

Access Disputes Committee – Timetable Panel

First Capital Connect Submission to Timetable Panel

Ref:- TTP384.

Network Rail Offer for the 2011 Subsidiary Timetable

Re:-Brighton Main Line

pf 1/3

1 DETAILS OF PARTIES

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

- (a) Network Rail Infrastructure Limited whose Registered Office is at Kings Place, 90 York Way, London, N19 4AG ("NRI") (the Claimant); and
- (b) First Capital Connect Limited whose Registered Office is at 3rd Floor, E Block, Macmillan House, Paddington Station, London W2 6LG ("FCC") (the Respondent).

This is a single party submission on behalf of First Capital Connect and the contact is:-

FCC Paul French
 Head of Planning
 First Capital Connect
 Hertford House
 1 Cranwood Street
 London
 EC1V 9QS
 Tel:- [REDACTED]
 e-mail: [REDACTED]

2 THE PARTIES' RIGHT TO BRING THIS REFERENCE

This matter is referred to Timetabling Panel ("the Panel") for determination in accordance with Condition D 3.2.8 and D 5 of the Network Code.

3 CONTENTS OF REFERENCE

First Capital Connect (FCC) has produced this reference and it includes:-

- (a) The subject matter of the dispute in Section 4
- (b) A summary of the issues in dispute in Section 5;
- (c) Relevance of published letters from ORR in connection with the Southern 1st Supplemental to this dispute in Section 6

- (d) A detailed explanation of the issues in dispute prepared by the Responder (in Section 7)
- (e) The decisions of principle sought from the Panel in respect of legal entitlement and remedies in Section 8; and
- (f) Appendices and other supporting material.

NOTE ON DEFINITIONS. Any undefined definitions commencing with capital letters are defined in Part D (B111 pages – dated 1 August 2010) of the Network Code.

4 SUBJECT MATTER OF DISPUTE

4.1 The subject of this dispute is the Offer of the First Working Timetable in respect of the Subsidiary Change Date 2011. Specifically, the offer to Southern of Train Slots to enable the operation of a fourth fast train each hour between London Victoria and Brighton during the Monday-Friday off-peak and all day Saturday. Network Rail have subsequently advised that Southern have spotted these trains to apply from 11th September 2011.

4.2 The Part or Condition within the Network Code that the dispute relates to, or is associated with, is:

D 3.2.2. Compilation of the First Working Timetable,

D 3.2.7. Offer of the First Working Timetable,

D 3.2.8. Acceptance of the First Working Timetable,

D 5 Timetable Appeal Procedure and D 5 Decision Criteria

4.3 FCC hold a Track Access Agreement with Network Rail dated 9 February 2006, and a copy of this together with Schedule 5 (The Services and Equipment), is annexed to this reference.

4.4 The other documents relevant to the dispute are:

Appendix 1 Letter from the ORR "Southern Railway 1st supplemental agreement" dated 12 November 2010

Appendix 2	Letter from the ORR "Southern Railway 1 st Supplemental Agreement dated 22 November 2010"
Appendix 3	Letter from the ORR "Southern Railway 1 st supplemental agreement" dated 24 November 2010.
Appendix 4	Timetable extract identifying the Train Slots within the First Working Timetable Offer and which is the subject of dispute.
Appendix 5	Analysis: "Access Rights Risks – Economic and efficient use of capacity" which was appended to FCC's response to Network Rail's consultation concerning the Southern 1 st supplemental.
Appendix 6	Analysis: FCC Performance Concerns – Appendix 1 – 22 September 2010
Appendix 7	Railways Performance Modelling of the December 2010 Brighton Main Line Timetable dated 18 June 2010
Appendix 8	Railways Performance Modelling of the May 2011 Brighton Main Line Timetable dated 28 January 2011
Appendix 9	Criteria and procedures for the approval of track access contracts, published by the ORR November 2009

Link to Criteria and Procedure for Approval, Track Access Agreement – ORR November 2009 - see <http://www.rail-reg.gov.uk/uploads/0438.pdf>

5 SUMMARY OF DISPUTE

5.1 The First Working Timetable Offer in respect of the Subsidiary Change Date 2011 was issued on 19 November 2010 and included Train Slots to enable Southern's aspiration to operate a fourth fast train each hour in each direction, between London Victoria and Brighton during the Monday-Friday off-peak and all day Saturday as described in Section 4 above. On 3rd February 2011, NR advised FCC that Southern had submitted a Spot Bid to remove the Train Slots in question from the Subsidiary Change Date, and would seek to

implement them, instead, from 11th September 2011. A timetable extract identifying the Train Slots concerned is included as Appendix 4.

- 5.2 The Train Slots concerned formed a substantial portion of the First Working Timetable Offer for the Principal Change Date 2010 referred for determination as TTP356/375 and heard on 23 August 2010. Whilst the Hearing Chair determined that Offer of the First Working Timetable (the Offer) – see Part D3.2.7 of the Network Code, should stand, FCC appealed the decision under condition M.6.1 of the Network Code. The appeal was subsequently withdrawn following the Office of Rail Regulation's (ORR) decision not to approve access rights required to operate the aspirational fourth fast train per hour between London and Brighton (the Fourth train).
- 5.3 In the TTP356/375 determination, the Hearing Chair caveated her discussion of the consequences for train performance with the comment that "... it will still be necessary for them (i.e. Southern Railway Ltd) to secure the associated access rights through the regulatory process and that process would enable concerns over such matters as risk to train service performance to be addressed with the ORR..." (paragraph 6.4.11, page 18). Following the necessary industry consultation, the application to the ORR was made on 7 October 2010. The parties agreed with the ORR that it was sensible to stay the Timetabling Panel appeal until a decision was made on the track access rights. The ORR wrote to notify the parties on 12 November 2010 that they would be refusing track access rights for the additional fourth London Victoria-Brighton fast service per hour. This was followed up on 24 November 2010 by a letter setting out in full the reasons for the decision; the letters are included as appendices 1, 2 and 3 respectively to this submission. Following the issue of the ORR letter, FCC withdrew the appeal of the TTP356/375 determination on the advice of the ORR.
- 5.4 As a result of the unequivocal conclusion of the ORR determination relating to the refusal of the access rights for Southern to operate the additional fourth London Victoria-Brighton fast service per hour, and given the continued concerns relating to the performance and commercial impact of the proposals, it is the view of FCC that the Decision Criteria set out in the Network Code had

not been correctly applied by NR in the Acceptance of Train Slots bid by Southern.

5.5 FCC believes that since Southern does not have Firm Rights to operate these Train Slots and, in view of the reasoning set out in the ORR letters, will not be able to obtain any to do so from the Subsidy Change Date 2014, Network Rail should not have included the Train Slots either in the First Working Timetable Offer or as subsequent dated Spot Bids. It is also important to note that despite the issue of the ORR letter on 24 November 2010 until a joint meeting with NR and Southern on 12 January 2011, FCC had been unaware that any of the reasoning explained within the ORR letters had been addressed in any way whatsoever.

5.6 It continues to be FCC's considered view that should the additional services proceed, there will be adverse passenger and industry impacts resulting from increases in already serious levels of congestion and adverse performance.

This -

(a) will detrimentally affect overall passenger service delivery and passenger experience on a number of important London commuter routes including (but not just) the London to Brighton route, Thameslink routes north of the Thames and routes into Blackfriars from south of the river,

(b) will consequently reduce passenger satisfaction,

(c) will increase costs and reduce the operational and economic efficiency of the network.

5.7 Based on the Timetabling Panel hearing which took place on 22 August 2010. It was clear that it was NR's case that it had made capacity allocation decisions based on a balance between the benefits to passengers of additional services and the impact those services would have upon the industry measure of train service performance. Whilst NR did and continues to, recognise the potential impact on performance of the introduction of additional services and revised stopping patterns, FCC argues that

- a) the effect of Condition D3.2.2 (iv) and the ORR letter is that, when applying Decision Criterion (d), NR had to take account of the applicable Rules of the Plan and that, in the circumstances of this case, NR had failed to do so;
 - b) the performance implications which are inherent in NR's acceptance of Southern's bids significantly outweigh the journey time advantages and sharing of capacity under Decision Criteria a); and in the light of the ORR letter, this should be given a greater weighting in NR's consideration;
 - c) This submission further explains FCC's objection to the offer based on the points raised above and draws on the conclusion of the ORR's Determination of the Access Rights application which saw the application for Rights for these services rejected.
- 5.8 It is FCC's considered view that the conclusion drawn by the ORR in rejecting the Access rights for the Fourth Train for the December 2010 timetable should assist the Panel in concluding whether NR has applied appropriate weighting to the decision criterion in re-offering the Fourth Train proposals in this instance. Indeed, the ORR letter to NR dated 22 November 2010 states "Given our significant concerns about the likely effect that these additional services would have on performance we are surprised that you have offered them to Southern in your offer of the May 2011 timetable". This implies that at the decision to offer the Train Slots for the May 2011 timetable pays no regard whatsoever to the ORR's views in applying the decision criteria, since the decision was made before the ORR's views had been published.
- 5.9 It is important to note that there have been no subsequent changes to the timetable proposals in relation to the Fourth Train, which remains consistent with the previous access panel hearing. In addition it appears that no tangible performance mitigations have been proposed to address the concerns raised by FCC during the hearing, and which have subsequently been supported by ORR's determination.

6 RELEVANCE OF PUBLISHED LETTERS FROM ORR IN CONNECTION WITH THE SOUTHERN 1st SUPPLEMENTAL TO THIS DISPUTE.

6.1 FCC believes the published letters from the ORR in connection with the Southern Railway 1st supplemental (*) are relevant to the determination of TTP384. This is because of the ORR's appeal jurisdiction under Part M of the Network Code, and the insight the views expressed give of the ORR's view of the relevance and importance to be applied to Condition D6 Decision Criteria in determining if the Fourth Train should be timetabled.

6.2 In the determination in respect of TTP356 & TTP375 (the previous determination), the Hearing Chair reached conclusions following her analysis concerning which with the benefit of hindsight and further analysis, it can now be seen that the ORR, as relevant appeal body, differs. FCC believes they fall under the following headings:

Compliance with the Rules of the Plan

6.3 In the previous determination, the Chair said: "Boaring in mind that Southern's bids are upheld, it will still be necessary for them to secure the associated access rights through the regulatory process and that process would enable concerns over such matters as risk to train service performance to be addressed with the ORR. I do not consider that technical non-compliance with the Rules of the Plan alone would be sufficient to require NR to withdraw their Offers to Southern." (Paragraph 6.4.1.1, page 13 of the TTP 356 & 375 determination)

6.4 The ORR says: "The Rules exist to give a clear indication to train planners of the margins that are necessary to create a workable and reliable timetable. NR should not be complacent about breaches of the Rules. Any non-compliances should be reviewed and, other than in exceptional cases, the Rules amended if they are found to be incorrect or the timetable amended if the Rules are found to be correct. In this respect NR's comment that there were many other BML services that had operated successfully for many years that were not compliant with the Rules is both surprising and disappointing, especially given current performance issues. The Rules should be reviewed before the

introduction of new services rather than compounding known non-compliances. We have seen nothing that supports NR's claim that the breaches are supported by '...experience and sound operating principles'." (Paragraph 22, page 5 of the ORR letter of 24 November).

- 6.5 So following the consideration anticipated by the Chair in the earlier determination, the ORR concludes that either the Rules of the Plan ('The Rules') or the proposed Timetable should be amended before the proposed additional services operate so that The Rules are respected.

Decision Criterion (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 interest 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)

- 6.6 In her analysis of the application and weighting of the Decision Criteria (a) and (d) as part of the previous determination, the Chair said that '...I prefer the arguments of NR and Southern and conclude that, in my judgement, NR correctly gave greater weight to Decision Criteria (a).' (Paragraph 6.5.2, page 22 of the TTP 456 & 375 determinations).

- 6.7 Summarising their conclusions on performance issues, the ORR said: 'On this basis, we could not approve the proposed services even if they would provide some benefits. In coming to this conclusion we had regard to our statutory duties, particularly those duties to:

- a) promote improvements in railway service performance (section 4(1)(2a) of the Act); and
- b) enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1) (g) of the Act).' (Paragraph 76, page 15 of the ORR letter of 24 November).

- 6.8 Whilst acknowledging the possible guidance contained in paragraph 42 of ORR's determination of appeals against the Access Disputes Panel

determination of reference ADP23 which concerned a Network Code Part 7 matter -

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

- 6.9. "FCC believes that the discharge of these particular statutory duties correlates closely with the obligations of Decision Criterion (a), so the ORR would be likely to reach the same conclusion in relation to the relative weighting of Decision Criteria (a) and (d).

Train Performance and the consideration given to Decision Criterion (d) (maintaining and improving the levels of service reliability)

- 6.10. "In her analysis of the application and weighting of the Decision Criteria as part of the previous determination, the Chair said that "...I also accept NR's evidence that the potential impact on performance can be mitigated to acceptable levels for each operator." (Paragraph 6.5.2, page 27 of the TTP356 & 375 determinations).
- 6.11. The ORR say "We do not support the addition of new services that would significantly increase the likelihood that committed levels of performance would be missed to an even greater extent." (Paragraph 26, page 8 of the ORR letter of 24 November)
- 6.12. This in the context of the importance which the ORR attached to the prerequisite that "appropriate performance modelling was undertaken to indicate the likely performance impact on what was a very busy route." Whilst recognising that NR had commissioned modelling, the ORR were "...surprised at the limited scope of this: London Victoria, the East and much of the West Coastway services and the Thameslink route north of Blackfriars were not covered by the modelling," concluding that "...we did not feel that we could rely on the modelling to give an accurate indication of the full extent of the

likely deterioration in performance. (Paragraphs 40-43, page 9-10 of the ORR letter of 24 November). Furthermore, we were surprised that the modelling work itself was based on RaiSys rather than the more sophisticated TRAI, particularly given the recent experience on the West Coast Main Line and extensive dialogue with Network Rail about the importance of comprehensive and timely modelling of new timetables and new ruling stock deployments on busy parts of the network (paragraphs 40-43, Page 9-10 of the ORR letter of 24 November).

- 6.13 Going on to review NR's planned mitigation plans, the ORR said "We were very disappointed that the JPIP process had not been used appropriately to anticipate and budget for the revised timetable and to identify concrete actions that would minimise the risk of delay. We would have expected these to include ensuring compliance with the Rules, and processes to expedite the assistance of failed trains. We also agree with FOC that the mitigation measures, which relate mainly to briefing, monitoring or processes that should be in place anyway, were insufficient. Leaving performance mitigation as late as the parties have done would also appear to indicate that it was an afterthought. The plans should have been created well in advance so that they could be properly disseminated to those who would have to operate them. However, we also feel that any mitigation should be based on a sound timetable, and in our view the proposal is not a sound timetable." (Paragraphs 66-67, page 13-14 of the ORR letter of 24 November).

So as above, following the consideration anticipated by the Chair in the earlier determination, the ORR concluded that the proposed mitigation of the risks to train performance of the proposals was inadequate.

Decision Criterion (b) (seeking consistency with any current Route Utilisation Strategy which is either (i) published by the Strategic Rail authority or the Department for Transport before 31 May 2006, or (ii) established by Network Rail in accordance with its Network Licence.

- 6.14 Although verbally mentioned at the Hearing to consider TTP356 & 375, the weight given to this Criterion did not feature in the written determination.

However in their letter of 24 November, the ORR conclude that in relation to the "gap" identified with regard to journey time between London Victoria and the Coastway East, the Fourth train "…would be likely to make it more difficult to address the gap at a future timetable…". (Paragraphs 84, page 16-17 of the ORR letter of 24 November) So, the ORR concludes that this Criterion weighs against the timing of the proposed Train Slots.

* Letters of 12 and 24 November headed 'Southern Railway 1st supplemental'

7. EXPLANATION OF EACH ISSUE IN DISPUTE

- 7.1 Southern does not have the Firm Rights to support the full extent of the Train Slots bid and offered (as described per D 3.2.1 Network Code) relating to the proposed additional services which are the subject of this dispute. The ORR letter details why the ORR did not grant the additional Firm Rights to enable the operation of the fourth train and FCC believes that the ORR will not approve the necessary rights until their views are assimilated and acted upon.
- 7.2 The operation of the Fourth Train in question is subject to the relevant Access Rights being agreed and approved by the ORR. This process has not been initiated at the time of submission of this appeal notice and therefore the Rights have yet to be agreed and approved by the ORR.
- 7.3 In their letter to NR of 22 November the ORR said "It is also important to recognise the time pressure relevant to this application. Our published guidance to train operators and NR is that they should allow up to 12 weeks for us to consider contentious applications, but in order for our decision to be reflected in the timetable at 1-12, 24 weeks should be allowed (see paragraphs 3.46 to 2.57 of our criteria and procedures)" Since there has, to date, been no industry consultation about any proposal, let alone a submission to the ORR, any application for access rights for 11th September 2011 could not possibly reflect this timescale.
- 7.4 The London to Brighton Main Line is an important route served by both Southern and FCC. For FCC, the route has wider significance as performance

on this route affects its Thameslink services north of the Thames. The Thameslink route can then quickly transfer delay over a considerable area affecting Southeastern Trains, Southern, East Midlands Trains, London Midland and London Overground which in turn reacts into other operators.

- 7.5 The route is heavily congested. NR has declared the part of the route between Gatwick and London as congested under Regulations 22-25 of the Railways Infrastructure (Access and Management) Regulations 2005.
- 7.6 The route experiences regular and frequent delays, and disruption to services and passengers. Presently the FCC Brighton Main Line Public Performance Measure (PPM) Moving Annual Average (MAA) at period 1110 (ending 8th January 2011) is 84.08% , with the figure in the peak being 72.83%. FCC believes Southern's performance levels on the route are very similar, as Appendix 6 highlights. These PPM figures are among the worst in the London and South East Region and compare unfavourably with the NR objective of a delivery of PPM in this sector of 93%. A particular concern is the effect of congestion on the route and the ability to recover from performance incidents, and the consequent knock on effect which this has on other routes, for example, on the wider Thameslink network.
- 7.7 FCC does not regard performance on the route presently to be satisfactory. In 2009/10 FCC and Network Rail failed to achieve their agreed Joint Performance Improvement Plans (JPIP) targets by 96,000 minutes. As such the same targets were set for 2010/11 despite this being behind NR's CP4 performance trajectory. Currently at Period 1111 the plan is being missed by over 103,000 minutes which is now 32% over target. The specific FCC NR Sussex Route delay is now 56% worse than the 2010/11 target and 24% worse than the same ten periods last year.
- 7.8 The proposals for the Fourth Train will increase congestion and risks to performance, reducing the opportunity for service performance to recover in the off-peak and increasing the risk of additional performance issues.
- 7.9 The performance concerns and level of congestion on the route is further evidenced by the increasing number of Rules of the Plan non-compliances as

a result of the Fourth Train as well as the findings of both an independent, but less than comprehensive, initial performance modelling report (Appendix 7) and NR's own internal work both of which were subject to review at the previous panel concerning the appeal against the Fourth train

- 7.10 In their letter of 24 November, the ORR said "... we were surprised at the limited scope of this. London Victoria, the East and much of the West Coastway services and the Thameslink route north of Blackfriars were not covered by the modelling. They also considered ... that in this instance the modelling covered far too small an area given the potential for the transfer of delay beyond the boundaries that were used"
- 7.11 Following the ORR's letter of 24 November and a subsequent meeting to understand the reasoning behind the ORR's decision, NR commissioned further performance modelling. Disappointingly the ORR's suggestion that the TRAIL methodology should be used was ignored, and the RailSys methodology was used again. This has given no further comfort that the performance on the route would not be compromised by the operation of the Fourth train.
- 7.12 A more detailed explanation of the performance concerns of the additional services was made to ORR as part of FCC's representations concerning the determination of access rights sought in Southern's proposed 1st supplemental. This is included as Appendix 6. This was used in part to assist ORR in reaching it's determination on the granting of the access rights.
- 7.13 NR's concerns regarding the Rules of the Plan are also underlined by the review which it has commenced of the Sussex Rules of the Plan, with the Brighton to Victoria Route identified as a priority. Many of the areas which NR has identified as requiring review are also areas which both performance modelling reports, have identified as being areas of material performance risk in the context of the Fourth Train. It is a concern that these areas of performance risk should be put under additional pressure by a Fourth Train before they are resolved.

Key findings from the first performance modelling report are as follows:

(a) The report confirmed that 'Delay to Class 1 FCC trains increases substantially as a result of the newly timed Southern services'; and that 'Once delay is introduced into the model, the difference in performance becomes greater'

(b) Increases in delays were identified along the entire route, although specifically at the following locations:

(i) East Croydon as a result of the increased use of bi-directional platform working;

(ii) Haywards Heath where tight headways give little performance buffer; and

(iii) Brighton platform workings which increase the number of station movement conflicts.

(c) The effect on Southern is summarised below:

(i) the total measured delay to passenger services in the unperturbed timetable increases by 16 minutes and 08 seconds (approximately 8%);

(ii) the total measured delay to passenger services in the disrupted timetable increases by 1 hour 43 minutes and 48 seconds (approximately 43%); and

(iii) on-time arrivals reduce by 1.62%

(d) The effect on FCC (194 services) is summarised below:

(i) the total measured delay to passenger services in the unperturbed timetable increases by 6 minutes and 15 seconds (approximately 25%), and

(ii) the total measured delay to passenger services in the disrupted timetable increases by 17 minutes and 16 seconds (approximately 9%);

- (d) On-time arrivals reduce by 7.02%.

The initial performance modelling failed to include impacts involving London Victoria and did not include effects which would be felt off the route – for example on the Thameslink services north of the river, and on Sussex Coastal and off-peak services. FCC therefore considered that it was highly likely to understate the performance impacts even on the Victoria to Brighton route. Details of FCC's concerns are set out in Appendix 6.

Subsequently, NR commissioned an expanded RailSys performance modelling exercise to further consider the effect of the proposed timetable and this was sent to FCC on 14th February 2011.

Key headlines emerging from this study indicated that:

- (a) Total measured delay in an undisrupted timetable increases by 58 minutes and 53 seconds (approximately +3%). Delay to Class 1 FCC trains alone are expected to be 16 minutes and 47 seconds (a worsening of +12.39% for May 2011 against December 2010).
- (b) Total measured delay in a disrupted timetable increases by 3 hours and 4 minutes (approximately 12.5%). Delay to Class 1 FCC trains alone is expected to be 31 minutes and 53 seconds (a worsening of 43.30% for May 2011 against December 2010).
- (c) Overall measurable punctuality in the May 2011 timetable drops compared to December 2010. For example, on-time arrival for FCC services is expected to decrease by 7% from May 2010 to December 2010, with a further 1.1% reduction by May 2011.
- (d) Lateness is anticipated to be generally higher from May 2011 on all routes involving Brighton – London services.

indeed, the report summarises that 'By introducing one extra train per hour in each direction, 15 extra services in total between London Victoria and Brighton, the May 2011 Timetable performs measurably worse than the May and December 2010 timetables in terms of both delay and punctuality. Under normal and disrupted conditions the overall delay increases and punctuality decreases'.

Separately, as noted above, it should be noted that the report failed to consider performance effect north of Blackfriars despite the ORR request to do so. Neither is it clear whether the report deals with the performance characteristics of different traction types on the route which can have a material effect.

- 7.14 The NR submission to the Timetable Panel (ref TTP356) dated 17 August 2010 included an Appendix A which included further comment on the performance risks associated with the Fourth Train, including the tightness of the phasing of services in the southbound direction, the reduction in recovery times and the reduced turnaround times at Brighton. These serve to emphasise the performance risks. However FCC is concerned that this NR report does not adequately engage with the issues raised by the performance modelling and is affected by other serious limitations as further described in Appendix 6. It therefore fails adequately to assess the performance risks presented by the Fourth Train.
- 7.15 The off-peak hours provide an important opportunity for the service to recover from morning peak disruption and ready itself for the evening peak. Increasing frequencies by introducing the Fourth Train into the off peak on already congested infrastructure is likely to reduce the ability to recover from performance problems and so add peak risk.
- 7.16 The ORR concluded, as outlined above, that the mitigation proposed by NR to support the December 2010 proposals were inadequate. FCC is concerned that there is still a lack of detail as to what these will be and lack of assurance that they will be effective. In these circumstances no or limited weight only should be given to the indication of possible mitigations.

7.17 FCC understands from oral evidence provided by Southern to the TTP356/375 hearing which took place in August 2010 that current loadings on its off peak services are in the region of 60-70%, indicating that there is not a pressing need for additional off-peak services on a route that is already well served and that there may well be room for investigating alternatives of strengthening rather than adding services. In the determination of TTP 356/375, the Hearing Chair commented upon the lack of any figures to support the contention that the proposed services would be financially attractive. Consequently, the analysis submitted to the ORR in connection with the consideration of Southern's 1st Supplemental is attached as Appendix 5 (an unredacted version will be separately provided to the ADG Chair). FCC's opinion is that the additional services will in fact be primarily abstractive of existing services on the route, as well as having material adverse effects on congestion and performance; this is an issue which FCC expects to be considered further in the context of the approval of the application for access rights. However, whether or not the additional services are primarily abstractive, in FCC's judgement the case for the provision of increased capacity and off-peak frequency is not sufficiently strong to outweigh the performance and congestion risks. It is however, important to note that the ORR letter of 24 November says that '... as it became clear to us that we would not be able to approve the application on performance grounds, we did not consider it necessary to complete our assessment of the revenue implications of this application.' Consequently FCC does not consider it necessary to argue further the effect upon FCC's commercial interests, (Decision Criterion (c)), since the ORR clearly believes the effects upon service reliability (Decision criterion (d)) are overwhelming.

7.18 To add further services without addressing those congestion and performance issues will not generate additional network capacity or improve passenger delivery but will conversely:

(3) increase congestion;

- (b) consequently increase delay and lateness, [principally] through impacts on recovery time both on the London to Brighton line and by imported disruption on other services, including FOC's Thameslink services north of the river;
- (c) serve to reduce PPM and achievement of JPIP Targets in line with the improvements required of Network Rail in Controlled Period 4; and
- (d) through the impacts on congestion and performance, serve to reduce rather than increase the overall industry revenue pool

7.19 The impact would therefore be to reduce service delivery materially, to the material economic detriment of the network.

7.20 In this case, FOC's submission is that the proper application of the Decision Criteria would not support the inclusion of the Train Slots for the Fourth Train for the following reasons, when all the circumstances are taken into account:

- (a) the case for a Fourth Train per hour off-peak is not strong having regard to present off-peak loadings and the level of service provision currently provided on the route and the potential for alternative approaches to strengthen services;
- (b) the addition of the Fourth Train onto a route which is already congested will add to congestion and lead to reductions in levels of performance for the route which are already not good;
- (c) the addition of the Fourth Train adds to the levels of Rules of the Plan non-compliances on the Brighton-Victoria Route and so increases the risks to performance
- (d) the adverse performance implications are exacerbated by the implications of the service for services on other routes, including the Thameslink route north of the river; and
- (e) there may be alternative strengthening options to the Fourth Train which would offer increased capacity without such severe congestion and performance risks and should thus be explored as an alternative to avoid industry efficiency concerns.

7.21 The ORR letter of 24 November concludes that "...the proposed additional services would be highly likely to have a significantly adverse effect on performance. This was on the basis that the proposed timetable was not robust given the number of non-compliance with the Rules and conflicts contained within it. We felt that the risks to performance were such that we could not approve the proposed services even if they would provide some benefits." FCC believes this means that the industry's regulatory body and ultimate recourse of appeal for timetabling issues considers that the proposed Train Slots as they were presented at the end of 2010 are incompatible with "maintaining and improving the levels of service reliability". (Decision Criterion (d) – D5 of the Network Code)

7.22 The ORR letter explicitly identifies nine significant breaches of the Rules of the Plan ("the Rules").

- The xx.06 and xx.36 Victoria to Brighton occupy platform 3 at East Croydon from xx.21½ to xx.23 and xx.51½ to xx.53 respectively. The xx.54 and xx.24 Bedford to Brighton re-occupy a minute later. The Rules require a 2 minute margin.
- The rear portions of the xx.17 and xx.47 Victoria services are expected to leave Haywards Heath two minutes behind the front portions. The Rules require there to be a four minute margin. The present timetable allows three minutes – which is perhaps more realistic. (Note that this follows from a technical, but not unrealistic, breach of the Rules in that the xx.21 and xx.51 Victoria are scheduled to pass Haywards Heath just three minutes (instead of four) after the arrival of the xx.17/xx.47 Victoria)
- The xx.54 Bedford to Brighton passes Keymer Junction at xx.59½ (after calling at Wivelsfield, and therefore being effectively a slow train, requires a four minute margin behind it). The xx.53 Ore to Victoria is expected to cross behind it at xx.01½.
- Similarly, the xx.24 Bedford to Brighton passes Keymer Junction after calling at Wivelsfield at xx.31½. The xx.58 Eastbourne to Victoria is

expected to cross behind it at xx/24. (Note that in both cases there is a tight juxtaposition between the Up service, the existing fast Brighton to Victoria service, the Up Littlehampton service to which it will couple at Haywards Heath and the proposed fast Brighton to Victoria services which would overtake at Haywards Heath during the coupling procedure);

- The xx/54 Bedford to Brighton stops at Preston Park at xx.11½ and the xx.24 Bedford at xx.43½. The xx.21 and xx.51 Victoria to Brighton were to be scheduled to pass at xx/14½ and xx/46½ respectively, a breach of the four minute rule. Note that the latter were to have very tight turnarounds at Brighton as listed below, and that the xx/17 Victoria and xx.37 Haywards Heath to Littlehampton were scheduled very close behind these trains, and followed by the xx.40 and xx.10 fast Bedford to Brighton trains respectively, dramatically increasing the performance risk. The latter are also closely followed by the xx.36 and xx.06 Victoria to Brighton respectively
- The xx/17 Victoria to Littlehampton calls at Preston Park at xx.16½ and is followed by the xx/10 Bedford to Brighton at xx/21, a breach of the four minute rule. As mentioned above, the xx.36 Victoria to Brighton is then immediately behind.
- The xx.17 Victoria to Littlehampton departs Preston Park at xx.18½ and the xx.37 Haywards Heath to Littlehampton passes Preston Park at xx/46½. The xx.10 and xx.49 Brighton to Victoria pass Preston Park at xx/21 and xx/51 respectively, a clear breach of the four minute rule for the former and a probably unachievable expectation for the latter
- The Rules of the Plan (Rules) require that Class 1 (i.e. express) trains run into an un-occupied platform at Brighton in order to avoid the delay of an approach-control signal check. A minimum turnaround time at Brighton of seven minutes is required for four or eight-coach loaded trains, and twelve minutes for twelve-coach loaded trains. The plan

required the now fast services to turn around in seven or nine minutes, with some of them running into an occupied platform (for which an extra allowance should have been made, breaking the minimum seven minutes in some instances even if this procedure had not been in clear breach of the Rules) in order to make the train up with extra coaches. Southern's assurance that an extra driver would be waiting to take the train out while the incoming driver would make the attachment, is of little comfort, when passengers would be unable to alight or board during the attachment. Some morning services would have been formed of twelve coaches, and would detach vehicles at Brighton, which would require additional turnaround time. Note that the risk inherent in all this is made worse by the trains being scheduled to arrive at Brighton immediately behind the xx.54 to 24 Bedford to Brighton, which are the subject of the breach of the Rules at East Croydon mentioned above.

- The juxtaposition of the xx.52 Brighton to Victoria and xx.50 Ore to Victoria (two minutes), and of the xx.28 Brighton to Victoria, xx.54 Littlehampton and xx.34 Brighton to Bedford (two minutes and 3½ minutes respectively) in platform 4 at Gatwick Airport is not compliant with the four minute rule.

These breaches have not been addressed within offered First Working Timetable in respect of the Subsidiary Change Date 2011. The ORR's letter of 24 November goes on to say that "...it is not good practice to include non-compliances as a matter of course and where it cannot be shown that the Rules are incorrect. The proposed timetable would involve the introduction of additional non-compliances in every hour, often the same non-compliances twice each hour, during the off-peak. The non-compliances in the current timetable are likely to have contributed to the poor performance of the route and we believe that the inclusion of additional non-compliances would further undermine the robustness of the timetable."

- 7.23 Whilst NR undertook some performance modelling to inform the inclusion of the offer of the additional and adjusted Train Slots in the December 2010

Timetable. The ORR letter of 24 November says that "we did not feel that we could rely on the modelling to give an accurate indication of the full extent of the likely deterioration in performance." NR commissioned further performance modeling on a slightly expanded remit (which failed to include any effect north of Blackfriars, or the use of the recommended TRAIL mode), with equally unpersuasive results.

7.24 At the time of the consultation concerning Southern's 1st supplemental, FCC asserted that proposed plans to mitigate the effect on performance of the additional Train Slots were not sufficiently advanced to be quantified and endorsed as providing effective mitigation before the services were allowed to operate. The ORR letter confirms that "we were very disappointed that the JI+PI process had not been used appropriately to anticipate and budget from the revised timetable and to identify concrete actions that would minimise the risk of delay." The ORR also said that "We also agree with FCC that the mitigation measures which relate mainly to briefing, monitoring or processes that should be in place anyway, were insufficient." It should be noted that FCC meets NR periodically at Level 1 Directors Liaison/Joint Performance Reviews to formally review the respective deliveries of targets agreed in the JPIP. In addition, FCC specifically discussed Brighton Main Line contingency planning with NR prior to commencement of the December 2010 Timetable. More recently, on 10th January 2011, FCC met Southern jointly with NR to identify, in outline, any further mitigation measures that might be possible although no conclusive way forward was determined.

7.25 Whilst the degree to which the proposed Train Slots were compatible with "seeking consistency with any current Route Utilisation Strategy" was raised at the T1 P356/375 hearing, the ORR letter confirms that whilst a "gap" in service provision was identified in the Sussex Route Utilisation Strategy (RUS) with regard to journey time between London Victoria and Coastway East (RUS Option 6.3), it concludes that "Southern's proposed service does nothing to address that gap. Indeed, as the RUS option would require an additional slot between London Victoria and Haywards Heath, Southern's proposal would be likely to make it more difficult to address the gap at a future timetable change". FCC believes this means that the industry's regulatory body and ultimate

recourse of appeal for timetabling issues considers that the proposed Train Slots are not consistent with Decision Criterion (b) (D6 Network Code).

7.26 The additional Train Slots include in the First Working Timetable Offer are not consistent with the appropriate application of the Network Code Decision Criteria D6(b), (d), and (e).

7.27 Accordingly while FCC accepts that the primary Decision Criteria to consider in this case are those at D6(a) (sharing capacity and securing the development of the Network in the most efficient and economical manner) and D6(d) (maintaining and improving levels of service reliability), it submits that:

- (a) in relation to D6(a), the Fourth Train is not in fact an efficient and economical development of the Network. Alternatives such as strengthening, should be considered and the impacts on congestion and performance have to be taken into account. The overall costs to the industry in congestion and performance are expected by FCC to outweigh the new revenue generated as a result, at least until the performance and congestion issues are resolved. The overall assessment under this criterion should therefore be neutral or negative;
- (b) in relation to D6(d), the Fourth Train will have adverse performance implications, as reinforced by the opinion of the ORR, and should be regarded as a strong negative;
- (c) in relation to D6(d), in the words of the ORR, the Fourth Train "would be likely to make it more difficult to address" the gap identified in the Sussex Route Utilisation Strategy with regard to journey times between London Victoria and the Coastway East (i.e. Sussex eastern coastal line);
- (d) no other Decision Criteria should carry any material weight in favour of the Fourth Train to alter the overall conclusion based on D6(a) and D6(d);
- (e) Decision Criterion D6(e) (taking into account the commercial interests of existing and potential operators in a consistent manner) may in addition be counted as a further negative, having regard to the manner in which the Fourth Train is expected to abstract revenue from FCC services, as well as

its anticipated adverse effects on the performance of FCC and other services.

It is also relevant that Southern has confirmed that the Fourth Train is not part of their Franchise Service Level Commitment and that it is a 'Commercial' timetable development. As a result this is not considered to be a franchise commitment, so Decision Criterion D6 (c) should be non-applicable. .

FCC's believes its position is supported by conclusion reached in ORR's consideration of the Access Rights for the Fourth train as amplified in their letters of 12, 22 and 24 November 2010

8 DECISION SOUGHT FROM THE PANEL

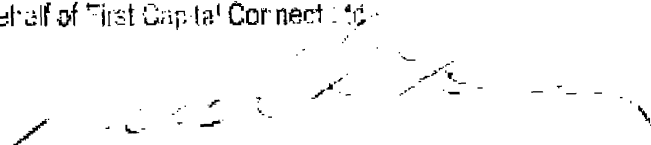
The Panel is asked to determine that:

Network Rail be directed to withdraw the offer to Southern of Off Peak Monday-Friday and Saturday Train Slots between Brighton and London Victoria for the fourth fast train per hour

9 SIGNATURE

For and on behalf of First Capital Connect Ltd:

Signed



Print Name

Mark C. Jones

Position

Chief Executive
First Capital Connect Ltd

Date

24 November 2010

APPENDICES AND ANNEXES

Appendix 1	Letter from the ORR 'Southern Railway 1st supplemental agreement' dated 12 November 2010
Appendix 2	Letter from the ORR 'Southern Railway 1st Supplement Agreement' dated 22 November 2010
Appendix 3	Letter from the ORR 'Southern Railway 1st supplemental agreement' dated 24 November 2010.
Appendix 4	Timetable extract identifying the Train Sets within the First Working Timetable Offer and which is the subject of dispute
Appendix 5	Analysis: 'Access Rights Risks – Economic and efficient use of capacity' which was appended to FCC's response to Network Rail's consultation concerning the Southern 1st supplemental
Appendix 6	Analysis: 'FCC Performance Concerns – Appendix 6 – 22 Sept 2010
Appendix 7	Railsys Performance Modelling of the December 2010 Brighton Main Line Timetable dated 19 June 2010
Appendix 8	Railsys Performance Modelling of the May 2011 Brighton Main Line Timetable dated 28 January 2011
Appendix 9	Criteria and procedures for the approval of track access contracts, published by the ORR November 2009