



**Heathrow  
Express**  
The smarter way

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*BY EMAIL AND COURIER*

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**MOST URGENT**

26 November 2021

Dear Sirs / Madams

**APPEAL UNDER PART M OF THE HAL NETWORK CODE BY HEATHROW EXPRESS OPERATING COMPANY (“HEOC”) IN RESPECT OF DISPUTE REFERENCE HAL/TTP003 DATED 27 OCTOBER 2021**

We refer to your letter dated 19 November 2021, requesting written representations as to the below, each of which is addressed in this letter as follows:

*“(i) ORR’s legal power to act as an appeal body in this dispute and under which statutory provision(s) (See Paragraph 1 below)*

*“(ii) Which party/parties have a right to appeal to ORR and under which statutory and/or contractual provisions, including:*

*a. The inter-relationship between a party’s right to appeal under the contractual provisions of the HAL Network Code and any statutory right to appeal*

*b. The inter-relationship between Parts D and M of the HAL Network Code with respect to a party’s right to appeal.”*

**(See Paragraph 2 - 4 below)**

We also refer to the representations raised by MTR Corporation (Crossrail) Limited (“**MTR**”) in their letter of 12 November 2021 to the Office of Rail and Road (“**ORR**”) (“**MTR’s Representations**”). We do not respond exhaustively to MTR’s Representations herein, and HEOC should not be taken, by the ORR, to accept any point within MTR’s Representations that is not addressed in this letter, which focusses instead on providing the representations

requested in your letter dated 19 November 2021. We enclose copies of those documents referenced throughout this letter that HEOC have not already provided to the ORR.

HEOC considers both the ORR's legal power, and its own right of appeal, to be clear. We address each in turn below.

## 1. ORR JURISDICTION

- 1.1 The points disputing the ORR's jurisdiction are without merit; the ORR has the legal power to act as the appeal body on this matter. We set out below points that evidence this.
- 1.2 The ORR has a duty under Section 4 of the Railways Act 1993 to exercise the functions assigned or transferred to it under the Railways Act 1993 (and / or Railways Act 2005). This includes a duty to exercise its functions in the manner it considers best calculated to serve a range of objectives listed in Section 4<sup>1</sup>, including but not limited to the protection and furtherance of the interests of users and potential users of the services in respect of prices charged for travel and the quality of the service provided<sup>2</sup> as well as the safety of users<sup>3</sup>. In addition to the specific objectives under Section 4, the ORR recognises appeals may be made in relation to facilities that are otherwise exempt from the Railways Act 1993 in its own Statutory and Contractual Framework Module.<sup>4</sup>
- 1.3 The ORR's functions clearly include making determinations in matters such as this. As the ORR states itself (emphasis added): "*Important changes to the structure of the railways, such as the reclassification of Network Rail as a public track and stations owner, means we must play a vital role in holding the rail industry to account for public benefit. It also falls to us to make tough choices about operator access*"<sup>5</sup>. The ORR has previously heard appeals of Access Disputes Committee ("ADC") decisions in respect of timetabling under Part D of the Network Code<sup>6</sup>; timetabling under the HAL Network Code equally concerns operator access; and there can accordingly be no doubt that such decision-making falls within the ORR's functions if it is to discharge its duties.
- 1.4 Further, Regulations 32 and 34 of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (SI 2016/645) (the "**Regulations**") provide HEOC with a right of appeal to the ORR; see paragraph 4.2.4 to 4.5 below. It therefore follows that the ORR must have jurisdiction to hear such appeals.
- 1.5 We also note that MTR's letter dated 12 November 2021 references the appeal decision taken by the ORR on 23 April 2018 regarding an appeal made by Transport for London ("**TfL**") on 10 November 2017 (the "**Ruling**") under regulations 32 and 34 of The Regulations.
- 1.6 At paragraph 96 of the Ruling, the ORR stated: "*Without prejudice to our exercise of any such discretion in the particular circumstances of such a case, we are likely to be slow to accept a reference or appeal in relation to the Heathrow Rail Infrastructure where it does not also have implications for the Network Rail mainline and / or wider industry relevance\_beyond the Heathrow Rail Infrastructure (in a similar way to that*

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<sup>1</sup> The Railways Act 1993 Section 4(1)(zb) – (g)

<sup>2</sup> The Railways Act 1993 Section 4 (2).

<sup>3</sup> The Railways Act 1993 Section 4 (3)(a). HEOC referenced the potential safety impact on passengers at paragraph 7.50 and 7.51 of HEOC's Notice of Appeal dated 5 November 2021.

<sup>4</sup> ORR The Statutory and Contractual Framework dated 28 July 2021, specifically paragraph 23. Accessible via -

<sup>5</sup> <https://www.orr.gov.uk/about/how-we-work/strategy-duties/our-functions>

<sup>6</sup> E.g. TTP1174

*envisaged in the present drafting of both Part M and Part C, which note the likelihood of ORR refusing to accept a reference or appeal where it does not involve matters of general relevance to the rail industry: see paragraphs 89 and 90 above).”*

- 1.7 This further demonstrates that ORR has jurisdiction to hear such appeals. The ORR confirmed its view that it has discretion (and therefore jurisdiction) to hear appeals which are in relation to Heathrow Rail Infrastructure where there are also implications for the Network Rail Mainline and / or of wider industry relevance. This appeal is within that category and HEOC has addressed the issues raised by the Ruling, as quoted above, at paragraph 3 of its Notice of Appeal. In particular, HEOC explained why its appeal has both (i) material implications for the Network Rail mainline and (ii) wider industry relevance beyond the Heathrow Rail Infrastructure. In support of this position, HEOC explained that the Network Rail mainline is clearly impacted given the operation of the Heathrow Express service from Paddington station follows the Network Rail mainline to Airport Junction en route to Heathrow; HEOC’s Notice of Appeal contains further detail in this regard.
- 1.8 The effect of the Determination is of wider industry relevance, as it will affect both the route between London and Heathrow Airport and have a potential impact across the western route out of Paddington. The impact on the Heathrow route is now further evidenced by British Airways’ letter to the ORR (dated 12 November 2021) regarding the impact on British Airways’ customers. The wider impact on the industry is further evidenced by Network Rail’s letter of 5 November 2021 (which makes it clear that the issue affects their infrastructure), and again further by the GWR letter to the ORR dated 15 November 2021.
- 1.9 Further, the wider material implications at Paddington are evident from the fact that the platforming arrangements at Paddington Station have an impact on the viability of the Determination itself - if HEOC had not (as noted in GWR’s letter dated 15 November 2021) given up a platform at Paddington in order to assist MTR (and the wider network), this dispute would not exist.
- 1.10 For these reasons, it remains imperative that HEOC’s appeal is heard and the ORR plainly has the jurisdiction to hear it. MTR dispute that the ORR should hear this appeal. It is notable that MTR stated to the ORR (by letter dated 12 November 2021) that the ORR is not the appropriate “Forum” for the appeal and that HEOC is not a “Dispute Party”. We explain the application of relevant definitions in the HAL Network Code below (paragraphs 3.2 to 3.7). MTR’s position that the ORR does not constitute the appropriate “Forum” for this matter is incorrect (as demonstrated by the remainder of our letter) on the following basis:
  - 1.10.1 the ADC made the Determination that is the subject of the HEOC Appeal on 27 October 2021;
  - 1.10.2 HEOC made submissions, although such submissions were limited, to the ADC, the “Timetabling Panel” in this matter;
  - 1.10.3 HEOC is, for reasons explained further below, plainly a Dispute Party (pursuant to the HAL Network Code) in relation to the Appeal; and
  - 1.10.4 the Appeal of the ADC’s Determination, being a decision of a Timetabling Panel, is appropriately made to the ORR.
- 1.11 Therefore, for the reasons detailed in this letter, the ORR is able to and should hear the appeal, and its duties require it to do so. Should the ORR decide it does not have

jurisdiction to hear this appeal, this would be incorrect and would breach the ORR's duties to exercise its functions under Section 4, for the reasons set out above.

- 1.12 HEOC notes, in passing, the letter sent by TfL on 24 November 2021. It asserts that the Railways (Heathrow Express) (Exemptions) Order 1994 excludes the HAL network and oversight of access to it from ORR's regulatory function. That assertion is incorrect, as is plain from the terms of that statutory instrument (which says no such thing); HEOC notes paragraph 8 of the ORR's decision dated 23 April 2018 in respect of an appeal brought by TfL itself under Regulations 32 and 34 (as to which, see HEOC's statutory rights of appeal below); the ORR expressly stated that this exemption does not extend to the Regulations<sup>7</sup>. Further, there are many instances where the ORR exercises regulatory functions.<sup>8</sup> HEOC does not therefore propose to address this point in any detail unless requested to do so.
- 1.13 However, whilst HEOC assumes that the situation will not arise, if the ORR did (incorrectly) conclude that it did not have jurisdiction to hear the appeal or should not do so, a different right of appeal or claim would arise. If the ORR does not conclude it has jurisdiction on this matter, a different appeal would be needed to rectify what would appear to be erroneous network statements on the following basis:
- 1.13.1 Regulation 32(2)(a) of the Regulations references network statements being a matter that can be subject of an appeal to the ORR (as can the content of network statements under Regulation 32(2)(b));
- 1.13.2 in this instance, all parties, including HEOC, have contracted and have proceeded on the basis that, following an ADC determination of a timetabling dispute under Part D of the HAL Network Code, there is a contractual right of appeal of a determination of the ADC to the ORR; this avenue to appeal is *expressly* provided for in the HAL Network Statement<sup>9</sup>;
- 1.13.3 that right of appeal exists, for the reasons set out in this letter. However, if HEOC is wrong in the understanding that the parties have such a right of appeal to the ORR on this matter, then the parties and the ADC would have collectively (in the ORR's full knowledge and acquiescence) proceeded under the mistaken understanding that any timetabling disputes could be referred to the ADC for determination, and potentially that an appeal may then be referred to the ORR, under Part M of the HAL Network Code. If this was now deemed not to be the case, the ADC would instead, contrary to all parties' understanding to date, be the final point of determination;
- 1.13.4 this is plainly not the current wording or intent of the HAL Network Code or Network Statement. Such an outcome would fundamentally undermine both the legitimacy of the ADC determination itself and the contractual enforceability of the ADRR and the dispute resolution processes provided for in the HAL Network Code. HEOC reserves its position in this regard at present but notes (for completeness) that it considers that, if the ORR declines to hear the

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<sup>7</sup> Paragraph 7 of the decision states "*While the Heathrow Rail Infrastructure has a thirty-year exemption from the access and licencing regimes under the Railways Act 1993..., by virtue of the Railways (Heathrow Express) (Exemptions) Order 1994, that exemption does not extend to the Regulations*" The ORR's analysis of Regulation 32(1) and the section 4 duties upon it in this regard, at paragraphs 12 and 13 of that decision, are noted.

<sup>8</sup> Including but not limited to accessibility, complaints handling, safety approvals for changes to Rolling stock.

<sup>9</sup> The HAL Network Statement is of course detailed in and accessible through the ORR website as a network statement. See: <https://www.orr.gov.uk/guidance-compliance/rail/network-statements>

appeal, different rights of appeal and/or claim may arise that might be appropriate for the ORR to consider.

## 2. HEOC'S RIGHTS OF APPEAL

2.1 Plainly, regardless of its rights of appeal, this is a matter on which HEOC (given the impact of the Determination<sup>10</sup>) must have the right to make submissions to the ORR and to be heard by it. HEOC has already detailed the material implications and effect on the wider industry (above paragraph 1.7) and at paragraph 3.5 of its Notice of Appeal dated 5 November 2021.

2.2 However, pursuant to this background and to the statutory and/or contractual position generally, in response to your letter of 19 November 2021 this letter focuses on specifically detailing why HEOC has a right to appeal to the ORR on this matter. HEOC further submits that it has both:

2.2.1 contractual rights of appeal pursuant to: (1) Condition D5.2.1 of the HAL Network Code; and, further or alternatively (2) Part M of the HAL Network Code (see Paragraph 3 below); and

2.2.2 statutory rights of appeal (see Paragraph 4 below).

2.3 First, we note the following by way of background:

2.3.1 the HAL Network Code is incorporated into both the MTR Access Agreement with HAL dated 17 May 2018 and the Access Agreement between HAL and HEOC dated 17 May 2018;

2.3.2 Condition D5.1.1 of the HAL Network Code states that "*Where an appeal is expressly authorised by this Part D, a Timetable Participant may refer a decision for determination by a Timetabling Panel in accordance with the ADRR*"<sup>11</sup>;

2.3.3 MTR's appeal submission to the ADC dated 29 September 2021:

(a) named HEOC as a party to the reference to the ADC (see MTR submission, paragraph 1.3);

(b) stated that the matter was referred to the ADC as "*a Timetabling Panel...for determination in accordance with Condition D5.1 of the HAL Network Code*" (see MTR submission, paragraph 2.1);

(c) stated that the subject matter of the reference to the ADC was various matters arising under Part D of the HAL Network Code (see MTR submission, paragraph 4).

2.4 Therefore:

2.4.1 the ADRR applied to the process of the ADC, which was the Timetabling Panel to which MTR had referred its appeal;

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<sup>10</sup> This being the ADC's decision of 27 October 2021. HEOC use the defined term consistent with HEOC's Notice of Appeal dated 5 November.

<sup>11</sup> The "Access Dispute Resolution Rules" or "ADRR" means the set of rules regulating the resolution of disputes, entitled "Access Dispute Resolution Rules" and annexed to the HAL Network Code at Annex 1.

2.4.2 the ADC heard the MTR appeal pursuant to Part D of the HAL Network Code.

### 3. **HEOC'S RIGHTS OF APPEAL - Contractual Rights of Appeal**

HEOC has contractual rights to appeal to the ORR under both Part D and Part M of the HAL Network code. We set out analysis below to assist the ORR on HEOC's position.

#### ***Contractual Rights of Appeal – pursuant to Part D of the HAL Network Code***

3.1 Condition D5.2.1 of the HAL Network Code states that “*Where either HAL or a Timetable Participant is dissatisfied with the decision of a Timetabling Panel under Condition D5.1, it may refer the matter to the ORR for determination under Part M, provided that any such referral must be made: (a) within five Working Days of receipt of the Timetabling Panel’s written reasoned determination to which objection is made....*” (emphasis added).

3.2 In relation to Condition D5.2.1, it is noted that:

3.2.1 for the reasons set out above, the ADC determination of MTR’s appeal is a decision of a Timetabling Panel under Condition D5.1; and

3.2.2 HEOC submitted its referral within 5 Working Days of receipt of the Timetabling Panel’s written reasoned determination to which objection is made.

3.3 HEOC is a “Timetable Participant” such that the right of appeal in Condition D5.2.1 arises. HEOC’s position in this respect is based on:

3.3.1 under Condition D1.1.11 of Part D to the HAL Network Code, a “Timetable Participant” is an “Access Beneficiary” or a “Potential Access Party”;

3.3.2 under Condition A1.2 to the HAL Network Code:

(a) “Access Beneficiary” means, in respect of an Access Agreement, the Train Operator or Access Option Holder who is party to that Access Agreement;

(b) “Access Agreement” means any particular access contract, whether or not entered into pursuant to any directions of the ORR under the Act, incorporating the HAL Network Code; and

(c) “Train Operator” means a person who has permission to use track pursuant to an Access Agreement.

3.4 HEOC is therefore a Timetable Participant, because:

3.4.1 it is a Train Operator, as it has permission to use track (including the HAL infrastructure) pursuant to an Access Agreement;

3.4.2 it is therefore an Access Beneficiary; and

3.4.3 it therefore falls within the definition of Timetable Participant.

3.5 Accordingly, HEOC has the contractual right to appeal to the ORR by virtue of Condition D5.2.1 of the HAL Network Code and as envisaged by the Network Statement;

documents which have been applied and followed (including by the ORR) in respect of the HAL infrastructure and on which all parties have relied upon as having effect.

**Contractual Rights of Appeal – pursuant to Part M of the HAL Network Code**

3.6 HEOC also has status as an Appellant under Part M of the HAL Network Code:

3.6.1 Condition 1.1.1. of Part M of the HAL Network Code states that Part M provides “*the process by which a party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D ... can appeal the matter to the Office of Rail and Road for determination*”. HEOC is such a dissatisfied party and Part M allows it (further or alternatively to the right under Condition D5.2.1) to pursue an appeal to the ORR;

3.6.2 under Condition M2.1.1:

- (a) “Appellant” means any Dispute Party seeking to challenge a determination made in accordance with the ADRR by appeal to the ORR;
- (b) “Dispute Party” means any person who fulfilled the definition of “Dispute party” set out in the ADRR;

3.6.3 under the ADRR (at Annex 1 to the HAL Network Code) the following defined terms are used:

- (a) “Dispute Party” means an Involved Party which is likely to be materially affected by the outcome of the dispute and is putting its position to the Forum and/or requesting a determination from a Forum<sup>12</sup>;
- (b) “Involved Party” in relation to a dispute, dispute procedure or dispute resolution process means a party directly involved in the dispute including the Secretary, all Dispute Parties, and the Forum.

3.7 Therefore, HEOC is an “Appellant” (as defined by Part M of the HAL Network Code, and as per paragraph 3.6.2(a) above) and may make an appeal to the ORR in respect of the ADC’s determination in circumstances where:

3.7.1 this is a dispute arising under Part D and the ADC is a Timetabling Panel which reached a determination in accordance with the ADRR (see above);

3.7.2 HEOC is directly involved in that dispute (see background above) and so is an Involved Party (as per paragraph 3.6.3(b) above). The definition of “Involved Party” is circular, in that it refers to “Dispute Parties” and that definition refers back to “Involved Parties”. However, the definition of Involved Parties only states that those parties *include* “the Secretary, all Dispute Parties, and the Forum”; it is not limited to those parties and the fact that HEOC is directly involved in the dispute suffices;

3.7.3 HEOC:

- (a) was present before the ADC and, whilst it was given only limited opportunity to make submissions, it put its position to the ADC in

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<sup>12</sup> “Forum” is defined as including a Timetabling Panel, i.e. the ADC in this context

summary form on why it is important to HEOC that it retains two platforms at Terminal 5;<sup>13</sup>

- (b) is plainly materially affected by the outcome of the dispute; and
- (c) is therefore a Dispute Party.

3.8 To the extent that the ORR believes that there is any ambiguity in whether HEOC is indeed within the definition of a “Dispute Party”, HEOC notes the ORR has previously indicated<sup>14</sup> that any uncertainty in the drafting of Network Codes was to be interpreted in a non-restrictive sense. If the ORR were to view HEOC as not being within the definition of “Dispute party” this would be incorrect, and it would be an overly restrictive interpretation of the HAL Network Code.

3.9 HEOC also notes the approach taken in the ORR’s letter of 19 December 2018 concerning TTP1331 and 1376<sup>15</sup> in which DB Cargo had argued that Condition D5.2.1 entitles *any* Timetable Participant to appeal the decision of a Timetabling Panel to the ORR (whether or not it brought the underlying appeal to that Timetabling Panel). The ORR correctly agreed with DB Cargo’s position. It should also agree that HEOC has a contractual right to appeal to the ORR in these circumstances.

#### 4. HEOC’S RIGHTS OF APPEAL - Statutory Rights of Appeal

4.1 In addition to HEOC’s contractual rights described above, HEOC submits that ORR’s statutory functions mean that it cannot lawfully refuse HEOC the right to proceed with its appeal.

4.2 Non-exhaustively and without prejudice to any other statutory and / or contractual rights of appeal that are available to HEOC, HEOC notes as follows pursuant to the Railways (Access, Management & Licensing of Railway Undertakings) Regulations 2016 (“**the Regulations**”):

4.2.1 HEOC considers the HAL Rail Network Statement to be a network statement in accordance with section 13(1) of the Regulations<sup>16</sup>. HEOC notes paragraph 1.2.1 of the HAL Rail Network Statement which states: This “Network Statement” has been made in respect of the HAL infrastructure in satisfaction of the requirements of Regulation 13(4)<sup>17</sup>.

4.2.2 The HAL Rail Network Statement states as follows under paragraph 1.5.3, “Appeals Procedure”: “*Any dispute for matters covered by the HAL Access Disputes Resolution Rules (“ADRR”) is dealt with in accordance with the*

<sup>13</sup> MTR misrepresent (in its letter dated 12 November 2021) paragraphs 6.4 and 6.6 of HEOC’s Notice of Appeal. The fact that HEOC was not given the opportunity to put *full* submissions to the ADC does not mean that HEOC is not a “Dispute Party” for the purposes of the HAL Network Code

<sup>14</sup> By letter from the ORR dated 19 December 2018 (accessible at: <https://www.orr.gov.uk/sites/default/files/om/ttp-1331-and-1376-determination-7-orr-letter-2019-12-19.pdf>) issued to the parties in advance of the 13 March 2019 Determination of the ORR in Appeals pursuant to Part M of the Network Code against a Determination of the Timetabling Panel of the Access Disputes Committee dated 20 November 2018 (TTP1331 and TTP1376), by (1) GB Railfreight Limited (Issues of jurisdiction ground) and (2) DB Cargo (UK) Limited–(All Grounds) accessible via <https://www.orr.gov.uk/sites/default/files/om/determination-of-ttp-1331-and-1376-appeal-2019-03-13.pdf>

<sup>15</sup> Ibid.

<sup>16</sup> Section 13(1) states that “*The infrastructure manager must, following consultation with all interested parties, develop and publish a network statement containing the information relating to its network described in paragraph (4)*”. Under section 3 of the Regulations, “*infrastructure manager*” means “*any body or undertaking that is responsible in particular for— (a) the establishment, management and maintenance of railway infrastructure, including traffic management and control-command and signalling...*”

<sup>17</sup> Section 13(4)(f) requires “*information about procedures for dispute resolution and appeals relating to matters of access to railway infrastructure and services*” to be addressed in the network statement.



*procedure prescribed in such rules, annexed to the HAL Network Code. The procedure addresses disputes arising out of [Track Access Contracts]. The Access Disputes Committee for the Wider UK Rail Network provides services under the ADRR. [...] The ORR is the regulatory body to which an appeal may be made in accordance with the Regulations should any applicant for capacity believe it has been discriminated against or treated unfairly” (emphasis added).*

- 4.2.3 Under Part 5 of the Regulations, sections 23(7) and 23(8) set out the basis for the ADRR process (section 23(7)) and that the right of appeal to the ORR may exist (section 23(8)). They state (emphasis added):

*“(7) The infrastructure manager must facilitate the establishment and operation of a dispute resolution system, which must be set out in the network statement, to resolve disputes about the allocation of infrastructure capacity promptly and, where that system is applied, a decision on the matters in dispute must be reached no later than ten working days after the final submission of all relevant information in accordance with that system.*

***(8) The dispute resolution system provided for under paragraph (7) is without prejudice to the right of appeal to the Office of Rail and Road under regulation 32(1).”***

- 4.2.4 Under the Regulations, sections 32(1) and (2) state (emphasis added):

***“(1) Subject to paragraph (3), an applicant has a right to appeal to the Office of Rail and Road if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager, an allocation body, a charging body, a service provider or, as the case may be, a railway undertaking, concerning any of the matters described in paragraph (2).***

***(2) Those matters are—***

- (a) the network statement produced in accordance with regulation 13, in its provisional and final versions;***
- (b) the information which, by virtue of regulation 13(4), must be included in that network statement;***
- (c) the allocation process and its result as prescribed in Part 5 and Schedule 4;***
- (d) the charging scheme, the charging system and the Channel Tunnel charging framework;***
- (e) the level or structure of railway infrastructure charges, the principles of which are prescribed in Part 4 and Schedule 3, which it is, or may be, required to pay;***
- (f) the arrangements for access provided under Part 2 and Schedule 2; and***
- (g) access to and charging for services provided under Part 2 and Schedule 2.”***

- 4.3 Accordingly:
- 4.3.1 the HAL Rail Network Statement, produced pursuant to the Regulations, which is accepted by and acknowledged by the ORR<sup>18</sup>, and which sets out (as required) the applicable dispute resolution process, provides that the ORR is the relevant appeal body;
  - 4.3.2 Section 23 of the Regulations makes clear that the dispute resolution process set out in the HAL Network Code is without prejudice to any right of appeal under section 32(1) of the Regulations;
  - 4.3.3 HEOC has a statutory right of appeal under section 32(1) of the Regulations given that, as a minimum, its appeal concerns matters arising under the network statement (see section 32(2)(a)), and/or in respect of the allocation of capacity process (see section 32(2)(c)) and/or arrangements for access (see section 32(2)(f)<sup>19</sup>). HEOC is aggrieved and/or has been treated unfairly in respect of such matters.
- 4.4 Further Section 34(1) of the Regulations details the ORR's role in respect of matters in Section 32(2);
- “The Office of Rail and Road must monitor the competitive situation in the rail services markets.*
- (2) In particular it must—*
- (a) control the **matters referred to in regulation 32(2) on its own initiative** and with a view to preventing discrimination against applicants; and*
  - (b) check whether the network statement contains discriminatory clauses or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants.”*
- 4.5 This appeal concerns matters within Section 32(2) of the Regulations (as summarised above at paragraph 4.3.3) as the appeal concerns matters arising under a network statement and/or in respect of the allocation of capacity process and/or arrangements for access. Thus, by virtue of Section 32 of the Regulations HEOC has a right to appeal and such an appeal is appropriately posed to the ORR (pursuant to Regulation 34 and for those additional reasons detailed at paragraph 1 of this letter).

## 5. CONCLUSIONS AND NEXT STEPS

- 5.1 Therefore, in response to MTR's representations that the HEOC appeal should not be heard and that HEOC does not have standing to submit an appeal, HEOC considers that its appeal should be heard, that it does have standing to appeal, and it would be an error in law and a matter of procedural impropriety for its appeal not to be heard. HEOC's appeal should be heard, and on an expedited basis by no later than 17 December 2021 for the reasons already stated, and to avoid the prospect of HAL implementing the ADC's determination into live operation (and HEOC suffering prejudice) whilst this appeal process is ongoing.

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<sup>18</sup> <https://www.orr.gov.uk/guidance-compliance/rail/network-statements>

<sup>19</sup> See also section 5(1) and 5(9) of the Regulations which refer to a right of appeal under section 32.

- 5.2 We respectfully request that the ORR considers HEOC's representations in this letter when it makes its decision on whether the appeal should proceed.
- 5.3 Please mark all further correspondence for the attention of Sophie Chapman ([REDACTED]), and Andrew Darbyshire ([REDACTED]) of HEOC.

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, appearing to be 'SC' followed by a long horizontal line extending to the right.

Sophie Chapman  
**Business Lead**  
**Heathrow Express**

Heathrow Airport Limited: [REDACTED]

MTR Corporation (Crossrail) Limited: [REDACTED]