

**IN THE MATTER OF AN APPEAL TO THE OFFICE OF RAIL AND ROAD
AND IN THE MATTER OF TIMETABLING DISPUTE TTP 1064**

BETWEEN:

ABELLIO SCOTRAIL LIMITED

Appellant

v

NETWORK RAIL INFRASTRUCTURE LIMITED

Respondent

RESPONDENT'S NOTICE

1. In this Respondent's Notice, the following abbreviations will be used:
 - 1.1 The Appellant will be referred to as "**ASR**";
 - 1.2 The Respondent will be referred to as "**NR**";
 - 1.3 The Office of Rail and Road will be referred to as the "**ORR**";
 - 1.4 ASR's Notice of Appeal dated 12 May 2017, to which this Notice responds, will be referred to as the "**Notice of Appeal**" and the appeal brought by ASR by the Notice of Appeal will be referred to as the "**Appeal**";
 - 1.5 The bundle of documents attached to ASR's Notice of Appeal will be referred to as "**ASR's Appeal Bundle**";
 - 1.6 The Determination dated 5 May 2017 in Timetabling Dispute TTP 1064 will be referred to as the "**Determination**";
 - 1.7 The Timetabling Panel who delivered the Determination will be referred to as the "**Panel**";
 - 1.8 The various Parts of the Network Code shall be referred to as "**Part [M]**";
 - 1.9 ASR's Sole Reference Document submitted to the Panel for TTP 1064 will be referred to as the "**ASR SRD**";
 - 1.10 NR's general response to the issues identified by the Panel as the Heads A and B Issues will be referred to as "**NR's General Response**";
 - 1.11 NR's specific Response to the ASR SRD, which appeared as Appendix 2 to NR's General Response, will be referred to as "**NR's Response to the ASR SRD**";
and
 - 1.12 Version 2 of the 2018 Timetable Planning Rules (Scotland) published by NR on 3 February 2017 will be referred to as "**TPR 2018 (Scotland)**".

SUMMARY OF NR'S POSITION

2. This Respondent's Notice should be read in conjunction with the Respondent's Preliminary Notice Addressing The ORR's Powers Under Paragraph 4.4.1 Of Part M Of The Network Code dated 22 May 2017 ("**NR's Preliminary Notice**").

3. In summary, NR's overall position is that it:
 - 3.1 Opposes the Appeal;
 - 3.2 Invites the ORR to decide that the Appeal should not proceed on one or more of the grounds in Paragraph 4.1.1 of Part M; and
 - 3.3 In the event that the Appeal does proceed, opposes ASR's request that the Appeal be expedited.
4. NR's submissions in relation to 3.2 are set out in NR's Preliminary Notice. However, since aspects of those submissions go to the merits of ASR's Appeal, some parts of those submissions are repeated below.
5. Appended to this Notice is a witness statement dated 26 May 2017 of Andrew Bray, NR's Timetable Production Manager for Scotland. The ORR is invited to read that statement and in addition to read:
 - 5.1 The witness statement of Matthew Allen dated 12 April 2007 prepared by NR for the hearing before the Panel (**Tab B4 of ASR's Appeal Bundle**);
 - 5.2 NR's Response to the ASR SRD (**Tab B3 of ASR's Appeal Bundle**); and
 - 5.3 The Determination (**Tab B6 of ASR's Appeal Bundle**).

ASR'S FURTHER SUBMISSIONS AS CONTAINED IN THE BURGESS SALMON LETTER DATED 25 MAY 2017

6. The further ASR submissions, received on 25 May 2017 at 16:59 hrs, on the eve of NR having to provide its Respondent's Notice, are substantial, numbering seven pages.
7. In the time available, and bearing in mind NR's need to focus on filing the Respondent's Notice in order to meet the ORR's deadline and Part M, NR has only been able to conduct a preliminary review of ASR's further submissions. On that basis it appears that points are raised which NR should be entitled to address: for example, ASR states that the fact NR has withdrawn a proposed change is evidence that NR was wrong or that its approach was unreliable; this entirely mischaracterises the position. What this shows is that NR is willing, even at this late stage, to engage in consultation with ASR.
8. Further, ASR's submissions were made purportedly in response to the ORR's email of 23 May 2017 timed at 20:56. That email stated (at point 2):

"Network Rail has stated that there are now only five STRs that are still in dispute between Network Rail and AST, all others having been resolved. Would you please confirm:

 - (a) Whether ASR agreed with Network Rail that only five SRTs are still in dispute;*
 - (b) Whether ASR considers that agreement could still be reached on these five SRTs and implemented for the December 2017 timetable or, if not, for the May 2018 timetable;*
 - (c) The impact on ASR if agreement on the five outstanding SRTs could not be reached and implemented for the 2017 December timetable."*
9. Section 2 of ASR's submissions fails entirely to provide the simple confirmation requested by the ORR, but instead seeks to make submissions. NR submits that

the only reasonable conclusion that can be drawn from ASR's failure to provide the simple confirmations requested is that doing so would damage their case.

10. Finally, NR understandably reserves its position in relation to these submissions, including, if so advised, seeking permission from the ORR to respond to those submissions.

ASR's APPLICATION FOR AN EXPEDITED PROCESS

11. Before turning to the substance of the Appeal, NR deals first with ASR's application for an expedited process.
12. NR resists ASR's request for an expedited process. The T-26 date is 9 June 2017 and it will plainly not be practicable to make changes in advance of that date. The simple reality is that even if the process is expedited, the changes proposed by ASR cannot be practicably accommodated into the timetable set out in Part D. There is little practical point in expediting the process in these circumstances.
13. In paragraphs 2.4 and 2.5 of the Notice of Appeal, ASR appear to suggest that they need the Appeal to be resolved before they start implementing the TPRs set out in v.2 – issued on 3 February 2017.
14. By paragraph 4.7 of Part D, NR's decisions are binding on ASR unless and until they are changed by an appeal. Those decisions have not yet been changed and accordingly ASR has been under an obligation since 3 February 2017 to implement NR's decisions. If ASR has failed to comply with this obligation, that is a serious breach on its part which it would be well-advised to rectify immediately. It is not a reason however for there to be an expedited hearing.
15. Further, for the reasons explained in NR's Preliminary Notice, and which are repeated below, a major reason for ASR finding itself in its current predicament is that it failed to engage properly in the consultation process with NR. ASR appears to be trying to re-engage with that process by entering into negotiations with NR since the Determination was provided (as explained in Mr Bray's statement). However, ASR is insisting that NR's proposed timetable be shelved in the meantime. ASR has only itself to blame for the situation it finds itself in and should not be entitled to special treatment as a result. This further consultation shows that outstanding matters are being resolved between NR and ASR (as explained in Mr Bray's statement).

ASR'S APPEAL

16. If the ORR allows the Appeal to proceed, NR submits that the Appeal should be dismissed for the reasons set out in NR's Preliminary Notice. In particular, NR submits that the Appeal falls to be dismissed since:
 - 16.1 ASR does not in fact appeal the findings which led the Panel to arrive at the Determination. As such the Appeal is bound to fail;
 - 16.2 ASR is attempting to introduce a considerable amount of new evidence which was not before the Panel. It is in effect attempting to use the ORR to hold not just a re-hearing, but a re-hearing with fresh evidence which was not put before the Panel; and
 - 16.3 There are material omissions and inaccuracies in much of the material presented by ASR.
17. These submissions will be dealt with in turn.

18. The ORR is reminded that the main relief which ASR sought from the Panel, and now the ORR, is that the Panel / ORR:

"Directs Network Rail that the proposed Revision [i.e. TPR 2018 (Scotland)] be cancelled [in its entirety] and do not apply (or order that the revisions are so cancelled)" – see paragraph 6.1 (a) of ASR's SRD (Tab B1 of ASR's Appeal Bundle).

19. The breadth of the relief requested underpins a considerable amount of NR's submissions. It is impracticable and would be hugely disruptive: moreover, there is no reasonable basis for reaching this draconian conclusion.

ASR DOES NOT IN FACT APPEAL THE FINDINGS WHICH LED THE PANEL TO ARRIVE AT THE DETERMINATION

20. The ORR is invited to read the Determination in full, and to consider section 6 in particular.

21. It will be seen that the Determination comprises various sections. There is extensive recording of the respective parties' submissions and of the exchanges at the hearing (sections 1 to 5).

22. Section 6 sets out "*Analysis and consideration of issues and submissions, guidance and other observations*". The bulk of this section comprises guidance and observations.

23. The actual basis for the Panel's Determination in Paragraph 7.1 is contained in Paragraph 6.7 in which the Panel states:

"Before and during the hearing ASR set out its view that the introduction of the revised TPRs would have a significant effect on its current and planned services, to an extent which would prejudice its ability to meet its SLCs. Our general approach to this issue is explained above. Although some examples were given in presenting ASR's case which were said to have this effect, none was pleaded within ASR's claim for relief on which the Panel could reach a Determination. Indeed at one point ASR appeared to be expecting Network Rail to understand the likely effect of changes on ASR's use of its fleet, which the Panel was not convinced was within Network Rail's knowledge.

While the Panel did form some concerns about possible effects on ASR's services, and ASR effectively sought leave to bring detailed claims before this Timetabling Panel (see paragraph 5.4 above), for the reasons explained above I concluded that it was beyond my powers to allow ASR to raise individual issues for which relief was sought without the consent of Network Rail, which was not forthcoming. These issues can therefore only be dealt with within our guidance and comments."

24. The "reasons explained above" are set out in the final paragraph of paragraph 6.2 of the Determination as follows:

"The view of the Panel on [the question of whether it can be said that a new method of calculating TPRs can be regarded as either complying with the Decision Criteria, or of failing to do so] is that it is only when individual TPR adjustments emerge from the process that it can be asked whether the Considerations which are relevant in each case have been correctly identified and where any are in conflict, they have been weighed appropriately in each case. Thus it was the Panel's view that in appealing any individual amendment (at the level referred to in this Dispute TTP1064 as granular) it would be open to any Access Beneficiary to point to reasons why the use of ODA data in that particular amendment had led to an incorrect application of the Decision Criteria, but that a challenge to the

use of ODA as a whole could not be sustained by arguing that ODA, as a constituent part of the TRIP process (in some but not all instances) or the TRIP process as a whole, failed to comply with Decision Criteria”.

25. By paragraph 3.1.1 of Part M, ASR must identify the determination which the Appellant wishes to challenge and detail why the Appellant believes that the determination is wrong or unjust because of a serious procedural or other irregularity.
26. Despite the length and detail of the Appeal, the actual reasons why ASR considers that the Determination is wrong are set out at two pages, namely in paragraph 4.3 (a) to (e) of the Notice of Appeal.
27. It can be seen from the paragraph numbers of the Determination listed in paragraph 4.3 of the Notice of Appeal that (i) there is no appeal against the Panel's conclusion in paragraph 6.7 of the Determination; and (ii) there is no appeal against the conclusion quoted above in paragraph 6.2 of the Determination.¹
28. The Panel was not prepared to conclude that the whole of TRIP, or ODA, failed to comply with the Decision Criteria. It seems that, at least in this Appeal if not before, ASR agrees with that – see paragraph 1.2(a) of the Notice of Appeal: *“ASR does not object to the principle of TRIP or ODA”.*
29. What the Panel required was detailed objections to particular TPR adjustments. It was prepared to consider those and determine in each case whether the proposed adjustment was appropriate. But beyond a few examples (which NR responded to in detail in its Response to the ASR SRD) which were supposed to justify the rejection of the totality of the revisions (an argument which the Panel rejected), ASR did not provide details of the specific adjustments it objected to.
30. Even more importantly, ASR did not seek any relief in relation to any such specific adjustments: ASR wanted (and continues to want) nothing short of the rejection of the entirety of TPR 2018 (Scotland). Given that the Panel was not prepared to reject the whole TRIP / ODA project (a decision ASR apparently – at least now - agrees with) the Panel was simply not able to grant ASR any further relief.
31. Since ASR is not challenging the basis on which the Panel arrived at the Determination, it follows that the Appeal must fail.
32. Further, it will be seen that ASR's central argument is that NR failed to carry out proper consultation. Although some of ASR's arguments are expressed by reference to Decision Criteria (see Notice of Appeal 4.3 (c) and (d)), in reality these arguments also flow from an alleged failure to consult since, to the extent that a Timetable Participant properly objects to the application of Decision Criteria, that is an issue to be addressed during the consultation process – see Paragraph 5.20 of the Determination recording NR's approach to this process and the fact that if a party simply objects and does not provide relevant material, there is little that NR can do.
33. The Panel found that in circumstances where a Timetable Participant has ceased to engage in the consultation process, it is difficult to even imagine how NR can be at fault. See the fourth paragraph of Paragraph 6.3 of the Determination:

“If, however, a Timetable Participant ceases to engage with Network Rail at any stage of the development of new TPRs, as ASR did in this case, it is difficult to

¹ There is a reference to paragraph 6.2 of the Determination in ASR's reason (a) in paragraph 4.3 of the Notice of Appeal, but the paragraph quoted above is not challenged.

imagine how a Panel can then determine that the consultation process has failed because of any lapse on Network Rail's part" [emphasis added].

34. Again, there is no appeal either against the Panel's finding of fact (i.e. that ASR ceased to engage in the consultation process) or the conclusion of law (i.e. that once a Timetable Participant ceases to engage in consultation, there is realistically no proper basis to criticise NR). The Appeal cannot realistically succeed if these conclusions remain.
35. The ORR will be aware that several other TTP appeals were heard at the same time as TTP 1064 and that several other Timetable Participants expressed concerns about some aspects of the proposed rule changes set out in the version of the timetable issued on 3 February 2017. However, in all other cases the Timetable Participants set out specific rules to which objection was taken (as well as, in some cases, making more general criticisms of ODA and TRIP – criticisms rejected by the Panel) so that NR was able to engage in constructive dialogue. The majority of these individual disputes were resolved through this process and the Panel only had to deal with a small number of remaining items.
36. Indeed, of the 13 Timetable Participants who issued Notices of Dispute, only 10 issued Sole Reference Documents and ultimately, apart from ASR, the Panel only had to resolve issues brought by GBRf and DB Cargo: and both of those parties made agreements which significantly reduced the number of issues in dispute. The remainder of the disputes were resolved – and some of the agreements reached will be recorded in the Panel's next determination.
37. ASR stands alone in refusing to engage collaboratively and constructively in this process of consultation and in insisting that the entirety of Revision 2 (Scotland) be set aside. It is unclear precisely what is motivating ASR to take this extreme line but, as the Panel noted, ASR cannot cease to engage in the consultation process which the Network Code requires and then criticise NR for failing to do everything ASR wants it to.

ASR'S ARGUMENT THAT THERE HAS BEEN SERIOUS PROCEDURAL OR OTHER IRREGULARITY

38. It would appear that ASR itself recognises the impossibility of its position since it has tacked on an attempt to argue that the Determination is unjust because of serious procedural or other irregularities: see paragraph 4.4 of the Notice of Appeal. This is a serious allegation to make and it should not be made lightly.
39. Two arguments are made by ASR:
 - 39.1 First, ASR argues that the Panel changed the procedure for hearing the joined TTP references two days before the hearing and that as a result the Panel "*prevented ASR having its case fully heard*".
 - 39.1.1 This is nonsense. The Panel, in exercising its case management powers decided, having seen NR's Response, that the individual disputes should be heard separately rather than, as had been previously indicated, together. ASR did not object to that approach and therefore approached the hearing on 20 April 2017 knowing that its reference would be heard first and in its entirety;
 - 39.1.2 ASR's letter of 10 April 2017 is irrelevant. It was written at a time when the Panel had proposed that Heads A and B be dealt with first. ASR appeared to be saying that it thought its "*specific points of detail*" may need to be heard later. No order was made to that effect and that suggestion was not repeated at the hearing on 20 April 2017;

- 39.1.3 The suggestion that the Panel prevented ASR having its case heard is unsustainable. The point made by the Panel was that there was no pleaded case for ASR to make, and ASR did not suggest otherwise: it had failed to seek any relief in relation to specific rules or even (beyond the few examples cited in the ASR SRD) to identify what specific rules it objected to. The implied suggestion that there was some part of ASR's pleaded case that it was prevented from advancing is simply wrong – and it is noted that ASR has not identified any such allegations;
- 39.1.4 What actually happened was that once ASR recognised that the Panel was not prepared to grant the wide and general relief sought by ASR, ASR wanted an opportunity to set out, for the first time, a case on detailed rules. The Panel, rightly, refused permission to ASR to do so. There is no appeal against that conclusion, although there is now an attempt by ASR to introduce such additional evidence, as discussed in the next section.
- 39.2 Secondly, ASR argues that the Panel's "finding" that all current schedules could be operated after the Changes amounts to a serious procedural or other irregularity. No explanation is provided for this argument, which is really no more than assertion. What ASR appears to be saying is that it disagrees with a piece of evidence, which the Panel indicated it accepted. That cannot possibly amount to any kind of "irregularity": it is simply a difference of opinion.
- 39.3 It follows that ASR's attempt to allege that there have been serious procedural, or other, irregularities fails.

ASR IS ATTEMPTING TO INTRODUCE NEW CLAIMS AND EVIDENCE AND IS SEEKING A RE-HEARING BASED ON THAT EVIDENCE

- 40. ASR is seeking to introduce a considerable amount of new evidence and arguments for the first time on this Appeal. In particular:
 - 40.1 The witness statement of Neil Sutton was not before the Panel.
 - 40.2 Further, the following exhibits to Mr Sutton's witness statement were not before the Panel:
 - 40.2.1 Exhibit NS2, a table entitled "Change Suggested by NR not supported by ASR Data", which is described as "*a table showing the results of ASR's analysis in respect of SRTs*".
 - 40.2.2 Exhibit NS3, ASR's SLCs in its Franchise Agreement.
 - 40.2.3 Exhibit NS4, a table entitled "*Increased Journey Time Changes NR Impact Study v ASR Bid Dec 17*", which is described as a comparison of NR's Timetable Impact Study against ASR's SLCs.
 - 40.2.4 Exhibit NS5, described as a graph prepared by ASR's Performance Team showing PPM results over the Argyle and Glasgow North Electric lines (and for the reasons discussed below, for an unexplained period). The arguments set out in paragraphs 6.15 to 6.17 of the Notice of Appeal which compare ASR's OTMR data to NR's data are based on the material appended to Mr Sutton's statement and are therefore new.
 - 40.3 It is to be emphasised that none of this material was before the Panel and so was not under consideration for the purposes of ASR's case. Some of it has previously been seen in some form by NR (e.g. NS3); some has been provided to

NR in some form since the hearing (e.g. NS2, although NR believes that there is some further information included which it has not previously seen); and some has not, to the best of NR's belief, been provided before now at all.

- 40.4 Further, Mr Sutton makes no mention of the 10 May 2017 meeting and the agreements reached (as discussed above). That is highly relevant both to alleged need to, and feasibility of, cancelling the whole Revision.
- 40.5 There is also new material appended to the Notice of Appeal which was not before the Panel. In particular, the documents included at Tabs 9, 11 and 12 of ASR's Appeal file appear to be documents which were not before the Panel.
- 40.6 The arguments set out in paragraphs 6.15 to 6.17 of the Notice of Appeal which compare ASR's OTMR data to NR's data are based on the material appended to Mr Sutton's statement and are therefore new.
41. It follows that ASR is not in fact confining itself to appealing the Panel's decision based on the material made available to the Panel, but is seeking a rehearing to overturn the Panel's determination using fresh evidence and arguments. Moreover, ASR has failed to explain in its Notice of Appeal that this is what it is doing and has not sought permission to introduce the new evidence or explain why it is required.
42. Further, ASR is inviting the ORR to grant all of the relief which ASR sought from the Panel. Although ASR purports only to challenge five decisions of the Panel (see paragraph 4.3 of the Notice of Appeal), ASR actually seeks a complete re-hearing: the breadth of its arguments and its letter to the ORR dated 23 May 2017 make that clear. No attempt has been made to explain why ASR is entitled to such a re-hearing.
43. The reality is that ASR is now attempting to advance some semblance of the case which the Panel explained it needed to advance – although at the same time still seeking the wide-ranging relief which the Panel refused to countenance. The ORR should not allow itself to be used for such purposes: it is an appellate tribunal whose function is to correct clear mistakes by a panel and to provide clarity on points of law and procedure. It is not an appropriate forum for a re-hearing.

THERE ARE MATERIAL OMISSIONS AND INACCURACIES IN MUCH OF THE MATERIAL PRESENTED BY ASR

44. The ORR is entitled to expect that a party bringing an appeal sets out factual matters accurately and completely, so that the ORR is able to take decisions which have a sound factual basis. There are various matters in which the account provided by ASR falls short in this respect.

THE DETERMINATION

45. In section 4 of the Notice of Appeal, ASR purports to summarise the key points of the Determination. There are serious omissions, and therefore inaccuracies, in this account. The ORR is invited to read the Determination in full and not to rely on ASR's partial account.
46. By way of illustration:
- 46.1 In paragraph 4.2(ii) of the Notice of Appeal, ASR refers to a "key message" put forward by NR recorded in paragraph 5.1 of the Determination. The implication is that that is all NR had to say. In fact paragraph 5.1 of the Determination also records that:

"Network Rail thought ASR was complaining of lack of consultation when Network Rail thought any complaint might be that there had been some lack of agreement..."

ASR had put its claim on a quite general basis underpinned by a small number of detailed complaints which it could be argued had not been pleaded in detail in its claim for relief."

- 46.2 In paragraph 4.2(b) of the Notice of Appeal, ASR refers to paragraph 5.4 of the Determination and to its case that NR had been provided with a list of items of concern; but ASR fails to record that the Panel expressed concern, also recorded in this paragraph, that ASR had failed actually to plead specific examples.

- 46.3 In paragraph 4.2(d) of the Notice of Appeal, ASR sets out some concerns recorded by the Panel questioning whether TPRs had been derived from flawed data. ASR however fails to record the Panel's further observation at paragraph 6.9.3 that:

"These concerns, however, did not overcome the countervailing reasons which led to the Determination..."

- 46.4 In paragraph 4.2(f) of the Notice of Appeal, ASR records an observation made by the Panel that all available sources of information are to be used. ASR fails to record the Panel's further observation which immediately follows the words quoted by ASR at paragraph 6.2, that:

"The Panel accepts that professional judgment must be applied in assessing which inputs to the process are likely to be useful, which may vary from place to place, and in assessing how the outputs are to be applied".

- 46.5 In paragraph 4.2(g) of the Notice of Appeal, ASR records an observation that the Panel expects all relevant sources of information to be used for TPRs. ASR fails to record the Panel's further observations at paragraph 6.9.1 that:

"...the duty of consultation cannot require Network Rail to agree to all suggestions from TOCs/FOCs (which might anyway contradict each other)..."

...but the corollary is that for an appeal to be successful, the TOC/FOC concerned must have engaged with Network Rail constructively throughout. Any blanket dismissal of proposals from Network Rail, or any unwillingness to explain the TOC/FOC's reasons for disagreeing with such proposals, is unlikely to succeed in persuading a Panel that a decision by Network Rail should be overturned (by whatever means)."

- 46.6 In paragraph 4.2(l) of the Notice of Appeal, ASR states that the Panel recorded in paragraph 5.20 of the Determination *"Network Rail's explanation of why it had not applied the Decision Criteria to the Changes"*. This is a wholly inaccurate summary of paragraph 5.20 which actually states:

"Network Rail responded that it had to consider the Decision Criteria for every decision it makes in accordance with Part D but the Network Code did not really say when or how Network Rail should share its conclusions across the industry. But how the process worked was that Network Rail put its proposals out at D-59 to help it to apply the Decision Criteria correctly. Network Rail then relied on inputs from colleagues it was consulting with, covering such matters as impact on rolling stock utilisation. That allowed Network Rail to take a very balanced view, trying to understand which Considerations should have a higher weighting..."

- 46.7 In paragraph 4.2(m) of the Notice of Appeal, ASR records the Panel's observation that the Decision Criteria come into play in respect of individual decisions to implement changes rather than in relation to the use and conduct of the project

to revise TPRs as a whole (TRIP). ASR fail to record that this observation was made in response to "ASR's assertion that Network Rail had failed to observe the Decision Criteria in the whole process" - i.e. the Panel was rejecting ASR's argument (as the Panel understood it) that the whole process, or whole groups of decisions, could be attacked as a whole.

- 46.8 In paragraph 4.2(o) of the Notice of Appeal, ASR records various observations which the Panel made in paragraph 6.5 of the Determination about how the Decision Criteria were to be applied. ASR fails to refer to the final paragraph of this section where the Panel drew together its observations and concluded in the following terms:
- "Having reminded itself of these factors, it is the Panel's view that an amendment to TPR which is operationally necessary cannot be "trumped" by any commercial interest. The fact that commercial interests are a consideration has been explained above, but once its weighting has been properly applied any consequential commercial issues, such as a failure to achieve SLCs under a Franchise Agreement are not seen as a matter falling to be dealt with under Part D of the Network Code and, therefore, in a Timetabling Panel Determination".*
47. This brief summary of just some of what ASR says about the Determination demonstrates that great care has to be taken with the account now put forward by ASR. There are material inaccuracies and omissions in ASR's account with the result that its summary is incomplete and misleading. If ASR is prepared to put forward such a partial account, it is submitted that the ORR should treat everything said by ASR with care and scepticism. This is relevant to considerations of ASR's conduct.
48. There are similar concerns regarding ASR's assertions concerning the public performance measure ("**PPM**"). The ORR will be aware that PPM attrition is the term used for any reduction in performance from 100% PPM, that is from 100% of train services arriving at their terminating station within 5 minutes for commuter services and within 10 minutes for long distance services.
49. An important element of ASR's case as presented orally to the Panel was that Scotland's PPM was, as at the date of the hearing, 97% (see e.g. paragraph 4.4 of the Determination). The implication of this was that services in Scotland were already highly efficient – and much more efficient than in other parts of the country – such that it was highly unlikely that the rules proposed by NR could improve matters and ASR asserted that the changes could negatively impact its PPM.
50. It is fair to say that NR was sceptical about ASR's figure of 97%, but since ASR did not present this figure until it was actually in the hearing before the Panel, NR was not in a position to gainsay it on the day.
51. No mention is made in the Notice of Appeal of this 97% PPM figure. Instead, Mr Sutton's evidence is that on a single line – the Argyle Line – the most recent data indicates a PPM of 94.1%.
52. NR has significant concerns about ASR's reliance on PPM figures:
- 52.1 The 97% figure has never been fully explained or justified. It appears now to have been abandoned;
- 52.2 The only data now referred to is for a single line and the value in PPM terms is significantly lower than 97%;
- 52.3 The figure of 94.1% is taken from the graph exhibited at NS5 to Mr Sutton's statement. The figure can be seen on the far right of the line of figures in the top

graph. The x-axis of the graph appears to show the PPM figures in the preceding periods. There are 13 x 4 week periods in the year commencing on 1 April and concluding on 31 March. NR believes there is a formatting error in the graph in that the second digit of the double digit figures has been lost. The graph below the Argyle Line graph shows the equivalent data for the Glasgow North Electrics line. The following should be noted:

- 52.3.1 Figures for the Argyle Line in the previous periods are lower than 94.1% - many are in the 70%s (as low as 74%) and are generally in the 80%s;
 - 52.3.2 The latest figure for Glasgow North Electrics is 91.5% and again the majority of preceding works are lower than this (a few are fractionally higher);
 - 52.3.3 Figures for the Motherwell Cumbernauld Line are not provided;
 - 52.3.4 ASR's own published data (see its website page - https://www.scotrail.co.uk/sites/default/files/assets/download_ct/schedule_7_web_upload_p1718_01.pdf, copy attached) states that the Moving Annual Average PPM is 90.4% and the latest four weekly PPMs by area range from 86.9% to 95.1%. A figure in the top left of the page states 93.6%. It is assumed this is claimed to be an average figure.
53. It therefore appears that ASR, both at the hearing before the Panel and in its Notice of Appeal, is putting forward figures which are, at best, selective and not accurately indicative of the true overall picture and, at worst, misleading. A proper understanding of the PPM figures suggests that, contrary to what ASR appears to be suggesting, there is plainly significant room for improvement and it is far from certain that by adopting the NR position it would make matters worse.
54. Again, it is submitted that the ORR is entitled to assume that an appellant is presenting accurate and complete factual information in support of its appeal. This does not appear to be the case here. The ORR cannot assume that NR's proposed revisions are unlikely materially to improve the efficiency of the timetabling.

ASR'S STATED REASONS FOR THE APPEAL

- 55. Despite the length of the Notice of Appeal, ASR's reasons are shortly stated in paragraphs 4.3 and 4.4 of the Notice of Appeal. Paragraph 4.4 - relating to alleged serious procedural or other irregularity - is dealt with above.
- 56. NR sets out its responses to each of the five points made by ASR in paragraph 4.3 of the Notice of Appeal:

ASR'S REASON (A)

"Network Rail did not consider data (including GPS data) and objections raised by ASR before implementing the Changes. As a result the consultation process was ineffective and the Changes introduced are unreliable.

In line with the Panel's view that all available sources of information should be used, the Hearing Chair should have concluded that the Changes were unreliable and should not have been implemented until further verification could be undertaken" (emphasis in original).

NR's RESPONSE TO ASR'S REASON (A)

57. There is little evidence that ASR actually provided any data to NR. Much is now made of the GPS Data said to have been provided on 8 November 2016. Mr Sutton explains in paragraph 13 of his witness statement that he does not have a copy of what was provided but he has "to the best of my ability recreated the document". That is entirely unsatisfactory. If the document provided on 8 November 2016 was an important document then it would be expected that Mr Sutton would have kept a copy.
58. In the ASR SRD, ASR stated in paragraph 5.2 that the background to the Revision (i.e. the Timetable Planning Rules (Scotland) dated 3 February 2017) was set out in Appendix 1 to the SRD. There is no reference in Appendix 1 to any GPS data being provided or to any meeting taking place on 8 November 2016. Mr Bray's evidence is that he does not consider that the document produced at NS1 is a recreation of what Mr Sutton gave him – and in any event Mr Bray understood that it was being provided on a confidential basis (see paragraph 11 of Mr Bray's witness statement).
59. NR set out a full account of the actual consultation process, which was extensive, in paragraph 4 – 67 of NR's Response to the ASR SRD (**Tab B5 of ASR's Appeal Bundle**). The ORR is invited to read that section. See also, NR's response to ASR's Appendix 1 in Annex 1 to NR's Response to the ASR SRD.
60. The chronology demonstrates that, far from ignoring ASR's objections, NR considered and dealt with them. A number of points call for specific comment:
- 60.1 When NR issued Revision 1 of the rules at D-59 on 21 October 2016, the majority of ASR's questions and comments did not relate to TRIP related changes (NR's Response to the ASR SRD/ para 49 (**Tab B5 of ASR's Appeal Bundle**));
- 60.2 The point was explored by the Panel and the evidence recorded in paragraph 5.26 of the Determination as follows:
- "In dialogue between Network Rail and ASR it was established that the proposals were issued for consultation (as Version 1) at D-59 and for D-55 ASR, "put a note in objecting to them." At that point there was no counter-proposal or suggestion of working together or bringing in a third party. Network Rail's subsequent requests for the opportunity to calibrate available information - such as ASR's GPS data - with the ODA output were not met. Network Rail explained that through engaging from September 2015, if this ASR data had been available, it should have been given to Network Rail much earlier in the process, as had been the case with other operators which operated in Scotland. Accordingly, Network Rail had discussed and agreed SRT changes with other operators based on the ODA data, whereas in the case of ASR that possibility had only come much later in the process despite Network Rail wanting it much earlier. This was why Network Rail would not accept a stay of implementation until May 2018 and that was what drew the hard line on the part of ASR."*
- 60.3 ASR gave no indication over the ensuing months of the concerns which it now expresses. For example, on 11 January 2017 Mr Bray asked Mr Sutton to resend any counter proposal for SRTs based on GPS data; Mr Sutton replied on 11 January 2017 explaining that ASR was not proposing any changes (see NR's Response to the ASR SRD paragraph 53 (**Tab B5 of ASR's Appeal Bundle**) and the email exchange referred to in **Exhibit AB1 / p.2**).
- 60.4 ASR then changed tack and, belatedly, started raising objections. Even then, NR continued to work with ASR and appeared to be making good progress until ASR issued its appeal and decided to object on a root and branch basis and did not engage in discussions after 2 or 3 February 2017.

61. Clearly there have been disagreements at ASR as to the proper approach to all this. Whatever the reason for this the fact remains that ASR did not engage in the consultation process when it could and should have (i.e. when Revision 1 was issued) and when it changed its mind as to the approach it wanted to take, did not engage constructively or co-operatively.
62. The Panel's finding that ASR ceased to engage in the consultation process (paragraph 6.3 of the Determination) is not appealed and is plainly correct. As such, ASR cannot now complain about any failure to consult on NR's part.

ASR'S REASON (B)

"Network Rail did not conduct any modelling, proposed changes based on unreliable historic data and did not take account of actual GPS and OTMR data.

In line with the Panel's view that all available sources of information should be used and modelling should take place if ORR recommends it, the Hearing Chair should have concluded that the Changes were unreliable and should not have been implemented until further verification could be undertaken" (emphasis in original).

NR'S RESPONSE TO ASR'S REASON (B)

63. This is really a further allegation that NR failed properly to consult. NR repeats the points made above in response to ASR's Reason (a).
64. As far as the allegations about modelling and proposed changes based on unreliable historic data are concerned, ASR pleaded its case in paragraphs 5.4 to 5.8 of the ASR SRD. It cannot introduce any further facts or matters for the purposes of this Appeal. NR answered these allegations in paragraphs 76 to 93 of NR's Response to the ASR SRD. The ORR is invited to read those paragraphs.
65. It can be seen that ASR provided very limited examples of some alleged limitations in ODA data and analysis. NR has answered those points. The Panel's conclusion that those criticisms were not a sufficient foundation for the far-reaching relief sought by ASR is plainly correct. It would be absurd if the entirety of TPR 2018 (Scotland) were to be rejected on the basis of this evidence even if, which is not the case, the points were correct.
66. ASR's failure properly to engage in the consultation process is also highly relevant here. If there are points to be made here (and NR remains of the view that ASR is incorrect) then the proper approach for ASR to take is to engage in a timely way with NR and work collaboratively to ensure that sensible agreement can be reached. ASR cannot disengage from that process and then expect that the whole raft of revisions be set aside.

ASR'S REASON (C)

"Network Rail did not apply the Decision Criteria to the Changes as required by Network Code Condition D.

The Hearing Chair appears (6.2) to have mischaracterised ASR's argument by seemingly suggesting ASR claimed that TRIP and/or ODA breached the Decision Criteria. ASR is not challenging the TRIP or ODA processes themselves. It is challenging the Changes made as a result of those processes, and asserts that it is the Changes themselves to which the Decision Criteria must be applied. As such, the Hearing Chair appears in fact to agree with ASR's argument, despite then applying incorrectly that finding to TTP1064.

In line with the Panel's finding that Network Rail should apply the Decision Criteria to individual changes and the fact that Network Rail did not do so, the Hearing Chair should have concluded that the Changes were unreliable and rejected them until a proper analysis of the Decision Criteria could be conducted" (emphasis in original).

NR'S RESPONSE TO ASR'S REASON (C)

67. This argument proceeds on the assumption that the Panel made a finding that NR did not apply the Decision Criteria to individual changes. No such finding was made. The Panel's actual findings about the way NR approaches the Decision Criteria are set out in paragraph 5.20 of the Determination - i.e. that NR does apply the Decision Criteria and expects the consultation process at D-59 to assist it to apply the Decision Criteria appropriately.
68. The Panel did not mischaracterise ASR's argument. ASR's position was - and remains - that it has said enough about the unreliability of NR's approach to justify its wholesale rejection and it is implicit in ASR's approach that it considers that NR failed to apply the Decision Criteria as a whole.
69. Be that as it may, the Panel's fundamental point was that ASR had failed to present specific proposed revisions, along with evidence as to why they were unsatisfactory, or to seek relief based on such specific proposed revisions. ASR does not suggest that it did provide any such evidence or seek such relief.
70. The question for the ORR is whether the Panel ought to have concluded that the changes were unreliable. It is submitted that the Panel could not have reached such a conclusion on the basis of the material before it. ASR asserts that the Decision Criteria were not applied to the proposed changes. That is not accepted by NR and nor is it a finding made by the Panel. The Panel properly concluded that it was simply unable to reach any such conclusion based on the case presented by ASR.
71. It is submitted that this is enough to dispose of this part of ASR's appeal. However, there are two further important points to make.
72. It is clear from all the evidence that NR is fully aware of the Objective and of the Considerations set out in Paragraph 4.6 of Part D and that it takes its obligations to consider these matters very seriously. Indeed the whole structure of the decision making process is geared around ensuring that the Considerations are given their proper due. The fact that proposed revisions are discussed so extensively with operators also means that there is ample opportunity to challenge NR if there is any serious question about the approach being taken by NR.
73. No criticism can properly be made of NR in relation to this. The whole point of the industry-sponsored TRIP project - which ODA fed into - is to improve the efficiency of the network. That is something which is in everyone's interests to achieve and it is wholly artificial to go through each of the Considerations and wonder how they might have been applied differently when one is considering the primary obligation of ensuring that the network runs more efficiently and delays are reduced.
74. It follows that ASR's challenge based on the Decision Criteria is wholly misconceived. The suggestion put forward by ASR that NR has some agenda of its own - to ensure that TRIP is implemented or the like - is simply absurd.
75. There is a further and fundamentally important point to consider here, which ASR has singularly failed to address, but which the Panel recognised as key. It is NR's obligation to consider the overall interests of all current and prospective users of

the network (see Paragraph 4.6.1 of Part D). It is not NR's job simply to consider whether a particular revision to a particular rule might cause a degree of inconvenience and potentially some loss of income to a particular Timetable Participant. NR's obligations are much wider than that: NR needs to balance a whole series of interests.

76. That is not in any way to suggest that individual Timetable Participants do not matter - of course they do because they are also users of the network - but their commercial interests do not automatically prevail over all other interests. They do not, as the Panel rightly found, have any kind of trump card to play.
77. Stepping back, what NR is trying to achieve - generally with an enormous amount of support from all of the Timetable Participants - is an improved network where Specification Error (i.e. delay associated with the way the timetable is created and then operated - currently the most significant cause of delay) is reduced or, in an ideal world, eliminated. The fact that some individual revisions to the rules may be unwelcome to a particular Timetable Participant cannot be made to prevail over that fundamental aim.
78. ASR makes no attempt to bring this wider perspective to bear. As such, ASR provides little or no assistance on how the Considerations should be applied when the perspective which NR is obliged to take, is brought to bear.
79. ASR says little more than: we would like things to be different. When balancing competing interests of multiple users it is hardly surprising that some elements do not suit everyone. The ORR can rest assured that the same applies to NR. Such is the nature of the need to balance interests. It says nothing however about any failure on NR's part.

ASR'S REASON (D)

"A correct application of the Decision Criteria to the Changes should have considered the impact upon all relevant considerations including the Scotland RUS, the commercial interests of the parties (including ASR's ability to meet Transport Scotland's SLCs which represent government policy and the scope of the franchise award). Such a correct application should result in the Changes being rejected as set out in Appendix 2 of ASR's sole reference;

The Hearing Chair should have considered ASR's submissions in relation to each of the Decision Criteria and assessed whether the Changes were justified in light of those Decision Criteria. In doing so he should have noted that Network Rail's reasons for implementing the Changes at this time appear to be motivated by a desire to protect the UK-wide TRIP programme rather than assess whether the changes are ready and robust to introduce. Having conducted this assessment the Hearing Chair should have concluded that the Decision Criteria were not made out and the Changes should be rejected." (emphasis in original).

NR'S RESPONSE TO ASR'S REASON (D)

80. This is simply another attempt to suggest that NR failed properly to apply the Decision Criteria and it fails for all the reasons set out in relation to ASR's Reason (c), which are repeated.
81. It is clear from ASR's account that, contrary to the Panel's (obviously correct) view that one party's commercial interests cannot trump all other interests, ASR considers that its own commercial interests should prevail. ASR's position is absurd: they seem seriously to be suggesting that NR should not propose changes whose aim is only to improve the efficiency of the network, simply so that ASR is not placed under pressure in relation to its commercial obligations.

NR would quite clearly be in breach of the Decision Criteria if it took such an approach.

ASR'S REASON (E)

"There is a risk that the proposals, if implemented prematurely and based on inapplicable historic data from a period when performance was poor may adversely affect current good performance;

In line with the Panel's concerns about damaging current good performance and ensuring changes are robust to ensure the proper operation of the Network the Hearing Chair should have rejected the Changes until their impact was properly modelled and assessed (as anticipated by Network Rail's own TRIP programme)" (emphasis in original).

NR'S RESPONSE TO ASR'S REASON (E)

82. This takes matters no further. The position is that NR has, in good faith and based on an enormous amount of evidence, suggested certain revisions, in the reasonable belief that those revisions will improve the efficiency of the Network. ASR has, for its own reasons, declined to consult on those revisions. To the extent that specific points of criticism were made in the ASR SRD, they were answered by NR in NR's Response to the ASR SRD.
83. It is of course possible that further improvements can be made to the revisions. NR has never suggested otherwise and is always prepared to listen to constructive, evidence-based observations. But, having failed to engage in the consultation process at the proper time, ASR cannot now be heard to complain about the risk that the revisions might be improved.

THE REMAINDER OF ASR'S NOTICE OF APPEAL

84. ASR sets out lengthy submissions in Sections 5 to 7 of the Notice of Appeal. It is not entirely clear what the purpose of these sections are, since they do not appear to be directed to the particular aspects of the Determination which ASR seeks to appeal: there is, for example, no cross-reference to the ASR Reasons set out in paragraph 4.3 of the Notice of Appeal.
85. For completeness, however, NR sets out brief responses to these sections.

RESPONSE TO SECTION 5 OF THE NOTICE OF APPEAL

86. NR agrees that it is important that changes are developed appropriately and as accurately as possible. This is precisely what NR has endeavoured to do with the TRIP programme, using ODA data and other sources as appropriate. The ORR is referred to the witness statement of Matthew Allen (**Tab B4 of ASR's Appeal Bundle**) for a fuller explanation of all that NR did.
87. An essential part of the process of developing revisions is consultation. NR was and remains prepared to consider objections and representations which are made in a timely way and based on proper evidence. ASR decided not to engage in this process.

RESPONSE TO SECTION 6 OF THE NOTICE OF APPEAL

88. ASR starts out by trying to argue that there is no operational need to implement the TPR 2018 (Scotland) in 2017. That is wrong for two reasons.

89. First of all, ASR suggests that ASR's performance is currently good. The accuracy of that is discussed and questioned above.
90. Secondly, ASR states that the changes to TPR 2018 (Scotland) are "a large scale change". The results of the meeting on 10 May 2017 shows that: 1) the changes are not large scale as ASR has only complained about 22 values; and 2) through consultation most of the differences in relation to these values could be resolved. Given that ASR and NR may well narrow their differences further, it is difficult to see how ASR can complain about large scale changes. Further, on 2 February 2017, ASR commented on 241 ODA SRT values (not all were proposing changes): they agreed with 158 and did not agree with 83. Of those 93 where NR was proposing changes: ASR agreed with 24; disagreed with 38 and did not comment on 31 (see paragraph 13 of Mr Bray's witness statement and the attached email at that paragraph).
91. At paragraph 6.5 of its Notice of Appeal ASR relies on five reasons why implementation of TPR 2018 (Scotland) "may" (see paragraph 6.3 of the Notice of Appeal) negatively impact on performance. For completeness NR deals with each of these points below.

NON-REPRESENTATIVE HISTORIC DATA

92. The data used has been dealt with at paragraph 6 of Mr Bray's statement. In any event the issue of data is dealt above at paragraphs 54 to 64 where NR deals with paragraphs 4.3(a) and 4.3(b) of the Notice of Appeal.

UNRELIABLE ODA ANALYSIS

93. Again this is an issue in relation to the data used, which is dealt with above at paragraphs 54 to 64 where NR deals with paragraphs 4.3(a) and 4.3(b) of the Notice of Appeal. In short, if ASR was not content with the data used it should have engaged in full and proper consultation with NR and mentioned this during its consultation. The fact that ASR did not raise this issue and then simply stopped consulting with NR is fatal to ASR's argument. Further, ASR now raises specific issues in relation to matters like junction margins. Again Mr Bray deals with these matters at paragraphs 49 to 54 of his statement. However, in any event, these are detailed factual matters which should have been raised before the Panel; and which should have been the subject of pleaded relief if some specific alteration was being requested in respect of them.

NO OTMR DATA

94. First, as explained above, the OTMR data which ASR now relied on is new. That is enough to dispose of this matter. Secondly, this point is dealt with above in relation to paragraph 4.3(b) of the Notice of Appeal.

NO MODELLED DATA

95. This issue is dealt with above in relation to paragraph 4.3(b) of the Notice of Appeal.

IMPOSED WITHOUT CONSIDERATION OR APPLICATION OF THE DECISION CRITERIA

96. This issue is dealt with above in relation to NR's response to ASR's reason (c).

RESPONSE TO SECTION 7 OF THE NOTICE OF APPEAL

97. This section is effectively repetitive of points made elsewhere in the Notice of Appeal and which are dealt with above.

98. As far as the allegation that NR failed to follow due process is concerned, this does not appear to be any ground of appeal. In any event the evidence shows that NR made appropriate use of a wide range of information sources and engaged in full and proper consultation. ASR ceased to engage in the consultation process and cannot now complain that NR ought to have taken different decisions.
99. As far as the criticisms relating to the Decision Criteria are concerned, these are dealt with above. The suggestion in paragraph 7.7(b) that NR decided on its own questions instead of applying the Decision Criteria is misconceived. Mr Allen's evidence makes it clear that the questions identified are used as a means of assisting with the application of the Decision Criteria and not in substitution for them.
100. ASR makes three points in section 7 in support of its position. The first is that the TPRs were forced through when further data was allegedly required. That is dealt with above. The second and third matters are respectively that the Decision Criteria was allegedly not followed and that ASR's comments were not taken into account.
101. ASR's statement that NR did not follow the Decision Criteria has been dealt with above in response to paragraphs 4.3(b) and 4.3(c) of the Notice of Appeal.
102. NR does not understand ASR's third point. As set out above 1) ASR decided to stop consulting with NR; and 2) even after the Hearing before the Panel, NR has been willing to meet and compromise on certain matters. In light of these two matters it is very difficult to see how ASR can sensibly say that its comments were not taken into account.

THE PANEL'S POWERS

103. The ORR will note that the Panel made some observations in passing about the extent of the Panel's powers. Essentially, the Panel observed that it preferred ASR's submissions on this to the position set out by NR. However, since this did not form any part of the actual determination, this is only obiter dicta.
104. In due course it may be necessary to explore these issues further in future appeals. Unless it is necessary to do so (see below), NR's preference is not to address the ORR on this in any detail for the purposes of this Appeal for the simple reason that the Panel's observations are only that – observations – and there is, in this Determination at least, no exercise of power by the Panel which NR considers wrongful. It would be unsatisfactory, unnecessary and wasteful to deal with these important issues on a purely hypothetical basis, and if the Appeal is dismissed there should be no need to do so.
105. However, it may be necessary to address the ORR on these matters if the ORR is minded to grant ASR any part of the relief which it seeks. Accordingly, NR sets out its position briefly below. The ORR is invited to be clear at the hearing of the Appeal itself as to whether it wishes to deal with these issues or whether it considers that they are best left to be dealt with as and when it is actually necessary to do so.

NR'S POSITION

106. Part D Paragraph 5.3.1 provides that:

"In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail [and Road] (as the case may be) may exercise one or more of the following powers:

(a) it may give general directions to [NR] specifying the result to be achieved but not the means by which it shall be achieved;

(b) it may direct that a challenged decision of [NR] shall stand;

(c) it may substitute an alternative decision in place of a challenged decision of [NR]

provided that the power described in (c) above shall only be exercised in exceptional circumstances."

107. NR's position is that all of its challenged decisions should stand and the ORR should follow the Panel and so direct: and in doing so dismiss all of ASR's claims.
108. If, contrary to NR's position, the ORR finds that some element of ASR's dispute is made out by ASR, the starting point is that the ORR gives general directions to NR specifying the result to be achieved but not the means by which it shall be achieved. By way of example, the ORR could give a general direction that in relation to some particular revision which affects ASR, NR is to give further consideration to specific matters so as to fulfil any perceived failure to consider a particular representation or objection made by ASR.
109. It is only in exceptional circumstances however that the ORR can substitute an alternative decision in place of a challenged decision. The rejection of an NR decision amounts to the substitution of an alternative decision, even if that alternative decision is simply the position before the proposed revision is made. Accordingly, the ORR needs to be satisfied that there are exceptional circumstances before taking any such decision.
110. An alternative view is that the ORR can exercise its powers under paragraph 5.3.1(a) so, in effect, requiring the position to revert to that before the proposed revision.
111. Several issues arise here, for example:
- 111.1 What does paragraph 5.3.1(a) mean? How, in practical terms can a result be achieved without specifying the means to do so?
- 111.2 What are exceptional circumstances?
- 111.3 Can a Panel find exceptional circumstances even if the party bringing the appeal has not argued for this?
112. The Panel answered "yes" to the last question. NR disagrees:
- 112.1 First, it would be extraordinary if a panel were to find that exceptional circumstances existed when a claimant has not made any such allegation: the claimant is uniquely placed to set out the facts and matters which it says amount to exceptional circumstances and if it does not make that allegation, then the panel cannot properly consider whether or not there really are exceptional circumstances; and
- 112.2 Secondly, the panel must determine the dispute as presented and NR must be given a full opportunity to consider and respond to that dispute. Where no allegation is made that exceptional circumstances exist, there is no case to answer and therefore no need for NR to respond to it. The issue is not before the panel and the panel cannot introduce it.
113. Matters are further complicated by Paragraph 50 of the Access Dispute Resolution Rules which provides that:

"Subject to any other provision of the Access Conditions and Underlying Contract, the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute including without limitation that:

(a) one Dispute Party should take or not take specified action; or

(b) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination".

114. On the face of Paragraph 50 the Hearing Chair does appear to have wider powers than are set out in Paragraph 5.3.1 of Part D. However:
- 114.1 Paragraph 50 is expressed to be "*Subject to any other provision of the Access Conditions*". The Access Conditions include the Network Code and in particular Part D². Accordingly, Paragraph 50 is subject to the tighter definition of powers contained in Part D; and
- 114.2 It is *noteworthy* that Paragraph 50 refers only to the Hearing Chair, not a *Timetabling* Panel or even the ORR. That suggests that Paragraph 50 is perhaps directed at the exercise of case management powers which might be exercised by the Hearing Chair alone.
115. It is highly unlikely that a Timetabling Panel was intended to have the breadth of powers available to it as the Panel seems to think it has. Timetabling Panels provide a means of arriving at quick pragmatic decisions about practical timetabling matters. The format and constitution of such panels makes it intrinsically unlikely that the intention was that they could make far-reaching declarations about the parties' rights and obligations – for example by making the sort of sweeping generalisations which ASR invites the ORR to make and which would have the effect of setting aside many months of work.
116. If the ORR is minded to grant ASR any of the relief sought, the ORR is invited to clarify how a Timetabling Panel's powers (and the ORR's powers) are properly to be understood and how the apparent tension between Part D of the Code and Chapter H of the ADRR is to be reconciled.

COSTS

117. The ORR has power under Paragraph 8.1.1(d) to make such order as it shall think fit in relation to costs. For the reasons set out above, ASR's conduct in pursuing this appeal has been unreasonable.
118. NR submits that the ORR should exercise this power in NR's favour and order that ASR shall pay all of NR's costs of the Appeal (as well as ASR's own costs).

² See the definition of Access Conditions in paragraph 1 of the ADRR: "*In relation to an access contract, whichever of the Network Code...is incorporated by reference in that access contract*"

SIGNATURE

For and on behalf of
Network Rail Infrastructure Limited

Signed

M Allen 26/05/2017

Print Name

M. ALLEN

Position

Head of Timetable Production

