

The Office of Rail and Road
CC: Network Rail Infrastructure Limited
CC: Abellio ScotRail Limited
CC: West Coast Trains Limited

By e-mail only

4 December 2017

Dear ,

Many thanks for your letter dated 30/11/2017 outlining the ORR's intention to hear Network Rail's appeal in respect of the Determination of TTP1174. XC Trains Limited would like to make the following representations regarding NRIL's appeal.

Firstly, as you note in your letter the appeal raises a matter of general importance to the industry. Whilst XCTL do have opinions on the matter, XCTL believe that this is an issue that should be consulted more widely than is currently the case. All Timetable Participants are affected by this appeal and should be given the opportunity to make representations on the matter.

On the particular points raised by Network Rail in their Notice of Appeal, dated 21/11/2017 –

In 4.1, Network Rail state that the proper interpretation of the relevant provisions are those preferred in the Determination of TTP1122. XCTL disagree and believe that the Determination of TTP1174 was accurate and correct in its interpretation of Part D.

In 4.2, Network Rail discuss D4.6.1, which states that "*where Network Rail is required to decide any matter in this Part D...*". XCTL observe that following their statement of fact regarding the wording of D4.6.1, there is discussion about the definition of "*Decision*", but no further comment on the word "*required*". XCTL maintain that where no conflicting Access Proposals are submitted, there is no requirement placed upon Network Rail by the Network Code to decide any matter.

Whilst some wording contained in the Network Code is open to interpretation, there is no ambiguity in D4.2.2, which states that "*Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it...*" (underlining added). In the case brought by XCTL that became both TTP1122 and TTP1174 NRIL had clearly not endeavoured wherever possible to comply with the Access Proposals submitted to it. In 4.8, NRIL agree that provided that it conducts itself as set out in D4.2 it can make decisions concerning any matter, but in TTP1122 and TTP 1174 this was not the case, and not part of the matter in hand. If NRIL had applied the Decision Criteria and conducted itself as set out in D4.2 then XCTL would have had no wish to make a dispute.

In 4.12 NRIL quote D4.2.2 incorrectly, stating that they are required to "*endeavour to comply*" with Access Proposals. They are required to "*endeavour wherever possible to comply*" (underlining added).

In 4.22, NRIL outline their concerns that if TTP1174 is upheld then NRIL's role will be "*reduced to one of a passive bystander, merely required to police disputes between Train Operation Companies... NRIL will not be able to propose changes at all for prospective users and providers of railway services*". The Network Code expressly allows NRIL to make such proposals, in D2.4.8b,

which states that “*Network Rail shall facilitate and co-ordinate dialogue with all Timetable Participants and (as may be appropriate) between Timetable Participants in order to identify opportunities to develop strategic initiatives and to promote Network benefits such as connections, complimentary service patterns and efficiency of operation*”. This responsibility is placed upon NR between D-55 and D-40, prior to Access Proposals being submitted. It is at these timescales that NRIL have the power to be involved in such matters. This is in no way affected by the Determination of TTP1174. XCTL support NRIL in any such endeavours undertaken during this timeframe.

In 4.25 NRIL quote Paragraph 1.23 of its Licence to run the Network. This Paragraph states that the processes used should “*enable persons providing railway services... to plan their businesses with a reasonable degree of assurances to meet their obligations to railway users*”. XCTL believe that the processes and best practice also discussed in the paragraph align with the need for NRIL to comply wherever possible with Access Proposals submitted to it, as it gives the reasonable degree of assurance being sought.

In 4.26 NRIL discuss their ability to initiate changes to relevant industry processes. XCTL is unsure as to how this would be affected.

XCTL agree with NRIL that conflict between TTP1122 and 1174 needs to be resolved and request that the ORR do so.

XCTL also however notes the persuasive previous cases past precedents raised in the Determination of TTP1174, namely TTP834 and TTP324. In particular, TTP324 established that “*The Decision Criteria only come into force in those circumstances explicitly contemplated by the Network Code, where there is the potential need for Network Rail to exercise its discretion in relation to possible conflicts of priorities*”. XCTL are not aware of an appeal brought by NRIL in relation to TTP324 and are therefore of the belief that this Determination was accepted. However, NRIL now appear to rely on the assumption that they can apply the Decision Criteria at will, subject to Access Rights being met.

It is ultimately XCTL’s belief that the Determination of TTP1174 should be upheld by the ORR, and NRIL’s particular role in the Timetabling Process between D-40 and D-26 clarified.

Kind regards

Head of Timetabling and Diagramming, XC Trains Limited