

PART J (CHANGES TO ACCESS RIGHTS) OF THE NETWORK CODE

CRITERIA FOR INTERPRETING THE EXPRESSION “REASONABLE ON-GOING COMMERCIAL NEED”

Explanatory Note

Context

Part J of the Network Code took effect on 10 January 2005. Condition J13 provides for rules or criteria to be established on the interpretation of the expression “reasonable on-going commercial need”, which is used in several of the mechanisms in Part J as they affect freight train operators.

Principles

The then Regulator’s foreword to Part J of the network code: conclusions and notice of changes, July 2004¹ provides key principles on the overall purpose of Part J and focuses upon physical capacity usage and the importance of releasing that which is under-used. On this basis the rules or criteria need to link well to the efficiency of actual usage of rights. Physical under-utilisation of rights is, therefore a reasonable key indicator that there is not a reasonable on-going commercial need.

Characteristics

The criteria should have all of the following characteristics:

- *Designed to produce an outcome consistent with the overall purpose of Part J;*
- *Simple and unambiguous to apply;*
- *Measurable and transparent to the parties;*
- *Provide for efficient scarce capacity decisions that recognise industry net benefits; and*
- *“Reasonable on-going commercial need” would require to be evidenced or backed up in a tangible manner. Examples include:*
 - *existence of a contract or evidence of commitment from the end-customer*
 - *capability to deliver and resource availability.*

¹ available at www.rail-reg.gov.uk/upload/pdf/208.pdf.

Criteria

Definitions

Terms defined in the Network Code have the same meaning when used in this Criteria.

The proposed criteria below should be read in conjunction with the principles and characteristics set out below and also the existing rules contained within Part J.

Condition J4 (Failure to Use) and J9 (Rights Review Meetings)

In order to demonstrate:

- (a) for the purposes of Condition J4.10.2(b), that it has a “reasonable on-going commercial need” in respect of any or all of the Rights Subject to Surrender specified in a Failure to Use Notice; and
- (b) for the purposes of Condition J9.4.1(a), that it has a “reasonable on-going commercial need” for some or all of the Rights Subject to Surrender and/or Existing Cordon Caps specified on the Review Proposal,

a Train Operator must be able to show all of the following:

(i) Commitment - It has a commitment with a third party which cannot be satisfied, in whole or in part, without use of the relevant Rights Subject to Surrender and/or Existing Cordon Caps in respect of which it claims that it has a “reasonable on-going commercial need”, or it has a reasonable prospect of entering into such a commitment in respect of an identifiable traffic flow which is suitable for conveyance by rail. Evidence of commitment can include:

- Traffic covered by grant support e.g. a facility or connection.
- Customer contract. A letter from a FOC Director and the end customer confirming the nature of the commitment.
- Reasonable prospect of a customer contract, e.g. Heads of Terms, good faith contract drafting (with lawyers instructed).

(ii) Acceptable reasons for failure to use – May include:

- Seasonal factors, e.g. commodities for which demand varies during the course of the year.
- Non-economic issues beyond the train operator’s control (such as a fire).
- A strike or other industrial action.

(iii) Committed resources - It has the necessary committed resources, including suitable locomotives and wagons and traincrew with relevant route and traction knowledge, to satisfy the commitment referred to in paragraph (i) above, or that it has a reasonable prospect of obtaining such resources in the relevant timescales.

(iv) Reasonable on-going prospect of use - Reasonable prospect of using the relevant Rights Subject to Surrender and/or Existing Cordon Caps in respect of which it claims that it has a “reasonable on-going commercial need”, including reasons for such reasonable prospect, within 90 days from the issue of the Counter Notice (Condition J4.9) or Train Operator notice (Condition J9.4).

Condition J6 (Cordon Cap Reduction (Failure to Use)) and Condition J9 (Rights Review Meetings)

Cordon Cap Reduction Calculation

The calculation of the cordon cap reduction (associated with either, Condition J4 or Condition J5 surrender, or Condition J9) is based upon actual average usage compared with the existing cap and in accordance with the following formulae:

(a) Cordon caps up to and including 8

Where $C - A > 1$

Cordon Cap reduction = $C - (A + 1)$

Otherwise Cordon Cap reduction = 0

(b) Cordon caps over 9

Where $C - A > 2$

Cordon Cap reduction = $C - (A + 2)$

Otherwise Cordon Cap reduction = 0

(Key: C – current cordon cap; A – actual average daily usage of the cordon based upon Monday to Friday inclusive over the relevant Use Period)

Reasonable on-going commercial need

To demonstrate, for the purposes of Condition J6.2(d)(i) or Condition J9.4.1(a), that it has a “reasonable on-going commercial need” to retain some or all of its Existing Cordon Cap a Train Operator must be able to show all of the following:

(i) Commitment - It has a commitment with a third party which cannot be satisfied, in whole or in part, without use of the relevant cordon cap in respect of which It claims that it has a “reasonable on-going commercial need”. Evidence of commitment can include:

- Customer contract. A letter from a FOC Director and the end customer confirming the nature of the commitment.

(ii) Acceptable reasons for failure to use – May include:

- Seasonal factors, *e.g.* commodities for which demand varies during the course of the year;
- Non-economic issues beyond the train operator’s control (such as a fire); and
- A strike or other industrial action

(iii) Committed resources - It has the necessary committed resources, including suitable locomotives and wagons and traincrew with relevant route and traction knowledge, to satisfy the commitment referred to in paragraph (i) above, or that it has a reasonable prospect of obtaining such resources in the relevant timescales.

(iv) Reasonable on-going prospect of use – reasonable prospect of using the relevant cordon cap in respect of which it claims that it has a “reasonable on-going commercial need”, including reasons for such reasonable prospect, within a defined timescale, *i.e.* for cordon caps associated with condition J4 or J9 – use within 90 days of issue of the Counter Notice (Condition J4.9 or Condition J9.4)); or cordon caps associated with Condition J5 – use within 30 days of issue of the Counter Notice (Condition J5.4(b)).

Condition J7 (Freight Transfer Mechanism)

Where there is a transfer of customer traffic between operators, there should be a presumption that the relevant access rights/train slots should transfer with the customer contract.

Reasonable on-going commercial need

To demonstrate, for the purposes of Condition J7.6.1(a), that it has a “reasonable on-going commercial need” all or any of the Rights Subject to Surrender, a Train Operator must be able to demonstrate in respect of each of such rights that they are required to continue to convey traffic for other customers which is also being conveyed using the rights in question.

Condition J8 (Cordon Cap Reduction (transfer))

Cordon Cap Reduction

The calculation of the cordon cap reduction (associated with Condition J7 transfer) is based upon the relationship of rights transferred (under Condition J7) to the incumbent operator's actual average daily usage of the cordon before transfer, rounded down to the nearest whole number and in accordance with the following formula:

$$\text{Cordon Cap reduction} = (R_r / R) \times C$$

Note - cordon cap reduction not to exceed R_r

(Key: R_r - rights transferred; R - incumbent operator's actual average daily Monday to Friday (inclusive) usage over the 90 days immediately preceding the date of surrender of rights by the incumbent operator passing through the cordon; C incumbent operator's cordon cap before transfer)

Reasonable on-going commercial need

To demonstrate that it has a "reasonable on-going commercial need" to retain some or all of its Existing Cordon Cap the incumbent operator must be able to show:

(i) Commitment - It has a commitment with a third party which cannot be satisfied, in whole or in part, without use of the relevant cordon cap in respect of which it claims that it has a "reasonable on-going commercial need". Evidence of commitment can include:

- Customer contract. A letter from a FOC Director and the end customer confirming the nature of the commitment.

(ii) Acceptable reasons for failure to use – May include:

- Seasonal factors, e.g. commodities for which demand varies during the course of the year.
- Non-economic issues beyond the train operator's control (such as a fire).
- A strike or other industrial action.

(iii) Committed resources - It has the necessary committed resources, including suitable locomotives and wagons and traincrew with relevant route and traction knowledge, to satisfy the commitment referred to in paragraph (i) above, or that it has a reasonable prospect of obtaining such resources in the relevant timescales.

(iv) Reasonable on-going prospect of use - Reasonable prospect of using the relevant cordon cap in respect of which it claims that it has a "reasonable on-going commercial need", including reasons for such reasonable prospect, within 30 days of the date of surrender of rights by the incumbent operator.