision Criteria. This meant that even where NR had two bids of equal priority, as in this case both at Level (iv), it should not immediately then advance to apply the Decision Criteria in order to

resolve the conflict, but must first go through this procedural step in terms of proper offer and acceptance - which in this case it did not, because the 1608 Newark as offered to EC was non-compliant in accordance with the Rules. This problem, at least, did not arise for Alliance/Grand Central because it had not received an offer in response to its own non-compliant bid.

- 5.44 On the basis of this and the conclusion that both bids were effectively at the same level at Level (iv), there was therefore a possible reason for knocking out the East Coast bid before proceeding to resolve the conflict by application of the Decision Criteria, an intermediate stage of saying that the bid, even at Level (iv), should not have been converted into a part of the Timetable because the offer should not have been made. GC noted that this was an important point to be established, in that a non-compliant path was a structural defect in the Timetable which was the subject of work Network Rail was doing now to achieve an improvement in overall performance. GC asserted that its eventual service identified in exchange for the 1608 at 1552 was fully compliant but was not offered because of a potential performance impact, and the implication was that NR would accept a structural defect in the Timetable as an offer but not offer a compliant path.

TTP494 Basis for application of Decision Criteria, if relevant

- 5.45 A further consideration had been raised by the Panel, the possibility that the train on which EC's 1608 1B88 had the short headway, Freightliner's 4E19, was actually the path that conflicted and had lower priority and should not have been offered, rather than EC's 1608. NR undertook to establish what were the Rights for this train, to see if it was a real issue.
- 5.46 This accordingly reintroduced the possibility that EC's and GC's conflicting bids for the 1608 path were still equal at Level (iv) priority, but with no non-compliance to vitiate the offer made favouring EC, and therefore that the conflict should have been resolved by application of the Decision Criteria. The ensuing discussion on how NR had or should have applied the Decision Criteria, in their latest form, is recorded in the Transcript.
- 5.47 Some time was spent examining which version was applicable in the instant case. It was noted that if we were right in saying that the Alliance/Grand Central bid that was proceeded with was the Grand Central bid, then that was effective, one way or another, from 16 March 2012 so no one would contest that, on that basis, if the Decision Criteria were to be applied, they were those in force from 16 March 2012. It was concluded that the operative time for applying the Decision Criteria in this case, taking into account the chronology of events and the timing of GC's notification of its Rights application, was at a time when it was the version of 16 March 2012, in which former Criterion (a) had been lifted out to constitute the overriding Objective against which the other Criteria were to be assessed, rather than just one of a number of equal Criteria.
- 5.48 NR had set out its view of how it initially envisaged applying the Decision Criteria in a letter of 30 April 2012 to GC, in response to a letter from GC of 27 April. The Panel noted that little had been volunteered by either Dispute Party as to how the Considerations were designed to fit with the Objective under the new version. After some consideration as to what further information would assist in this area, I invited GC, on the one hand, to state how it thought the Objective should have been applied in this case and also to respond to what had already been said by Network Rail, including as to whether it did or did not take into account specific points GC had previously made; and at the same time, I invited NR to provide its views on the missing part of its analysis, as to how it would or should have applied the Objective and, at the same time, saying anything else it wished to in relation to the Considerations. There would subsequently, of course, be a chance to reply or comment on each other's positions on that, which would also be copied to East Coast.

TTP495 Contractual priority of conflicting bids and effect of omission of complete conflict information from offer letter

- 5.49 Discussion then moved to TTP493 and TTP495, taking TTP495 first. The ensuing discussion is recorded in the Transcript.

- 5.50 The overarching issue to be determined in TTP495 was GC's contention was that its D4.2.2(d)(iii) level priority bid for service 1N93 1323 Kings Cross to Sunderland was rejected by Network Rail on the ground that it conflicted with a GB Railfreight service 6N50 bid for somehow. GC said, on any analysis, that this was not a conflict where the GB Railfreight service bid for had any sort of priority over the GC service bid for because the GB Railfreight bid was, on any analysis, a spot bid. So it did not even get into the D4.2.2(d) system of determining priorities. To which Network Rail responded that that may or may not have been the case, but, actually, the reason it rejected the Grand Central bid for that service was because it conflicted with four or five other services bid for by other operators. GC's contention was that NR had not mentioned these other services at the time of rejection, and in any case that NR simply did not try hard enough, that it did not exhaust its process in looking for ways to flex allegedly conflicting services in order to try to find GC a workable solution.
- 5.51 We explored NR's case that it was not just GB Railfreight's service 6N50 (as asserted by NR in its offer letter at the time), which admittedly was a spot bid, which conflicted with GC's bid, but that it was a number of other services as alleged in its Sole Reference Document. We also wanted to know from NR what was meant by "conflicted with" – whether in the sense that they had higher priority contractually than the GC service bid (according to the analysis we had reached as to how to assess that), or that they had an equal priority but came out better on the Decision Criteria, or that they had some other sort of priority over the GC service bid. NR's response was that it was a bit of a mixture, with the main challenge being to determine whether or not it could Flex all of these services. It was accepted on all sides that NR had an obligation to use its contractual right to Flex one operator's services bid, for the benefit of other operators including Open Access.
- 5.52 We embarked upon an analysis, service by service, of the four which were adduced by NR in their submission, anticipating possibly having to extend that to the fifth (which was not mentioned there but was mentioned apparently in the rejection), as to whether NR had done what it could in accordance with its overriding obligation, as we had deduced it from Condition D4.2.2, to explore to the limits the available Flex. The discussion is recorded in the Transcript. We reached the point where we needed to draw a line under this exercise and ask NR to provide further supporting evidence.
- 5.53 NR wanted to emphasise that in any case service 6N50 should not have been mentioned in the offer letter. It was an oversight and should have been removed. We then explored the contractual consequences of NR not having mentioned in that letter the four other services referred to in its Sole Submission. GC's contention was that even if NR could produce evidence that it was entitled to regard any of these services as overriding GC's bid, the process defect of NR having said they were going to 'down tools' too early (as was relevant also to TTP493) and then having failed to include mention of those services in the formal offer letter as reasons for rejection, would, of itself, contractually disentitle NR from relying on what it could otherwise have relied on. NR contested this – it recognised that the offer letter was not the best bit of workmanship in terms of not having the complete information documents, but the information that had been exchanged between NR and GC was far above probably what other operators would have seen in terms of work progressing on their bids on the London North Eastern route. NR objected to the suggestion that it was not sharing information with GC about how it was able to progress the changes it was trying to make on GC's paths.
- 5.54 We reached the provisional conclusion that, in the abstract, any one of these four, or indeed the other one in the rejection letter could in itself be sufficient grounds for rejecting the GC bid – it could be a 'showstopper' - if it effectively had contractual priority and could not be flexed outside over the GC bid, which the GB Railfreight service clearly did not. Their not having been included in the offer letter as reasons for rejection had not detracted from the overall transparency of the process adopted by NR in sharing information on these aspects.
- 5.55 GC was still apparently desirous of achieving some sort of express recognition of NR's failure to include all the conflicting services in the offer letter. As recorded in the Transcript, I took the opportunity to dwell on the nature of the eventual determination and remedies we could sensibly give. I considered that we should only grant practical remedies in respect of the particular services that had been affected, and that it would be undesirable to attempt to make a determination in the form of some sort of declaratory judgment generally criticising or

injuncting NR's behaviour. The Secretary noted that there was precedent supporting this approach, that the decision should only be aimed at delivering the coming timetable and not going beyond it, and that a Panel should start afresh if the situation arises again. NR accepted in any event that it had a responsibility to take the learning from this hearing and spread it back to its teams.

TTP493 Contractual priority of conflicting bids, and effect of NR's alleged failure to comply strictly with Network Code processes

- 5.56 Discussion then moved on to TTP493. I suggested that the matter to concentrate on here was NR's alleged rejection or failure to grant GC's relevant requested slot which was the 1518 Sunderland to London Kings Cross. I noted that the remedy sought by GC was a general declaration against NR's behaviour which fell foul of the principle I had just been expounding on TTP495. The point was to give a specific remedy in respect of the particular Slots at issue. So the issue was, had there been there a breach of contract by NR? On the face of it, the reasons advanced as to why there might have been some sort of breach of contract which would lead to that result were, first, the procedural failure in terms of getting a Prior Working Timetable out in time or at all and, secondly, the alleged failure by Network Rail properly to give procedural consideration to GC's bid for this particular slot, resulting in, and evidenced by, the 'down tools e-mail' from NR, previously referred to.
- 5.57 The ensuing discussion is recorded in the Transcript. In summary GC's case amounted to the assertion that NR were in breach of contract in not arriving at the new Timetable, and eventually the offer, in accordance with the priority determined, plus any Flex exercised, in accordance with Condition D4.2.2. This sounded, on the face of it, to be a similar sort of analysis as we had just been through on TTP495. In respect of those things which NR were saying conflicted with either the service bid for, the 1518 from Sunderland, or the sort of variation to the Bradford service which Grand Central said could have been accommodated within the limits of its contractual Flex on that service, NR was said to have asserted that there were other conflicts which made effectively either of those not possible. We started to explore these alleged conflicts with NR to see how it characterised those services as having had greater contractual priority, in terms of Condition D4.2.2, over both GC's 1518 Sunderland bid and the proposed variation to the Bradford service which could otherwise have accommodated it.
- 5.58 We also examined the circumstances and effects of NR's 'down tools' e-mail sent to GC between D-40 and D-26, in which NR had stated that it did not intend to continue work to find a path for GC's 1518 Sunderland bid. GC contended that had that work been undertaken prior to the Offer Date, as it would have expected, then NR could have used all its Flex in order to facilitate what GC required.
- 5.59 As also recorded in the Transcript, having previously concluded that NR had not only a right but also an obligation (by virtue of the overriding principle at the beginning of Condition D4.2.2) to exercise Flex, we considered the extent of that obligation and concluded that it must be to exhaust all reasonable possibilities of Flex. NR accepted this but considered that the obligation was nevertheless still limited by whatever should be included in the Timetable, in the sense of having greater priority as a matter of contract.
- 5.60 This brought us back eventually to inviting NR to provide, along with other additional material previously identified, its analysis of the alleged conflicts with GC's 1518 Sunderland bid in terms of contractual priority, in the same way as for TTP495. If NR could not provide that evidence, it would be 'game over', because that would mean that GC was contractually entitled to its bid path. However, even if NR could provide that evidence of priority of another service, the argument would possibly remain that even so, that priority was somehow overridden by the procedural defects of NR stopping trying to do something about it, as evidenced by the 'down tools e-mail', or failing to produce a Prior Working Timetable. NR would also have to be able to show that it communicated the evidence of relevant priority to GC at the time of the offer, and had not just dug it up afterwards.
- 5.61 GC acknowledged it would have to accept that the 'down tools e-mail' had created an unnecessary dispute but hoped this analysis and examination would at least ensure that such a

dispute would not occur again. In relation to the Prior Working Timetable, GC felt it had established that it was an important part of the requirement under the Network Code. An incorrect or incomplete Prior Working Timetable created further disputes because GC had bid into space that clearly, in NR's view, should not be there but was there because the trains were not identified completely. So GC viewed it as very important now that NR did take on board the fact that the Network Code was drafted in such a way as to be contractual and it therefore was NR's responsibility to comply with it.

- 5.62 In further discussion as recorded in the Transcript, GC nonetheless accepted that, if NR could provide the contractual evidence of priority of other conflicting bids as suggested, NR's 'down tools' e-mail and failure to provide a Prior Working Timetable, whilst constituting contractual deficiencies, would not actually have had an effect on GC's contractual position as regards the paths bid for and the offer. It may well have caused GC to act in a way differently than it would have done if it had had a Prior Working Timetable to work on, but that, actually, did not affect the contractual analysis of the strict position on bid and offer and of what Network Rail should have done. That contractual position had to be determined according to whether any of these allegedly conflicting services were in fact contractually rightly prioritised over what GC had bid for as at the time of the Offer Date, and whether the rationale for that prioritisation was established and known by NR and communicated to GC by the issue of the offer letter.

TTP494 – provision of EC rolling stock information

- 5.63 Finally, reverting to TTP494 in further discussion as recorded in the Transcript, the issue of sufficiency of rolling stock diagrams provided by East Coast was reconsidered. It was concluded that if EC had provided the rolling stock diagrams for its proposed York services at the Notification of Significant Change date back in November 2011, then GC would be willing to accept that they were referenced in the PDNS document that EC had submitted. However, if the rolling stock diagrams were not provided in November at the Notification of Significant Change date, then there was an issue still. NR therefore needed to provide evidence that the rolling stock diagrams were provided for the York services including additional trains. It was accepted that in relation to EC's proposed alternative Newark services, rolling stock information had been provided in sufficient detail. GC noted that there still remained an issue of not being compliant with the Timetable Planning Rules.

TTP 493-5 Day 2 Parties' Closing Statements

- 5.64 I invited the Parties to make any closing statements briefly that they would like to.
- 5.65 GC stated that the rules (of the Network Code) were defined to ensure the most efficient use of capacity through agreed Track Access Contracts which themselves were based upon the correct interpretation and application of those rules. Network Rail was correctly funded to undertake necessary timetable development work to ensure it used all its options through Flex and timetable variation to deal with Access Proposals submitted in line with the Network Code.
- 5.66 GC said NR, by its own admission, 'downed tools' in April 2012 and so the opportunity to Flex other operators' services or vary the timetable was lost. This had resulted in Grand Central seeking agreement for any changes with other operators as opposed to having the benefit outlined by the Network Code.
- 5.67 In relation to the 1608 Newark service bid by EC, NR had confirmed that this East Coast path was non-compliant. A non-compliant path could not be offered and, as a result, the application of the Decision Criteria became irrelevant. The path did not work and could not be made to work compliantly. GC's 1608 Wakefield path was compliant. GC's 30 seconds dwell issue at Doncaster could easily be addressed. EC's sub-standard headway on the 1608 Newark could not.
- 5.68 If the Decision Criteria had ultimately applied, GC would provide evidence that they, too, had been incorrectly applied in favour of East Coast.
- 5.69 GC was grateful for the opportunity to have these issues determined in such a detailed manner within this forum and hoped that as well as understanding the decisions it would also help to

ensure clarity on future applications and obligations.

- 5.70 Network Rail wished to say three things in its closing statement. First, whatever the determination looked like, it thought there was a degree of learning it could take away from the two days it had had here and it actually thought it would make interesting reading. NR had got a lot to look at in terms of thinking what that did. So, from that point of view, whilst the topic was very complex and had gone round in lots of different circles, NR thought it was going to get something that it could take back and help improve this process in the future.
- 5.71 Secondly, NR was not sure it could actually agree that it had unlimited resources to actually go to every degree of nook and cranny about exhausting Flex, but it did agree that it had an obligation to make sure its decisions were transparent and that it did very visibly and very vocally explain, when it got to a genuine show-stopper, supported by the contract, that that was what it should do. If NR had failed to do that this time round, then it was something that it could learn from for next time round and see where it could avoid a similar confusing situation. NR was not ever going to say it would never appear in front of a Timetabling Panel again, but it did think it should probably appear in a slightly more focused way.
- 5.72 Thirdly NR wished to thank the Panel very much for their time and for a very interesting hearing.
- 5.73 In response to my question East Coast thanked us and said it had no final observations.
- 5.74 As recorded in the Transcript, at my invitation the Secretary then recapped and summarised the additional information and evidence required to be provided by the Parties arising out of this second day's Hearing. We also agreed arrangements and timescales for its provision, and we discussed the necessity, desirability or otherwise of copying the information to other relevant operators or other outside parties. (The further material required to be provided and the issues which arose out of it are summarised in Section 4 above, Submissions of the Dispute Parties, at paragraph 4.14.3.)
- 5.75 I invited submissions on the issue of costs and the Dispute Parties declined to make any. I observed that this seemed to be the right position to take having regard to the complexity of the issues raised by the disputes which it had been entirely proper to pursue to this level of the dispute process. I confirmed that I would therefore not be making any determination as to costs.

Day 3, 12 November 2012

TTP 493-5 Review of previous Hearings and further information provided

- 5.76 At the start of the reconvened Hearing, before recommencing oral exchanges on the disputes, I took the opportunity to review the position reached as the result of the previous two days' Hearings. I noted this was the third day's Hearing we had had of the three disputes TTP493, 494 and 495. We had had half a day on them on 18 September 2012 immediately following the Hearing of the dispute between the same parties, TTP518, on the same day, on which we had since issued a written determination. We had then had some more information requested to be provided, and then a full day's adjourned hearing on 24 September. After that, whilst we had ostensibly reached the end of the oral proceedings for all three disputes, we had required some more information to be provided by both Dispute Parties and commented on by each Party. As a result of that further information and some of the additional material and arguments raised by it, we had decided that it would be sensible to reconvene for a third day to conduct further oral examination of the issues arising.
- 5.77 I then summarised the issues raised by the further information provided as requested since the last Hearing, taking the more general issues first and then moving to the specifics.
- 5.77.1 The first general issue, relevant to TTP494, was the relationship between the bid by Alliance and what came to be the bid by Grand Central, before and after the Priority Date. This issue had been extensively discussed in the course of both days' Hearings, but had been raised somewhat anew by Alliance/GC in its further information letter.

- 5.77.2 The second general issue, relevant to all three disputes, was what data were necessary to an evaluation of whether Rights had been 'Exercised' for the purpose of prioritising conflicting service bids. The issue there was as raised by Alliance/GC in its further information letter that, in order to have a full understanding of the particular point as to whether Rights had been 'Exercised', as required by the Network Code, it was necessary to see some or all of the relevant PDNS – that being the vehicle through which the Exercising of Rights was necessarily communicated, as at or before the Priority Date. This was a general issue raised by Alliance/GC, in relation to several of the services referred to in its further information letter.
- 5.77.3 The third general issue, also relevant to all three disputes, was the position of Network Rail when required to apply various provisions of the Network Code: first, relating to how it prioritised bids as at the Priority Date; and then as to how it applied the Decision Criteria for the purposes of ranking bids of the same priority at a later stage in the process. The issue now raised by Alliance/GC in relation to a number of the specific services being dealt with was whether and to what extent NR was permitted to justify the way in which it had implemented these processes only after the event and in the context of a dispute having arisen, if NR did not provide that justification at the time when it was implementing the process; and whether the fact that NR had produced only a retrospective justification, however good or bad that justification might be, of itself somehow did not accord with Network Rail's obligations.
- 5.77.4 Having dealt with those three general points we would then come on to, in the case of TTP494 (involving East Coast), the specific issues of application of the Decision Criteria, being potentially relevant if we decided that the conflicting bids – of Alliance/GC on the one hand and EC on the other – in fact, for various possible reasons, had had the same priority. That was something on which further information had now been provided.
- 5.77.5 Lastly, for TTP493 and TTP495, there were points of difference on the information provided to be resolved as to the prioritising of the conflicting bids – Alliance/GC's on the one hand for a particular service, and a whole host of services on the other hand, which Network Rail had said conflicted with the service bid for by Alliance/GC.
- 5.78 Reference is again made throughout to the appended Transcript to supply the detail of the ensuing oral exchanges, discussion and analysis conducted of the issues and submissions raised.

TTP494 Relationship between Alliance's bid before and Grand Central's bid after the Priority Date to run the same service

- 5.79 As discussed at the previous two days' Hearings, the broad point here was the difference in identity of the legal entities that bid for this particular service, before and after the Priority Date. It had been agreed factually on all sides that the initial bid had been submitted via the PDNS of Alliance, for Alliance, on or before the Priority Date. Alliance had said it was its intention – made perfectly clear to everyone – that, were it to have been successful in that bid, the actual trains would have been run by Grand Central.
- 5.80 I noted that what had happened after this was that, quite soon after the Priority Date (2 March 2012), for various reasons Alliance and GC, which were both in common ownership of Arriva plc by that stage, had decided that GC should proceed with the bid, GC among other things having the rolling stock and also having the existing Track Access Agreement. GC could proceed to get the necessary Rights, which it was agreed on all sides that neither Alliance nor GC had at the time. At the time of bidding they had both had only the expectation of Rights, not actual Rights. Therefore GC, having an existing Track Access Agreement, could apply to ORR for the necessary Rights for the service in question via a Section 22A agreement as a change to its Track Access Agreement. Alliance on the other hand, not having had a Track Access Agreement, would have had to apply for a new Track Access Agreement, either as a Section 17 contested agreement, i.e. not agreed with Network Rail, or hypothetically, if it were possible, as a Section 18 agreed agreement. It was suggested at the Hearing that, had Alliance had to do

this, it would have been a Section 17; it was assumed that Network Rail would not have agreed, so it would have had to go to ORR as a Section 17 application.

- 5.81 I had raised this as an issue now because, in its submission of additional information, although not requested to do, Alliance had had another go at this particular point, arguing in summary that Alliance's bid should be considered as at the Priority Date for whatever priority it was to be accorded and should have been given that priority. Somehow Alliance could not see a contractually based argument for saying that either Alliance or GC had any priority later on which was less than Alliance had as at the Priority Date, because (it asserted) the question of priority crystallised as at that date. The first point I wanted to address was, even assuming to be true what Alliance/GC had said in their further submission, how did Alliance/GC assert that the priority accorded to Alliance's bid as at the Priority Date transferred to what became a GC bid after the Priority Date?
- 5.82 The ensuing discussion is recorded in the Transcript. GC said there had been no change to the path under discussion. The bid had just 'gone along' and at some point it did transform into a Grand Central service. There was nothing in the Network Code that said that you could not actually change the operator and it did not say what happened if you did change the operator. There had been discussions by all parties with ORR prior to and after submission and ORR had known perfectly well what was the position between GC and Alliance. However GC stopped short of contending that ORR had specific power to direct or permit a transfer of a bid from one operator to another.
- 5.83 NR agreed with some of what Alliance/GC had said about how in practice it was intended that these services would be resourced by Grand Central's rolling stock for the bid that Alliance had made. However these Hearing proceedings had made NR go back and look at the contracts. At that time, NR had very much focused on the practical approach going forward, and it was still working on the premise that it was going to try to deliver everything for everybody and do the best it could with the Timetable. It was only over the last few weeks that NR had started to look at the issue of whether it was right to continue that approach. NR accepted the view that Timetable Participants could not just trade a slot between each other and expect it to have the same status that it would have done if it had been bid by a single participant all the way through the process, from Priority Date onwards. NR had queried internally with its legal department about the transfer of participants' bids between each other and their view was very much that it could not be done without there being a loss of priority and a new bid coming in from the new operator that intended to run the service. NR also did not think ORR had any power to direct or permit the transfer of a bid from from one participant to another.
- 5.84 Discussion continued on this issue, as recorded in the Transcript. It was suggested that a transfer of a slot as part of the timetabling process might be regarded as analogous to the transfer of an asset as part of the franchising process, but this was dropped. It was also suggested that a transfer of a slot might somehow work under the Network Code, but I pointed out that the Network Code took effect only by incorporation in a contract between two parties.
- 5.85 I summarised the position on this issue as being that the Timetable Participant, who participates by virtue of one of these types of contract, was a specific legal entity that made a bid. The bid was that of that legal entity alone. The fact that the Network Code, incorporated in the contract between that legal entity and Network Rail, did not expressly prohibit a transfer of one participant's bid in a binding way to another participant which had a different contract with Network Rail, did not validate such a transfer being made or having legal effect. In my view, in order for such a transfer to be capable of being made and having legal effect, the Network Code would have had expressly to provide a procedure for it – to permit it and provide a procedure for it to be made – and it did not. Because it did not, it was necessary to fall back on the default legal position, which was that each legal entity operated in its own right discretely and the relevant rights and obligation attached to it alone. Nor did it appear that ORR had the power to direct such a transfer.
- 5.86 GC eventually accepted the point that technically there were different legal entities. GC observed that it was trying to show the difficulty, particularly for a new operator, of trying to get onto the network. Had it been clear that changing the bidder actually would drop them down the pecking order, then they would not have done it, because it would have been easy to have

made a Section 17 application on the back of Alliance. This exemplified one of the biggest frustrations in the process, the complexity of the Network Code, and the apparent inability now for everybody to pull the Code together and apply it correctly. I observed that this made it all the more important for participants to recognise that this was something of a technical tripwire, particularly for people in GC's position. Just as in other contexts the Panel would say to Network Rail that it could not be lax in operating the contractual procedures for the sake of just trying to get what it saw as a decent result, the same held good for operators as regards the need for playing it by the book. There was an important distinction, which all needed to be aware of, between different Timetable Participants.

- 5.87 I noted one remaining aspect to consider, which had been mentioned in the summary of issues sent to the Parties. The Railways Infrastructure (Access and Management) Regulations 2005 on the face of it expressly appeared to say that one Timetable Participant may not transfer capacity. They were dealing there with capacity in the large sense, but that meant, for practical purposes, Train Slots. However in further discussion, as recorded in the Transcript, it appeared likely that these Regulations were not relevant to this situation because they would not apply until capacity had actually been granted so as to be capable of being transferred, therefore after the Offer Date and also after ORR had granted any necessary Rights. We were therefore left with the points previously discussed, that in the case of putative rights as distinct from actual granted capacity, the Network Code did not give any power to transfer and there was no other apparent source of power for a transfer, for example for ORR to direct or permit it. This proposition was acceded to by all, and that disposed of the first general issue.

TTP 493-5 Extent of Network Rail duty to disclose PDNSs when only of potential but unknown relevance

- 5.88 The second general issue (as raised by the information produced since the last Hearing) was whether Network Rail needed to produce the entire PDNSs covering all the services that were in dispute, in order to produce a full evaluation as to whether they were in conflict or not. This issue had been compounded by GC's formal request, made as part of this process in the intervening period between the last Hearing and this reconvened Hearing, for the ordering of disclosure of some PDNSs, which I had rejected. The principal reason for rejection was that what was being asked for was so broad as to be unworkable. (My reasons for rejection are set out in full at Annex 5 to this determination.) I invited GC to make any observations on that particular aspect of the process and the rejection of that request.
- 5.89 The ensuing discussion is recorded in the Transcript. GC's main point was that without seeing the PDNS, it was not possible to identify whether a Right had been Exercised, and it made a strong argument that NR had an unfortunately lax approach to checking information provided by operators and in particular, whether Rights referred to in PDNSs had been Exercised, which was an important part of the prioritisation process. GC's concern was as to NR's ability to be as transparent as it should be with the information at its disposal. It was uncomfortable about accepting what NR said at face value, not because it thought NR was actually trying to mislead, but because it did not think NR necessarily always did the detailed work required to get an answer that it could justify with evidence.
- 5.90 I noted that the point of this Hearing was not to consider the merits of NR's general approach to disclosing material such as PDNSs in the course of the timetabling process, but to determine if a particular piece of information was necessary to inform a particular decision. I reminded them that the Panel's normal approach – the default position, as stated earlier in this determination – was to accept what was said or produced by the parties as true, unless some particular reason or evidence was adduced for suspecting otherwise and investigating further. It was not usually a sufficient argument to say, "We cannot tell whether it is true or not without seeing everything else on which it was based". As a general principle, I did not think it was the job of a Timetabling Panel to address, in a general way, the discomfort and general suspicion that an operator had, however well founded or ill founded, with Network Rail's practices. As I had said at the outset of the Hearings, it was not the jurisdiction of this Panel to grant some of the larger remedies and outcomes sought by GC, in the sense of general injunctive edicts as to how NR should behave for all time to come. The function and jurisdiction of this Panel, under the ADJR, was to adjudicate the specific matters in dispute, equipping itself with enough information of such calibre as was accepted by everybody and not challenged on any substantial basis, in

order to make the necessary decision. I said I proposed to do that by reference to the specific services which, as a matter ultimately of contract, were alleged to have been in conflict with and overridden the ones bid for, and to look at the information necessary to make a determination on those particular issues.

- 5.91 NR, being asked to respond, observed that it was a fair criticism to enquire whether PDNSs (the forms used) had the right focus that pointed NR in the right direction at the start of the process. For example, there used to be a clause about rolling things forward and, for bigger operators and for NR itself, NR had probably fallen into a slightly poor practice of using those very words 'roll over' as meaning absolutely everything else that that the bidder was entitled to was in that bucket and went with it. NR would not defend this practice and felt it perhaps used that phrase far too casually around the timetabling process. Also the PDNS template that NR used very clearly stated that it was referencing back to the Prior Working Timetable. Again, NR knew that it did that part of the process very inefficiently or did not do it at all for the instant Timetable, so there had been an indisputable error in the way NR had done business. NR recognised it could be more transparent about how it used documents provided by bidders, having become far too relaxed in the way it did business with them. A lot of what NR tried to do was to try to make these processes that were very complex as straightforward as possible to execute. NR thought it had perhaps not taken those decisions about trying to make the process streamlined with enough understanding of how these elements fitted together in the processes.
- 5.92 Continuing in more detail, as recorded in the Transcript, NR recognised that really there was a flaw in everything it had just done, because the PDNS template very clearly pointed an operator to confirming that it was Exercising its Firm Rights in the Prior Working Timetable NR had published – and NR recognised that in this case NR had never published that, so it was not clear how anybody could actually say that they were going to Exercise their Rights. GC still maintained, however, that NR had in effect eventually issued what it called a Prior Working Timetable. NR then acknowledged that, whilst it had produced a document that was issued nationally to every Timetable Participant, one that for GC's purposes was the equivalent of the Prior Working Timetable, nevertheless it did not fulfil the obligations of the full Prior Working Timetable.
- 5.93 I accepted this as meaning that it was not the entire national Prior Working Timetable as required by the Network Code. I found NR's response very helpful, because it gave us a useful basis on which to evaluate the way in which the specific services that we were going to come on to did actually conflict or not conflict with the services that GC was concerned about. I said it was appreciated that Network Rail quite candidly acknowledged the general issues of lack of transparency and so on, because these were very relevant to the specific services in dispute.
- 5.94 I concluded on this issue that it was not necessary, in order to arrive at a determination of these disputes, to require Network Rail to provide all the PDNSs that might be asked for by GC, even if they were to be identified, which they had not yet been. I considered that, for the practical purposes of getting to a decision in a sensible timeframe, we could move to considering the specific services and, where necessary, ask NR to attest to what was the content of a particular PDNS, if that were relevant to a particular service, and then take that at face value, unless a very good reason were given for suspecting that it might not be accurate. I did not propose to embark on the very interesting issue raised by GC, but one not ultimately germane to these proceedings, of whether PDNSs in general should always be put on the table and how they should be treated in the matter of legal obligations and confidentiality, because I saw that as a minefield. There were various conflicting provisions in different aspects of the whole regulatory matrix, ranging from licences and regulatory provisions through to the Network Code and the Timetable Planning Rules, as to what should and should not be kept confidential, according to who did or did not want it to be kept confidential. Actually trying to resolve the conflicts between some of those provisions would certainly be a useful exercise, but not one for this Panel.

TTP493-5 Timing of Network Rail decision-making processes – admissibility of retrospective justification for prioritisation and application of Decision Criteria

- 5.95 I noted that the third general issue was to consider the timing of Network Rail's application and rationalisation of the processes it had to apply; and to establish whether it was sufficient for NR

to develop only retrospectively the analysis and justification for how it had applied a process, particularly in the context of a dispute and for the purposes of that dispute. That was arguably less valid than, and not as sufficient as it would have been, had it applied its analysis and communicated it at the time of actually implementing the process. The two processes we were concerned with here were, first, prioritisation according to Condition D4.2 of the Network Code, and secondly the process of applying the Decision Criteria, where they became relevant because of conflicting bid services of the same priority.

- 5.96 There were two different variants of this to consider, with different possible outcomes. One was the more simple situation where, in either dealing with the prioritisation or applying the Decision Criteria, NR had not really communicated anything particularly clearly at the time of or immediately after doing it, but had only retrospectively come up with a more precise analysis of its thought process, because it had been required to do so for the purposes of a dispute resolution. The other was where NR had actually communicated some or all of its thought process at the time and then, when asked to provide its comprehensive analysis of what the process was after the event and for the purposes of the dispute resolution, it came up with a new or modified version of whatever analysis it had previously provided. That second variant was, in several instances, what GC was alleging to be the case. The general issue we needed to look at was whether in legal, contractual terms, NR doing it in either of those ways somehow invalidated the justification it gave and therefore prejudiced the justification, to the point where it could be said that it did not stand up because it had been either given or changed retrospectively.
- 5.97 My provisional view on this (as I and others had held in determinations on other Timetabling Panels) was that, at least in terms of applying the Decision Criteria if not the prioritisation procedure, it did not invalidate NR's decision if the justification was to some extent worked out retrospectively, provided that what was eventually worked out did not clearly differ from what was happening at the time and the way the Decision Criteria were applied at the time. The fact that NR sometimes came up with a grid in which it enumerated all the factors and applied weighting to them after the event, it had been held, was not an invalid way of doing it. This was partly for practical commonsense reasons, in that to require NR to have gone through a formal written analysis and grid process and to have argued it at the time, in respect of every bid and service, would be impossible practically and would just completely choke the whole process. That view in substance, therefore, admitted a degree of retrospective analysis as being a valid way of dealing with these matters. I invited the Dispute Parties' observations.
- 5.98 The ensuing discussion is recorded in the Transcript. Broadly, GC disagreed that retrospective analysis by NR could normally be justified in principle or warranted by the practicality of having to deal with a multitude of such matters that would otherwise clog the system. On this point we later asked NR for rough estimated figures and were surprised to be told that in fact there were very few instances annually where NR concluded that it had to go into print on its application of the Decision Criteria, at least on the passenger operations side. In fact, for the December 2012 Timetable, NR said it had only had to do it once, and that was for the services the subject of this dispute. Consequently GC believed that application of the Decision Criteria should be a relatively straightforward matter and made a strong argument that NR should normally have ample time to do the analysis at the time it was needed for a decision, rather than coming up with it some time after only when prompted by a dispute. In any case, GC maintained that NR's purported application of the Decision Criteria (as communicated to GC in the 30 April 2012 letter) had fallen within my second variant, in that it gave a different rationalisation (with weighting) from that originally applied (without weighting).
- 5.99 NR accepted that it was bad practice to retrofit the Decision Criteria. It regarded them as necessarily at the heart of all NR's thinking on such matters, something which had to be intuitive to all its decisions. However, NR did not accept that their application was a straightforward exercise, but thought it an exceptional, complex thing to do and one which was very bespoke, and based on a fairly subjective set of rules to apply. NR felt that it needed to make sure it was getting the core theme right, so it could link it back to the objective of the decision-making. Then, if at the start of the process it had underlying understanding how it would apply the Decision Criteria, and it was thinking about it and making those decisions, it was acceptable to build on that with more granularity of detail that was required to present the case in a forum like this, as long as there were a couple of real core items that remained the

same through the use of the Decision Criteria. Moreover, the actual information was constantly changing. Different operators brought different bits of evidence throughout the process, which should not stop NR from re-evaluating how it had used the Decision Criteria when such information came to light.

- 5.100 An issue was raised as to the applicability of the Decision Criteria in exercising contractual Flex, on which the discussion is recorded in the Transcript. NR believed they should underpin everything it did, whereas GC contended that, by definition, if the Flex was contractual, it should just be exercised to accommodate as many bids as possible, without regard to the Decision criteria. I noted that the Network Code did not give a clear answer. By Condition D4.2.1, NR was obliged to apply the Decision Criteria in compiling a New Working Timetable, whereas by Condition D4.2.2 it must endeavour wherever possible to comply with all Access Proposals submitted to it subject to, among other things, being entitled to exercise its Flexing Right.
- 5.101 I observed we appeared to have established that NR did not consciously, and certainly not expressly – in the sense of putting it down on paper – apply the Decision Criteria at the time of going through this process, other than very rarely and, in this case, instructively, only once for the entire national timetable. That once happened to be the one that were considering as the substance of this dispute. Possibly, as a matter of ideal practice, NR should have been consciously and expressly applying the Decision Criteria, rather than intuitively and at the back of its mind, and writing about it in a lot more cases, including in the Exercise of Flex. Had it done so, however, I suspected that was the point at which it would have become impractical for the running of the railway in combination with compiling the timetable, to issue a full written justification at the time of every instance of Exercising contractual Flex. We did not need to decide that then, because that was not the situation under dispute.
- 5.102 On this issue, as regards application of the Decision Criteria and the timing, I said I had heard what Network Rail had said, acknowledging the need to be intuitive about it, and I thought that was a point well made. However I had come to the conclusion that, actually, it needed to be more than merely intuitive. If there was only one instance per annual national timetable where NR needed to really go to town on applying the Decision Criteria to resolve a very distinct conflict, then it could do so at the time and not come up with a different justification afterwards, and certainly not come up with a fuller and more granular, as it was put, justification afterwards. I did not think that conclusion conflicted, as a matter of logic, with the sort of precedent I had mentioned earlier – my own and other previous decisions – which had found a justification for NR providing a later more granular, detailed, analytical basis for having applied the Decision Criteria in cases where it has clearly done so intuitively in the proper way at the time, and to some extent communicated that to all parties.
- 5.103 Where that left us on this issue was that we had an explanation of the analysis of application of Decision Criteria at the time and then, later on, we had another one. The later explanation fell the wrong side of the line; it was not one where it just filled in missing detail after the original decision. It did more than that, changing, to some degree, the analysis of how the Criteria were applied.
- 5.104 That dealt with the general issue of timing and analysis of the application of the Decision Criteria, which just left us with the same point, only in relation to the application of the prioritisation process, under Condition D4.2.2. My conclusion was that, even more so than in application of the Decision Criteria, it really was up to Network Rail to analyse the position properly at the time in accordance with the contractual Network Code provisions and to be transparent at the time about its analysis; to communicate that to operators and not to fill in the granularity of how those particular prioritisation decisions were arrived at after the event for the purposes of the dispute; and still less to change that analysis after the event.
- 5.105 Both Dispute Parties confirmed agreement with the summary of my conclusion on this issue.

TTP494 Application of the Decision Criteria and effect of non-compliance of offer made to East Coast

- 5.106 We moved to consider the specifics of the trains in each of the three disputes where there were specific conflicts between GC's and NR's respective arguments, arising out of the latest batch of information provided. For TTP494, I noted that this provoked an analysis of the application of

the Decision Criteria on the provisional supposition that, one way or another, they were applicable because the conflicting EC and GC bids the subject of the dispute had equal priority, at whichever level for whichever reason. I proposed to go through what had been stated in our analysis of the evaluation of the Decision Criteria as applied to that particular conflict, in the light of our earlier conclusion that there should not, through the medium of the information Network Rail had provided for this dispute, prove to have been a retrospective change of the analysis by Network Rail from the analysis it had given at the time.

- 5.107 GC interjected to recall that it had been confirmed at the previous Hearing that the train in conflict with GC's bid the subject of TTP494, EC's 1608 to Newark, was non-compliant with the Timetable Planning Rules in having a short headway at Newark, and also that it could not be made compliant. In consequence, said GC, the need to consider the Decision Criteria on TTP494 arguably became irrelevant.
- 5.108 The ensuing discussion is recorded in the Transcript. The nature of the headway infringement was investigated at length and found to have resulted from the lack of a specific Timetable Planning Rule for two moves at Newark that followed each other across the crossing at Newark South into and then out of the station. After extensive consideration of various arguments for and against the headway being interpreted to be technically deficient, NR accepted that it was. It appeared to be a situation where the applicable default Rule was not practically appropriate to the situation, but nonetheless technically binding, unless and until someone went through the appropriate procedure to change or supplement it, which was probably the realistic solution to be found. As a result of the agreed non-compliance, it was accepted that EC's 1608 Newark service should not have been offered and included in the Timetable. NR commented that it would be impossible for the Rules to deal with every conceivable eventuality and combination of circumstances – they would be impossible to run or even interpret.
- 5.109 I wanted briefly to address the issue of the application of the Decision Criteria, in case the dispute proceeded further, even though it was probably not now essential to the actual decision. My provisional conclusion on the argument for and against how to apply the Decision Criteria to this particular service, as expressed in the further information put in by both Dispute Parties, was that, in the round, Grand Central had won the argument, partly because Network Rail did not comment on what GC had said in its first submission. Without going through GC's points one by one, I felt from this that, overall, the weight came down in GC's favour. GC had also made the argument that supported what we were looking at in more general terms, namely that a certain amount of NR's analysis of the application of the Decision Criteria, as expressed in this new information put in to us, was retrospective and changed what had previously been said to such a degree that it was not warranted to regard that as overriding what had previously been said and what GC was now saying. NR accepted that interpretation of the way it had weighted the Considerations.

TTP493 Examination of conflicting services

- 5.110 This left the task of identifying any head to head timetabling conflict affecting GC's bid services under TTP493 and TTP495, and assessing the priorities of the other services variously cited by NR as conflicting with them. My view overall on this was that in order to succeed, NR had only to establish one service that, either as a matter of priority or by the application of the Decision Criteria in a case of equal priority, eclipsed the service bid for by Grand Central.
- 5.111 Starting with TTP493, I therefore suggested to NR that it identify its best example of a priority Level (i) head to head clash with GC's bid service 1A68. I recalled that in TTP493, the complaint had started off being characterised not as the wrong offer of a specific conflicting service, but more as a grievance. By reference to what we had called the 'down tools' e-mail, GC's complaint had been that NR had wrongly abandoned the process before it should have done and that this had tempered GC's whole approach to it, in that it would have acted differently had NR not so acted but carried on discussing it. However, in the course of the last session, we had effectively put all that to one side and identified that what it boiled down to was a straight dispute concerning the service bid for, at Level (iii) priority, and whether or not NR behaved fairly or unfairly in the course of the process.

- 5.112 NR identified Northern Rail's service 2P79 1619 Scunthorpe to Lincoln, which had a Firm Right for the whole of the period in question and therefore clearly Level (i) priority. The ensuing discussion is recorded in the Transcript. It included consideration of two further issues with this from GC's point of view. First, whether the Rights for that service were Exercised, because GC said it did not know, not having been given sight of Northern's PDNS. Secondly, whether NR should have exercised its right to Flex the Northern service, notwithstanding its Level (i) priority.
- 5.113 After considerable discussion, including a lengthy digression into the differences between a PDNS and an electronic bid, GC accepted NR's statement that the relevant Rights for 2P79 had been Exercised. GC also conceded that NR had established, apparently at least to the point where GC felt it had no further evidence on which to challenge it, that it had reasonably considered all available Flex options, and that (as I characterised it) NR had no further unsatisfied contractual obligation to have exhausted all possibilities for contractual Flex of 2P79. GC therefore accepted the conclusion that it was not necessary to examine in the same detail any of the other potentially conflicting services in relation to TTP493. This conclusion appeared to dispose of TTP493.

TTP495 Examination of conflicting services

- 5.114 We turned finally to TTP495, to conduct the same exercise as for TTP493 of examining the services allegedly conflicting with GC's service under dispute, 1N93 1323 Sunderland to Kings Cross, to see if at least one of them clearly had a higher priority than GC's. In TTP495 the main service identified in NR's offer letter as conflicting with the relevant GC bid had been GB Railfreight service 6N50 which was clearly only a spot bid, and so on any basis did not have priority over GC's bid. NR's contention in response was that there were several other services, albeit mostly not mentioned in the offer letter, which in one way or another conflicted with GC's bid and which did have priority. I invited NR simply to identify one such service with clear priority, and preferably one mentioned in the offer letter in order to avoid the challenge of retrospective justification or lack of transparency.
- 5.115 The ensuing very lengthy discussion on all these services, and extended debate on a number of subsidiary timetabling procedure and practice issues arising, is recorded in the Transcript. In summary, at first the several services cited by NR all appeared to have deficiencies of one sort or another for this purpose, including a freight service (Freightliner Heavy Haul 6H88) which did not clarify the underlying Rights; a freight service (DB Schenker 6E84) which was apparently for Mondays and Fridays only – "MFO"; a passenger service (East Coast 1N85) which was not mentioned in the offer letter, was not Exercised properly, and had its own conflict with 6H88; and various other services not mentioned in the offer letter. A separate issue also arose and was exhaustively debated as to whether, to constitute a proper bid i.e. Access Proposal for the purposes of Network Code Part D, a PDNS needed to include rolling stock diagrams in order to supply information necessary (as required by Condition D2.5) as to the rolling stock intended for a bid service.
- 5.116 DB Schenker's 6E84 MFO was examined further as to whether, if only for Mondays and Fridays, it really was the potential 'knockout blow' for GC's 1N93. Consideration was given as to whether, if that were the only truly conflicting service, NR should have offered the path to GC for Tuesdays to Thursdays only, and whether GC would have accepted it on that basis. It was argued that 6E84 MFO would not of itself rule out those days for GC unless, having equal priority with GC's bid, it were to win on the Decision Criteria, which was possible but unlikely. At this point in the Hearing GC started to consider the possibility of setting up a Tuesday to Thursday service, and went as far as obtaining clearance on the spot from its senior management to apply for a three-day service if that should prove a viable outcome.
- 5.117 However in a further attempt to find a five-day rather than two-day knockout service, discussion turned back to EC's 1N85 which, although not actually mentioned in the formal offer letter, NR said had been previously clearly identified to GC as a conflict, thereby satisfying the requirement of transparency. GC responded by raising further issues as to deficiencies in EC's PDNS; it emerged now for the first time that the document supplied to GC, on which it had based its contention, was not EC's main PDNS but only a supplement to it; and this gave rise to

a further discourse on whether the Rights relating to 1N85 had been "Exercised", within the meaning of the Network Code, by the submission of the PDNS in such a form. In the end GC accepted my suggestion, by reference to the earlier debate (on the first day's Hearing) on the meaning of an 'expectation' of Rights, that in this case they had been duly Exercised.

- 5.118 GC now reverted to questioning the extent of available Flex in relation to 1N85, having regard to the fact that this EC service as granted (i.e. to Newark rather than York) had only quantum Rights not Rights to departure time ranges. After some analysis and discussion as regards NR exercising contractual Flex, as recorded in the Transcript, we established that although there was not actually an express obligation in the Network Code and the contract to do so, there nevertheless appeared to be an implied obligation deduced from the totality of bringing together the Network Code, the Track Access contracts, the licence and the practicalities of the process. I proposed that such an implied obligation to use the power to Flex could only be to use it to a reasonable and pragmatic extent and accordingly we tried to establish if this had been done.
- 5.119 As a further complication, since the Offer Date GC had been offered 1253 as an alternative to the 1323 service bid for, and there would also have been the theoretical possibility of a straight swap for the 1308 as offered to EC. The 1253 would not have worked for various reasons, but the 1308 would. However the decisive point was that after further questioning NR conceded that it was apparent from the information most recently submitted to the Panel by NR itself that EC's 1308, as a franchised service, had in effect been treated as a fixed reference point around which any available Flex would have been regarded, if only subconsciously, as having to be conditioned. We therefore concluded and NR accepted that, one way or another, sufficient attention had not been given by NR to Flexing the departure time of EC's 1308, so that reasonable possibilities of Flex had not been exhausted. 1N85 therefore was not the knockout service being looked for.
- 5.120 The next service raised by NR was 6H33 of DB Schenker, which had not been cited as a conflict in the Offer Letter to GC but like 1N85 had been identified as such in the advance information. After some examination it became clear that 6H33 having sufficient pathing time could after all have been accommodated with an alternative solution, which had not been previously explored or offered to GC as a way of reaching a viable alternative. This therefore also proved not to be the sought for knockout.
- 5.121 GC reminded us also, with a view to having this specifically noted in the determination, that the service identified in NR's offer letter as the principal conflict with GC's bid for 1323, GB Railfreight service 6N50, had been only a spot bid and therefore on any view should not have been cited as having priority over GC's bid.
- 5.122 On TTP495 we appeared thus to have reached the point where all reasonable options proposed by NR for a knockout higher priority conflict to GC's bid service 1N93 had been systematically worked through and discarded, except for one, DB Schenker's 6E84, where the conflict however was only partial because effective only for Mondays and Fridays. As recorded in the Transcript, preliminary exchanges then commenced towards a consideration of the consequences in terms of available timetabling solutions, having regard to the obvious difficulties in reconciling numerous points of possible knock-on conflict in the web of interrelated services around the path in question. I noted that for the purpose of getting to a workable determination I was minded to determine only what should or should not be done by Network Rail and Grand Central, the parties to the dispute, without being prescriptive as to how Network Rail should deal with the knock-on consequences of that on other services of other operators, passenger and freight; my function was to determine the contractual rights and obligations of the Dispute Parties, not to act as a timetabler for an admittedly difficult patch of the East Coast Main Line.
- 5.123 In the course of these exchanges the discussion started revisiting old ground on various issues. NR was emphasising the difficulty inherent in the whole process of constantly trying to reconcile so many individual points of conflict in a complex web of knock-on effects every time each characteristic of a service was Flexed or just altered. NR expressed concern that in trying to unravel this complexity for the elucidation of the Panel, without having the detail of the timetable at the fingertips of its representatives at the Hearing – without, as it were, actually looking at it over the shoulder of an expert – NR could not say whether it had done everything reasonably

possible by way of Flex etc to accommodate all interests. For NR, that was the absolute devil in every bit of this, in the detail.

- 5.124 I suggested that, exacting as it might be, it was reasonable to expect an organisation holding the function of NR to be capable of producing the required information, particularly where we were reaching the end of the third day of a dispute Hearing and NR had been given every opportunity and encouragement to produce what was necessary. I observed that the whole system would not really function if we could reach the point after three days of a Hearing, with all the wealth of information that had been requested and provided in response to requests, where one Party was still saying it actually did not know the position on some proposed solution and whether in practice it would work or would block up the entire network, so that it was not open to the Panel to determine in a way that would bring about that problem. This did not sit with the nature of the whole dispute resolution process.
- 5.125 NR continued to maintain that it could not see why GC's 1323 bid should take precedence over the various others that had been identified as conflicting, such as EC's 1N85, even if they were only of an equal priority. The Panel pointed out that resolving such a conflict would be a matter for application of the Decision Criteria. GC made the comment – with which I had some sympathy – that this issue, like all those brought by GC to this Hearing, had concerned the problems of a small operator basically being the "last on the graph", i.e. the last into every decision and ultimately having to fight for everything after the Offer Date. GC felt it had needed to get some clarity on this problem, and that the industry for too long had been collaborative for certain parties but not for others.
- 5.126 In a final attempt to find a knockout service for GC's 1323 bid, NR reverted to a consideration of Freightliner Heavy Haul 6H88. A further protracted discussion ensued, as recorded in the Transcript, in the course of which GC charged NR with lying as to whether or not Rights had been applied for by Freightliner Heavy Haul by a Supplemental Agreement covering this service. There was some doubt as to what ORR had told the Parties at the time, and in any event GC withdrew the charge of lying. Following this discussion the best I could do contractually was say yet again that in all the circumstances, at the point we had reached in respect of 6H88 in particular, NR had not succeeded in demonstrating that that was contractually a 5 day knockout of GC's bid 1N93, for a whole variety of reasons. Basically Network Rail had not provided a satisfactory answer, either written beforehand or at this day's Hearing, to some of the points made by Grand Central.
- 5.127 That left us, not for the first time, with concluding that we already had what I had called 'a contractual knockout' in the shape of DB Schenker's 6E84, but only for Mondays and Fridays. I asked for the last time if there were any other services that satisfied the transparency criterion of having been referenced in the offer letter or clearly discussed beforehand, which knocked out the other days for GC's 1N93 1323 bid. NR acknowledged that the information it could produce regarding possibly conflicting services had been exhausted. However, a further twist was to come.
- 5.128 One of the Panel members, Mr Gibbons, a senior manager in DB Schenker, was receiving contemporaneous e-mails from DB Schenker staff providing further relevant information as to the factual position regarding Rights applied for and/or granted by ORR for service 6E84. We had to consider if it was appropriate to admit and consider information from this source, bearing in mind that in providing it Mr Gibbons was acting purely in his capacity as a Panel Member and not a manager in DB Schenker.
- 5.129 I noted that information material to this dispute was now being provided, as it happened by a member of the Panel, regarding the position on a particular set of Rights. I raised the question whether, as a matter of jurisdiction, as a Panel we could and should properly take cognisance of that information, notwithstanding that it had been provided by a member of the Panel, rather than by other parties. I believed we could because I thought the Panel had the power, among other things, to be pro-active in seeking out relevant information, just as it had in researching the relevant law and being inquisitorial when trying to dig out information. The Secretary reminded us that under ADRR H14(c) the Panel "Where appropriate, may take the initiative in ascertaining the facts and law relating to the dispute." I therefore decided, pursuant to that power, that we could properly take cognisance of what our Panel member, from DB Schenker,

had elicited as the information. I stipulated that, naturally, we would give the Parties the opportunity, if they wanted, to refute as a matter of evidence an account of something said that, one way or another, happened to be before the Panel.

- 5.130 Mr Gibbons informed the Hearing that DB Schenker's PDNS had made reference to a number of Supplemental Agreement applications which were with ORR. It was not yet clear whether 6E84 was one of those applications to run SX, i.e. including Tuesdays, Wednesdays and Thursdays. He believed and was trying to verify that this train had changed, and now did run on more than Mondays and Fridays. However further discussion, as recorded in the Transcript, reached the conclusion that this of itself would have given DB Schenker no more than equal priority with GC for Tuesdays to Thursdays and therefore only the chance to be evaluated according to the Decision Criteria. This was still therefore not a knockout for GC for five days.
- 5.131 Shortly after, however, from further investigation of DB Schenker's records it was reported to the Hearing by Mr Gibbons that, notwithstanding having been repeated in a recent Supplemental Agreement application, DB Schenker's application for the Rights to an SX path for 6E84 in fact had originally been submitted to ORR and subsequently approved in September 2009. This statement having been apparently verified from the records with DB Schenker's Timetable Manager, GC confirmed it did not seek to refute it but was willing to accept it at face value as true, but noted that nevertheless it did not appear in the contract that was publicly available on the ORR website. It appeared therefore as though the fault actually lay in the updating of ORR's consolidated contractual table, about which GC had complained previously.
- 5.132 This being the position, GC therefore accepted the fact that DB Schenker had a higher priority and contractual Rights for a path in conflict with GC's 1N93 1323 bid, and that this finally was a "killer blow" for GC, in respect of that service. GC said it was still satisfied eventually to have established this through the right route, and one which would support putting pressure on ORR to get contracts correctly updated and correctly referred to on its website, failure in which GC felt had been a major part of the reason that it had been in this dispute Hearing for three days. I observed that it was not open to this Panel to issue directions to ORR to do things better.
- 5.133 As recorded in the Transcript, the consequence of this was the logical conclusion under dispute TTP495, on the basis of the evidence received, that DB Schenker's service 6E84 at least, irrespective of all the others that had been adduced and debated, was what had been called the 'knockout' to the assertion that service 1N93 as bid for by Grand Central at 1323 had priority as bid for, and should have been admitted.

TTP 493-5 Day 3 Parties' Closing Statements

- 5.134 Although closing statements had already been made at the close of the Hearing on day 2, having had a further full day's Hearing (of some 12 hours) I said I would invite the Dispute Parties and also East Coast, as the interested party attending, finally to make any closing statements or observations they wished to.
- 5.135 Grand Central thanked the Panel for undertaking a full and exhaustive evaluation of the disputes in question. These had clearly been difficult areas to address, but the importance to Grand Central as a small operator of establishing the principles of contract in the industry were very relevant, and it was grateful to the Panel for providing that clarity.
- 5.136 Whilst there were clearly many issues between Grand Central and Alliance with Network Rail, GC thought it only proper to record that it had been grateful to NR's representatives, Matt Allen and Andy Lewis, for their honesty in addressing the many difficult areas that they had faced in these Hearings. GC sincerely hoped that future timetable development with Network Rail would be carried out in a more constructive manner than had perhaps been the case in the past.
- 5.137 Grand Central and Alliance only sought to operate train services like those of their industry colleagues, and were comforted that the decisions of the Panel would, in the future, help them achieve that. Despite what colleagues at Network Rail had suggested, they had not treated these matters flippantly, far from it, and indeed had acknowledged the work undertaken by

Network Rail's planners. However, despite their best efforts, they had been unable to agree a position without recourse to dispute, and hoped the parties could all take away the lessons learned.

- 5.138 Network Rail had nothing significant to add, just wished to thank the Panel for their time. NR agreed with Grand Central, that it had been a thorough and exhaustive look at what NR had done. It was generally really helpful. NR thought there was a lot of learning that it could take out of it, so that it would work to deliver hopefully a better round for everybody next time. NR welcomed the guidance that our determination would give the parties. That was a promise from NR that it would take that learning away, distil it into its teams and look to do the right thing, supported by the contract, for future decisions that NR made on capacity.
- 5.139 EC did not have a formal statement to make, but wished to echo the comments of both Grand Central and Network Rail in thanking the Panel for what had been an extremely interesting three days. EC however also wished to raise one further question regarding TTP494, as to whether the East Coast PDNS was deemed to be defective or invalid in some way, as it thought had been suggested in this day's Hearing.
- 5.140 I said my recollection broadly was that to start with it turned on the relationship between a roll over timetable and the aspects that were not rolled over but had changes made to them, and on how that was expressed in the PDNS, and generally how the whole thing fitted together. This was not a matter concerning compliance with the Timetable Planning Rules, which was a separate issue and actually fell to be considered at a later stage, but purely an issue over how it emerged as an Access Proposal for the purposes of the relevant provisions of the Network Code, as at the time of its submission and as at the Priority Date. The point of concern was that it was deemed that by bidding for both the Newark terminators and the services through to York, EC had made a bid for the same train effectively, bidding for services in the alternative.
- 5.141 However, though the terms 'defective', 'deficient' and 'non-compliant' had started to be used in connection with this, these were probably inappropriate and the wrong words to use in any case, in respect of the PDNS. The issue had been purely that, one way or another, EC's bid had not attracted priority Level (iii) in respect of this particular service, because it could not be said of it that Network Rail could have formed a reasonable expectation that it would have Rights, because of the fact that there were two things bid for in the alternative. That, as a matter of logic, meant there could not be an expectation of both of them; we had established that to make it work, it was necessary to construe 'expectation' as meaning a possibility rather than a probability. It could not be said simultaneously of two mutually exclusive things that it was possible that both of them would get through. It could be said only that it was definitely impossible that one of them would get through, because they were mutually exclusive. That was just the result of a logical analysis.
- 5.142 I noted that this concluded the discussion and oral exchange part of the proceedings. I expressed the hope that after a break the Panel would be able to arrive at a conclusion to announce to the Parties immediately, in sufficient substance to amount to the decision of the disputes, which could then be taken away and acted upon.

6 Decisions and conclusions

- 6.1 At the conclusion of the final Hearing day on 12 November 2012, having conferred with the other members of the Panel, I summarised the substance of my determination of the three disputes, including their outcomes and the reasons for them, as recorded in the Transcript and as set out below. Immediately following this summary, East Coast raised an enquiry as to the consequences for its conflicting service the subject of TTP494, and the Panel addressed this.
- 6.2 I noted at that time that the Panel had achieved the objective I had previously stated of reaching a conclusion that day and were in a position to give the substance of the decision on these three disputes in a form which could amount to a determination for the purposes of the Rules. I wished to be transparent and make it clear that it would prove impossible to prepare, agree and issue a full written determination of these three very complex disputes, covering such a wide range of issues and voluminous amount of material, within the 10 working-day

period stated by Condition D5.1.3 as the period for a Timetabling Panel to determine an appeal. I proposed that the conclusions I was about to state at this stage would be sufficient to stand as the determination of the disputes brought by GC for the purposes of the Network Code and the Rules, and also for practical purposes to enable everybody, and particularly Network Rail, to act on it within what was then already a relatively short timescale before the Timetable Change Date.

- 6.3 I also noted then that the eventual full written determination might contain additional detailed analysis, but that the immediate statement of conclusions would set out the broad steps of reasoning that I and the Panel had applied. In the event, this full determination, as explained at the beginning, both summarises all the stages of the arguments and analysis conducted during the Hearings and appends the complete consolidated Transcript in order to supply the detail. It will be apparent that most of the actual analysis of points covered was worked out and substantially explained in the course of the oral exchanges, particularly on day 3 of the Hearing which addressed the issues arising out of the exchanges of the previous two days and additional material subsequently provided by the Dispute Parties. The account of that analysis is therefore not repeated in full here but is to be found in the foregoing narrative of section 5 of this determination, supplemented by the relevant sections of the Transcript. The decisions, and conclusions set out below are a summary of the reasoning that has gone before and are substantially in the same form as stated by me at the end of the Hearings and encapsulated in the preliminary record of determination issued on 5 December 2012.

TTP494.

- 6.4 Grand Central's relevant bid for the service under dispute should have been accorded, in effect, priority level (iv) under Condition D4.2.2(d), because it was a bid that came into being after the Priority Date. Therefore, the best it could achieve was priority level (iv). Alliance's bid, which was made prior to the Priority Date and as at the Priority Date may or may not have had priority level (iii), in effect had been allowed to lapse. Without the legal possibility of transferring the bid rights that went with it from one Timetable Participant, Alliance, to another, Grand Central, whatever priority was or should have been achieved by the Alliance bid at the Priority Date was lost when its bid was not proceeded with and, instead, a bid from Grand Central came into being and was proceeded with.
- 6.5 The conflicting bid by East Coast should also have been accorded priority level (iv), because it failed to satisfy the requirements of Condition D4.2.2(d)(iii) in failing to give rise to a possible reasonable "expectation" in Network Rail, as the recipient of the bid, that the relevant Rights would have been achieved. This was principally because the service for which the Rights would have become relevant was bid for in alternative modes and, as a matter of logic, it was not possible to have an "expectation" (even if the expectation was only of a possibility, rather than a probability) that two parallel and mutually exclusive things could come about.
- 6.6 There were thus two bids, both capable of being accorded equal priority under Condition D4.2.2(d) albeit, it appeared, at level (iv) rather than level (ii). Therefore, on the face of it, the Decision Criteria would have been applicable to resolve the conflict. The exercise of applying the Decision Criteria had been carried out and communicated by Network Rail, to some degree.
- 6.7 Had the application of the Decision Criteria remained the determining factor, I would have been minded to accept Grand Central's analysis of the proper application of the Decision Criteria as ultimately favouring their bid. That would have been for two reasons: first, the proper weighting to be given to the relevant Decision Criteria; and secondly, the timing of when the weighting exercise had been carried out by Network Rail and whether the original weighting had been changed or supplemented.
- 6.8 However, that particular consideration was not central to the final determination, because it had turned out that, on any view, the offer that had been made to East Coast was itself non-compliant with the Timetable Planning Rules, as regards the headway that needed to be accorded to the path bid for. The conclusion that the offer was non-compliant was arrived at on the basis of an interpretation agreed by all present at the hearing, in the absence of a specific provision in the Timetable Planning Rules dealing with the situation where a through-train headway for a route is expressed without also expressing a particular variant of that for a train

stopping at a particular station on the same route, in this case Newark.

- 6.9 The interpretation agreed by all present was that, if the Timetable Planning Rules state an applicable headway for the whole of the route in question or at least that part of the route that includes that particular station, the default headway is that applicable to the route as a whole. It was agreed that this was not complied with in the offer to East Coast. Therefore, the path as offered to East Coast on the offer date should not have been given preference over the path that was to be offered to Grand Central.
- 6.10 For that reason I concluded, and stated that I so determined, that the 1608 path that had been bid for by Grand Central should be awarded to them and included by Network Rail in the Timetable. That was the substance of the determination on TTP494. I expressed the hope that it was stated with sufficient reason and clarity that it could properly be regarded as standing as the determination on that dispute, and as something that could be acted on.

TTP493

- 6.11 Dispute TTP493 as brought was initially characterised as a complaint about Network Rail's handling of the process, as regards a particular bid, and in particular the effect of an e-mail from Network Rail to Grand Central on 14 April 2012 which said, as at this particular point between the Priority Date and the offer date, Network Rail had consulted and discussed this as much as they possibly could and they could not do anything more with it until after the release of the Timetable. Grand Central asserted that this stance of Network Rail, as so communicated, of itself disadvantaged them in the whole process.
- 6.12 I concluded that, whilst it appeared that such an approach by Network Rail might indeed have disadvantaged Grand Central in the process, it had not done so in a way that gave rise to any further disputable consequences or that had a material effect on the outcome. This was because as a matter of contract, whatever defect there may have been in the process, the outcome was that there was at least one service bid for by another operator, which was identified by Network Rail and accepted by Grand Central as contractually overriding Grand Central's bid for the service in question, 1A68 1518 (SX) Sunderland to London Kings Cross (and complementary return and SO services).
- 6.13 The determination on TTP493, accordingly, was that Network Rail was entitled not to award Grand Central the service that was bid for. That was as far as I thought it necessary to go in terms of the actual determination, i.e. simply to say that Network Rail was entitled not to accept the service bid for by Grand Central, thereby intentionally leaving it open, because not specifically directed, as to what Grand Central or indeed Network Rail might do as a result of that.
- 6.14 One of the specific outcomes sought by Network Rail, on both TTP493 and TTP495, was that Grand Central should be directed to accept whatever was offered instead. I noted that I was not minded to direct that, because I did not think it necessary to a just determination of the dispute. I considered it preferable to leave it up to Grand Central as to what it might wish to do, whether to accept it, seek further consultation or challenge it. For the purposes of the determination on TTP 493, therefore, I confined it to saying that Network Rail was entitled not to accept Grand Central's bid and so should not be directed to accept it.

TTP495

- 6.15 In substance, the outcome for TTP495 was the same as for TTP493, though having arrived there by a slightly different route. Network Rail had been able to produce at least one conflicting service bid for by another operator that, effectively, worked out as having a higher contractual priority and therefore had to be taken as contractually overriding the service bid for by Grand Central, 1N93 1323 (SX) London Kings Cross to Sunderland.
- 6.16 On this matter we had devoted some time to considering whether the identified contractual overriding applied to all five days of the SX period. We had reached the conclusion, which apparently was accepted by all parties at the hearing, that this decision did indeed apply to all five days, because of the way in which the service had been bid and the content of the relevant

PDNS.

- 6.17 The determination on TTP 495 accordingly was also that Network Rail was entitled not to accept Grand Central's bid for the particular service the subject of that dispute. As with TTP493, I declined to go further and direct any specific action or consequence as a result, so excluding a direction that Grand Central should accept the alternative path which had eventually been offered by Network Rail in that case.
- 6.18 I noted that a difference between TTP493 and TTP495 was that in the latter, the alternative path was offered to Grand Central not at the offer date but some time afterwards as part of the ongoing consultation process. I had considered whether, because of that distinguishing factor, there was a case for making some additional direction to Network Rail to the effect that it should have acted in a certain way, which should have resulted in the service eventually offered having been available for offer as at the offer date rather than some time thereafter. I declined so to decide, because I was satisfied that the process of continuing to discuss and consult on possibilities after the offer date was common in the industry, on both the freight and passenger sides. Therefore, the fact that Network Rail had not come up with that particular alternative offer at the time of the offer date, which might or might not have affected Grand Central's reaction, would not justify a specific direction that Network Rail should now do something particular or that it should have done so.

Dispute Parties' observations

- 6.19 As with TTP494, I confirmed my hope that it would be accepted by all parties that this extempore statement was adequately expressed to constitute the determination for TTP493 and TTP495, and that it was stated in a form and with sufficient detail to be acted on for practical purposes with the imminent timetable change date in mind. I invited the Dispute Parties to make any further observation they wished in relation to this statement. Grand Central did not wish to do so. Network Rail noted that the interesting issue for them to work out was that they had already been instructed (by ORR) to enter into Rights regarding the 1608 path the subject of TTP494, but they were sure of finding a way of picking up that issue and confirmed that this was something they would have to work on.

East Coast's intervention – effect of Rights already granted – Parties' observations

- 6.20 Having heard the determination for TTP494 that the 1608 path should be offered to Grand Central, East Coast at this point took the unusual step of intervening to raise for the first time the question of how this fitted with the situation that both EC and GC had received decisions from ORR in respect of their Track Access applications, and that EC had been granted Firm Rights to a 1608 service to Newark, whereas the GC application had been rejected on grounds not related to the timetable. Although this was raised at such a late stage in the proceedings, after the determination, I did my best to address the issue and answer EC's question without affecting the substance of the determination just given. This precipitated a further lengthy discussion between the Parties and the Panel. That is recorded in the Transcript, but as it touched on a number of still difficult issues I also summarise it here.
- 6.21 I observed that GC was entitled, if it wished, to go back to the ORR and challenge its decision, with or without the benefit of this determination. GC confirmed that indeed it did intend to go back to the ORR. It would have done so earlier, but had said it would await the outcome of this Timetabling Dispute, of which ORR was aware.
- 6.22 I explained that all the Timetabling Panel could do was look at the contractual position as best it could and decide what were the contractual Rights. The fact that those contractual Rights might need more in order to give them teeth and be operable – in this case the blessing of ORR – I did not believe of itself affected the decision that this Panel had to make, as to what those contractual Rights were. GC agreed my proposition; it considered this was now an issue for ORR, based upon the information it should have had at the time and the position it found itself in now.
- 6.23 Continuing, my view was that the fact that EC had got Rights from ORR under its Track Access contract would not be the end of the story normally, because it would still have to get those

Rights crystallised for each particular timetable through the contractual bid and offer process. Even if it had had the Rights before its bid and did not have to seek them from ORR, it would have had to submit its bid as part of the timetabling process and (in theory) it might not have succeeded. In this case it was the opposite; the way it had panned out was that the result of the contractual process had only caught up after the result of the regulatory process and was at odds with it. The practical effect of that was that the contractual process, as a result of this decision, did not operate to give body to the regulatory rights already achieved by EC as regards this particular timetable.

- 6.24 Network Rail, invited to comment, thought it was uncharted territory and declined to give a view. I observed that if the position were otherwise than as I had explained, then we would not have been considering this dispute at all, because the effect would have been that once ORR had pronounced on the regulatory Rights of a matter, there could be no contradictory contractual rights, and that would make no sense of the contract. GC agreed.
- 6.25 I suggested that, conceptually, the way the system operated was that there were two processes that lead to a particular service being included in a particular timetable. Those processes happened sometimes sequentially, sometimes in parallel. There was the contractual process under the Track Access Agreements incorporating the Network Code, and there was the regulatory process, which led to the embodiment of the Track Access Agreements, which in turn gave rise to the contractual process. Normally those two processes happened in a particular sequence, which did not give rise to this kind of conflict. The present case (of TTP494) might well be an unusual, possibly unique, situation in that, because of the way the timing of the dispute had panned out, the regulatory process leading to the Rights had actually worked itself out in a way that turned out to be at odds with the subsequent contractual process for determining the Rights for the specific timetable. It seemed that was simply what the system led to.
- 6.26 NR confirmed that there was no assurance that ORR would even give Grand Central the 1608 path. It still needed to go through getting a Track Access Agreement in place for that particular stock before it could operate to the timetable. I agreed that was correct. I observed that this Panel did not have the power to decide or direct that, come hell or high water and irrespective of the outcome with ORR, Network Rail must include that service in the December 2012 Timetable. The decision implicitly was only that, to the extent it could, consistent with other obligations on it including compliance with regulatory requirements and the regulatory Rights and the Track Access Rights accorded to Grand Central, Network Rail should allow the bid. To put it another way, it should allow the bid as made, subject only to the same considerations and other obligations as it would have been subject to, had it allowed the bid as at the offer date, i.e. had it offered the bid as at the offer date. The Panel agreed with this as a rationalisation of how the system worked; it was a problem for someone else.
- 6.27 EC agreed it was a problem for someone else, but did not see how this was benefitting the end customer at all, which was surely what all were meant to be here for as an industry. EC had had trains on sale, reservations on sale, since 20 September 2012 including this service. It now had to think what to do with that; whether to suspend it with immediate effect; whether the train dropped out of the timetable. It now had questions as to whether four weeks from today this train would exist, on the basis that the determination had said it would not exist, unless that were changed elsewhere.
- 6.28 I recognised this was the case, unless there was a way of finessing it through further consideration and consultation, to accommodate this service or something like it. I noted that this was the outcome of the process. This was what the process inevitably led to as a matter of legal entitlement. What the Panel was here to determine was a matter of legal entitlement of the parties. We were not here to determine, in a very broad sense, the best outcome for the industry as a whole, including every named interested party and every unnamed interested party. We were here to determine the legal entitlements and obligations of the parties to the dispute and that was what we had attempted to do.
- 6.29 EC still did not see how that then fitted back with decisions that had been made subsequent to this dispute being lodged and then eventually heard. I agreed it might well fit very awkwardly with them, but that was the process required by the whole contractual matrix incorporating the

contractual dispute resolution process, and that was the process we had gone through as best we could, and that was how it worked out. The interaction with the regulatory process was as I had just attempted to define and deduce. The fact that it produced an awkwardness and it might be a commercial problem for one or another interested party or Timetable Participant was an unavoidable consequence of the process that we were required to follow.

- 6.30 At this point I observed that, whilst not wishing to put a bar on further discussion, nevertheless, if East Coast as an interested party had wanted to raise these points for legal consideration, it could have done so earlier, and it could have done so with more ability to influence the outcome if it had chosen to join as a Dispute Party and raise this issue of the interaction of the regulatory Rights accorded through the Track Access application process with this contractual process. I suggested that this stage, the fact that this decision, reached through application of the contractual dispute resolution process, might result in some practical and commercial disbenefits to another party did not actually preclude us from coming to that decision.
- 6.31 EC confirmed it accepted and respected that position, as did the Panel support that conclusion. The Panel observed that it was unfortunate that it had come down to the fact that Network Rail was not able to offer trains which were non-compliant with its own Timetable Planning Rules. I observed that we had examined that point just like the rest and that was the conclusion that we had come to, as a matter of contract, as a matter of law, as a matter of legal entitlement. I could only say it was regrettable if that particular conclusion had adverse commercial consequences for anybody involved in the process. The fact that it did have adverse consequences was not of itself a reason for not reaching that conclusion.
- 6.32 EC thought in that respect it would all come down to an issue of timing, and just considered that the timing inherent in the process was appalling, with the timing of the hearing and the decision being four weeks before the timetable was due to start. Members of the Panel agreed, particularly so as regards ORR's decision-making process which, as the industry was aware, was somewhat tardy and had historically been that way. I noted that it was mindful of the tight timing that I had at least tried to give what counted as an implementable decision now, rather than wait for the time it would take to produce the full written determination, but that was just the way the process and the timing of the dispute had gone. Whilst that might be regrettable, I was confident that it was not the result of any fault or breach of the Rules, of any contract or the process by any participant in it; that was just the way it had turned out.
- 6.33 GC said it had concluded that it would not be helpful for this Panel to direct a particular solution, either for the December 2012 Timetable or for the May 2013 Timetable, but it would hope that, as a matter of practicality, everybody had every incentive to try to get to the best conclusion possible, certainly for May 2013 and also for December 2013. EC thought the decision was that the 1608 path, basically with immediate effect from December 2012, should be awarded to Grand Central, which left East Coast with no path at all at the moment. The Panel thought there was an implication that there might be an alternative solution for the 1608 path.
- 6.34 I observed that I did not know if there was an alternative solution for December 2012 or indeed for May 2013. That was something for Network Rail to work out with East Coast and with any other operator affected by this decision. All I could really do was repeat that the timing of this decision, relative to the Timetable Change Date and also relative to the determination by ORR of the Rights and the fact that that determination succeeded the latter rather than preceded it, whilst unfortunate, was a fact. It was not the result of disputable or actionable fault on the part of any party to the process. It just left the practical result that Network Rail had to work out, as best it could, with East Coast, which we know to be an affected party, and anybody else that might be affected by this particular point of view. It also left Grand Central with the need, in order to give effect to and benefit from the decision, to have another attempt at getting the Rights which would be needed to crystallise the decision. It might or might not get that; I did not know. If it did not get it in time, then that would mean that it did not get its service in the timetable. I do not know how ORR would react to the need for expediency.
- 6.35 After some further discussion the Dispute Parties confirmed that as far as they were concerned the statement I had made was sufficient to constitute the decision delivered orally, *extempore*, for the purposes of the Rules and, in a practical sense, to enable the Parties and indeed any other interested party that was cognisant of the decision to act on it. NR said it gave it what it

needed to go and look at and find a resolution for, and that it was up to NR, with dialogue between everybody impacted and whoever might become impacted by it, to find that resolution to the issue. It helped to give NR a clear direction in terms of Part D and pointed it in the direction of where it had to go next in terms of finding the solutions.

- 6.36 EC however was very concerned over the practical problem of what to do about its service which had already been on sale to the public for some weeks, and still asserted that the Panel should have taken account of this in reaching its decision. I suggested that if that were true, then it would mean the fact that ORR had already pronounced on the Rights meant that the Panel could only have come to one decision, in favour of EC, and therefore there would never have been any point in GC bringing a dispute. EC confirmed it did think that. I observed that none of the Panel thought this was the case, but even if as an interested party EC thought that it was so, it really should have raised that earlier in the process. The Panel noted that in any case, EC's Rights were not in place at the PDNS stage but came later in the process so, in terms of timetable development at that time, they could not have affected the position.
- 6.37 As regards EC's concern over the effect on its customers, GC observed that the converse applied to its customers, who had not had the benefit of having the timetable and had only got a restricted service. As identified in GC's response, there were plenty of options to get to all the destinations served by East Coast. I concurred that GC had not had the benefit of having had the Rights it might have done in order to start selling tickets for this service. The unfortunate timing and the way in which the process generally had been conducted and had been required to be conducted cut all ways. It would leave EC, as a matter of practicality, with the urgent need to think tomorrow what to do about it and to sit down with NR and arrive at the best solution it could, and also to decide what it did with its customers in terms of communication and contractually as regards tickets already sold. However I was sure this would not be the first time that a train operator had had to go back to its customer base and confess to having to make a change that would have a number of consequences, ranging from an apology to compensation to the customer. That was just how these things worked out.
- 6.38 NR acknowledged that all parties needed to do the right thing for the customer. NR could clearly follow through all the logic about where it had got to with the decision on the 1608. NR said it had been painfully trying to encourage ORR back in January to make all these decisions, so that they could be resolved by the Priority Date.
- 6.39 The other issue NR recognised was that what had got it to this point quicker than anything was the timetabling non-compliance with the headway at Newark. If nothing else, said NR, the industry needed to learn, because there was pressure every day for people to breach headways. As capacity became more constrained on the network, it was a big challenge to address this. This had been seen with TTP518. NR felt it had to think how to manage that and how to make sure it had a very solid foundation to stand on. GC felt NR needed just to address the Timetable Planning Rules, reducing the data for the headways. NR agreed, but said that was not always the answer. NR knew it had some Timetable Planning Rules clashes and non-compliance potentially with some of the platform alterations needed.
- 6.40 I concluded by thanking the Dispute Parties for all these observations. That seemed to be an entirely sensible, rational way of looking at the matter and acknowledging that things needed to be done to improve the process on all counts. Finally, the Dispute Parties concurred with me that the logical analysis undertaken by the Panel in this dispute process had not been such as in any way to override the ultimate interests of the customer, in the sense of, for example, prejudicing East Coast potential customers who had bought tickets, but actually what this Panel had done was what it was mandated to do by the ADRR and the process, which was to apply an analysis of contractual entitlement. Ultimately that, in the grand scheme of things, should redound to the overall benefit of the customer.

7 General Observations

- 7.1 ADRR H51(j)(iii) requires a determination to distinguish, among the decisions and conclusions reached, any guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or remedy. I have a few such observations to make here.

- 7.2 In the course of three days' Hearings on four disputes (including TTP518), an extraordinarily wide range of issues were explored, some possibly at too great length and in too much detail, on many aspects of interpretation of the timetable bidding, offer and compilation process mandated by Part D of the Network Code. These included, in no particular order, matters such as:
- 7.2.1 the relationship between contractual entitlements and regulatory Rights to train paths and service characteristics;
 - 7.2.2 the effect of the relative timing of NR establishing contractual entitlements versus ORR granting regulatory Rights to paths and characteristics;
 - 7.2.3 the required content and timing of a PDNS and whether it needs to include, among other things, rolling stock diagrams;
 - 7.2.4 the subtle differences between a PDNS and an electronic bid;
 - 7.2.5 the proper method of application of the priority rules;
 - 7.2.6 the definition of relative priority levels of bids, and their variation at different stages of the process;
 - 7.2.7 the applicability of the Decision Criteria;
 - 7.2.8 the proper method of application of the Decision Criteria;
 - 7.2.9 the proper timing of analysis of priority levels and/or the Decision Criteria in satisfying the all-important requirement of transparency of process;
 - 7.2.10 retrospectivity of compliance with detailed process requirements, e.g. whether reasons for decisions are given in an offer letter, or in previous communications, or constructed after the event for the purposes of a dispute;
 - 7.2.11 the generally obfuscatory language, and sometimes unhelpful drafting, of the priority rules;
 - 7.2.12 the transition between successive versions of Part D;
 - 7.2.13 the interaction of the Timetable Planning Rules with the timetabling process;
 - 7.2.14 the interpretation of imprecise areas of the Timetable Planning Rules;
 - 7.2.15 what is a reasonable 'expectation' of Rights and can the same expectation be shared by more than one operator, or by more than one service of the same operator;
 - 7.2.16 when and how are rights properly 'Exercised';
 - 7.2.17 is the exercise of Flex a power or a duty of NR and, either way, what is its extent; and
 - 7.2.18 very importantly, what exactly is contractual Flex.
- 7.3 The scope of these issues gives a stark demonstration of (a) the complexity, (b) the relatively widespread lack of understanding, and (c) the apparent practical inoperability, of some aspects of the timetabling process as gleaned from the basic text of Part D of the Network Code; plus (d) some areas of real doubt and confusion in all timetable participants, including most importantly Network Rail itself. Clearly NR should be in the position of being able to hold the ring with confidence but it seems that at an operative level its planners frequently have resort to abandoning the strict letter of the contractual process (to the extent that such can be deduced in the first place) in favour of just 'doing the best it can' in all the circumstances to get to a pragmatic and non-disruptive solution.

- 7.4 I appreciate that this is frequently said, but there must be a strong case for an overhaul of the process to produce something that is clear, comprehensible and practically operable, so as to be in all respects contractually sound and enforceable. It has to be asked whether the process really needs to be so complicated, even in order to address the manifold nuances of all the multi-dimensional variables necessarily involved in putting together an annual or bi-annual timetable – whether it needs to try to cover so many, let alone all, permutations of bidding and operating circumstances. Possibly the complexity of the process may be self-generating; such complexity could be the inevitable consequence or equally the cause of the plethora of issues that arise and the associated confusion surrounding them.
- 7.5 The Hearings were lengthy, the issues complex and the debate sometimes circular and repetitive; on the face of it such as perhaps to point to a degree of over-flexible chairmanship, but also showing clearly that many aspects of the process are just not understood by all participants. The sometimes apparent randomness of discussion did actually follow a pattern, and all parties volunteered that they had derived much that was worthwhile from the content and analysis undertaken.
- 7.6 As well as appending the full Transcript I have tried to summarise the main components of each section of the debate. The last, on TTP495, particularly exemplifies the complexity, difficulty and consequent lack of understanding of the whole process by its participants, let alone those called on to evaluate it. I urge a reading of the Transcript (notwithstanding its lack of correction, as mentioned earlier) because it provides a detailed and graphic illustration, more than any summary can possibly do, both of the difficulties faced by NR in mastering the detail of the whole process and its strenuous efforts made to get on top of this and to square innumerable circles; and equally the problems and frustrations faced by, particularly, an Open Access operator such as GC in trying to cut into the dense web of interlocking paths and service characteristics established incrementally over previous timetables, often on the principle of sheer pragmatism. Both in my view have acted throughout with an exemplary candour and determination to arrive at a just and proper solution.

8 Determination

Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, **I DETERMINE** as follows:

8.1 TTP 493

As a matter of legal entitlement, Network Rail was entitled not to offer to Grand Central service 1A68 1518 (SX) from Sunderland to London Kings Cross nor to include it in the Timetable, and accordingly Network Rail is not directed to do so.

8.2 TTP 494

8.2.1 As a matter of legal entitlement, the 1608 path for service 1D72 (SX) London Kings Cross to Wakefield Kirkgate bid for by Grand Central in 2012 should have been offered by Network Rail to Grand Central and included by Network Rail in the Timetable as such.

8.2.2 As a remedy, subject to compliance with any conflicting direction by ORR from time to time in the exercise of its regulatory function of approving Rights under Track Access Agreements binding upon Network Rail, Network Rail is directed as soon as practicable to take such measures as are necessary to include that service in the Timetable and in any extension to the Timetable.

8.3 TTP 495

As a matter of legal entitlement, Network Rail was entitled not to offer to Grand Central service 1N93 1323 (SX) London Kings Cross to Sunderland nor to include it in the Timetable, and accordingly Network Rail is not directed to do so.

- 8.4 I make no order in response to any other outcome, entitlement or remedy sought by either Dispute Party in its respective sole reference document or otherwise in these proceedings.
- 8.5 I make no order as to the costs of these proceedings.
- 8.6 I confirm that, so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.

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

Peter Barber
Hearing Chair

15 March 2013

Annex 1 to Timetabling Panel determination of reference TTP493/494/495

EXTRACTS FROM THE NETWORK CODE, PART D (19 JULY 2011 AND 16 MARCH 2012 VERSIONS)

1.1 Overview [and definitions]

1.1.11 **Exercised** shall mean as a consequence of:

- (a) submitting an Access Proposal to Network Rail by the Priority Date in accordance with Conditions D2.4 and D2.5; or
- (b) a Rolled Over Access Proposal:

Rolled Over Access Proposal where an Access Proposal was submitted in a previous revision of the Working Timetable resulting in Train Slots being included in the Prior Working Timetable which the relevant Timetable Participant does not seek to vary in the New Working Timetable in accordance with this Part D;

2.3 Timetable consultation – D-55 to D-40

2.3.6 Not later than D-45 Network Rail shall provide to the Timetable Participants a copy of the Prior Working Timetable. If any changes are made to the Prior Working Timetable as a result of the appeal process under Condition D2.7, then Network Rail shall notify these changes to Timetable Participants as soon as reasonably practicable.

2.4 Submission of Access Proposals by Timetable Participants – before and after the Priority Date at D-40

2.4.1 A Timetable Participant shall set out its requirements in respect of the New Working Timetable in a written proposal, to be referred to as an "Access Proposal" where:

- (a) it wishes to exercise any Firm Rights and/or Contingent Rights and/or any expectation of rights to obtain Train Slots in respect of the relevant Timetable Period, where those rights were not exercised to obtain Train Slots in the Prior Working Timetable; and/or
- (b) it wishes to make changes to any Train Slot in the Prior Working Timetable; and/or
- (c) it wishes to set out its requirements in response to a notification by Network Rail under Condition D2.4.6.

2.4.2 Where a Timetable Participant does not intend using a Train Slot, which is included in the Prior Working Timetable, in the relevant Timetable Period, it shall notify this fact to Network Rail in writing by D-40 or as soon as practicable thereafter.

2.4.3 Access Proposals may be submitted to Network Rail during the period up to D-26. However, Timetable Participants shall submit their Access Proposals (and any revised Access Proposals) as early as reasonably practicable prior to D-26 in order to facilitate optimal planning of the New Working Timetable by Network Rail and to ensure optimal consultation between Network Rail and all Timetable Participants.

- 2.4.4 Access Proposals submitted by D-40 ("the Priority Date") are given priority in the compilation of the New Working Timetable in certain circumstances set out in Condition D4.2. Access Proposals submitted after the Priority Date but by D-26 will be incorporated by Network Rail into the New Working Timetable as far as reasonably practicable, taking into account the complexity of the Access Proposal including any reasonable foreseeable consequential impact on the New Working Timetable and the time available before the end of the Timetable Preparation Period, and in accordance with the principles set out in Condition D4.2.
- 2.4.5 Any subsequent or revised Access Proposal submitted by a Timetable Participant shall amend an Access Proposal submitted earlier where it sets out different requirements to the earlier submitted Access Proposal regarding the manner in which a right is to be exercised. In such case the date on which the subsequent or revised Access Proposal is submitted will be treated, for the purposes of Condition D4.2.2, as the date of notification of the relevant right.
- 2.4.6 Where a Timetable Participant has:
- (a) submitted an Access Proposal which cannot be accommodated in the New Working Timetable; or
 - (b) a Train Slot in the Prior Working Timetable which cannot be accommodated in the New Working Timetable; or
 - (c) submitted a proposal purporting to be an Access Proposal but which is defective or incomplete,
- 2.4.7 Network Rail must notify the Timetable Participant of this fact, as soon as possible after it has become aware of it, so that the Timetable Participant has the opportunity to submit a further Access Proposal under Condition D2.4.1(c).

2.5 Content of an Access Proposal

- 2.5.1 Each Access Proposal shall include as a minimum in respect of each Train Slot, save to the extent that Network Rail expressly agrees in writing to the contrary:
- (a) the dates on which Train Slots are intended to be used;
 - (b) the start and end points of the train movement;
 - (c) the intermediate calling points;
 - (d) the times of arrival and departure from any point specified under paragraphs (b) and (c) above;
 - (e) the railway vehicles or Timing Load to be used;
 - (f) any required train connections with other railway passenger services;
 - (g) the proposed route;
 - (h) any proposed Ancillary Movements;
 - (i) any required platform arrangements at the start, end and all intermediate calling points;
 - (j) any relevant commercial and service codes; and
 - (k) the proposed maximum train speed and length and, in relation to a freight train, the proposed maximum train weight.

- 2.5.2 Where an Access Proposal has been submitted by a Timetable Participant, Network Rail shall be entitled to require any further information in respect of that Access Proposal that it reasonably considers to be necessary or beneficial to the preparation of the New Working Timetable.

2.6 Timetable Preparation – D-40 to D-26

- 2.6.1 During the Timetable Preparation Period (D-40 to D-26) ("Timetable Preparation Period"), Network Rail shall compile the proposed New Working Timetable.
- 2.6.2 Between D-40 and D-26:
- (a) all Timetable Participants shall have access to the evolving draft of the New Working Timetable either:
 - (i) by way of "read-only" remote computer access or such other electronic means reasonably requested by a Timetable Participant ; or
 - (ii) to the extent that a Timetable Participant does not have the required systems to facilitate remote computer access, by read-only computer access upon attendance at such of Network Rail's offices specified by Network Rail;
 - (b) Network Rail shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable, and shall continue to answer enquiries and facilitate and co-ordinate dialogue as stated in Condition D2.3.4.
- 2.6.3 In compiling the New Working Timetable, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.

2.7 New Working Timetable Publication – D-26

- 2.7.1 The New Working Timetable shall be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in this Condition D2.7.
- 2.7.2 Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it, provided that an appeal is lodged within twenty Working Days of its publication. All such appeals shall be conducted in accordance with Condition D5.
- 2.7.3 Where a Timetable Participant has enquiries or requires further information from Network Rail regarding the published New Working Timetable, Network Rail shall respond fully and promptly and where possible, taking into account the nature of the enquiry or information requested and the date this is received by Network Rail, so as to enable a Timetable Participant to comply with the timescales in Condition D2.7.2.

4.2 Decisions arising in the preparation of a New Working Timetable

- 4.2.1 In compiling a New Working Timetable in accordance with Condition D2.6, Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2.
- 4.2.2 Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:
- (a) a New Working Timetable shall conform with the Rules applicable to the corresponding Timetable Period;

- (b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;
- (c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right;
- (d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:
 - (i) first to:
 - (A) the Firm Rights of any Timetable Participant that will subsist during the whole of the Timetable Period and which have been Exercised; and
 - (B) any rights Network Rail has for Network Services included in the Rules;
 - (ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that Network Rail considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;
 - (iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will be Firm or Contingent Rights in force during the Timetable Period;
 - (iv) fourth to any:
 - (A) rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5. Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to Network Rail; and
 - (B) Strategic Paths contained in the Strategic Capacity Statement.

**EXTRACT FROM THE NETWORK CODE, PART D
(19 JULY 2011 VERSION)**

4.6 The Decision Criteria

4.6.1 Where Network Rail is required to decide any matter by applying the considerations in paragraphs (a)-(p) below ("the Decision Criteria") it must consider which of the Decision Criteria is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Decision Criteria will lead to a conflicting result then it must decide which is or are the most important Decision Criteria in the circumstances and when applying it or them, do so with appropriate weight. The Decision Criteria are:

- (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 (A) published by the Strategic Rail Authority or the Department for Transport before 31 May 2006 or (B) established by Network Rail in accordance with its Network Licence;
- (c) enabling a Timetable Participant to comply with any contract to which it is party (including any contract with its customers and, in the case of a Timetable Participant which 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 the 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 Timetable Participants 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 Timetable Participant's previous level of utilisation of Train Slots;
- (n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Timetable Planning Rules;
- (o) avoiding changes to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates;
- (p) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.

In applying the Decision Criteria, the terms of any maintenance contract entered into or proposed by Network Rail shall be disregarded.

Annex 3 to Timetabling Panel determination of reference TTP493/494/495

**EXTRACT FROM THE NETWORK CODE, PART D
(16 MARCH 2012 VERSION)**

4.6 The Decision Criteria

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective").
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the "Considerations") in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
 - (b) that the spread of services reflects demand;
 - (c) maintaining and improving train service performance;
 - (d) that journey times are as short as reasonably possible;
 - (e) maintaining and improving an integrated system of transport for passengers and goods;
 - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
 - (g) seeking consistency with any relevant Route Utilisation Strategy;
 - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
 - (i) mitigating the effect on the environment;
 - (j) enabling operators of trains to utilise their assets efficiently; and
 - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in the light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.

Annex 4 to Timetabling Panel determination of reference TTP493/494/495

**EXTRACTS FROM THE RAILWAYS INFRASTRUCTURE (ACCESS AND MANAGEMENT)
REGULATIONS 2005**

Regulation 3 – Interpretation

"applicant" means –

- (a) a railway undertaking licensed ;
- (b) an international grouping of railway undertakings; or
- (c) a body or undertaking with public service or commercial interest in procuring infrastructure capacity, such as public authorities under Regulation (EEC) No. 1191/69(d) and shippers, freight forwarders, and combined transport operators

Regulation 16 – Capacity allocation

(4) Subject to paragraph (7), any applicant may apply to the infrastructure manager for the allocation of infrastructure capacity.

(6) Subject to paragraph (8), an applicant who has been granted capacity by the infrastructure manager, whether that capacity is in the form of –

- (a) a framework agreement made in accordance with regulation 18 specifying the characteristics of the infrastructure granted; or
- (b) specific infrastructure capacity in the form of a train path,

must not trade that capacity with another applicant or transfer it to another undertaking or service.

(7) Any person who trades in capacity contrary to the provisions of paragraph (6) shall not be entitled to apply for capacity under paragraph (4) for the period of the working timetable period to which the allocation of capacity transferred related.

(8) The use of capacity by a railway undertaking on behalf of an applicant who is not a railway undertaking, in order to further the business of that applicant, is not a transfer for the purposes of paragraph (6).

Annex 5 to Timetabling Panel determination of reference TTP493/494/495

CORRESPONDENCE CONCERNING DISCLOSURE OF DOCUMENTS

Text of application from Alliance dated 17 October 2012

"As you will be aware Alliance Rail has requested Priority Date Notification Statements (PDNS) from Network Rail, to determine the extent of Flex that Network Rail had at its disposal and to determine the correct level of priority under D4.2.2. Alliance Rail argued that D8.2.1 allowed Network Rail to provide the PDNS documents without any confidentiality issues being breached. Network Rail has refused to provide this information stating:

"The clause provides that Network Rail is not required to keep confidential the identity of or information provided by a Timetable Participant, but does not impose an obligation to disclose this information".

It is clear that Network Rail will not share the PDNS documents to allow Alliance determine how Operators have Exercised their rights at the Priority Date. The PDNS documents are key elements in the capacity allocation process and should be available to all Operators to allow them to have the comfort that Network Rail is correctly allocating capacity and giving the correct priority under D 4.2.2. It is in Network Rail's gift to share this information – its refusal to provide this does not give any comfort that Network Rail is managing this part of the process correctly.

Alliance Rail therefore requests the formal disclosure of the PDNS documents by Network Rail as part of TTP 493, 494, and 495 hearings."

Text of response sent by Committee Secretary on 23 October 2012

Peter Barber, the Hearing Chair, has considered the formal disclosure request submitted by Alliance Rail on 17 October 2012; his conclusion is to reject the request and he has set out the following reasons:-

- I am satisfied that I have the power under ADR Rule H26 to order a disclosure by one party at the request of another of documents "which it controls and which are relevant to the dispute".

- I am satisfied also that the class of documents (PDNSs) the subject of Alliance's request is likely to be in the "control" of Network Rail, in that they will be both in its possession and not subject to any overriding obligation of confidentiality (as made clear by Network Code Condition D8.2.1 - and noting that disclosure of "protected information" as defined in Condition 14.3 of Network Rail's Network Licence is, by Condition 14.1(c), not restricted if it is "pursuant to any judicial or arbitral process").

- I am not satisfied, however, that all or any documents within the description of documents requested by Alliance are "relevant to the dispute".

- First, Alliance's request for disclosure has not identified any specific documents but has referred only to "the PDNS documents", apparently on the basis that the ADC Secretary is aware that Alliance has previously requested some such documents from Network Rail. Alliance has not specified which documents of this description have been so previously requested nor which are the subject of the request in this dispute. In any event, Alliance's only role or capacity in this dispute is as the disclosed agent of the claimant Grand Central, and it is wholly unclear when or in what capacity Alliance's previous request to Network Rail (if that request is relevant at all) was made. It clearly cannot be the case that all PDNS documents of any description, or even only all such PDNS documents as may or may not have been previously requested by Alliance from Network Rail at some time or other, are relevant to this dispute. Therefore at least some of the documents requested by Alliance may be presumed to be irrelevant. Therefore, if Alliance (even if acting on behalf of Grand Central and not in its

own right) has not thought fit to specify which particular documents could be relevant and which could be irrelevant, they may all be presumed to be considered possibly irrelevant.

- Secondly, the same analysis may be applied to the content of any individual PDNS which may be identified. The area of dispute with which this material is concerned is some specific services alleged by Network Rail to override or otherwise conflict with services bid for by Grand Central. The entire content of even a single PDNS cannot possibly be relevant to an analysis of those specific services. Most of it will definitely be irrelevant. Therefore Alliance may be presumed to consider the whole content of each PDNS as possibly irrelevant, having not identified what may be specifically relevant.

- Thirdly, in the matter of proving or disproving the various alleged conflicts, priorities and available flexes relating to the specific services the subject of this dispute, the content of any PDNS is not evidentially essential. Sufficient material has been provided by both Grand Central and Network Rail, both with their original submissions and in response to the Panel's requests for further information, to enable the Panel, with some further questioning at the reconvened hearing, to reach a conclusion on the arguments with respect to each of the specific services concerned. If during the reconvened hearing Grand Central can cogently assert that a particular piece of an identified PDNS could, if made available, disprove a specific contention by Network Rail regarding the characteristics of a service in dispute, then we can deal with that at the time.