Review of
Part J (changes to access rights) of the Network Code – final conclusions

December 2011

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Executive summary

1. This document:

   (a) sets out our final conclusions on the review of Part J of the Network Code ("the Review"), which we consulted on in December 2010: and
   (b) formally submits to the Class Representative Committee a proposal for change (PfC) for the amendments required to the Network Code and the associated Access Dispute Resolution Rules (ADDR).

2. The objective of the review was to ensure that Part J remains fit for purpose and enables the industry to optimise the use of the network. At a time when the network is becoming fuller and competition for space increases we must ensure that the approach and processes remain appropriate for the changing requirements of the railway and its passengers and customers.

3. The mechanisms within Part J represent just one of a number of processes available to the industry for the purpose of allocating capacity and ensuring optimum use is made of that capacity[1]. However, it is important that we make sure that they are fully effective and continue to achieve the desired outcome, particularly given the concerns raised in the Rail Value for Money Study ("VFM Study")[2].

4. To this end, in arriving at our conclusions we have recognised the importance of ensuring that the industry has a legal and contractual framework that:

   (a) is comprehensive, but remains fair and transparent for all stakeholders;
   (b) includes appropriate mechanisms to ensure optimum use of the network that is in the public interest to the benefit of all users of the railway and the taxpayer; and
   (c) incentivises and facilitates a sound commercial balance between the parties (particularly the smaller ones), including a more collaborative approach to working relationships.

5. Our conclusions are explained in detail in this document, but the key changes that we have decided need to be made are:

   (a) **Condition J4** (*Failure to Use*) - the simplification of the 'use it or lose it' (UIOLI) process into J4 through the introduction of a simple mechanistic test;

[1] This is an area that our consultation on incentives addresses in more depth – http://rail-reg.gov.uk/pr13/consultations/orr020.php.

[2] Available from Department of Transport's website at http://www.dft.gov.uk/publications/realising-the-potential-of-gb-rail/.

(b) **Condition J7** (*Freight Transfer mechanism*) – the clarification and simplification of the process for transferring freight track access rights;
(c) **Condition J9** (*rights review meetings*) - to replace the existing J9 with a simplified and more accessible process focussing on the outputs we want to see from the industry;
(d) **Condition J11** (*obligation of Network Rail to publish documents*) – now Condition J10 under our proposal, which sees the introduction of template notices to remove ambiguity and an obligation on Network Rail to maintain them;
(e) the removal of **Condition J12** (*Reasonable on-going commercial need*) and the discontinuance of the separate document entitled "Criteria for Interpreting the Expression "Reasonable on-going Commercial Need", which has been the source of much debate and dispute since its introduction; and
(f) the amalgamation and simplification of **Condition J13** (*Dispute resolution*) and **Condition J14** (*Appeal procedure*).

6. Overall, we believe that the removal of unnecessary burdens and procedural requirements, and their replacement with straightforward, more mechanistic, systems, will significantly improve the accessibility, usage and functionality of Part J. It will also ensure that the transfer of rights is as quick, cost efficient and as fair as possible.

7. We believe that our final conclusions are consistent with our statutory duties and published policies and that they build on the other areas that ORR and the industry have been working on in recent years.

Office of Rail Regulation
23 December 2011

Introduction

Purpose

1.2 This document sets out our final conclusions on the Review, together with our associated Proposal for Change (PfC) to the Network Code.

1.3 Our final conclusions and proposals have been reached after extensive industry wide consultation, starting with an initial consultation in December 2010[3], followed by emerging conclusions in August 2011[4] and a number of exchanges and discussions with various stakeholders on specific issues.

Background

1.4 As we explained in our original consultation, the aim of the Review was to address issues which have arisen with Part J, since its last review in 2005, to ensure that it remained effective and fit for purpose against the background of the rapidly changing shape and nature of the railway industry. Although our consultation document in December 2010 identified a number of issues, it became apparent from both the responses received and from the Rail Value for Money Study ("VfM Study")[5], that more radical and fundamental change was needed. In particular, the VfM Study was clear about the need to review and streamline industry contractual change processes and, where feasible, simplify them, particularly in terms of language used, clarity and timescales.

1.5 As a result we decided to delay publication of our final conclusions and the formal PfC until we had published first our emerging conclusions and proposals in *draft* and given stakeholders a further opportunity to comment, which we did in August 2011. We received 12 responses from stakeholders (see **Annex A)** all of whom gave permission for their response to be posted

[3] *Review of Part J (changes to access rights) of the Network Code – A consultation document - December 2010*, Office of Rail Regulation, available at http://www.rail-reg.gov.uk/upload/pdf/partj_review_consultation_december2010.pdf.

[4] *Review of Part J (changes to access rights) of the Network Code – emerging conclusions - August 2010*, Office of Rail Regulation, available at http://www.rail-reg.gov.uk/upload/pdf/partj_review_conclusions_aug2011.pdf.

[5] Available from Department of Transport's website at http://www.dft.gov.uk/publications/realising-the-potential-of-gb-rail/.

on our website[6]. As ever, we are grateful to the industry for its contributions and the detailed helpful suggestions received. In this document we report only in more detail where we have amended the PfC or consider that further explanation from our emerging conclusions is required. However, we can assure the industry that all issues raised with us have been considered and taken into account.

Structure of document

1.6 This document is structured as follows:

(a) **Chapter 2** summarises the issues identified in consultees' responses to our emerging conclusions by Part J Condition and sets out our final conclusions;

(b) **Annex A** lists those who responded to our emerging conclusions;

(c) **Annex B** contains the draft PfC for modifying Part J. Amendments to the text in existing Part J are marked, but please note that, in order to avoid confusion with too many deletions, Conditions J9 to 14 have been deleted in their entirety and replaced with the new Conditions J9, 10 and 11. The Introduction is also new.

(d) **Annexes C, D and E** contain related changes to Parts D and M and the ADRR which follow on from our final conclusions;

(e) **Annex F** contains the impact assessment.

1.7 Copies of this document, including the PfC are available from our website[7].

Next steps

1.8 Any changes introduced to the Network Code could necessitate consequential changes to other ORR documents, including our Criteria and Procedures[8], and these will be made as soon as possible.

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6 Available at http://www.rail-reg.gov.uk/server/show/ConWebDoc.10282.

7 Available at http://www.rail-reg.gov.uk/server/show/ConWebDoc.10282.

8 *Criteria and procedures for the approval of track access contracts – November 2009*, Office of Rail Regulation, available at http://www.rail-reg.gov.uk/server/show/nav.2409.

Chapter 2 - Overview of the responses to ORR's emerging conclusions – by Part J Condition

Introduction

2.1 This chapter:

(a) summarises the issues identified in our emerging conclusions;

(b) provides an overview of the responses received; and

(c) sets out our views and final conclusions.

Please note that this document does not discuss any issues on which we either received no substantive comments and/or there is no change to the proposals set out in our emerging conclusions – this includes Conditions J2, J3, J10, J11 and J13.

General issues

Alliance Rail Holdings (Alliance)

2.2 Alliance noted that a main focus of Part J relates to quantum of rights and their removal either voluntarily (J2) or by way of the failure to use process (J4). However, Alliance believes that in addition to quantum rights all associated rights should be either amended or removed. It suggests that this is particularly relevant to passenger operators, for example, where an operator surrenders a quantum right but that quantum right also has interval protection, this too should be amended. In addition station calling patterns of some operators should be subject to Part J where these are not used as they can restrict the efficient development of the network

ORR's response

2.3 The definition of a Quantum Access Right in the revised Part J states:

"*means any right under an Access Agreement in respect of a number (or quantum) of Train Slots in any specified periods (including rights to Train Slots*

in respect of additional trains or relief services), and includes part of such a right;"

This would include any characteristics, such as interval protection or calling patterns – without the right itself any characteristics are meaningless.

Direct Rail Services Limited (DRS)

2.4 DRS believe that Part J in its entirety needs to be reviewed with a view to improving the process and thus encouraging fair competition in the freight market. DRS's direct experience of this process to date is that it is inefficient and presents too many ambiguous situations which allow incumbent operators to frustrate the process. This creates an uncertain environment which affects potential customers' decision making process. DRS believes that our proposals, if adopted, should be monitored and reviewed periodically for effectiveness as part of an ongoing programme of Part J improvements.

ORR's response

2.5 We hope that DRS will agree that our proposals go a long way to providing the industry with more straightforward and efficient change mechanisms. We agree that the revised Part J, if accepted for inclusion on the Network Code, should be kept under review and whilst ORR is happy to play its part, we believe that it is for the industry, particularly Network Rail, to monitor its effectiveness. If any access beneficiary believes that Part J is found wanting, then it is of course open to it to put forward its own a PfC.

The Freight Transport Association (FTA)

2.6 FTA made a number of general points mainly about the timescales involved and the fact that processes are too slow and drawn out. In particular, the ability of paths to be switched quickly between freight operators (FOCs) with the certainty (or lack of it) on the part of the end customer of the operator that the new operator will actually be able to operate the services they have been contracted for. These issues do little to help to stimulate confidence in either existing rail freight shippers, or perhaps more importantly, shippers considering using rail as a new mode of transport.

ORR's response

2.7 Again, we hope that FTA agrees that our proposals go a long way to providing the industry with more straightforward and efficient change mechanisms which, if adopted, should resolve many of its concerns about the timescales involved.

GB Railfreight (GBRf)

2.8 GBRf suggested that to avoid industry concerns that voluntary surrender of freight access rights and paths might result in capacity being lost permanently to passenger operators, such rights and corresponding paths should be kept by Network Rail as strategic freight paths and kept validated through the normal timetable process. That vital freight capacity will then be kept and this can kick start the populating of strategic freight paths in the timetable as recently incorporated into Part D of the Network Code.

ORR's response

2.9 This is a matter for the industry, but we believe that all rights that change under Part J, whether freight or passenger, should be reviewed by Network Rail and added to the Strategic Capacity Statement, as appropriate, in accordance with Network Rail's Code of Practice, "Management of Strategic Capacity on the Network"[9] and Part D of the Network Code.

Transport Scotland (TS)

2.10 TS asked that we ensure that the revised Part J does not artificially restrict the ability of rail freight operators in Scotland to meet the needs of their customers, nor their ability to compete with other forms of haulage. In addition, Part J should continue to be able to provide the assurances necessary to support the decision making processes of funders and third parties in respect of investment in infrastructure and services.

ORR's response

[9] Available from Network Rail's website at http://www.networkrail.co.uk/browse%20documents/track%20access/4%20strategic%20capacity/final%20code%20of%20practice/management%20of%20strategic%20capacity%20on%20the%20network%20-%20may%202011.pdf.

2.11 As we explained in our emerging conclusions and in this document, what we have tried to do throughout this review is to introduce a simple, straightforward and mechanistic approach that is clear and unambiguous and will reduce industry costs, reduce the degree of monitoring required and generally reduce the administrative burden and room for dispute, whilst ensuring that adequate protections remain in place for train operators wanting to retain an unused access right. We consider that our proposed approach will continue to provide reasonable and transparent protection for those operators with a demonstrable and/or strategic requirement.

2.12 We do not expect that this change will have any significant effects on existing or strategic traffic where a train operator meets the use quota/use period. The industry continues to develop strategic capacity which will assist in preserving capacity over core routes. In respect of infrequent traffic, the existing processes will still apply, allowing freight operators to make timetable variation requests when required. Network Rail, as the infrastructure manager, will continue to manage the J4 process and operators will still have the protection of the enhanced Network Code dispute mechanisms.

Condition J4 (failure to use - application by Network Rail)

2.13 Condition J4 sets out the process for Network Rail to seek the surrender of a train operator's unused rights. Our emerging conclusions said that:

(a) the definition of **Quantum Access Right** should be amended to include any right under an access agreement;

(b) **J4.2.2** should be deleted;

(c) the **UIOLI process** should not contain any ROCN defence except for non-economic reason,s and rights should automatically transfer where they have not been used in the use quota/period.

(d) the **use quota/period** should:

(i) remain as it is but apply to each day of the week. This will mean that the use quota/period will actually be 1 in 13 consecutive weeks in which the Train Slot is included in the Working Timetable which equates to approximately 1 in 90 days; and

(ii) appear on the face of J4.

(e) train slots obtained by Train Operator Variation Requests under paragraph 2.5 of Schedule 5 of the freight contract should also be capable of being removed from the timetable under **Part D** if they are not subsequently used.

Consultees' views on our emerging conclusions

Definition of Quantum Access Right

2.14 Consultees agreed our proposal to amend this definition.

The deletion of condition J4.2.2

2.15 Of those who responded on this issue, only Network Rail was in favour of its deletion. Both DB Schenker (DBS) and Freightliner Group (Freightliner) were concerned about the effect the withdrawal of this Condition would have and amplified views expressed at earlier stages of the process. DBS said that there are many reasons why train paths may not be secured in the timetable in respect of an operator's rights, for example, because of restrictions of use proposed in Network Rail's Engineering Access Statement. This required a cooperative way of working and DBS feared that this could be lost with operators reluctant to agree changes because their access rights would be at 'severe risk' of Failure to Use and furthermore, would lead to an increased number of disputes and force operators to make Access Proposals for the entirety of their rights.

2.16 In summary, DBS said that the disadvantages far outweighed any perceived benefit and that it was very concerned that this proposal could result in significant adverse effects on FOCs and their customers, particularly those involved in the transportation of coal that rely heavily on the flexibility given by Level 2 and Contingent Rights. DBS said that the effect on franchised operators would be much smaller as they could rely on the defence that the rights were required in support of their franchised agreements. Freightliner said this would mean that access rights no longer conferred the expectation to be able to deliver a train service and would make it even more difficult to engage in a contractual relationship with a customer and would make a breach of contract inevitable. It was also concerned that our proposal could allow Network Rail to sterilise an access right by not providing a train path.

The Association of UK Coal Importers (Coal Imp) was concerned about the deletion of this Condition but proposed changes to J4 that would alleviate the effect of the Condition's removal.

2.17 In the light of the strong views expressed, particularly by DBS and Freightliner, and to ensure that we understood the position properly, we sought further information from each FOC about how often Network Rail refused Access Proposals for Level 2 Rights. In response Freightliner said that Network Rail had refused some of its Access Proposals when, at certain times of the year, the pattern of engineering blocks' impact on network availability for what is known as an engineering period (10 or 12 weeks). In particular, Freightliner referred to Network Rail having one period each year when the West Coast main line was blocked North of Carlisle at weekends, which meant it could not then accommodate a Freightliner Access Proposal for paths on a Saturday from Ravenstruther. We accept that this is a valid concern which would also apply to Level 1 Rights and therefore have proposed revised text that would exclude a Failure to Use happening where a failure to secure a Train Slot is caused by a Restriction of Use included in the Engineering Access Statement.

2.18 DBS also said that Network Rail would not always be in breach of contract where it could not accommodate Level 2 Rights. This was because, if all alternative routes' Cordon Caps were reached, then paragraph 2.2.7 of Schedule 5 of the freight model contract (replicated below) would apply:

> "*Where Network Rail has failed to accommodate any Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request for Train Slots under paragraph 2.2.6(ii) because such Train Slots would, if Planned, exceed any relevant Cordon Caps, then: (a) it shall not be in breach of contract; and (b) the Train Operator shall not, for the duration of that Timetable Period, have Level Two Rights to any Train Slots which, if Planned, would have any of the same Routing characteristics as any part of the Train Slots which Network Rail did not include in the New Working Timetable or the Working Timetable because they would, if Planned, exceed any relevant Cordon Caps*."

2.19 DBS considered that Level 2 Rights were not as 'firm' as Level 1 Rights given the effect of paragraph 2.2.7 of Schedule 5 which meant that they were more akin to Contingent Rights. As such, it was essential for condition J4.2.2 to

remain in place to avoid Level 2 Rights being automatically susceptible to 'Failure to Use'. In its view, it would be perverse for Level 2 Rights to be vulnerable to 'Failure to Use' under these circumstances when Level 3 Rights would not be.

2.20 In support of its position, DBS referred to our publication entitled "Changes to Access Rights Final Conclusions" dated June 2004:

> "*However, the Regulator has added Condition J4.2.2 to ensure that the UIOLI mechanism does not apply to level 2 rights in relation to which the train operator has not secured a train slot in the working timetable. Level 2 rights are found in some freight track access contracts and are firm rights in respect of quantum and origin and destination only, with Network Rail having freedom over the timing of the trains in question and the routes they must use. They have often been approved alongside cordon caps which limit the number of level 2 rights through nominated cordons on the network where otherwise Network Rail would be required to timetable more train slots than could be accommodated without conflicting with other operators' rights or taking up all possible spare capacity that could be used, for example, for short-term spot bid services. Given their flexibility for Network Rail and the availability of cordon caps to prevent over-selling of capacity, the Regulator has been prepared to approve more level 2 rights than could be included in a single working timetable, on the grounds that the level 2 rights the operator wants to use can change from one timetable period to another. He therefore considers that it would be unreasonable if the UIOLI mechanism were capable of removing an operator's unused level 2 rights in such cases. He believes that the rights review meetings process for freight operators should be a more flexible and targeted way of dealing with any problems of non-use of level 2 rights in such cases*.";

and from ORR's proposal for change to Part J of August 2007;

> "*Condition J4.2.2 currently indicates that J4.2.1(a) does not apply to Level Two (L2) Rights. This caveat was added to prevent a L2 right being removed from a contract if Network Rail was simply unable to accommodate a bid into the working timetable*."

2.21 DBS said that, in recent years, its Level 2 Rights had not been subject to the effect of paragraph 2.2.7 of Schedule 5 but that could not be taken as an

indication that it would not be invoked by Network Rail in future, particularly as the network becomes increasingly congested. Condition J4.2.2 was a necessary safeguard against freight operators losing Level 2 Rights where paragraph 2.2.7 of Schedule 5 was relied upon by Network Rail.

2.22 Given this information, we again asked DBS for details of the number of occasions where Network Rail had rejected Access Proposals made under Level 2 Rights. DBS acknowledged that this did not happen often but it was comforted by the fact that condition J4.2.2 prevented Network Rail from rejecting such Access Proposals as a precursor to extinguishing the associated access rights through Part J4 ('Failure to Use'). It referred to an occasion where Network Rail and Arriva Trains Wales (ATW) had introduced new services under a revised timetable which meant that there were no remaining paths for freight services. Because DBS was able to rely on its Level 2 Rights, the passenger services had been withdrawn and paths for two coal services accommodated in the timetable. If condition J4.2.2 had not existed Network Rail would have been able to remove DBS' Level 2 Rights and ATW could have secured the capacity to operate its new services.

2.23 DBS also acknowledged that decisions not to accommodate Access Proposals in respect of Level 2 Rights could be appealed but reliance on the outcome of such appeals to protect the removal of access rights increased uncertainty in it being able to meet customer requirements especially if condition J4.2.2 was removed.

UIOLI and removal of ROCN

2.24 Associated British Ports (ABP) and the Association of Coal Importers (Coal Imp) whilst agreeing with our aims said they should not be at the expense of certainty and assurance for FOCs and their customers, especially in markets such as coal where flexibility is required. They were concerned that the emerging conclusions if implemented could have an adverse impact on a business which is seasonal and relies upon call-off contracts. They would remove certainty for FOCs, particularly in respect of call off contracts, and end users might be forced to consider other modes of transport. The loss of access rights could present fundamental challenges to ports and mines with limited storage and therefore a degree of flexibility needed to be maintained. ABP proposed that the FOC that holds the contract should hold the paths; on

the submission under J5 the end user should be consulted as to the reasons for the change; and more should be done to penalise instances of deliberate train running simply to preserve an access right.

2.25 DBS and Freightliner made similar points about not being in a position to give assurance to their customers, existing and new, that they will hold the necessary access rights to meet contractual requirements making it difficult to compete with other transportation modes. More generally, DBS said that our proposals went too far and would not achieve our aim of a simpler, mechanistic and straightforward process and that relying on J4.3 to challenge a Failure to Use Notice provided inadequate protection for operators and their customers. It was particularly concerned about the impact our proposal would have on 'multi-customer' services. Freightliner suggested that our approach would not necessarily reduce the amount of disputes as ROCN provides a very reasonable measure and any disputes would then be around the meaning of J4.4.

2.26 DBS and Coal Imp also noted that the Regulations are intended to apply only to congested infrastructure and only contemplated the surrender of train paths not the surrender of access rights. The Regulations were therefore drafted to prevent train operators from holding onto paths and where the infrastructure has not been declared congested further protections were required. DBS also noted the franchised operators were permitted a defence under Condition J4.9.1 and FOCs should have a similar defence available. It felt that providing FOCs with an equivalent provision and requiring them to demonstrate the existence of a contractual commitment would be more effective than relying on the current ROCN criteria, which it acknowledged are open to misinterpretation and disagreement.

2.27 GBRf and Network Rail supported our proposals with the former suggesting that the time for serving counter notices could be further reduced to 5 working days.

Use quota/period

2.28 Of those that responded on this issue, GBRf considered that the 1 in 90 day use quota/period was adequate and acceptable. Hull Bulk Handling (HBH) said that it was very important that paths were maintained even if they were not used in a 90 day period. If any paths were lost then this would place a

substantial restriction on its ability to operate its business on a profitable commercial basis, particularly when considered against the substantial investment HBH had made in its facility, which could be wasted. Coal Imp said that our proposal would have an adverse effect on call off contracts and make the transportation of coal by rail reliant on the short term availability of capacity.

2.29 However, others disagreed. Freightliner felt that our emerging conclusions on the use quota/period would reinforce the benefits of rotating trains through a series of paths to keep them all 'active' and said 10 in 90 days would be more effective at ensuring that capacity was not retained when not needed. Network Rail said that the use quota/period should be lower on routes where capacity was constrained such as the West and East Coast main lines and the use period on these routes should be reduced to 30 days. Network Rail also considered that J4.2.4 should be amended so that train movements made for the 'primary purpose' of meeting the use quota do not count. The Freight Transport Association (FTA) noted the ability of train operators to retain disputed paths on the basis of "once in ninety days" usage by making, for example, a light engine move or hauling some empty wagons. The Rail Freight Group (RfG) went further and said that this was a missed opportunity to tighten the use period further and that application to each day of the week would only increase complexity

Surrender of train operator variation requests under Part D rather than Part J

2.30 Network Rail and Freightliner agreed with our proposal, but DBS was concerned that the proposed drafting and insertion of the provision into Part D rather than Part J would diminish many of the benefits that it had previously suggested. DBS said that the provision should apply equally to passenger operators who can also secure train paths in the timetable not backed by specific rights by way of general approvals. In addition, DBS said that the process must also be capable of enforcement by an operator in the same way that J5 is and also commented that some of the proposed wording such as "unlikely to be used" and "may be removed" added some unnecessary uncertainty into the proposed process.

ORR's response to consultees' views

The deletion of Condition J4.2.2

2.31 We have considered all the points made very carefully, especially given what we said in our earlier publications. However, in practice, we believe that, if a FOC has a quantum of rights that can only be satisfied by passing through a Cordon, and the quantum was greater than the associated Cordon Cap, it would seek to move the traffic by utilising the "Y-path" mechanism, whereby a common path is used for two traffic flows over part of the route, branching off to different origins and/or destinations as necessary on either side of the cordon. It would then determine shortly before any day of operation which specific path it wished to use, depending on the traffic on offer. Otherwise, it would have no means of moving the traffic for which the right existed, and so would potentially be in breach of contract with its customer. If this was not a practicable option, it would have sought an increase in its cordon cap when applying for the Rights.

2.32 To test this theory, we considered the scenario that a FOC might hold rights for ten slots from Burngullow, in Cornwall, to a variety of destinations across the country, with a cordon cap of five located at Plymouth. There being no alternative route, the FOC would have to make an access proposal for the use of "Y-paths" in order to move the traffic (and, indeed, some Rights might be included in its Rights Table as "Y" with each other). A further example was of movements from Hunterston and the Ayr Coalfield to the English power stations. All possible routes have at least one Cordon Cap, and FOCs involved in moving this traffic relying on Level 2 Rights actually use "Y-paths" with multiple origins and destinations in order to move the traffic.

2.33 Given these circumstances, we consider that if a FOC has chosen not to make an Access Proposal in respect of Level 2 access rights it holds, or it has been unable to secure a Train Slot thereby triggering a Failure to Use under condition J4.2.1(a), it will, given the removal of condition J4.2.2, be subject to surrender without affecting the "Y paths" it has already secured under Access Proposals. The 'common portion' of the path will therefore still be held with the alternative access rights. But, in practice, such a failure may not materialise. If, in the first instance, a FOC is dissatisfied with Network Rail's ability to identify and offer a Train Slot, or continue to provide a Train Slot in a successor timetable, in satisfaction of an Access Proposal, then there are

established industry processes which a FOC can consider initiating to pursue satisfaction of its Access Proposal.

2.34 For this reason, we do not consider that Network Rail will purposely seek to reduce a FOC's access rights or sterilise an access right by not providing a Train Slot in the absence of condition J4.2.2, issues over which Freightliner raised concerns. Neither do we consider there will be any adverse effect on a FOC's continuing ability to haul ESI coal in satisfaction of their customer contracts given that we envisage that Train Slots will continue to be offered in satisfaction of Access Proposals by use of "Y Paths". If Network Rail failed to satisfy Access Proposals made under Level 2 Rights, it would almost certainly be in breach of contract were it not for paragraph 2.2.7 of Schedule 5.

2.35 We note the point DBS makes about the allocation of capacity to ATW to the detriment of its freight services. In granting access to its network, Network Rail is required to consult on such access rights and we consider that train operators affected by such proposals will be able to register their concerns prior to capacity being allocated in a way which could affect their own aspirations for the operation of services. Such concerns could also be addressed to ORR who would take them into account in approving or otherwise the allocation of capacity on the network.

2.36 Turning to the ATW rights in question, we ensured, as part of our decision to approve ATW's 7th Supplemental Agreement, that sufficient capacity existed to accommodate EWS's rights, as well as leaving capacity for additional freight trains to and from Cwmbargoed should this be required.[10] We had previously taken action when Network Rail had agreed a timetable for additional passenger services to and from Aberdare without considering how it would accommodate existing freight rights to and from Tower Colliery, when we required that a number of services be terminated short in order to allow for the freight paths to be included in the timetable.

2.37 We remain of the view that deletion of condition J 4.2.2 will have no detrimental effect on the ability of FOCs to secure the appropriate number of Train Slots under Access Proposals for its current traffic. A Failure to Use will

[10] See http://www.rail-reg.gov.uk/upload/pdf/22-atw_7sa_declet.pdf.

occur where there has been no such Access Proposal due to the absence of traffic.

UIOLI and removal of ROCN

2.38 Our emerging conclusion to remove ROCN as a defence against loss of access rights and train slots also resulted in strong opposing views on this issue particularly in respect of call-off contracts. We remain of the view that to retain any form of ROCN criteria for 'evergreen' call-off contracts will continue the current unsatisfactory situation of Part J being open to manipulation and unresponsive to end users' needs. We consider that the capacity issues surrounding call-off contracts are best dealt with by Network Rail, as infrastructure manager, through the strategic capacity process which is currently ongoing. However we recognise that, in certain circumstances, FOCs may require a defence where the FOC has a contractual commitment to haul an agreed quantity of goods within a specified period.

2.39 We do not consider that the removal of ROCN will necessarily result in more disputes about the interpretation of J4.4 because the mechanistic approach set out in the PfC makes clear that a notice regarding failure to use will relate to the particular circumstances set out in J4.1. If the train operator disagrees that these conditions have been met then it is able issue a counter notice with supporting evidence to Network Rail. We note Freightliner's concerns about the assurance that new to rail business often requires, and we consider that the work relating to Strategic Capacity will go a significant way to providing both FOCs and end users with the assurance they need on the availability of capacity for their services.

2.40 We disagree with DBS and Coal Imp's interpretation of the Regulations that UIOLI should only apply in respect of a train path and also only to congested infrastructure. These Regulations state that the 'infrastructure manager must, **in particular** (our emphasis) where infrastructure has been declared congested … , require an applicant who has, over a period of at least one month, used a train path less often than the threshold quota stipulated in the network statement, to surrender that train path.' In our view the Regulations do not apply the UIOLI mechanism solely to congested infrastructure. The drafting includes all network. We also consider that the use of 'train path' does not necessarily restrict surrender to train paths but also applies to access

rights because the Regulations only consider train paths. However, in Britain, these paths are normally supported by rights to slots, and holding rights which prevent the paths being resold ossifies the use of the network.

2.41 In response to DBS's concerns about the fact that franchised passenger operators would have a defence under J4.9.1(a), we have considered this issue further and consider that there is not sufficient justification for operators of passenger trains and FOCs to be treated differently in this regard and this defence should be removed. Passenger operators will retain a defence if the rights subject to surrender relate to an enhancement for which they are contracted to pay access charges or the reason is attributable to non-economic reasons beyond the operator's control, (a defence that is available to all operators).

2.42 We note consultees' support (with the exception of DBS) for our emerging conclusion for Part D rather than Part J to include ability for Network Rail to remove unused train operator variation requests from the working timetable and

2.43 consider that this should apply additionally to passenger train operators' variation requests.

2.44 GBRf proposed that the timescales should be reduced further, however we consider that the timescales are reasonable and because of the mechanistic approach taken in the emerging conclusions there will be an overall reduction in time taken to remove access rights or complete any dispute resolution processes.

Use quota/period

2.45 We note the views of consultees on the use period and use quota but we do not consider that we have received sufficient reasons to alter our proposal of the 1 in 90 use period/use quota applying to each day of the week. This approach will go a significant way to ensuring that unused capacity is made available for other operators. In response to Freightliner and the RFG who considered that the use quota/use period should be further tightened, we have requested evidence in previous reviews of Part J to support significant changes to the use period but the industry has not been able to supply this. We do not believe that the use quota applying to each day of the week will

necessarily add to any complexity given Network Rail's systems for train monitoring. We note Network Rail's proposals to reduce the use period for busy routes. However, we consider that this would complicate a process which needs simplification. Furthermore it was not clear how such an approach would apply to train paths using two or more routes which had different use periods. We also do not consider that the amendment to J4.2.4 would add any further clarity to the drafting.

Proposal to incorporate wording into Part D for ability to remove train slots not backed up by Firm or Contingent Rights which are not being used

2.46 We do not agree with DBS that the provision should apply equally to passenger operators. FOCs have the right to operate trains which have been accepted into the timetable following a timetable variation request under clause 5.2(a) and paragraph 4.1(d) of Schedule 5 of their access agreements without adding specific rights to those services. Train slots obtained in the working timetable by passenger operators must be backed up by either firm or contingent rights before the trains operate. The passenger general approval which DBS refers to is a general approval regarding the approval of specific rights and therefore is not comparable to the circumstances in which FOCs can operate. In light of this, we think that the proposed provision can only ever be relevant to FOCs as passenger operators' train slots will always have underlying access rights which could be subject to the failure to use test in Part J.

2.47 We also do not agree with DBS that the provision should be enforceable by operators. Network Rail controls the timetable and therefore only it can remove train slots from it. However, if a Timetable Participant was concerned that a FOC had unused train slots in the working timetable which were not underpinned by access rights, then the Timetable Participant should report this to Network Rail so that it can discuss the issue with the relevant operator and then remove the rights, if appropriate, under the proposed provision. We have revised the wording of the proposed provision to make this clear.

2.48 As to DBS' comments regarding specific phrases in the proposed provision, we have revised the wording to meet the concerns. We have also revised the drafting to make it clear that this provision is dealing with unused freight Train Slots which are not underpinned by access rights. We think the provision sits

comfortably in Part D as Part J deals with the removal of access rights and associated train slots which are not being used.

ORR's final conclusion

2.49 Taking into account the issues discussed above, we therefore conclude that J4 should remain largely unchanged from the proposal in our emerging conclusions, except for a change to J4.2.2 that allows an exemption where Rights have not been exercised or a path obtained as a result of the Engineering Access Statement, and a change to J4.9.1 to remove a passenger operator's franchise as a defence.

Condition J5 (failure to use - third party application)

2.50 Condition J5 sets out the process for a third party to seek the surrender of a train operator's unused rights. In our emerging conclusions we said that we were not proposing to make substantive changes to J5.

Consultees' views on our emerging conclusions

2.51 GBRf said that its comments for J4 also applied to J5 and that it was not in favour of merging J4 and J5. GBRf also said that the process could be made quicker (response times reduced from 10 to 5 working days) and Network Rail should retain its supervisory role in the process.

ORR's response to consultees' views

2.52 We note the comments made by GBRf regarding merging these Conditions and have decided to keep them separate. On reviewing the drafting we do not consider that J5 needs to have a Third Party Failure to Use Notice as where Network Rail receives an application from a third party which meets the necessary criteria, we think it would be much simpler if this led to Network Rail serving a Failure to Use Notice under J4.

ORR's final conclusion

2.53 As set out in our emerging conclusions the drafting changes we are proposing to J5 are mainly consequential except we are also now proposing to remove the concept of a Third Party Failure to Use Notice. Instead we propose to link J5 more closely with J4 by requiring Network Rail, where it has received an

application under J5 which meets the necessary criteria, to serve a Failure to Use Notice.

Condition J6 (reduction of cordon caps (failure to use)) and Condition J8 (adjustment of cordon caps (freight transfer mechanism))

2.54 Condition J6 sets out the process for the reduction of a FOC's cordon cap where Network Rail serves a Failure to Use Notice relating to a Level 2 right under J4 or J5 and specifies in that notice that there should be a reduction in the level of cordon caps. Condition J8 provides for the adjustment of cordon caps where a notice has been served under J7 and Network Rail considers that there should also be an adjustment to the incumbent FOC's cordon cap.

2.55 In our emerging conclusions, we noted that although there were no specific issues with either of these Conditions, a number of our other proposals for Part J impacted upon them. Therefore, we proposed that the formula be moved onto the face of both J6 and J8. We also proposed that the formula should change the cordon cap in proportion with the rights being transferred and where the resulting reduction was not a whole figure it should be rounded down.

Consultees' views on our emerging conclusions

2.56 Network Rail and DBS supported our proposal but Freightliner considered that the proposal to round down the cordon cap calculation may result in the incumbent being left with a smaller cordon cap than required.

ORR's response to consultees' views

2.57 We note Freightliner's comments. However we consider that, as the calculation is to work out how much the cordon should be reduced by, it is correct to round this calculation down so that the remaining cordon cap isn't reduced by too much and the incumbent is left with a cordon cap which is smaller than required.

ORR's final conclusion

2.58 Our proposed amendments to J6 and J8 remain the same as those set out in our emerging conclusions.

Condition J7 (freight transfer mechanism)

2.59 Condition J7 applies to FOCs only and is intended to enable the smooth transfer of rights where a FOC wins existing traffic from an incumbent FOC. We proposed a number of changes to J7 in our emerging conclusions including the deletion of the ROCN defence that the Rights Subject to Surrender were "required to convey traffic to fulfil a third party commitment which cannot be satisfied, in whole or in part, without the use of each of the rights in question." Other proposed amendments included that:

(a) J7.1.2 should be amended:

(b) an applicant should produce a letter from a third party customer confirming any commercial arrangement and confirming that the FOC had suitable access to and from the facility, including, where necessary, the associated infrastructure;

(c) the definition of "Rights Subject to Surrender" should be amended to include "Y-Paths". We also proposed that a definition of Y-Path be included in Part J;

(d) the J7 process be shortened and improved by making it between the applicant and the incumbent in the first place, involving Network Rail only where the parties cannot agree;

(e) a new provision (J7.10.1(ii)) should be provided to link the handover of rights to the date from which the applicant specified in its Third Party Notice that it required the rights. We also proposed deleting present J7.9(a)(ii) relating to Restrictive Provisions.

Consultees' views on emerging conclusions

2.60 Concerns were raised by DBS, Freightliner, Coal Imp and ABP about the proposal to remove ROCN. In particular, DBS said currently this could be used to prevent the transfer of access rights which conveyed traffic for more than one customer and that removing it may deter customers from making efficiencies though using mixed trains.

2.61 In relation to our proposal to amend J7.1.2, we did not receive any further comments from consultees. In our initial consultation in December 2010,

Freightliner, GBRf and Network Rail had supported the need for more clarity whilst DBS said that in light of ORR's Determination of ADP 23, it believed no further clarification was required but it would consider any suggested improvements.

2.62 DBS said that the supporting letter from the customer should be served as soon as reasonably practicable after the competitive tendering process had been completed rather than with the J7 application. DBS also said that the letter should not stipulate whether the applicant has obtained suitable access because if the facility is not owned by the freight customer then the freight customer would not be involved in access issues.

2.63 Network Rail supported our proposals in respect of Y-Paths whilst Freightliner said that it would be helpful for Part J to contain a definition of Y-Path but this could highlight problems where Y-Paths are held for two different customers. DBS said that it was concerned that the proposed definition of Y-Path differed from those contained in freight track access contracts and therefore could give rise to confusion and conflict. Any definition in the Network Code should replicate as far as possible those in the track access contracts and should also include a definition of 'Y-Path Option'. DBS said that the alternate use of Y-Paths by different FOCs for the same customer could be dealt with under the special conditions contained in FOCs' access contracts, as happens in some instances today. GBRf also noted that the existence of Y-Paths complicated transfers under J7 and this should be resolved.

2.64 Most consultees were supportive of our proposals to shorten the J7 process. Some consultees also provided specific feedback on the drafting of J7, including DBS saying that J7.3 and J7.4 should be merged and that the application process was still referred to in J7.3.1.

2.65 Only DBS supported the retention of present J7.9(a)(ii) relating to the transfer of restrictive provisions because it said that without this there would be no mechanism to make necessary modifications to the Applicant's track access contract without making a separate section 22 application.

ORR's response to consultees' views

2.66 In light of the comments received about the removal of ROCN in J7, we have re-visited our proposal. We recognise that in some instances paths are not

necessarily used solely for one customer, or, in the case of intermodal traffic, the FOC itself has a train slot and sells space on that train on a wagonload basis. Our emerging conclusions could mean the transfer of rights and slots to another FOC when in fact the majority of the train in that slot is used for another customer. This would clearly have a significant impact on that end user. We have therefore amended our proposed drafting to include a defence to the transfer of rights based on the Incumbent requiring the Rights Subject to Surrender to continue to convey traffic for another customer, whose traffic is the primary purpose for which the Rights Subject to Surrender were approved.

2.67 We do not agree with DBS that the customer letter should be served as soon as practicable after the competitive tendering process rather than with the application as the applicant would only be applying for the transfer of rights once it knew it had won the tender. However, we agree with DBS that the customer is not necessarily the appropriate person to confirm that the applicant had secured suitable access. However, we still believe that there should be a requirement on the applicant to confirm the position. We have amended the drafting accordingly.

2.68 Because of the difficulties regarding the transfer of Y-paths in previous cases arising under J7, we still consider that it would be beneficial if the definition of 'Rights Subject to Surrender' specifically referred to Y-Paths and a definition of Y-Paths was included in Part J. We have considered DBS's suggestion that either the transfer could be dealt with by a special term in FOCs' access contracts where a customer would select the relevant Y-Path and, therefore, the relevant operator, or by using the definition which is in FOCs' access contracts. We do not agree with DBS that this would solve the problem as both a special condition and the definition of Y-Path in the access contracts deal with access rights to Y-Paths. Our focus in J7 is the Y-Path access rights which have already been translated into Y-Path train slots in the working timetable. DBS's comments, however, have made us review our proposed drafting and we agree that it could be improved. We have therefore revised the definition of Y-Path so that it is clear that it refers to a Train Slot which is identified in the Working Timetable as a Y-Path by the incorporation of the letter "Y" in the operating characteristics part of the Train Slot's heading. For the same reason, we have also moved the reference to "Y-Path" in the definition of "Rights Subject to Surrender.

2.69 In respect of J7.9.1(a)(ii), we accept DBS's comments and therefore agree to retain this provision in our proposed drafting.

ORR's final conclusion

2.70 Taking into account the issues discussed above, we therefore conclude that J7 should remain largely unchanged from the proposal in our emerging conclusions, except for the changes outlined above. We have also taken into account all the other specific drafting points raised in relation to J7.

Condition J9 (access rights review meetings)

2.71 Condition J9 sets out the process for holding regular rights review meetings between FOCs and Network Rail. In our emerging conclusions we set out proposals to delete the present J9 and, instead, have a new J9 which:

(a) specified the objectives which Network Rail has to achieve in holding the meetings;

(b) placed an obligation on the relevant Part J Access Beneficiary attendee to participate in the meetings in collaborative manner to assist Network Rail to meet is objectives;

(c) provided ORR with the ability to direct Network Rail to hold a Rights Review Meeting and, where Network Rail does not comply, gives ORR the power to seek an order from the High Court securing compliance; and

(d) meant that Rights Review Meetings should be considered in relation to any Part J Access Beneficiary. This would be an extension of the present system which only applies in relation to FOCs.

Consultees' views on our emerging conclusions

2.72 DBS supported our proposal to extend this provision to both passenger and FOCs but was disappointed that we had not taken the opportunity to extend Rights Reviews to encompass the full range of changes to access rights (i.e., surrenders, amendments and additions). Network Rail said that providing ORR with an ability to apply to the High Court would increase the industry's costs. In any event, it did not consider that ORR requires such a power as it already has enforcement powers under Network Rail's licence and the

Railways Act 1993. Network Rail further stated that if the ability for ORR to seek a High Court Order remained in the drafting then it did not think this right should be automatic and Network Rail should be afforded the opportunity to explain why it had not complied with J9 before ORR had such recourse. Alliance believed rights reviews and issuing failure to use notices should be mandatory and not at Network Rail's discretion.

ORR's response to consultees' views

2.73 We agree with DBS that J9 should apply to amendments and additions. We are of the view that the definition of "Rights Review Meeting" which means "a meeting between Network Rail and a Part J Access Beneficiary for the purpose of reviewing the Quantum Access Rights held by that Part J Access Beneficiary and its use of them" is wide enough to permit amendments and additions being discussed at the meeting. However, in order to make it clearer that Network Rail should consider any necessary amendments and additions to the Part J Access Beneficiary's rights at the meetings, we have amended the drafting of J9 to include, as a new objective of holding the Rights Review Meeting in J9.1.4, "considering whether it is appropriate to agree any amendments or additions to the Part J Access Beneficiary's Access Rights."

2.74 As for Network Rail's comments, we disagree that ORR having the ability to apply to the High Court for an order will increase industry costs. Any cost in relation to the process would only arise if Network Rail had not complied with J9. We also disagree that ORR already has enforcement powers in relation to non-compliance with J9. In accordance with ORR's Economic Enforcement Policy and Penalties Statement[11], enforcement action in relation to Network Rail's licence is usually focused on systemic or sustained failings, which a failure to comply with J9 might not be. Network Rail also claimed that ORR already has enforcement powers it could use under the Railways Act 1993 but did not explain further what powers it is thinking of. We do not think we have powers under the Railways Act which we could use to force Network Rail to comply with J9, which is why we are proposing that we have recourse to the High Court in these circumstances.

[11] Available at http://www.rail-reg.gov.uk/upload/pdf/395.pdf.

2.75 We note Network Rail's comment that recourse to the High Court should not be automatic and Network Rail should have the opportunity to explain why it hasn't complied. However, the drafting of proposed J9.2.4 says that, where Network Rail has failed to comply with a J9 Direction, ORR may [emphasis added] apply to the High Court; the "may" means it is not automatic. Further, if Network Rail has good reason for not complying with a J9 Direction, then we would encourage Network Rail to engage with us and explain why it is not going to comply. We do not think the drafting need set this out as it should be the natural behaviour of a best practice infrastructure manager to engage with its regulator in such circumstances.

ORR's final conclusion

2.76 In view of our comments above, we have added some clarificatory drafting to the proposed J9 to explain that rights review meetings under J9 should also consider whether any additions and amendments should be made to the Part J Access Beneficiary's access rights. However, for the reasons set out above, we are not proposing any changes to the drafting in relation to ORR's ability to have recourse to the High Court where Network Rail does not comply with a J9 Direction.

Condition J11 (publication of documentation)

2.77 Condition J11 sets out the circumstances in which Network Rail must publish notices received and issued under Part J. In our emerging conclusions, we proposed that the revised J11 (J10 in the revised draft) place an obligation on Network Rail to publish, review and keep the template notices up to date. In addition, the new Condition 10 also gives ORR a power to order Network Rail to comply with this obligation and where Network Rail does not so comply for ORR to seek an order from the High Court securing compliance. We also said that we would attach template notices for J4 and J7 to our final conclusions.

ORR's final conclusion

2.78 As no consultees commented on our proposals for J11, we conclude that J11 (J10 in revised draft) should be amended as described in our emerging conclusions.

2.79 Alongside this document we are attaching template notices and counter notices for J4 and J7 as well as a J9 notice. However, these may well change as a result of any changes that are agreed through the CRC and it makes sense to wait until that process is complete. We think that Network Rail should be responsible for finalising and publishing these templates and we expect it to take this work forward once the revised version of Part J is approved.

2.80 We would, however, make one point. With a view to keeping the notices as simple as possible, they do not include next steps (i.e. how long the receiving party has to respond or what the effect of not responding is). We have omitted this because the Network Code does not say that this information has to be contained in the notices and we assume that on receipt of a notice the recipient would refer to the Code to see what should happen next. The industry needs to consider whether or not it would find it helpful to include 'next steps'.

J12 (reasonable on-going commercial need)

2.81 In our emerging conclusions document we proposed removing J12 and the discontinuation of the separate document entitled "Criteria for Interpreting the Expression "Reasonable On-going Commercial Need". Our proposals for removing ROCN and consultees' views on this matter are discussed above in our responses on J4 and J7.

Annex A: List of respondents to the final conclusions

Organisation	Date received
Alliance Rail Holdings	24 August 2011
Associated British Ports	4 October 2011
Association of UK Coal Importers	30 September 2011
DB Schenker Rail (UK) Limited	30 September 2011
Direct Rail Services Limited	27 September 2011
Freightliner Group	27 September 2011
Freight Transport Association	28 September 2011
GB Railfreight Limited	30 September 2011
Hull Bulk Handling Limited	19 September 2011
Network Rail Infrastructure Limited	30 September 2011
Rail Freight Group	30 August 2011
Transport Scotland	30 September 2011

Annex B: Proposal for change to Part J of the Network Code

Network Code – Part J

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1 Introduction

1.1 Overview

1.1.1 Part J provides mechanisms where, if a Train Operator or a Freight Customer Access Option Holder, together referred to as "Part J Access Beneficiaries", is not using Access Rights they can be removed from the Part J Access Beneficiary's contract. The mechanisms can be instigated by:

(a) the Part J Access Beneficiary itself as set out in Condition J2;

(b) Network Rail as set out in Condition J4; or

(c) by a third party Part J Access Beneficiary who wishes to use the rights in question. Condition J5 sets out a process where a Part J Access Beneficiary can apply for rights held by another Part J Access Beneficiary where that Part J Access Beneficiary has not used them and the applicant has a commercial need for them. Condition J7 sets out a process whereby a freight operator can apply for rights held by another freight operator if its wins the existing freight traffic. In addition, Condition J7 provides that a Freight Customer Access Option Holder can apply for the rights held by a freight operator where it wants to hold the rights itself to draw down to a Train Operator of its choice.

1.1.2 Where there has been a change of Access Rights' holder, Part J also sets out mechanisms for calculating any necessary corresponding change to cordon caps held by the Part J Access Beneficiary losing the rights. This process is detailed in Condition J6 in relation to rights that have been transferred pursuant to Condition J4 and in Condition J8 where rights have been transferred under the process set out in Condition J7.

1.1.3 Condition J9 provides that Network Rail should hold regular meetings with each Part J Access Beneficiary for the purpose of reviewing the Access Rights held by that Part J Access Beneficiary and its use of them. Where Network Rail does not do this, the Office of Rail Regulation can direct Network Rail to hold such a meeting.

1.1.4 Condition J10 obliges Network Rail to publish templates for any notice required under Part J and a copy of any notice served.

Where Network Rail does not do this, the Office of Rail Regulation can direct Network Rail to do so.

1.1.5 Condition J11 sets out a dispute resolution process whereby any dispute arising under Part J is first of all referred for determination in accordance with the ADRR and any appeal is referred to the Office of Rail Regulation.

1.2 Interpretation

1.2.1 In this Part J, capitalised words have the meanings shown below:

"ADRR Determination"	means a determination made in accordance with the ADRR following a reference made under Condition J11.1, where such determination has not been referred to the Office of Rail Regulation under either Condition J11.2 within the time limit for such referral;
"Access Proposal"	has the meaning shown in Part D of this code;
"Access Right"	means, in relation to an Access Agreement, permission to use track for the purpose of the operation of trains on that track by a beneficiary and rights ancillary thereto which are provided or charged for in the Access Agreement in question;
"Affected Person"	means, in relation to Qualifying Information, the person to whose affairs the information relates;
"Allocation Chair"	has the meaning shown in the ADRR;
"Ancillary Movements"	has the meaning shown in Part D of this code;
"Applicant"	has the meaning shown in: (a) Condition J5.1(a); or (b) Condition J7.2, as applicable;
"Appointed Operator"	means a Train Operator into whose Access Agreement a Freight Customer Access Option Holder has drawn down some or all of

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	its Access Rights in accordance with that Freight Customer Access Option Holder's Access Agreement;
"beneficiary"	has the meaning shown in section 17(7) of the Act;
"Commencement Date"	means the date on which the relevant Quantum Access Right takes effect in accordance with the Part J Access Beneficiary's Access Agreement;
"Confidentiality Direction"	has the meaning shown in Condition J3.8.1;
"Confidentiality Undertaking"	has the meaning shown in Condition J3.15.1;
"Contingent Right"	has the meaning shown, if any, in the relevant Access Agreement;
"Cordon Cap Increase"	has the meaning shown in Condition J8.3.1;
"Cordon Cap Reduction"	has the meaning shown in: (a) Condition J6.2.2; or (b) Condition J8.2.2, as applicable;
"Counter Notice"	means a notice given by the Part J Access Beneficiary to Network Rail under Condition J4.8, J5.4(b), J6.2.5 or J8.3.2;
"Determination"	means an ADRR Determination or an Office of Rail Regulation Determination, as the case may be and "Determined" (and cognate expressions) shall be construed accordingly;
"Disputes Chairman"	has the meaning shown in the Access Dispute Resolution Rules;
"Existing Cordon Cap"	means, in relation to an Access Agreement, a cordon cap specified in that Access Agreement concerning a location to which any Rights Subject to Surrender which are Level Two Rights under that Access Agreement relate;
"Failure to Use"	has the meaning shown in Condition J4.1.1;
"Failure to Use Notice"	means a notice given by Network Rail to a Part J Access Beneficiary under Condition J4.4;

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"Firm Right"	has the meaning shown in the relevant Access Agreement, and any reference in an Access Agreement to "Firm Contractual Right" shall be deemed to be a reference to a "Firm Right";
"Funder"	means the appropriate franchising authority, each Passenger Transport Executive and any local, national or supra-national authority or agency (whether of the United Kingdom or the European Union) or other person which provides money by way of grant or loan with the primary purpose of securing the provision of services relating to railways;
"Grounds for Objection"	means the grounds set out in Condition J4.9 or Condition J7.5.1, as applicable;
"Incumbent"	has the meaning shown in: (a) Condition J5.1(b)(ii); or (b) Condition J7.2, as applicable;
"J9 Direction"	has the meaning shown in Condition J9.2.1;
"J10 Direction"	has the meaning shown in Condition J10.3.1;
"Level Three Right"	has the meaning shown, if any, in the relevant Access Agreement;
"Level Two Right"	has the meaning shown, if any, in the relevant Access Agreement;
"network statement"	has the meaning shown in regulation 11 of the Railways Infrastructure (Access and Management) Regulations 2005;
"New Working Timetable"	has the meaning shown in Part D of this code;
"Notice of Objection"	means a notice given by an Affected Person to Network Rail of the kind referred to in Condition J3.5.1(b);
"Office of Rail Regulation Determination"	means a determination made by the Office of Rail Regulation following a reference made under Condition J11.2;
"Office of Rail	means the model passenger track access

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Regulation's Model Passenger Track Access Contract"	contract published by the Office of Rail Regulation under section 21 of the Act, as amended from time to time;
"Office of Rail Regulation's Model Freight Track Access Contract"	means the model freight track access contract published by the Office of Rail Regulation under section 21 of the Act, as amended from time to time;
"Office of Rail Regulation's Model Track Access Contract (Freight Customer Access)"	means the model track access contract for freight customer access published by the Office of Rail Regulation under section 21 of the Act, as amended from time to time;
"Part J Access Beneficiary"	means a Train Operator or a Freight Customer Access Option Holder;
"Period for Objections"	means the period specified in Condition J3.5.1(b);
"protected right"	has the meaning shown in Condition C8.3.3;
"Qualifying Information"	means information which Network Rail has acquired in relation to the affairs of any Affected Person under an Access Agreement between Network Rail and that person;
"Quality Adjustment"	means the alteration of any aspect of the Access Rights of the Part J Access Beneficiary (whether in relation to performance, the quality or condition of the Network, the liability of any person to any other person, or in any other respect) other than a Quantum Adjustment in a manner which is not inconsistent with this code;
"Quantum Access Right"	means any right under an Access Agreement in respect of a number (or quantum) of Train Slots in any specified period (including rights to Train Slots in respect of additional trains or relief services), and includes part of such a right;
"Quantum Adjustment"	means the surrender of any Access Right of the Part J Access Beneficiary in question;
"relate" and "in respect of"	in relation to a Train Slot and a Quantum Access Right where these terms are used together, means that the Train Slot in question has been secured by the Part J

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	Access Beneficiary in accordance with Part D in the exercise of that Quantum Access Right;
"Released Capacity"	means track capacity made available to Network Rail as a consequence of the making of a Specified Relevant Surrender or a Specified Relevant Adjustment, and "release of capacity" shall be construed accordingly;
"Relevant Adjustment"	means a Quality Adjustment or a Quantum Adjustment, and "adjust" shall be construed accordingly;
"Relevant Enquiry"	means an enquiry made of Network Rail by the Part J Access Beneficiary under Condition J2;
"Relevant Financial Consequences"	means the cost savings or costs incurred referred to in Condition J2.4.1(a);
"Relevant Information"	means information which complies with the provisions of Condition J2.4;
"Relevant Response"	means Network Rail's answer to a Relevant Enquiry under Condition J2;
"Relevant Surrender"	means the surrender to Network Rail of Access Rights possessed by the Part J Access Beneficiary;
"Restrictive Provisions"	means any provisions in the Incumbent's Access Agreement that restrict the operation of the transferring Access Right, and specific timings relating to the transferring Access Right;
"Rights Review Meeting"	means a meeting held between Network Rail and a Part J Access Beneficiary for the purpose of reviewing the Quantum Access Rights held by that Part J Access Beneficiary and its use of them;
"Rights Review Notice"	has the meaning shown in Condition J9.1.2;
"Rights Subject to Surrender"	means, in relation to: (a) a Failure to Use Notice; or (b) a Third Party Notice, as applicable, the Quantum Access Right to which such notice refers and: (i) any Train Slot, including any Y-Path,

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or part of it in the Working Timetable which relates to that Quantum Access Right;

(ii) any Ancillary Movements or Stabling that Network Rail (or the Applicant in relation to Condition J7.3) considers:

(A) are directly associated with the relevant Quantum Access Right; and

(B) will no longer be required by the relevant Part J Access Beneficiary following the surrender or reduction of the Quantum Access Right, as applicable; and

(iii) any Access Proposal relating to any such Quantum Access Right;

"Rights under Review"	shall have the meaning shown in Condition J9.1.2;
"Service Characteristics"	for the purposes of a right surrendered under Condition J7.8, has the meaning shown in the Incumbent's Access Agreement;
"Specified Relevant Adjustment"	means a Relevant Adjustment specified in a Relevant Enquiry;
"Specified Relevant Surrender"	means a Relevant Surrender specified in a Relevant Enquiry;
"Stabling"	has the meaning shown in the relevant Access Agreement;
"Third Party Counter Notice"	means a notice given by the Incumbent to Network Rail under Condition J7.6.1 or Condition J8.2.5;
"Third Party Notice "	means a notice given under Condition J7.2;
"Train Slot"	has the meaning shown in Part D of this code;
"Use Period"	has the meaning shown in Condition J4.2.3;
"Use Quota"	has the meaning shown in Condition J4.2.2; and
"Y-Path"	means a Train Slot incorporated in the

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Working Timetable that is identified as such by the incorporation of the letter "Y" in the operating characteristics part of the Train Slot's heading.

1.3 **Freight Customer Access Option Holders**

1.3.1 Where there is any reference in this Part J:

(a) to any Access Right of a Part J Access Beneficiary (including any reference to any Access Right of an Incumbent in Condition J5, J7 and/or J8) which is an Access Right of a Freight Customer Access Option Holder that has been drawn down by that Freight Customer Access Option Holder into an Access Agreement of an Appointed Operator, then any alteration, adjustment, surrender, agreement, determination or other decision to be made pursuant to this Part J in respect of that Access Right shall be made with reference to and, where required by this Part J, in consultation with, that Freight Customer Access Option Holder, and not that Appointed Operator; and

(b) to any notice or other document being served on a Part J Access Beneficiary (including any notice to be served on an Incumbent pursuant to Condition J5, J7 and/or J8), or a Part J Access Beneficiary being required to serve any notice or other document on any other party, and the notice or other document in question relates to, or otherwise affects, any Access Right of a Freight Customer Access Option Holder that has been drawn down into an Access Agreement of an Appointed Operator, then (save in respect of Condition J3):

(i) any notice or other document to be served on that Part J Access Beneficiary (including any notice to be served on an Incumbent pursuant to Condition J5, J7 and/or J8) shall be served on that Freight Customer Access Option Holder (with a copy to the Appointed Operator for information purposes only); and

(ii) any notice or other document to be served by that Part J Access Beneficiary shall be served by that Freight Customer Access Option Holder (with a copy to the Appointed Operator for information purposes only).

1.3.2 Non-receipt by an Appointed Operator of a copy notice or document pursuant to Condition J1.3.1(b) shall not affect the validity of a notice or document validly served on Network Rail or the relevant Freight Customer Access Option Holder (as the case may be).

1.4 **Transitional Provision**

1.4.1 Where, on the date of implementation of this revised Part J, any notice has already been served under the version of Part J which was in force immediately before this revised Part J took effect ("the previous Part J"), then the previous Part J shall apply in relation to the process, any consequential notice, decision or appeal related to that notice.

1.4.2 On the Principal Change Date in 2012, this Condition J1.4 shall cease to have effect and shall be removed from this Part J.

2 Adjustment of Access Rights

2.1 Obligation of Part J Access Beneficiaries to surrender Access Rights

2.1.1 Without prejudice to the rest of this Part J, a Part J Access Beneficiary shall voluntarily and in good faith surrender those Access Rights or part or parts of such Access Rights in respect of which it has no current or foreseeable reasonable on-going commercial need, provided that an Appointed Operator may not surrender on behalf of a Freight Customer Access Option Holder any Access Right which has been drawn down by that Freight Customer Access Option Holder into the Access Agreement of that Appointed Operator without the written consent of that Freight Customer Access Option Holder.

2.1.2 If a Part J Access Beneficiary wishes to make a Relevant Surrender pursuant to Condition J2.1.1, it shall give Network Rail notice to that effect. The Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J2.1.3.

2.1.3 Network Rail shall notify the Office of Rail Regulation of the relevant modification to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary gives notice to Network Rail agreeing to the Relevant Surrender pursuant to Condition J2.1.2.

2.2 Obligation of Network Rail to answer Part J Access Beneficiary's Relevant Enquiries

2.2.1 Network Rail shall provide the Part J Access Beneficiary with a Relevant Response within 30 Working Days of the making of a Relevant Enquiry.

2.3 Contents of Relevant Enquiries

2.3.1 Each Relevant Enquiry shall contain:

(a) a specification of the Access Rights (if any) which the Part J Access Beneficiary, at that time, is aware that it may be willing to surrender to Network Rail;

(b) a specification of the Access Rights (if any) which the Part J Access Beneficiary, at that time, is aware that it may be willing to adjust;

(c) a request that Network Rail provides the Part J Access Beneficiary with Relevant Information in relation to:

(i) any Specified Relevant Surrender; and

(ii) any Specified Relevant Adjustment;

(d) a specification of the dates with effect from which the Specified Relevant Surrender or Specified Relevant Adjustment may be expected to take place;

(e) a statement whether or not any Specified Relevant Surrender or Specified Relevant Adjustment is to be temporary; and

(f) in the case of a temporary Specified Relevant Surrender or Specified Relevant Adjustment, a specification of the date on which the temporary Specified Relevant Surrender or Specified Relevant Adjustment shall cease to have effect, being no later than the second anniversary of the date when it is to take effect.

2.4 **Information to be provided by Network Rail**

2.4.1 Subject to Condition J3, the Relevant Information which Network Rail shall provide in each Relevant Response shall be a statement of:

(a) the costs which Network Rail may reasonably expect to save or incur if any Specified Relevant Surrender or Specified Relevant Adjustment is made;

(b) the times at which and the periods over which the Relevant Financial Consequences will have effect;

(c) the steps which Network Rail would expect to take to achieve the Relevant Financial Consequences within the times referred to in Condition J2.4.1(b) and the opportunities which Network Rail has to accelerate or postpone the effect of the Relevant Financial Consequences;

(d) the extent to which any Released Capacity may reasonably be expected to be used:

(i) by any other operator of trains or Freight Customer Access Option Holder; and

(ii) in relation to the maintenance, re-alignment, re-configuration, repair or renewal of any part

of the Network;

(e) the reasonably foreseeable financial effects on Network Rail of the release of capacity;

(f) Network Rail's proposals as to the amounts (if any) which should be payable by or to the Part J Access Beneficiary under the Access Agreement as a consequence of the making of any Specified Relevant Surrender or Specified Relevant Adjustment and its reasons for them, including in relation to the sharing between Network Rail and the Part J Access Beneficiary of the Relevant Financial Consequences; and

(g) whether any other person has made an enquiry of Network Rail pursuant to an agreement between that person and Network Rail in relation to the surrender or adjustment of Access Rights under that agreement which, if made, might reasonably be expected to affect the interests of the Part J Access Beneficiary in relation to the Specified Relevant Surrender or Specified Relevant Adjustment in question,

together with such other information as the Part J Access Beneficiary reasonably requests, in each case in a form and amount of detail which is sufficient to enable the Part J Access Beneficiary to make a proper assessment of the effect of the making of the Specified Relevant Surrender or Specified Relevant Adjustment in question.

2.5 **Pre-existing obligations of confidence**

2.5.1 Nothing in this Condition J2 shall require Network Rail to break an obligation of confidence which arose before 1 April 1994.

2.6 **Consultation by Network Rail**

2.6.1 In preparing each Relevant Response, Network Rail shall:

(a) except to the extent otherwise requested by the Part J Access Beneficiary and in accordance with such (if any) conditions as the Part J Access Beneficiary shall specify; and

(b) subject to Condition J3,

carry out such consultation of:

(i) other operators of trains, other Freight Customer Access Option Holders and other persons whom it has reason to believe intend

to become operators of trains or Freight Customer Access Option Holders; and

(ii) any Funders which may be directly affected and of which Network Rail is aware, or ought reasonably to have been aware,

as shall be necessary or expedient so as to enable Network Rail properly to inform itself of the effects on the capacity of the track in question which the Specified Relevant Surrender or Specified Relevant Adjustment in question, if made, is likely to have.

2.7 **Obligation to co-operate**

2.7.1 If:

(a) Network Rail has made any enquiry of a Part J Access Beneficiary in relation to a Relevant Enquiry made by that Part J Access Beneficiary or any other Part J Access Beneficiary under this Condition J2; and

(b) the enquiry is one which the Part J Access Beneficiary may reasonably be expected to answer,

the Part J Access Beneficiary shall provide Network Rail with a response to the enquiry to the extent and in the amount of detail which is reasonable in the circumstances.

2.7.2 Information provided in any response under Condition J2.7.1 shall be treated as Qualifying Information and Condition J3 shall apply accordingly.

2.8 **Estimated costs of providing Relevant Response**

2.8.1 Network Rail:

(a) shall provide the Part J Access Beneficiary, if so requested by it and as soon as reasonably practicable after the request, with:

(i) its best estimate of its costs of providing a Relevant Response; and

(ii) having provided such an estimate, its best estimate of the costs which it has incurred in preparing the Relevant Response in question up to the date of the request or any other date specified in the request; and

(b) shall not, in preparing a Relevant Response, exceed the amount of the estimate without first notifying and obtaining the consent of the Part J Access Beneficiary.

2.9 **Payments of costs of Relevant Responses**

2.9.1 The Part J Access Beneficiary shall:

(a) be entitled to make any request of the kind referred to in Condition J2.8 at the time of making the Relevant Enquiry in question and at any time and from time to time thereafter, and the failure of the Part J Access Beneficiary to make any such request on any occasion shall not prejudice its right to make such a request on a later occasion;

(b) pay to Network Rail an amount calculated pursuant to Condition J2.10; and

(c) be entitled to receive from Network Rail, on request, a certificate from its auditors verifying that the costs referred to in Condition J2.10 have been incurred in providing the Relevant Response.

2.10 **Division and payments of costs**

2.10.1 The amount referred to in Condition J2.9(b) shall be an amount equal to 75 per cent of the amount of Network Rail's reasonable costs of providing the Relevant Response which exceed £1,000 (excluding VAT). Such amount shall be payable not later than 20 Working Days after the later of:

(a) the date upon which the Relevant Response shall be provided; and

(b) the date upon which Network Rail requests payment of the amount in question in an invoice which is sufficient for the purposes of Value Added Tax.

2.10.2 For the purposes of this Condition J2, Network Rail's costs shall include a fair allocation of its administrative and other regional and national costs of carrying on its business.

2.11 **Right to elect to surrender or adjust Access Rights**

2.11.1 If, following receipt of a Relevant Response, the Part J Access Beneficiary:

(a) wishes to have a Specified Relevant Adjustment effected; and

(b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,

it shall be entitled to do so after giving to Network Rail and the Office of Rail Regulation a notice to that effect within 15 Working Days after the date upon which it receives the Relevant Response in question. The Specified Relevant Adjustment shall have effect from the date the Office of Rail Regulation gives its consent to the making of the Relevant Adjustment in question in accordance with Condition J2.13.

2.11.2 If, following receipt of a Relevant Response, the Part J Access Beneficiary:

(a) wishes to make a Specified Relevant Surrender; and

(b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,

it shall give Network Rail notice to that effect within 15 Working Days after the date upon which it receives the Relevant Response in question. The Specified Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J2.11.3.

2.11.3 Network Rail shall notify the Office of Rail Regulation of the relevant modification to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary gives notice to Network Rail agreeing to the Specified Relevant Surrender pursuant to Condition J2.11.2.

2.12 **Right of Part J Access Beneficiary to have Access Rights adjusted**

2.12.1 If it is Determined that the Part J Access Beneficiary should be entitled to make any Relevant Surrender or have any Relevant Adjustment given effect, the Part J Access Beneficiary shall give notice to Network Rail as to whether it elects to exercise that entitlement. If the Part J Access Beneficiary does not give notice to Network Rail within 15 Working Days of the date of the Determination, the Part J Access Beneficiary shall lose the entitlement in question.

2.12.2 If the Part J Access Beneficiary gives notice pursuant to Condition J2.12.1 of an election to exercise an entitlement to make a Relevant Surrender, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J

Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of such notice. Network Rail shall include a copy of the relevant ADRR Determination, if applicable, with the notification.

2.12.3 Any Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J2.12.2.

2.13 **Office of Rail Regulation's consent to a Quality Adjustment of Access Rights**

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2.13.1 Subject to Condition J2.13.4, a Quality Adjustment shall have effect only with, and from the date specified in, in the Office of Rail Regulation's consent.

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2.13.2 Network Rail shall submit the relevant modifications to the Access Agreement or Access Agreements which have the effect of a Quality Adjustment to the Office of Rail Regulation for consent within 10 Working Days of:

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(a) The Part J Access Beneficiary's election to have a Specified Relevant Adjustment effected under Condition J2.11; or

(b) The Part J Access Beneficiary's election to have a Relevant Adjustment effected under Condition J2.12.

2.13.3 Network Rail and the Part J Access Beneficiary shall use all reasonable endeavours to procure that the Office of Rail Regulation is furnished with sufficient information and evidence as it requires to determine:

(a) whether or not to give its consent to the making of the Quality Adjustment in question or to part only of the modifications submitted to it: and

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(b) the date from which the Quality Adjustment, or part only, shall have effect.

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2.13.4 The Office of Rail Regulation's consent is not required in respect of a Quality Adjustment where the Quality Adjustment has been Determined by the Office of Rail Regulation in accordance with Condition J11.

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3 Confidentiality

3.1 Affected Persons and their interests

3.1.1 If, having received a Relevant Enquiry, Network Rail has reasonable grounds for believing that, in order to provide the Relevant Response:

(a) it is necessary for it to disclose to the Part J Access Beneficiary any Qualifying Information; and

(b) such disclosure would or might, in Network Rail's reasonable opinion, seriously and prejudicially affect the interests of the Affected Person,

Network Rail shall give notice to that effect to the Part J Access Beneficiary.

3.2 Part J Access Beneficiary's right to elect for Relevant Response without Qualifying Information

3.2.1 Having received a notice from Network Rail pursuant to Condition J3.1, the Part J Access Beneficiary shall be entitled, by notice given to Network Rail, to elect either:

(a) that the Relevant Response be provided to it without the Qualifying Information; or

(b) that Network Rail should give notice to the Affected Person in question pursuant to Condition J3.4 and thereafter comply with the procedures established in this Condition J3.

3.2.2 Network Rail shall not proceed with its preparation of the Relevant Response until the Part J Access Beneficiary has made its election.

3.3 Relevant Response without Qualifying Information

3.3.1 If the Part J Access Beneficiary makes an election pursuant to Condition J3.2.1(a):

(a) Network Rail shall proceed to prepare and provide the Relevant Response so as to omit the Qualifying Information; and

(b) if, having received a Relevant Response of the kind referred to in Condition J3.3.1(a), the Part J Access Beneficiary wishes Network Rail to revise it so as to

include any Qualifying Information, it shall be entitled to do so by notice to Network Rail.

3.3.2 If the Part J Access Beneficiary gives notice to Network Rail pursuant to Condition J3.3.1(b), Network Rail shall proceed to give notice to the Affected Person in question pursuant to Condition J3.4 and thereafter comply with the procedures established in this Condition J3.

3.4 **Relevant Response with Qualifying Information**

3.4.1 If the Part J Access Beneficiary makes an election pursuant to Condition J3.2.1(b), Network Rail shall give notice to the Affected Person that it has grounds for a belief of the kind referred to in Condition J3.1.

3.5 **Contents of notice to Affected Person**

3.5.1 The notice given to the Affected Person pursuant to Condition J3.4 shall be accompanied by:

(a) a statement of the information which Network Rail considers it necessary to disclose; and

(b) a statement to the effect that, unless the Affected Person gives notice to Network Rail within 15 Working Days of his receipt of the notice that he objects to the disclosure in question, that person shall have lost the right to object to its disclosure.

3.6 **Entitlement of Network Rail to include Qualifying Information if no Notice of Objection**

3.6.1 Subject to Condition J2.5, if no Notice of Objection has been given to Network Rail within the Period for Objections, Network Rail shall be entitled to include the Qualifying Information in the Relevant Response.

3.7 **Discretion of the Allocation Chair to order confidentiality**

3.7.1 If Network Rail has received a Notice of Objection within the Period for Objections, it shall immediately give notice of that fact to the Part J Access Beneficiary and the Secretary who shall pass that notice to the Allocation Chair.

3.7.2 The notice given to the Part J Access Beneficiary pursuant to Condition J3.7.1 shall not contain any indication as to the identity of the Affected Person, whether by stating its name, the nature of its business or any information which may enable the Part J Access Beneficiary to determine its identity.

3.7.3 The notice given to the Secretary shall be accompanied by:

(a) a copy of the Notice of Objection;

(b) an explanation by Network Rail as to its reasons for the belief referred to in Condition J3.1; and

(c) a request for directions of the kind referred to in Condition J3.7.4.

3.7.4 The parties shall comply with such directions which the Allocation Chair gives them in relation to the preservation of the positions of the parties (including the Affected Person) and the confidentiality of the Qualifying Information pending the determination of the matter. No such directions shall have effect for a period which is longer than 90 days without being renewed by the Allocation Chair.

3.8 **Allocation Chair's directions as to preservation of confidentiality of Qualifying Information**

3.8.1 In a case to which Condition J3.7 applies, and subject to Condition J2.5, Network Rail shall be entitled to include Qualifying Information in a Relevant Response except where directed not to do so by the Allocation Chair, to the extent stated and subject to such conditions (if any) as shall be specified in the direction (a "Confidentiality Direction").

3.8.2 No Relevant Response containing Qualifying Information shall be given until after the expiry of the period specified by the Allocation Chair in any directions of the kind referred to in Condition J3.7.4.

3.9 **Grounds on which the Allocation Chair may order confidentiality**

3.9.1 A Confidentiality Direction shall only have effect if:

(a) it is stated by the Allocation Chair to have been given on the grounds that:

(i) the disclosure to the Part J Access Beneficiary of the Qualifying Information in question would or might seriously and prejudicially affect the interests of the Affected Person; and

(ii) such prejudice outweighs or is likely to outweigh the interests of Freight Customer Access Option Holders, potential Freight Customer Access Option Holders, operators and potential operators of railway assets, in each case on the part of the Network in question in its disclosure to the Part J Access Beneficiary, having due regard to the matters about which duties are imposed on the Office of Rail Regulation by section 4 of the Act; and

(b) the Allocation Chair has complied with the requirements specified in Conditions J3.11 and J3.12.

3.10 **Opportunity to make representations to the Allocation Chair**

3.10.1 Within 20 Working Days of the Allocation Chair's receipt of a notice pursuant to Condition J3.7.1 (or such longer period as the Office of Rail Regulation may allow), each of Network Rail, the Part J Access Beneficiary and the Affected Person shall be entitled to make representations to the Allocation Chair:

(a) as to whether it considers that the Allocation Chair should exercise his discretion to give a Confidentiality Direction; and, if so

(b) the extent and conditions of the Confidentiality Direction.

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3.10.2 Any such representations shall be accompanied by the reasons why the person in question believes the Allocation Chair should or should not (as the case may be) give a Confidentiality Direction.

3.11 **Hearing on confidentiality representations**

3.11.1 If he has received any representations of the kind contemplated by Condition J3.10, the Allocation Chair shall be entitled to hear the parties on the matter. The Allocation Chair has an absolute discretion as to the procedure to be followed in any such hearing, and may at any time amend it if he considers it necessary to do so for the fair resolution of the matter.

3.12 **Written reasons for decision**

3.12.1 If any representations have been made to him pursuant to Condition J3.10, unless the parties concerned otherwise agree, the Allocation Chair shall provide them with his reasons for his determination. Such reasons shall be given in writing.

3.13 **Immunity of the Allocation Chair**

3.13.1 The Allocation Chair shall not be liable in damages or otherwise for any act or omission to act on their part (including negligence) in relation to any reference to them under this Condition J3.

3.13.2 Each of the Part J Access Beneficiary and Network Rail shall:

(a) indemnify and hold harmless the Allocation Chair, against every claim which may be made against any of them in relation to any of the matters referred to in Condition J3.13.1; and

(b) to the extent that it is the creditor in the indemnity in Condition J3.13.2(a), hold the benefit of that indemnity upon trust as bare trustee for the benefit of the Allocation Chair.

3.13.3 No provision of the Access Agreement which operates so as to exclude or restrict the liability of either party shall apply to the obligations of the parties under this Condition J3.13.

3.14 **Preservation of confidentiality of Qualifying Information pending determination**

3.14.1 In making any determination of the kind contemplated by this Condition J3, the remit of the Allocation Chair shall include a requirement that:

(a) any hearing of the kind contemplated by Condition J3.11 shall be conducted in such a way as not to disclose any part of the Qualifying Information; and

(b) the reasons for the Allocation Chair's determination shall, if given to the parties, not disclose to the Part J Access Beneficiary any part of the Qualifying Information.

3.15 **Obligation to provide Confidentiality Undertaking**

3.15.1 If:

(a) an Affected Person has given notice to Network Rail that it does not propose to give a Notice of Objection within the Period for Objections; or

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<#>If Network Rail, the Part J Access Beneficiary or the Affected Person is dissatisfied with the Allocation Chair's determination, it may refer the matter to the Office of Rail Regulation under Part M.¶

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(b) the Allocation Chair has determined that no Confidentiality Direction shall be given in relation to Qualifying Information; or

(c) the Affected Person requires Network Rail to procure that the Part J Access Beneficiary gives a Confidentiality Undertaking for the benefit of the Affected Person,

the Part J Access Beneficiary shall deliver to Network Rail an undertaking of strict confidentiality in relation to the Qualifying Information (a "Confidentiality Undertaking").

3.15.2 A Confidentiality Undertaking shall:

(a) contain an undertaking that the person giving it will hold the Qualifying Information disclosed to it strictly confidential and will not, without the consent of the Affected Person, disclose it to any person except in any of the circumstances referred to in Clause 14.2(a)-(k) (entitlement to divulge) of the Office of Rail Regulation's Model Passenger and Model Freight Track Access Contracts and clause 14.2(a)-(l) of the Office of Rail Regulation's Model Track Access Contract (Freight Customer Access)), in each case subject to the conditions which apply to such disclosures under that Clause;

(b) contain no limitations on the liability of the person who gives it in the case of its breach; and

(c) in every other respect, be unqualified.

3.15.3 A Confidentiality Undertaking shall be:

(a) given to Network Rail by the Part J Access Beneficiary as soon as reasonably practicable after Network Rail has requested the Part J Access Beneficiary to provide it; and

(b) held by Network Rail upon trust for the Affected Person.

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3.15.4 If the Part J Access Beneficiary fails to comply with its obligations under this Condition J3.15, Network Rail shall not include the Qualifying Information in its Relevant Response.

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4 Failure to Use

4.1 Failure to Use

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4.1.1 Subject to Conditions J4.1.2 and J4.3, a Failure to Use in relation to a Quantum Access Right occurs if:

(a) in any New Working Timetable established by Network Rail after the Commencement Date, the Part J Access Beneficiary fails to secure the quantum of Train Slots which the Quantum Access Right permits; or

(b) the Part J Access Beneficiary fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right.

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4.1.2 Condition J4.1.1(a) shall not apply where the Part J Access Beneficiary was unable to secure the necessary quantum of Train Slots permitted by the Quantum Access Right because of Restrictions of Use that are set out in the relevant Engineering Access Statement.

4.1.3 For the purposes of Condition J4.1.1(b), the Part J Access Beneficiary fails to make use of a Train Slot if it uses the Train Slot for less than the Use Quota during the relevant Use Period.

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4.1.4 For the purposes of Condition J4.1.1(b) and J4.1.3, a Freight Customer Access Option Holder fails to make use of a Train Slot if either:

(a) it fails to draw down the Access Rights to use such Train Slot into the Access Agreement of an Appointed Operator resulting in such Train Slot not being used by an Appointed Operator; or

(b) it draws down the Access Rights to use such Train Slot into the Access Agreement of an Appointed Operator and that Appointed Operator fails to make use of that Train Slot within the meaning of condition J4.1.3.

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4.2 Use Quota and Use Period

4.2.1 The Use Quota and Use Period shall apply to services for the carriage of goods by railway and passengers.

4.2.2 The Use Quota shall be one.

4.2.3 The Use Period shall be thirteen consecutive weeks for which a Train Slot is included in the Working Timetable. Where a Train Slot is derived from a Quantum Access Right which permits a Train Slot to be obtained on more than one day of the week, the use of the Train Slot on each relevant day of the week shall be assessed separately.

4.2.4 A train movement shall not count towards the Use Quota if it is made with the primary purpose of achieving the Use Quota for that Train Slot.

4.3 Certain periods to be disregarded

4.3.1 Any period of non-use shall be disregarded for the purpose of determining whether a Failure to Use has occurred under Condition J4.1.1(a) or (b) if, and to the extent that, such non-use is:

(a) attributable to non-economic reasons beyond the Part J Access Beneficiary's control; and

(b) is temporary in nature.

4.4 Service of Failure to Use Notice

4.4.1 If Network Rail considers there has been a Failure to Use by a Part J Access Beneficiary and that Failure to Use is continuing it may serve a Failure to Use Notice on the Part J Access Beneficiary requiring the Part J Access Beneficiary to surrender Rights Subject to Surrender.

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Deleted: determine different Use Quotas and/or different Use Periods for different categories of services for the carriage of:¶ passengers by railway; and¶ goods by railway;¶ specify the characteristics of train movements that will count or will not count, as applicable, toward any Use Quota; and¶ specify such other matters as the Office of Rail Regulation considers are necessary or expedient to give effect to any Use Quota or Use Period.

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4.5 Cessation of Failure to Use

4.5.1 Before a Failure to Use Notice has been served in accordance with Condition J4.4, there will be a cessation of a Failure to Use if, in relation to a Failure to Use under Condition J4.1.1(b), the Part J Access Beneficiary makes use of a relevant Train Slot such that the Use Quota is met.

4.6 Contents of a Failure to Use Notice

4.6.1 A Failure to Use Notice shall specify:

(a) the Failure to Use which Network Rail considers has occurred;

(b) the Rights Subject to Surrender which Network Rail requires the Part J Access Beneficiary to surrender; and

(c) the date on which the Surrender is intended to take effect.

4.7 Acceptance of surrender

4.7.1 If the Part J Access Beneficiary agrees to the surrender specified in the Failure to Use Notice then:

(a) it shall, within 10 Working Days, notify Network Rail and the Office of Rail Regulation;

(b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J4.7.1(c); and

(c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary agrees to the surrender pursuant to Condition J4.7.1(a).

4.8 Counter Notice

4.8.1 The Part J Access Beneficiary may, within 10 Working Days of receipt of a Failure to Use Notice, serve a Counter Notice on Network Rail stating that:

(a) it considers the Failure to Use Notice to be invalid;

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<#> in relation to a Failure to Use under Condition J4.2.1(a):¶
<#>the Part J Access Beneficiary Bids for a Train Slot in respect of the relevant Quantum Access Right before the compilation of a subsequent First Working Timetable; and¶
<#>Network Rail has not served a Failure to Use Notice before the Bid under Condition J4.6(a)(i) is made; and¶

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(b) there has been no Failure to Use or there has been a cessation of a Failure to Use in accordance with Condition J4.5; and/or

(c) any Ancillary Movements and/or Stabling specified in the Failure to Use Notice as being Rights Subject to Surrender:

(i) are not directly associated with the relevant Quantum Access Right; and/or

(ii) would still be required by the Part J Access Beneficiary following the surrender of the relevant Quantum Access Right; and/or

(d) there is a Ground for Objection to the proposed surrender within Condition J4.9, detailing the Ground for Objection on which it relies,

and must provide evidence with the Counter Notice in support of its contentions.

4.8.2 If no Counter Notice is served within 10 Working Days of receipt of a Failure to Use Notice:

(a) the Part J Access Beneficiary will be deemed to have agreed to the surrender specified in the Failure to Use Notice;

(b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J4.8.2(c); and

(c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary is deemed to have agreed to the surrender pursuant to Condition J4.8.2(a).

4.9 **Ground for Objection**

4.9.1 A Train Operator may object to a surrender specified in a Failure to Use Notice on the grounds that:

the Rights Subject to Surrender relate to an enhancement of the Network for which the Train Operator is contracted to pay through access charges ("Ground for Objection").

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<#>set out in Condition J4.10.1(b), in the case of Train Operators only; or¶
<#>that it has a reasonable on-going commercial need in respect of any or all of the Rights Subject to Surrender.¶
¶
¶

4.10 **Network Rail agrees with the Part J Access Beneficiary**

4.10.1 If Network Rail agrees with the Part J Access Beneficiary:

(a) that the matters set out in Condition J4.8.1(a), (b) or (c) have been substantiated; or

(b) that the Part J Access Beneficiary's Ground for Objection has been substantiated in respect of any or all of the Rights Subject to Surrender,

the Failure to Use Notice shall have failed and Network Rail shall notify the Part J Access Beneficiary in writing that this is the case within 5 Working Days of receipt of the Counter Notice.

4.11 **Network Rail does not agree with the Part J Access Beneficiary**

4.11.1 If Network Rail considers that:

(a) the matters set out in Condition J4.8.1(a), (b) or (c) have not been substantiated; and

(b) the Part J Access Beneficiary's Ground for Objection have not been substantiated in respect of any or all of the Rights Subject to Surrender,

then it shall notify the Part J Access Beneficiary in writing that this is the case within 5 Working Days of receipt of the Counter Notice.

4.12 **Surrender of Access Rights**

4.12.1 The surrender of the Rights Subject to Surrender will occur:

(a) where either the Part J Access Beneficiary accepts Network Rail's decision made pursuant to Condition J4.11 or there is an ADRR Determination, on the date on which such notice is given to the Office of Rail Regulation pursuant to Condition J4.12.2; or

(b) on the date specified in the Office of Rail Regulation Determination, if applicable.

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4.12.2 In the event of the Part J Access Beneficiary accepting Network Rail's decision or there is an ADRR Determination in accordance with Condition J4.12.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of the acceptance or of the relevant ADRR Determination, as applicable and shall include a copy of the relevant ADRR Determination, if applicable, with such notice.

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4.13 **Access Proposals**

4.13.1 Where any Rights Subject to Surrender surrendered under this Condition J4 include the surrender of an Access Proposal, Network Rail's obligations under Condition D2.4 shall cease to have effect in respect of that Access Proposal as from the date the surrender takes effect in accordance with this Condition J4.

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5 Failure to Use: third party application

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5.1 Failure to Use Notices

5.1.1 If:

(a) Network Rail receives an application from a Part J Access Beneficiary (the "Applicant") for a Quantum Access Right to a Train Slot; and

(b) the Train Slot:

(i) is one in respect of which the Applicant can demonstrate a reasonable commercial need; and

(ii) was secured in exercise of a Quantum Access Right of another Part J Access Beneficiary (the "Incumbent"); and

(iii) is one in respect of which there is a Failure to Use by the Incumbent,

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then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a Failure to Use Notice under Condition J4.4 on the Incumbent. If the Applicant's application does not comply with this Condition J5.1, then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a notice on the Applicant rejecting its

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application and setting out its reasons for rejecting the application.

5.2 **Cessation of Failure to Use**

5.2.1 For the purposes of Condition J5.1(b)(iii), there will have been a cessation of a Failure to Use if the test in Condition J4.5 has been met.

5.3 **Application of Conditions**

5.3.1 The following Conditions shall apply following service on the Incumbent of a Failure to Use Notice as they apply to a Failure to Use Notice:

(a) J4.7 (Acceptance of surrender);

(b) J4.8 (Counter Notice);

(c) J4.9 (Grounds for Objection)

(d) J4.10 (Network Rail agrees with the Part J Access Beneficiary);

(e) J4.11 (Network Rail does not agree with the Part J Access Beneficiary);

(f) J4.12 (Surrender of Access Rights), where in respect of this Condition J5, any relevant Determination is between Network Rail and the Incumbent, then the Applicant shall accept that the Determination will also dispose of the matter as between the Applicant and Network Rail; and

(g) J4.13 (Access Proposals), as if that Condition referred to a surrender under this Condition J5.

5.4 **Counter Notice**

5.4.1 Subject to the redaction of any commercially sensitive information, the Incumbent shall send a copy of any Counter Notice issued under Condition J5.3.1(b) to the Applicant.

6 **Cordon Cap Reduction (Failure to Use)**

6.1 **Application of this Condition J6**

6.1.1 This Condition J6 shall not apply if, in accordance with Conditions J4 or J5, the Part J Access Beneficiary and Network

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<#>A Third Party Failure to Use Notice shall specify:¶
<#>the Failure to Use which Network Rail considers has occurred;¶
<#>the Rights Subject to Surrender, which Network Rail requires the Incumbent to surrender; and¶
<#>the date on which the surrender is intended to take effect.¶

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Rail agree or it is Determined that in relation to the relevant Failure to Use there are no Rights Subject to Surrender.

6.2 Cordon Cap Reduction procedure

6.2.1 Where any Rights Subject to Surrender specified by Network Rail in a Failure to Use Notice or a Failure to Use Notice, as applicable, relate to Level Two Rights and concern a location where the Part J Access Beneficiary on whom the notice has been served has an Existing Cordon Cap, the provisions of this Condition J6 will apply in addition to Conditions J4 or J5.

6.2.2 The Failure to Use Notice, in addition to the matters set out in Condition J4.6 or J5.3, as applicable, may specify the amount by which Network Rail considers, in accordance with Condition J6.2.3, an Existing Cordon Cap should be reduced (the "Cordon Cap Reduction") if Rights Subject to Surrender were surrendered by the Part J Access Beneficiary under Conditions J4 or J5, as applicable.

6.2.3 The Cordon Cap Reduction shall be calculated in accordance with the following formula:

Cordon Cap Reduction = (Rr/R) x C

(a) where "Rr" means the number of Level 2 Rights being transferred, "R" means the total number of Level 2 Rights related to the cordon cap held by the Part J Access Beneficiary before transfer and "C" means the Part J Access Beneficiary's cordon cap before transfer; and

(b) where application of the formula does not result in a whole number, the result shall be rounded down to the nearest whole number.

6.2.4 If the Part J Access Beneficiary agrees to the Cordon Cap Reduction:

(a) it shall give notice to that effect to Network Rail, served in accordance with Condition J4.7.1(a) or J5.4.1(a), as applicable;

(b) Network Rail shall give notice to the Office of Rail Regulation, served in accordance with Condition J4.7.1(c) or J5.3.1(a), as applicable; and

(c) the Cordon Cap Reduction shall have effect from the date on which notice is given to the Office of Rail Regulation by Network Rail pursuant to Condition J6.2.4(b).

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6.2.5 If the Part J Access Beneficiary does not agree to the Cordon Cap Reduction, it shall serve a Counter Notice, in accordance with Condition J4.8 or J5.3.1(b), as applicable:

(a) specifying that it objects to the Cordon Cap Reduction and setting out its reasons why; and

(b) providing evidence in support of its objection.

6.2.6 Condition J4.8.2 shall apply as if that Condition referred to a Cordon Cap Reduction rather than a surrender.

6.2.7 If the Part J Access Beneficiary and Network Rail agree or it is Determined that the Cordon Cap Reduction shall not take effect, the Failure to Use Notice shall cease to have effect to the extent that it relates to a Cordon Cap Reduction.

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6.3 Effective Date of Cordon Cap Reduction

6.3.1 If it is Determined that the Cordon Cap Reduction shall have effect, then the Cordon Cap Reduction shall have effect from the date:

(a) on which notice is given to the Office of Rail Regulation pursuant to Condition J6.3.2, in the event of an ADRR Determination; or

(b) specified in the Office of Rail Regulation Determination, if applicable.

6.3.2 In the event of an ADRR Determination in accordance with Condition J6.3.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of the ADRR Determination and shall include a copy of the relevant ADRR Determination with such notice.

6.3.3 Where the Cordon Cap Reduction is specified in a Failure to Use Notice, any relevant Determination will be between Network Rail and the Incumbent, and the Applicant shall accept that the Determination will dispose of the matter as between the Applicant and Network Rail.

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7 Freight transfer mechanism

7.1 Application of this Condition J7

7.1.1 This Condition J7 applies only to services for the carriage of goods by railway.

7.1.2 This Condition J7 applies only to an application for a Quantum Access Right from an Applicant which is either:

(a) a Train Operator, who is replacing the Incumbent in the provision of transport services to a third party, where the Quantum Access Right relates to the provision of those transport services (subject, where applicable, to any competitive tendering process amongst other parties); or

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(b) a Freight Customer Access Option Holder, where the Quantum Access Right sought is:

(i) currently held by an Incumbent which is a Train Operator for the provision of transport services to or on behalf of that Freight Customer Access Option Holder; and

(ii) one which that Freight Customer Access Option Holder intends (subject, where applicable, to any competitive tendering process amongst other parties, including, if applicable, the Incumbent) to draw down into the Access Agreement of a Train Operator (whether or not the Incumbent) so that such Train Operator can become an Appointed Operator to provide those transport services to or on behalf of the Freight Customer

Access Option Holder.

7.2 **Third Party Notice**

7.2.1 Where a Part J Access Beneficiary wants to hold a Quantum Access Right ("the Applicant") that is substantially similar to an existing Quantum Access Right of another Part J Access Beneficiary (the "Incumbent") then it shall serve a Third Party Notice on the Incumbent and send a copy of that notice to Network Rail.

7.3 **Applicant's responsibilities**

7.3.1 When making an application to the Incumbent of the type described in Condition J7.2, the Applicant shall specify in the application:

(a) the Quantum Access Right sought by the Applicant;

(b) the Rights Subject to Surrender which the Applicant requires the Incumbent to Surrender in order to accommodate the Applicant's request;

(c) the date on which the Applicant requests that the Quantum Access Right takes effect in its Access Agreement;

(d) that it has suitable access to and from the freight customer's relevant facility in accordance with paragraph 6.4 of its Access Agreement; and

(e) that the Quantum Access Right sought has the characteristics described in either Condition J7.1.2(a) or Condition J7.1.2(b) (as the case may be). Where Condition J7.1.2(a) is being relied on, the Applicant must attach a letter from the relevant freight customer confirming the circumstances which mean Condition J7.1.2(a) applies.

7.4 **Acceptance of surrender**

7.4.1 If the Incumbent agrees to the surrender specified in the Third Party Notice, then:

(a) it shall, within 10 Working Days, give notice to that effect to the Applicant and copy this to Network Rail;

(b) the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's (and, if applicable, Appointed Operator's)

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specify in the application:

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<#>A Third Party Notice shall specify:¶
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Access Agreement on the date on which notice is given to the Office of Rail Regulation pursuant to Condition J7.4.1(c); and

(c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Beneficiary agrees to the surrender pursuant to Condition J7.4.1(a).

7.5 **Third Party Counter Notice**

7.5.1 The Incumbent may, within 10 Working Days of receipt of a Third Party Notice, serve a Third Party Counter Notice on Network Rail specifying that it objects to the surrender because the Incumbent requires the Rights to Surrender to continue to convey traffic for another customer and this currently is the primary purpose for which the Rights Subject to Surrender are used ("Grounds for Objection"). The Incumbent shall provide evidence in support of its Grounds for Objection. The Incumbent shall send a copy of any Counter Notice, subject to the redaction of any commercially sensitive information, to the Applicant.

7.5.2 If the Incumbent disagrees with:

(a) any Train Slots shown in the Third Party Notice as relating to the Quantum Access Right; or

(b) any Ancillary Movements or Stabling the Applicant included in the Third Party Notice as being directly related to the Quantum Access Right and no longer required by the Incumbent following the surrender of the Quantum Access Right; or

(c) any Access Proposal shown in the Third Party Notice as relating to the Quantum Access Right,

it shall include in the Third Party Counter Notice details of why it disagrees with the Applicant.

7.5.3 If the Quantum Access Right sought by the Applicant is the subject of a competitive tendering process amongst other parties including the Incumbent, then the Incumbent:

(a) may notify Network Rail of this process; and

(b) if it has done so, the period of 10 Working Days referred to in Condition J7.5.4 shall be deemed to commence on the date that the third party or Freight Customer Access Option Holder (as the

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case may be) indicates, at the end of the relevant tendering process, its intention to contract.

7.5.4 If no Third Party Counter Notice is served within 10 Working Days of receipt of a Third Party Notice:

(a) the Incumbent will be deemed to have agreed to the surrender of the Rights Subject to Surrender specified in the Third Party Notice and the Applicant will notify Network Rail, copied to the Incumbent, that this is the case;

(b) the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's (and, if applicable, Appointed Operator's) Access Agreement with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J7.5.4(c); and

(c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Incumbent's, Applicant's and, if applicable, Appointed Operator's Access Agreements no more than 10 Working Days after the date on which the Part J Access Beneficiary is deemed to have agreed the surrender pursuant to Condition J7.5.4(a).

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7.6 **Network Rail agrees with Incumbent**

7.6.1 If Network Rail considers that the Grounds of Objection in the Third Party Counter Notice have been substantiated then, subject to any appeal under Condition J11, the Applicant's application will have failed. Network Rail shall notify the Applicant in writing that this is the case, copied to the Incumbent, within 5 Working Days of receipt of the Third Party Counter Notice and shall set out the reasons for such failure.

7.7 **Network Rail agrees with Applicant**

7.7.1 If Network Rail considers that the Incumbent's Grounds of Objection in the Third Party Counter Notice have not been substantiated, then Network Rail shall notify the Incumbent in writing that this is the case, copied to the Applicant, within 5 Working Days of receipt of the Third Party Counter Notice.

7.7.2 Where the Incumbent has disagreed with the Applicant in accordance with Condition J7.5.2, then Network Rail shall, in the notification referred to in Condition J7.7.1, set out what it determines the Rights Subject to Surrender to be.

7.8 **Surrender of Access Rights**

7.8.1 The surrender of the Rights Subject to Surrender will be deemed to have occurred:

(a) where either the Incumbent accepts Network Rail's decision made pursuant to Condition J7.7 or there is an ADRR Determination, on the date on which such notice is given to the Office of Rail Regulation pursuant to Condition J7.8.2; or

(b) on the date specified in the Office of Rail Regulation Determination, if applicable.

7.8.2 In the event of the Incumbent accepting Network Rail's decision or there is an ADRR Determination in accordance with Condition J7.8.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of the acceptance or of the relevant ADRR Determination, as applicable and shall include a copy of the relevant ADRR Determination, if applicable, with such notice.

7.8.3 In respect of this Condition J7.8, any relevant Determination will be between Network Rail and the Incumbent, and the Applicant shall accept that the Determination will dispose of the matte as between the Applicant and Network Rail.

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<#> may notify Network Rail of this process; and ¶
<#>if it has done so, the period of 10 Working Days referred to in this Condition J7.6 shall be deemed to commence on the date that the third party or Freight Customer Access Option Holder (as the case may be) indicates its intention to contract at the end of the relevant tendering process.¶

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<#>on which notice is given to the Office of Rail Regulation pursuant to Condition J7.8.2, in the event of an ADRR ... [8]

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7.9 Grant to Applicant

7.9.1 Network Rail shall, through the issue of a notice to both the Applicant and the Incumbent, grant to the Applicant the rights surrendered by the Incumbent under this Condition J7. Such rights shall be granted to the Applicant:

(a) as from the latest of the following dates on which:

(i) notice is given to the Office of Rail Regulation pursuant to Condition J7.5.4(c), J7.4.1(c) or J7.8.2 or the date specified in the Office of Rail Regulation Determination (as applicable);

(ii) the date on which the Applicant requested that the Quantum Access Right take effect in its Access Agreement pursuant to Condition J7.3.1(a); or,

(iii) the Applicant's Access Agreement is modified to include, where applicable, any relevant Restrictive Provisions associated with such rights contained in the Incumbent's Access Agreement; or

(iv) the relevant Cordon Cap Increase, if any, has effect pursuant to Condition J8;

(b) with Service Characteristics in substantially the same form as the Rights Subject to Surrender; and

(c) for a period of time:

(i) equal to that which the Incumbent would have enjoyed had the rights remained with the Incumbent; or

(ii) until expiry of the Applicant's Access Agreement,

whichever is the shorter.

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7.10 **Access Proposals**

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7.10.1 Where any Rights Subject to Surrender surrendered under this Condition J7 include the surrender of an Access Proposal, Network Rail's obligations under Condition D2.4 shall, in respect of that Access Proposal:

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(a) cease to have effect in relation to the Incumbent as from the date the surrender takes effect in accordance with this Condition J7; and

(b) be deemed to have effect in relation to the Applicant as from the date the Access Proposal is granted to the Applicant in accordance with Condition J7.10.

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8 Cordon Cap Reduction (transfer)

8.1 Application of this Condition J8

8.1.1 This Condition J8 shall not apply if, in accordance with Condition J7, the Incumbent and Network Rail agree or it is Determined that in relation to any Quantum Access Right sought by the Applicant there are no Rights Subject to Surrender.

8.2 Existing Cordon Cap adjustments procedure

8.2.1 Where any Rights Subject to Surrender specified by Network Rail in a Third Party Notice relate to Level Two Rights and concern a location where either the Incumbent has an Existing Cordon Cap or Network Rail considers that a new cordon and/or cordon Cap should be incorporated into the Applicant's Access Agreement the provisions of Condition J8 will apply in addition to Condition J7.

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8.2.2 The Third Party Notice, in addition to the matters set out in Condition J7.4, may specify the amount by which the Applicant considers, in accordance with Condition J8.2.3, an Existing Cordon Cap (the "Cordon Cap Reduction") should be reduced if Rights Subject to Surrender were surrendered by the Incumbent under Condition J7.

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8.2.3 The Cordon Cap Reduction shall be calculated in accordance with the following formula:

Cordon Cap Reduction = (Rr/R) x C

(a) where "Rr" means the number of Level 2 Rights being transferred, "R" means the total number of Level 2 Rights related to the cordon cap held by the Part J Access Beneficiary before transfer and "C" means the

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Part J Access Beneficiary's cordon cap before transfer; and

(b) where application of the formula does not result in a whole number, the result shall be rounded down to the nearest whole number.

8.2.4 If the Incumbent agrees to the Cordon Cap Reduction it shall give notice to that effect to Network Rail, as part of its notice served in accordance with Condition J7.4.

8.2.5 If the Incumbent does not agree to the Cordon Cap Reduction, it shall serve a Third Party Counter Notice, as part of its notice served in accordance with Condition J7.5:

(a) specifying that it objects to the Cordon Cap Reduction and setting out its reasons why; and

(b) providing evidence in support of its objection.

8.2.6 Condition J7.5.4 shall apply as if that Condition referred to a Cordon Cap Reduction rather than a surrender.

8.2.7 Condition J7.5.3 shall apply.

8.2.8 If the Incumbent and Network Rail agree or it is Determined that the Incumbent has a reasonable on-going commercial need for its Existing Cordon Cap, the Third Party Notice shall cease to have effect to the extent it relates to a Cordon Cap Reduction.

8.2.9 Where the Cordon Cap Reduction is specified in a Third Party Notice, any relevant Determination will be between Network Rail and the Incumbent, and the Applicant shall accept that the Determination will dispose of the matter as between the Applicant and Network Rail.

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8.3 **Cordon Cap Increase**

8.3.1 If Network Rail considers that a new cordon and/or cordon cap should be incorporated into the Applicant's Access Agreement, it shall serve a notice on the Applicant specifying the increase that Network Rail considers should be made to the Applicant's Existing Cordon Cap or, where no cordon or cordon cap exists in the Applicant's Access Agreement, provide to the Applicant a new cordon and/or cordon cap (in either case a "Cordon Cap Increase") to take effect at the same time as the corresponding Relevant Surrender.

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8.3.2 The Applicant may, within 10 Working Days of receipt of a notice from Network Rail under Condition J8.3.1, serve a Counter Notice on Network Rail:

(a) specifying that it objects to the Cordon Cap Increase; and

(b) providing reasons for its objection.

8.3.3 If no Counter Notice is served within 10 Working Days of receipt of a notice from Network Rail under Condition J8.3.1 the Applicant will be deemed to have agreed to the Cordon Cap Increase specified in the notice.

8.3.4 Subject to Condition J8.4, a Cordon Cap Increase shall be granted to the Applicant:

(a) as from the date of the corresponding Relevant Surrender; and

(b) for a period of time:

(i) equal to that which the Incumbent would have enjoyed had its Existing Cordon Cap remained unchanged; or

(ii) until the expiry of the Applicant's Access Agreement,

whichever is the shorter.

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8.4 **Office of Rail Regulation's consent to or Determination of a Cordon Cap Reduction or Cordon Cap Increase**

8.4.1 Subject to Condition J8.4.2, any Cordon Cap Reduction or Cordon Cap Increase shall have effect only with the Office of Rail Regulation's consent in accordance with Condition J10. Such consent shall be sought by Network Rail submitting the

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relevant modifications to the Incumbent's, Applicant's and, if applicable, Appointed Operator's Access Agreements to the Office of Rail Regulation for consent within 10 Working Days after the later of:

(a) the Incumbent's acceptance of the Cordon Cap Reduction under Condition J8.2.6;

(b) the Incumbent's deemed acceptance of the Cordon Cap Reduction under Condition J8.2.7; or

(c) the relevant ADRR Determination.

8.4.2 Network Rail, the Incumbent and the Applicant shall use all reasonable endeavours to procure that the Office of Rail Regulation is furnished with sufficient information and evidence as it requires to determine:

(a) whether or not to give its consent to the modifications in question; and

(b) the date from which those modifications shall have effect.

8.4.3 The Cordon Cap Reduction or Cordon Cap Increase shall have effect from the date the Office of Rail Regulation issues a notice to the parties giving its consent to the reduction or increase. If the Office of Rail Regulation does not consent to the reduction or increase, it shall:

(a) issue a notice to the parties setting out why consent has been refused; or

(b) issue a notice requiring the parties to the relevant Access Agreement to modify the Cordon Cap Reduction and/or Cordon Cap Increase as specified in the notice, to take effect on the date stated in the notice. No such notice shall have effect unless the Office of Rail Regulation has:

(i) consulted the parties to the relevant Access Agreement on a draft of the notice it proposes to issue;

(ii) taken into account any representations made by the parties in response to the consultation under Condition J8.4.3(b)(i); and

(iii) notified the parties as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions.

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9 Rights Review Meetings

9.1 The Rights Review Meeting

9.1.1 Network Rail shall hold Rights Review Meetings as frequently as necessary in order for it to ensure that capacity on the network is shared in the most efficient and economical manner in the overall interest of users, providers, potential providers and funders of railway services.

9.1.2 Network Rail shall give a Part J Access Beneficiary at least 5 Working Days written notice of a Rights Review Meeting ("Rights Review Notice"). Network Rail shall, in the Rights Review Notice, list the Quantum Access Rights, related Train Slots or associated Ancillary Movements, Stabling or Y-Paths which are going to be the subject matter of the meeting ("Rights under Review").

9.1.3 Where a Part J Access Beneficiary has received a Rights Review Notice in accordance with Condition J9.1.2, it shall attend the meeting and participate in it in a collaborative manner in order to assist Network Rail to meet its objectives set out in Condition J9.1.4 below.

9.1.4 In holding a Rights Review Meeting, Network Rail's objectives shall include:

(a) establishing why any Rights under Review are not being used;

(b) assessing whether it is appropriate for Network Rail to commence the Failure to Use procedure under Condition J4 in relation to any of the Rights under Review;

(c) assessing whether it is appropriate for any Relevant Adjustment to be made to the Part J Access Beneficiary's Access Rights; and

(d) considering whether it is appropriate to agree any amendments or additions to the Part J Access Beneficiary's Access Rights.

9.1.5 Further to a Rights Review Meeting, Network Rail shall, where it considers it appropriate, commence and pursue the Failure to Use procedure under Condition J4 to remove any of the Rights under Review from the Part J Access Beneficiary.

9.2 **ORR Power to Direct a Rights Review Meeting**

9.2.1 If the Office of Rail Regulation considers that a Part J Access Beneficiary is not using any of its Quantum Access Rights, related Train Slots or associated Ancillary Movements, Stabling or Y-Paths and Network Rail has not held a Rights Review Meeting related to this, then the Office of Rail Regulation may, in writing, direct Network Rail to hold a Rights Review Meeting ("J9 Direction").

9.2.2 Network Rail shall comply with a J9 Direction within 10 Working Days of its receipt.

9.2.3 If any third party Part J Access Beneficiary reasonably believes that another Part J Access Beneficiary is not using any of its Quantum Access Rights, related Train Slots or associated Ancilliary Movements, Stabling or Y-Paths and Network Rail has not held a Rights Review Meeting related to this, then it may report the matter to the Office of Rail Regulation. The Office of Rail Regulation will then consider whether it is appropriate for it to direct, pursuant to Condition J9.2.1, Network Rail to hold a Rights Review Meeting.

9.2.4 Where Network Rail has failed to comply with a J9 Direction in accordance with Condition J9.2.2, the Office of Rail Regulation may apply to the High Court (in Scotland, the Court of Session) for it to make such order as it thinks fit for requiring the failure to be made good.

9.3 **Notification**

9.3.1 If before, during or after the Rights Review Meeting, the Part J Access Beneficiary agrees a Relevant Surrender or Relevant Adjustment of any of the Rights under Review, then, within 10 Working Days, Network Rail shall give the Office of Rail Regulation notice of the relevant modifications to that Part J Access Beneficiary's Access Agreement. The modifications shall be deemed to have effect on the date such notice is given to the Office of Rail Regulation.

10 **Obligation of Network Rail to publish documentation**

10.1 **Template Notices**

10.1.1 Network Rail shall publish promptly templates, and any revision to them, for any notices required under this Part J.

10.1.2 Before publishing templates or any revisions to them in accordance with Condition J10.1.1, Network Rail shall consult with relevant Part J Access Beneficiaries.

10.2 **Publication of Other Documentation**

10.2.1 Subject to Condition A3.1, Network Rail shall publish promptly an accurate and up-to-date copy or statement of every notice or notification given or received pursuant to this Part J, in order to inform persons holding or contemplating holding or surrendering Access Rights about how the allocation of capacity on any part of Network Rail's network may change over time.

10.3 **ORR Power to Direct Network Rail to Publish**

10.3.1 If Network Rail fails to comply with any of its obligations in Condition J10.1 or Condition J10.2, then ORR may, in writing, direct that Network Rail do so comply ("J10 Direction").

10.3.2 Network Rail shall start any process to comply with a J10 Direction within 10 Working Days of receipt of it and shall have complied with the J10 Direction within 30 Working Days of receipt of it.

10.3.3 Where Network Rail has failed to comply with a J10 Direction in accordance with Condition J10.3.2, the Office of Rail Regulation may apply to the High Court (in Scotland, the Court of Session) for it to make such order as it thinks fit for requiring the failure to be made good.

11 **Appeals**

11.1 **Appeal in accordance with the ADRR**

11.1.1 Any dispute arising under this Part may be referred by any Part J Access Beneficiary or Network Rail for determination in accordance with the ADRR.

11.1.2 A reference for determination brought under Condition J11.1.1 must be made:

(a) within 5 Working Days of receipt of the decision to which objection is made; or

(b) where the period referred to in Condition J11.1.2(a) includes Christmas Day, within 10 Working Days of such receipt.

11.2 **Appeal to the Office of Rail Regulation**

11.2.1 Where either Network Rail or any Part J Access Beneficiary is dissatisfied with the decision reached in accordance with the

ADRR under Condition J11.1, it may refer the matter to the Office of Rail Regulation for determination under Part M:

(a) within 5 Working Days of receipt of the written determination reached in accordance with the ADRR to which objection is made; or

(b) where the period referred to in Condition J11.2.1(a) above includes Christmas Day, within 10 Working Days of such receipt.

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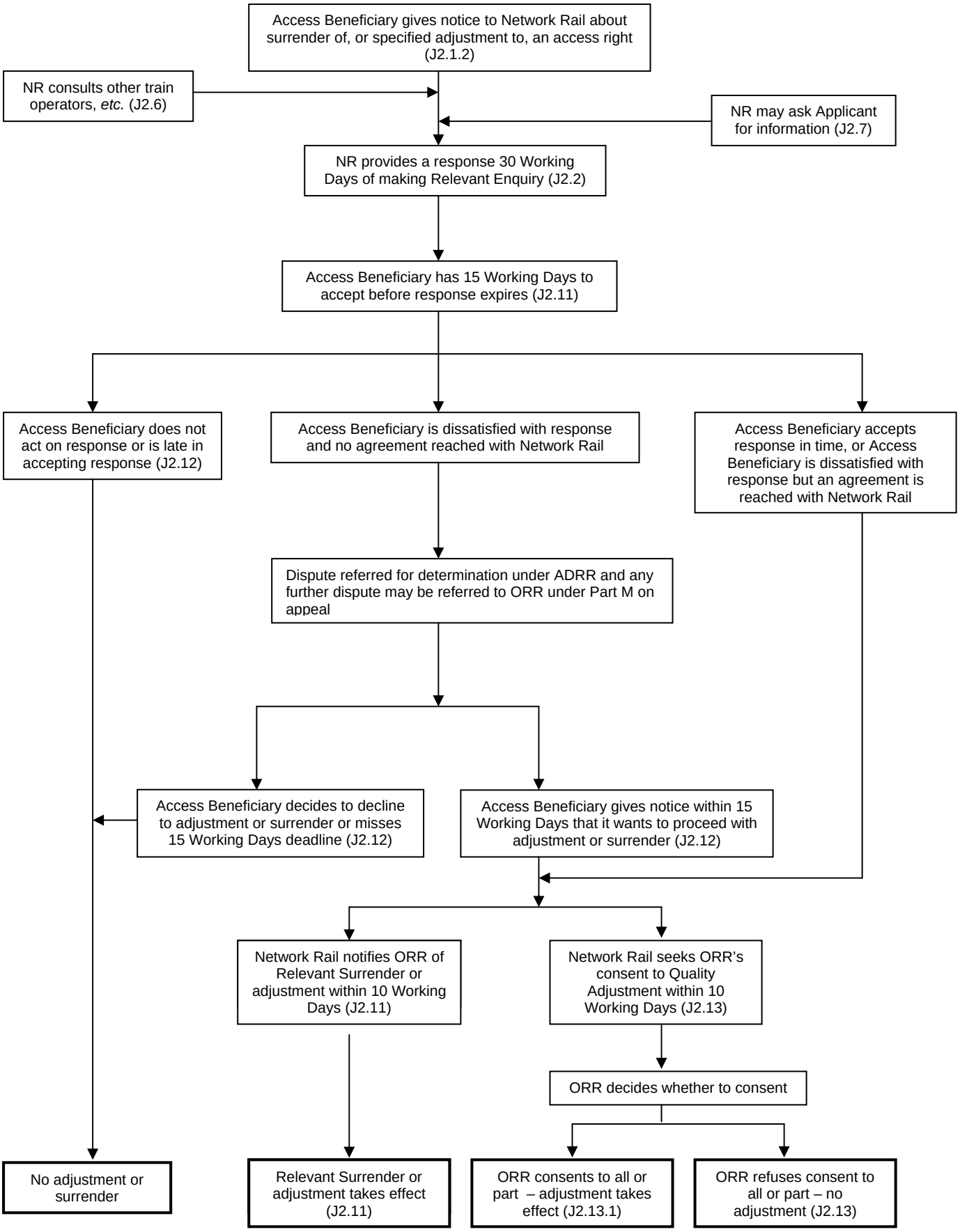
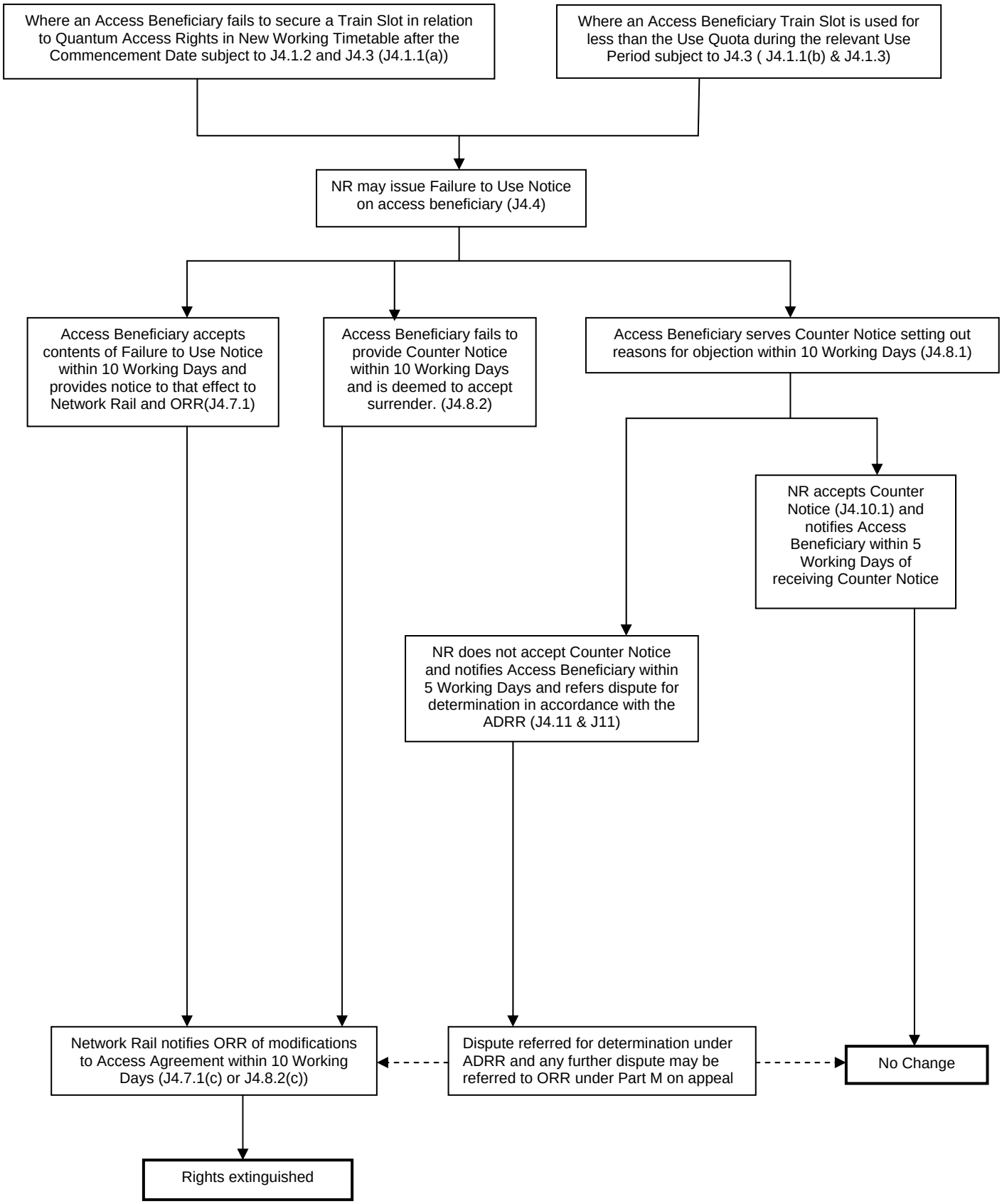
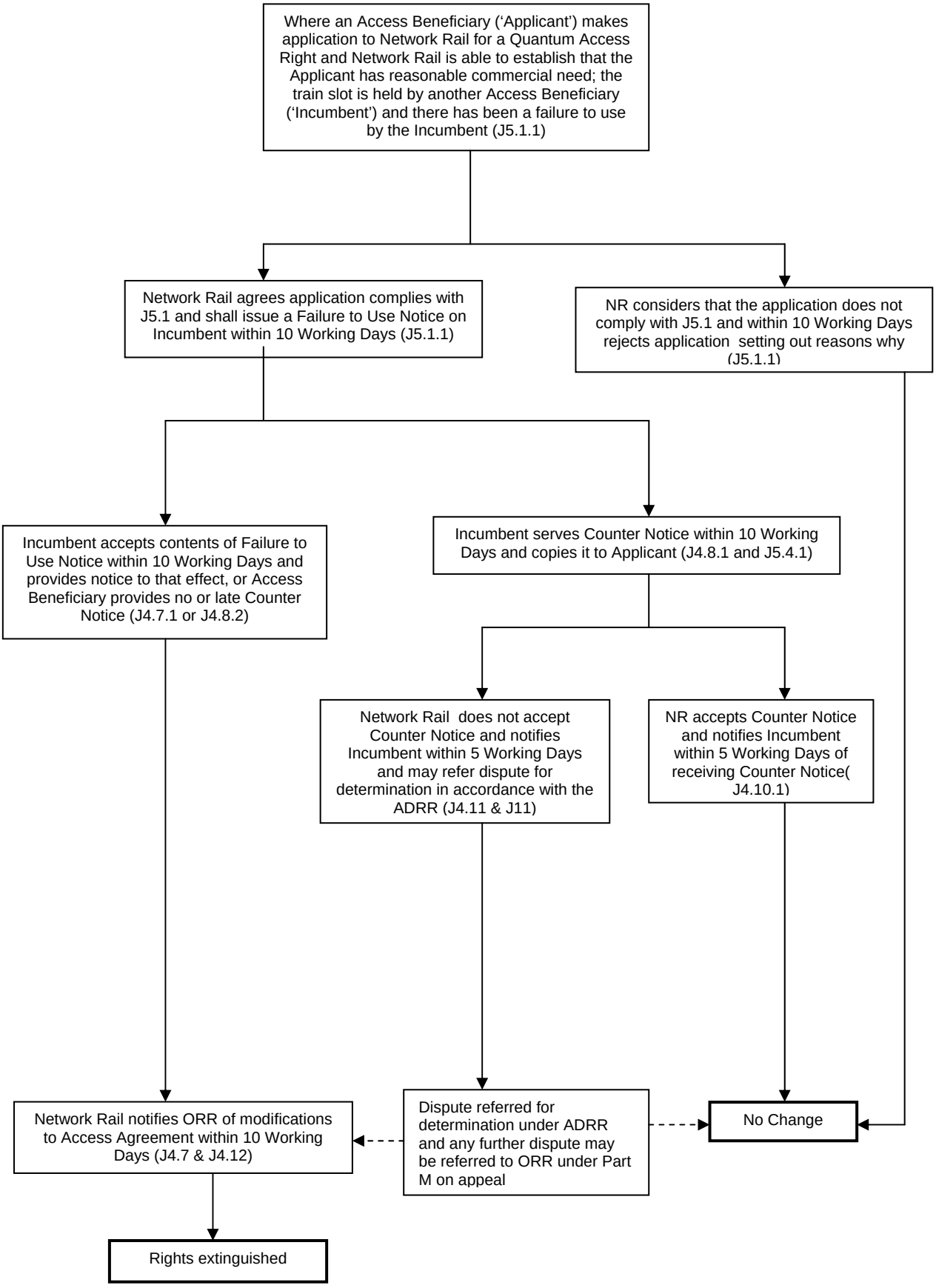
Appendix 1: Condition J2 process for voluntary surrender or adjustment of rights



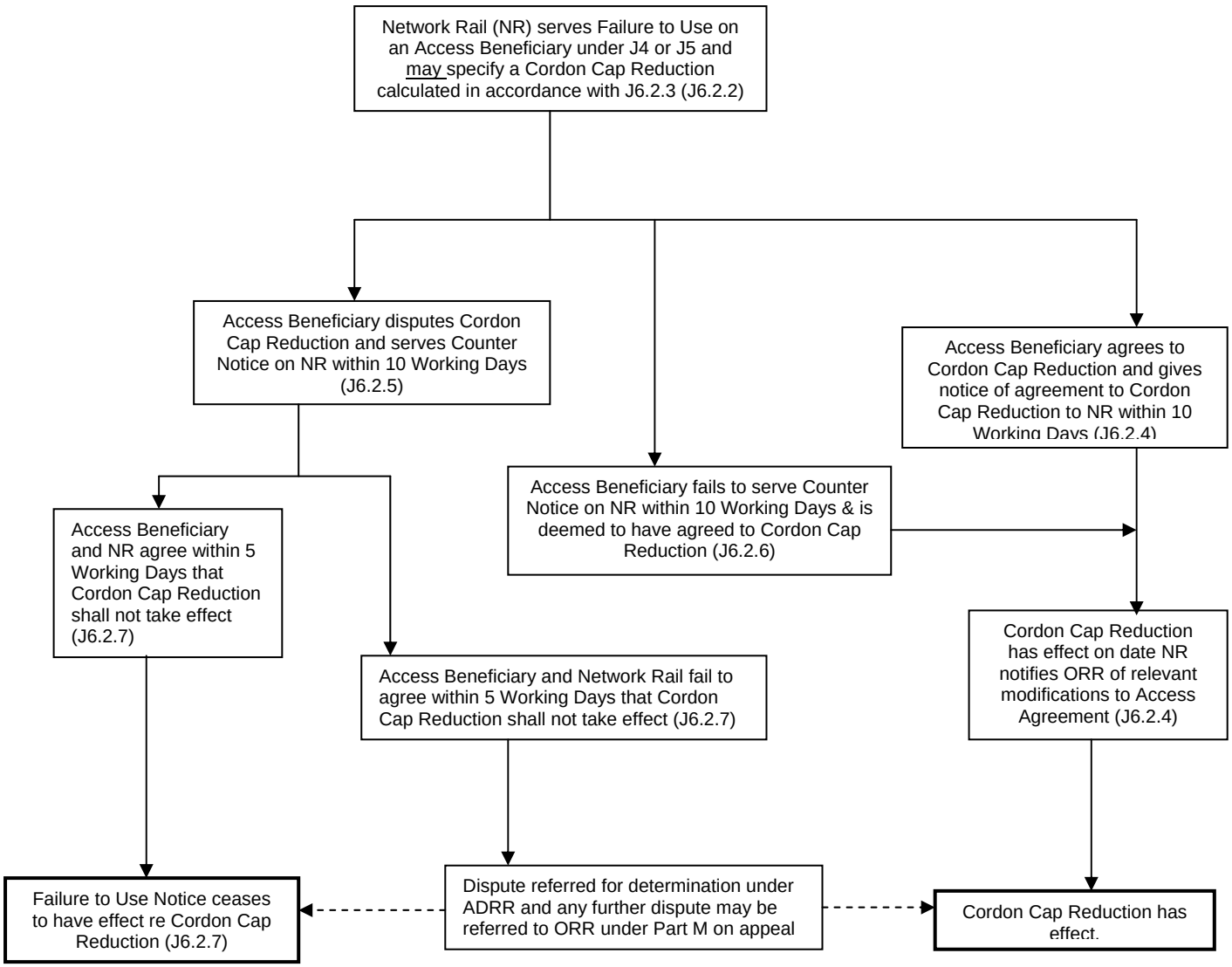
Appendix 2: Condition J4 UIOLI process for unused rights or where slots are not sought by another access beneficiary



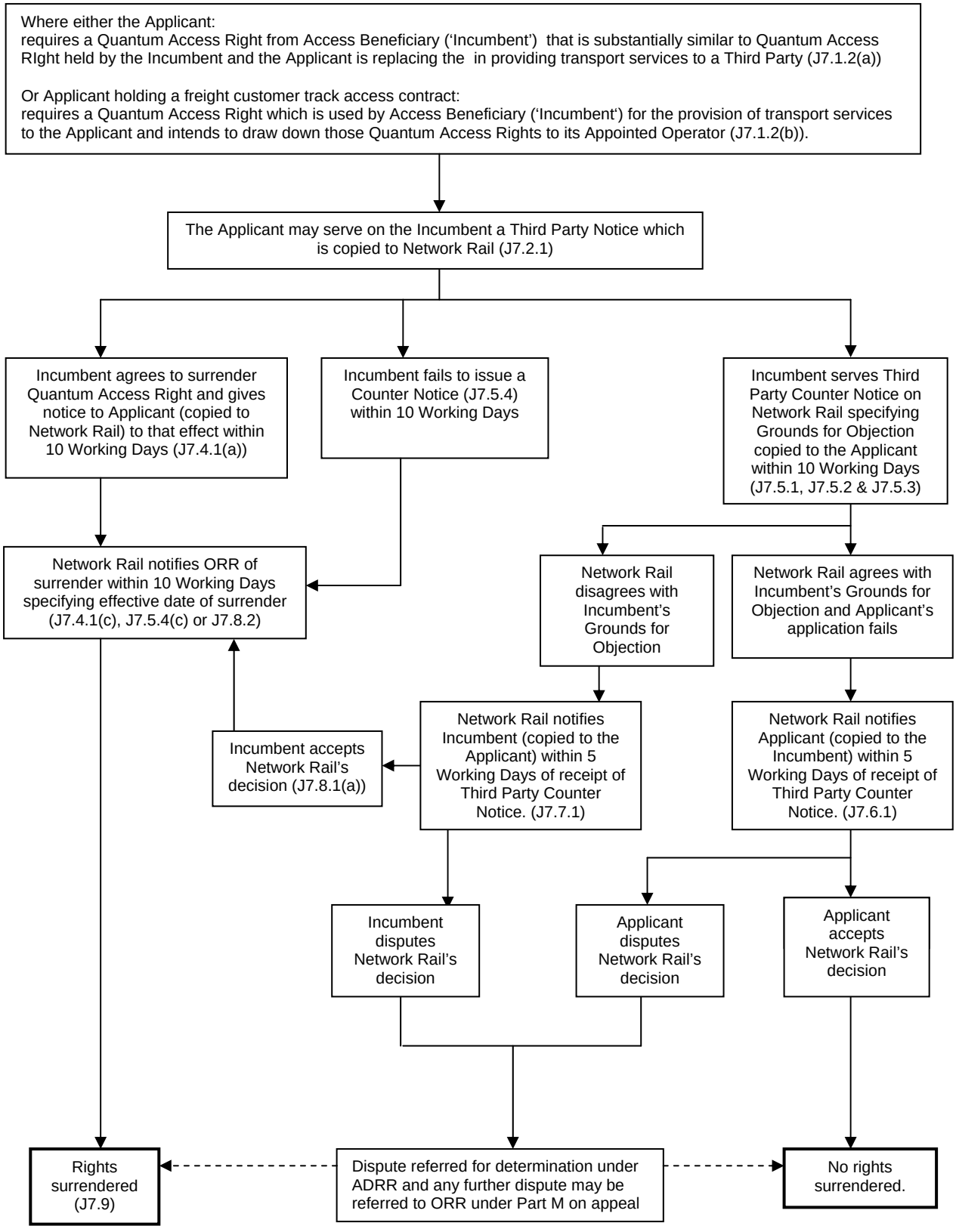
Appendix 3: Condition J5 UIOLI process where slots are sought by another access beneficiary (Condition J5 uses Condition J4 for most of the process)



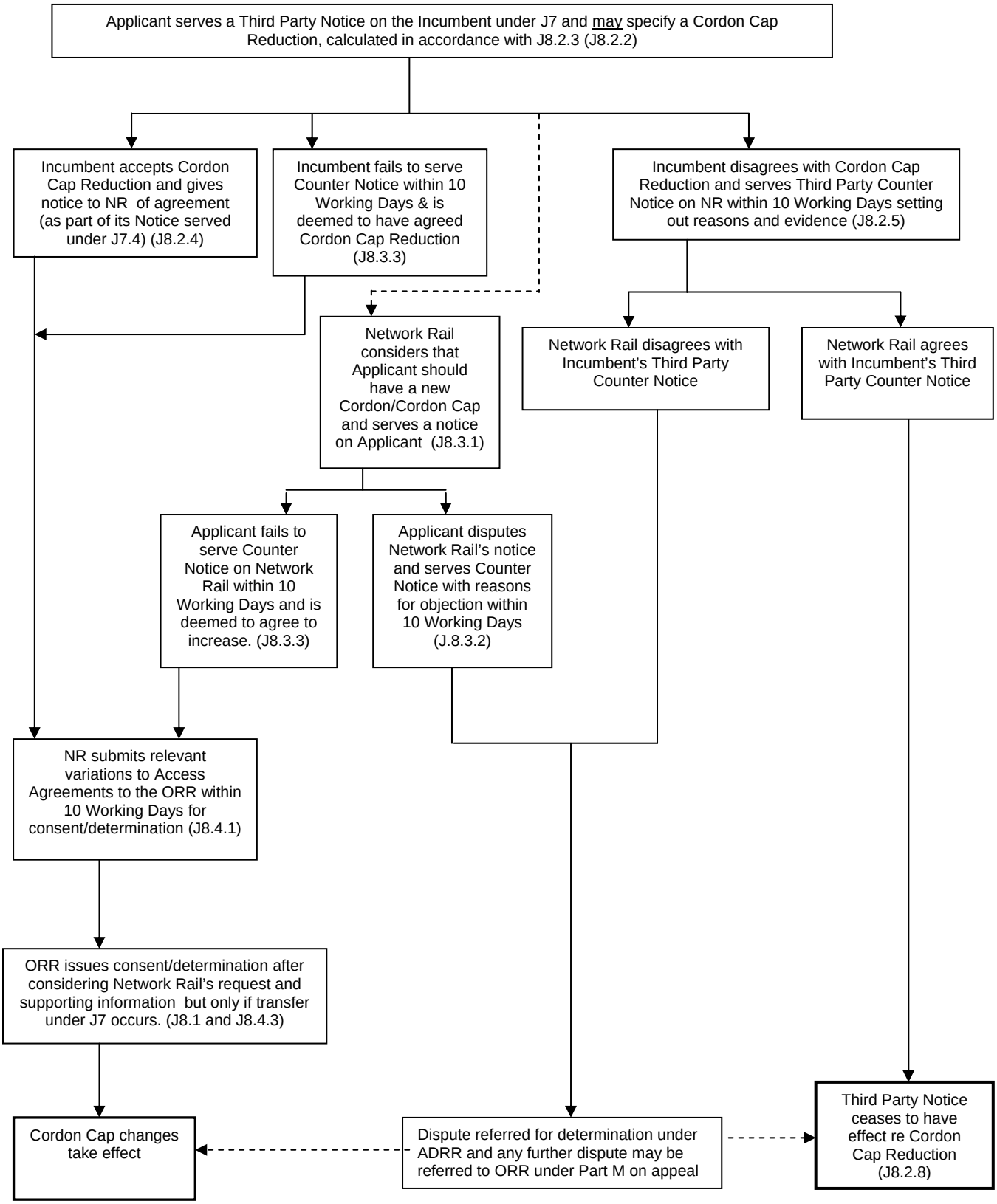
Appendix 4: Condition J6 process for reducing cordon caps under UIOLI mechanism



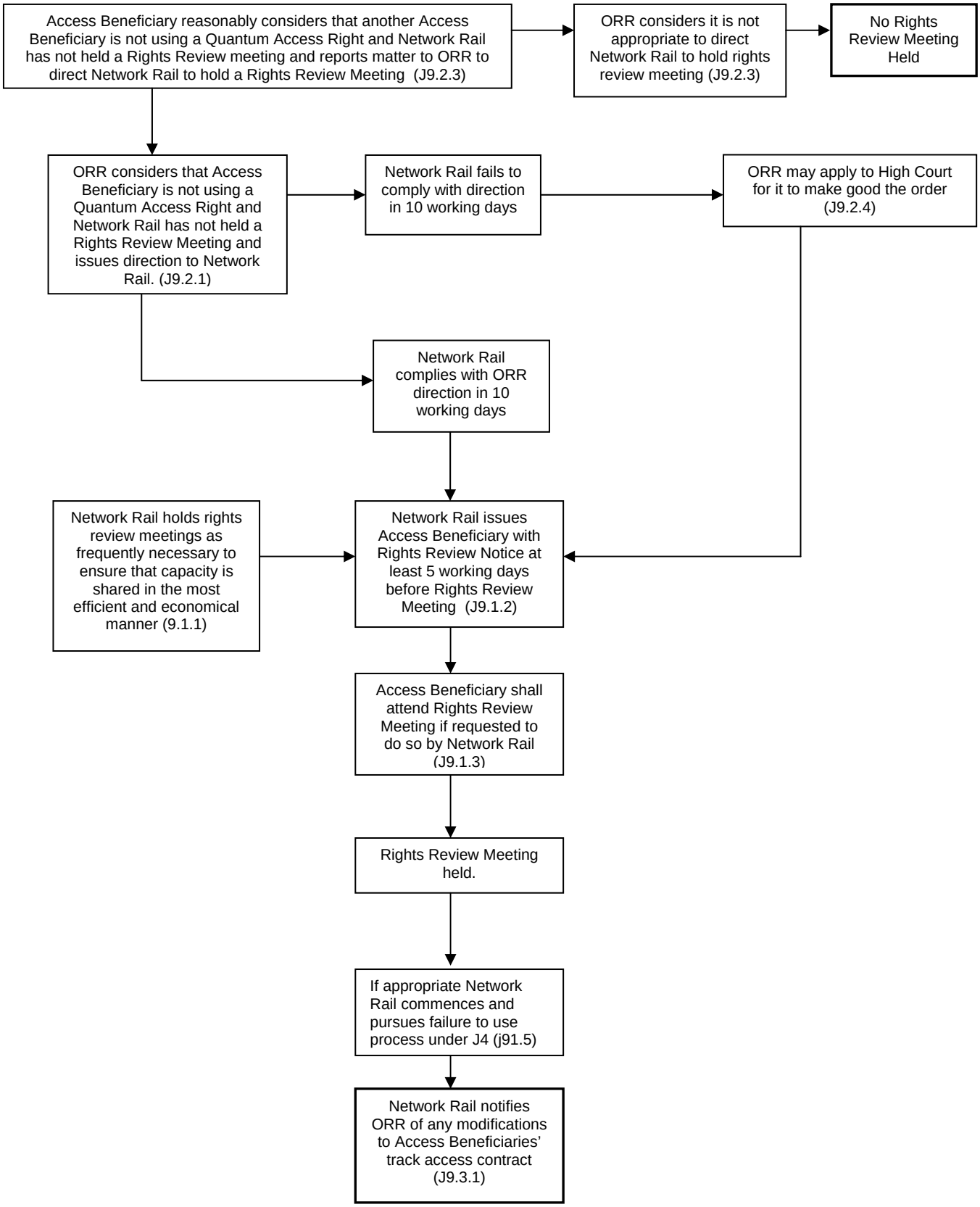
Appendix 5: CONDITION J7 PROCESS- freight transfer mechanism



Appendix 6: Condition J8 process for adjusting cordon caps under the freight transfer mechanism



Appendix 7: Condition J9 process for holding rights review meetings



Annex C - Table listing and explaining all the changes to Part J

PROPOSED CHANGES TO PART J OF NETWORK CODE

	Location	Change	Reason
1	Explanatory Notes	delete	The status of the information contained in the Explanatory Notes has caused dispute in the past. In light of this, we are proposing that the Part begins with an overview which does form part of the Code. This also reflects the practice adopted in Part D.
2	Appendices 1-7	Moved to the back of the Part	We think it is neater for the appendices to be behind the text. This also reflects the practice adopted in Part D where timelines are annexed at the end of the Part.
3	New Condition 1.1	Condition 1.1- sets out an overview of the whole Part	See above
4	New Condition 1.2	"Definitions" heading is changed to "Interpretation" . Instead of saying "In this Part J, unless the context otherwise requires.." change to "In this Part J, capitalised words have the meanings shown below.."	For clarity. In addition, in the Part, defined terms are not used in any other context.
5	Definition – "ADRR Determinatio n"	Add "in" after made in first line. Make consequential changes to references to other conditions	To correct typo. To make consequential changes
6	New definition – "Access Proposal"	To add new definition of Access Proposal and delete old definition of "Bid"	To reflect recent changes to Part D
7	Various Definitions	Change "has the meaning ascribed to it in" to "has the meaning shown in"	To express definitions in plainer English and make consistent with changes implemented in Part D
8	Definition "Grounds for Objection"	Change to singular "Ground of Objection" . Change reference of J4.10 to J4.9. Also add in reference to Condition J7.5.1.	Only proposing one ground in each of J4 and J7. To reflect changes to J4.10 and inclusion of grounds for objection on the face of Condition J7.
9	New Definition –	Add in new definition "J9 Direction - has the meaning shown in	Consequential to new Condition J9

PROPOSED CHANGES TO PART J OF NETWORK CODE

	"J9 Direction"	Condition J9.2.1"	
10	New Definition – "J10 Direction"	Add in new definition "J10 Direction – has the meaning shown in Condition J10.3.1"	Consequential to new Condition J10
11	New Definition – "New Working Timetable"	Add in new definition "New Working Timetable – has the meaning shown in Part D of this code;"	To reflect recent changes to Part D
12	Definition - "Office of Rail Regulation Determination"	Delete the word "either" and change reference to Conditions J13.3 or J14.2 to "Condition J11.2	To reflect that proposed that there will only be one dispute resolution condition
13	Definition – "Quantum Access Right"	After "means a", delete "Firm Right, any Contingent Right or any Level Three Right as such" and instead insert "any right" After "part of such a", delete "Firm Right, Contingent Right or Level Three Right" and instead insert "right"	We think the present definition is confusing because it specifically references any Level Three Right but not any Level One or Two Right. We presume that Level One and Level Two Rights were not specifically included in the definition because they are Firm Rights. However, a Level Three Right is a Contingent Right and therefore does not need to be referred to separately. We consider that what is actually intended to be covered is any right under an access agreement.
14	Definition – "Quantum Adjustment"	Delete "and the grant of it of any other Access Right"	We think that in the context of Condition J2, where this term is used, Quantum Adjustments should only be about the surrender of access rights and not about the grant of additional Access Rights to a Part J Access Beneficiary.
15	Definition – "reasonable ongoing	Delete this definition	Our proposed amendments to J4 and J7 remove this concept.

PROPOSED CHANGES TO PART J OF NETWORK CODE

	commercial need”		
16	Definition – “Restrictive Provisions”	Change references to “access right” to “Access Right”	To correct typos
17	Definition – “Review Proposal”	Delete this provision	Our proposed new Condition J9 removes this concept
18	Definition – “Rights Review Meeting”	After “between”, delete “the Part J Access Beneficiary and Network Rail pursuant to Condition J9” and instead insert “Network Rail and a Part J Access Beneficiary for the purpose of reviewing the Quantum Access Rights held by that Part J Access Beneficiary and its use of them”	To explain what a Rights Review Meeting is in the context of our proposals for that condition
19	New Definition – “Rights Review Notice”	Add in new definition “Rights Review Notice – has the meaning shown in Condition J9.1.2”	Consequential to new Condition J9
20	Definition “Rights Subject to Surrender”	Delete “(b) a Third Party Failure to Use Notice” and re-number following sub paragraph In (i) after “any Train Slot” insert “including any Y-Path” In (ii) after “Network Rail” add “(or the Applicant in relation to Condition J7.3) considers” In (iii) change “any Bid” to “any Access Proposal”	See paragraph 68 below To clarify that Y-Paths which relate to the Quantum Access Right can also be subject to surrender. To reflect the fact that under proposals to change Condition J7 the Applicant will serve a Third Party Notice directly on the Incumbent. To reflect the changes made recently to Part D
21	New Definition “Rights Under	Add in new definition “Rights Under Review – shall have the meaning shown in Condition J9.1.2”	Consequential to new Condition J9

	Review"		
22	Definition "Third Party Failure to Use Notice"	Delete	See paragraph 68 below
23	Definition – "Use Period"	Delete present explanation and instead insert "has the meaning shown in Condition J4.2.3"	To reflect the changes proposed to Condition J4 and also the proposal to move away from the Use Quota/Period being set out in a document sitting outside the Code and instead put their definitions on the face of Part J
24	Definition – "Use Quota"	Delete present explanation and instead insert "has the meaning shown in Condition J4.2.2"	To reflect the changes proposed to Condition J4 and also the proposal to move away from the Use Quota/Period being set out in a document sitting outside the Code and instead put their definitions on the face of Part J
25	New Definition – "Y-Path"	Insert new definition "Y-Path – "means a Train Slot incorporated in the Working Timetable that is identified as such by the incorporation of the letter "Y" in the operating characteristics part of the Train Slot's heading.	Because of the difficulties regarding the transfer of Y-paths in previous cases arising under Condition J7, we think it would be beneficial if the definition of 'Rights Subject to Surrender' specifically referred to Y-Paths and a definition of Y-Paths was included in Part J.
26	Present 1A	Becomes new Condition J1.3	Re-numbering
27	New Condition J1.4	Inserts a Transitional Provision	To deal with the fact that there could be outstanding notices/processes started under the present Part J when proposed revisions take effect. If this is the case then any notices/processes/appeals in relation to such notices will still be governed by the present Part J. So that transitional

			drafting does not remain in Part J for evermore, longstop date provided for transitional drafting to be removed from the code.
28	J2.13, heading,	After “a” add “Quality”	So that ORR’s consent is only required in relation to modifications which are Quality Adjustments
29	J2.13.1	In first line after “a”, delete “Relevant” and insert “Quality” Delete “in accordance with Condition J10”	To reflect that ORR’s consent is only required in relation to modifications which are Quality Adjustments. To reflect the fact that power for ORR to consent to part only of the modification presented to it is being moved from Condition J10 to J2
30	J2.13.2	After “Access Agreements” in the second line insert “which have the effect of a Quality Adjustment”	To clarify that ORR’s consent is only required in relation to modifications which are Quality Adjustments
31	J2.13.3(a)	Delete “relevant” and insert “Quality” After “question” insert “or to part only of the modifications submitted to it”	To ensure ORR’s consent is only required in relation to modifications which are Quality Adjustments To reflect the fact that power for ORR to consent to part only of the modification presented to it is being moved from Condition J10 to J2
32	J2.13.3(b)	Delete “relevant” and insert “Quality” After “Adjustment,” insert “or to part only”	To ensure ORR’s consent is only required in relation to modifications which are Quality Adjustments To reflect the fact that power for ORR to consent to part only of the modification presented to it is being moved from

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			Condition J10 to J2
33	J2.13.4	Delete “relevant” and insert “Quality” Change reference to “J13” to “J11”	To ensure ORR’s consent is only required in relation to modifications which are Quality Adjustments Consequential change arising from new dispute resolution condition J11
34	J3.13 – Appeal against Disputes Chairman’s determination	Delete this sub condition and make consequential changes to numbering	At the moment any dispute arising from the Allocation Chair’s decision about confidentiality of information provided under the J2 process comes to ORR on appeal. We propose that such disputes should be dealt with in the same way as any other dispute under the Network Code – determined in accordance with the ADRR. We think this is consistent with the approach taken elsewhere in the Network Code and with the industry’s wish to see disputes dealt with the industry.
35	J3.13 - heading	Change heading to “Immunity of the Allocation Chair”	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.
36	J3.13.1	In first line, before “Allocation” delete “Neither”. In first line after “Chair” delete “the Office of Rail Regulation” In first line after “shall” insert “not”	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.
37	J3.14.1	In the second line after “the remit of the Allocation Chair”, delete “and the Office of Rail Regulation”	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.
38	J3.14.2	Delete this sub-condition and re-number the rest of the sub-conditions	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.

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39	J3.15	Delete wording arising from old sub-condition J3.16.1(c) – "the Office of Rail Regulation has determined that a determination of the Allocation Chair of the kind referred to in Condition J3.16.1(b) shall be confirmed in whole or in part; or"	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.
40	J4.1	Delete and re-number the rest of the sub-conditions	This was old transitional drafting and is no longer relevant.
41	J4.1.1	Delete reference to "J4.2.2" Change reference to "J.4.2.3" to "J.1.2" Change reference to "J4.4" to "J4.3"	Old J4.2.2 is being deleted – see para 43 below. Consequential change Consequential change
42	J4.1.1(a)	Change "First" to "New" After "secure", delete "one or more" and instead insert "the quantum of" After "Train Slots", delete "in respect of that Quantum Access Right" and insert "which the Quantum Access Right permits"	To reflect recent changes to Part D To reflect that the quantum of Train Slots which the Access Right permits have to be obtained. Present wording means that where 1 Train Slot is obtained – even if Access Right permits more – then this criterion is satisfied.
43	J4.1.2	Delete sub-condition Insert as a new sub condition: **"**Condition J4.1.1(a) shall not apply where the Part J Access Beneficiary was unable to secure the necessary quantum of Train Slots permitted by the Quantum	We do not think rights, whatever their status, which have not been accommodated in the timetable and are therefore not being used should be protected from the Failure to Use process. This is to address a point made by Freightliner that sometimes it cannot secure the necessary quantum of Train Slots permitted by the Quantum Access Right because of

		Access Right because of Restrictions of Use that are set out in the relevant Engineering Access Statement."	Restrictions of Use.
44	J4.1.3	change reference to "J4.2.1(b)" to "J4.1.1(b)" change reference to "J4.2.1(b)" to "J4.1.1(b)" change reference to "J4.2.3" to "J4.1.3"	consequential re-numbering
45	J4.2	Delete and insert as a new J4.2 "Use Quota and Use Period 4.2.1 The Use Quota and Use Period shall apply to services for the carriage of goods by railway and passengers. 4.2.2 The Use Quota shall be one. 4.2.3 The Use Period shall be thirteen consecutive weeks for which the Train Slot is included in the Working Timetable. Where a Train Slot is derived from a Quantum Access Right which permits a Train Slot to be obtained on more than one day of the week, the use of the Train Slot on each relevant day of the week shall be assessed separately. 4.2.4 A train movement shall not count towards the Use Quota if it is made with the primary purpose of achieving the Use Quota for that Train Slot."	To reflect the fact that the Use Quota and Use Period should appear on the face of Condition J4. Also to reflect proposals to amend the Use Period so that it applies to each individual day of the week to which the Access Right relates. For example, where an operator has rights to use the same path on each day of the week then it will need to have used at least one path in a period of thirteen consecutive weeks on each day for which it has rights.
46	J4.3	Change reference to Condition "J4.2.1(a) or (b)" to Condition "J4.1.1(a) or (b)" After "such non-use" make text that follows a new sub (a) and then insert a new sub(b) to read "is temporary in nature".	consequential re-numbering To make clear that non-use shall be disregarded only if it is of a temporary nature.
47	J4.4	Change "considers there is" to "considers there has been"	Correction of tense

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		Delete sub para (b) and make text of sub para (a) run into main paragraph	ORR doesn't require copies of these documents
48	J4.5	Delete wording arising from old Condition J4.6 and instead insert: "4.5.1 Before a Failure to Use Notice has been served in accordance with Condition J4.4, there will be a cessation of a Failure to Use if, in relation to a Failure to Use under Condition J4.1.1(b), the Part J Access Beneficiary makes use of a relevant Train Slot such that the Use Quota is met."	To clarify difficulties experienced with present wording as evidenced in appeals by GB Railfreight and DB Schenker under Part J heard by ORR in relation to determination ADA05. To clarify that a cessation of a Failure to Use can only occur before a Failure to Use Notice has been served.
49	J4.6.1	Insert a new sub-paragraph (c) "the date on which the Surrender is intended to take effect"	To make consistent with what is presently required in a Third Party Failure to Use notice issued under J5
50	J4.7.1	In sub paragraph (a) delete "give notice to that effect to" and insert "notify" In sub paragraphs (b) and (c) to change reference to "J4.8.1" to "J4.7.1"	To make consistent with other such references in Part J. Consequential re-numbering
51	J4.8.1(a)	Add "and/or" at the end of sub paragraph (a)	To be consistent with other sub -paragraphs
52	J4.8.1(b)	After "or", delete "that the Failure to Use was not continuing at the date of the service of the Failure to Use Notice; and/or" and instead insert "there has been a cessation of a Failure to Use in accordance with Condition J4.5; and/or"	See reasoning under paragraph 48 above
53	J4.8(d)	Change "there are" Grounds of Objection to "there is a". Make "Grounds" singular. Change Reference to "J4.10" to "J4.9"	To reflect the fact that we are proposing that there is only one ground for objection
54	J4.8	In final paragraph delete "The Part J Access Beneficiary shall send a copy of any Counter Notice and such evidence to the Office of Rail Regulation."	To reflect the fact that ORR does not require to be sent copies of these documents.
55	J4.8.2	Change reference to "Condition J4.9" to "Condition J4.8"	Consequential re-numbering
56	J4.9 -	Change heading to "Ground for	To reflect that only one

	heading	Objection"	ground for objection is proposed
57	J4.9	Delete present text and replace with "A Train Operator may object to a surrender specified in a Failure to Use Notice on the grounds that the Rights Subject to Surrender relate to an enhancement of the Network for which the Train Operator is contracted to pay through access charges ("Ground for Objection")".	To reflect that we think that the ROCN defence should be removed as it enables 'evergreen' call off contracts to be relied on which leaves Part J open to manipulation. This proposal also reflects our response to DBS' concerns that removal of ROCN would mean that franchised passenger operators would have a defence under Condition present J4.9.1(a) but freight operators wouldn't have a similar defence. We consider that there isn't sufficient justification for passenger and freight operators to be treated differently and therefore propose removing the passenger operator defence. This means that the only remaining defence is that open to a Train Operator if the rights subject to surrender relate to an enhancement for which they are contracted to pay for.
58	J4.10 - heading	Delete existing heading "Cessation of Notice" and replace with "Network Rail agrees with the Part J Access Beneficiary	We think this heading is more suitable as it describes one of the two options Network Rail has, rather than focusing on the outcome of that option
59	J4.10.1	In Condition J4.10.1 change "If the Part J Access Beneficiary and Network Rail agree or it is determined.." to "If Network Rail agrees with the Part J Access Beneficiary.."	To emphasise that it is Network Rail's decision whether the Counter Notice has been substantiated or not
60	J4.10.1	Change reference to "J4.9" to "J4.8"	Consequential re-numbering

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		Change “Grounds” of Objection to “Ground” of objection At the end of the paragraph delete the wording after “shall” and instead replace with “have failed and Network Rail shall notify the Part J Access Beneficiary in writing that this is the case within 5 Working Days of receipt of the Counter Notice”	To reflect that only one ground of objection is proposed To add a 5 working day time period for Network Rail to notify the Part J Access Beneficiary
61	J4.11	Add a new Condition J4.11 “Network Rail does not agree with the Part J Access Beneficiary 4.11.1 If Network Rail considers that: (a) the matters set out in Condition J4.8.1(a), (b) or (c) have not been substantiated; and (b) the Part J Access Beneficiary’s Ground for Objection has not been substantiated in respect of any or all of the Rights Subject to Surrender, then it shall notify the Part J Access Beneficiary in writing that this is the case within 5 Working Days of receipt of the Counter Notice.”	To explain the alternative route, to that set out in Condition J4.10, and new timeframe of 5 Working Days which Network Rail has to notify Part J Access Beneficiary
62	J4.12	Condition J4.12 – Delete first paragraph and instead insert “The surrender of the Rights Subject to Surrender will occur:”	To simplify pre-amble to dates
63	J4.12.1(a)	At the start of the sub paragraph add “where either the Part J Access Beneficiary accepts Network Rail’s decision made pursuant to Condition J4.11 or there is an ADRR Determination, on the date….” After reference to “Condition J4.12.2” delete “, in the event of an ADRR Determination”	To deal with the scenarios that either the Part J Access Beneficiary accepts Network Rail’s decision or takes Network Rail to dispute under the ADRR Not now necessary as explained in earlier re-draft of sub-paragraph
64	J4.12.1(b)	Before the word “specified” insert “on the date”	Consequential drafting change to changes explained in paragraph 62 above
65	J4.12.2	After “in the event of” insert “the	To reflect that J4.12 now

		Part J Access Beneficiary accepting Network Rail's decision or there is an.." After "…no more than 10 Working Days after the date of.." insert "the acceptance or of the relevant…" After "ADRR Determination" in the penultimate line insert ", as applicable, " After "ADRR Determination" in the last line insert ", if applicable,"	explains what happens when either the Part J Access Beneficiary accepts Network Rail's decision or it takes the decision to dispute
66	J4.13	Amend heading to " Access Proposals" Amend reference to "D7.1" to "D2.4" Replace "bid" with "Access Proposal"	To reflect recent changes to Part D
67	J5.1 - heading	Delete "Third Party" from heading "Third Party Failure to Use Notices"	See paragraph 68 below
68	J5.1.1(b)(iii)	Delete the word "continuing" After sub paragraph (b), after "Network Rail shall serve a", delete "Third Party" and after "Failure to Use" add "under Condition J4.4. In addition, delete "Incumbent" delete "and send a copy of the notice to the Office of Rail Regulation"	See changes proposed to Condition J4.5. There is no such thing as a "continuing" Failure to Use – there is either a " Failure to Use" or not, in that it ceased to be so before the Failure to Use Notice was served. Rather than having a Third Party Failure to Use Notice we think it is much neater if J5 interlinks into J4 at this point and what Network Rail serves is a Failure to Use Notice under J4.4. This means that all references to Third Party Failure to Use Notice should be amended to Failure to Use Notice. ORR does not require copies of these notices.
69	J5.2	Delete "whether a Failure to Use has ceased to be continuing shall	For consistency with change proposed in

		be determined in accordance with Condition J4.6" and instead insert "there will have been a cessation of a Failure to Use if the test in Condition J4.5 has been met."	paragraph 48 above
70	J5.3	Delete this sub-condition and re-number remaining sub-conditions	See paragraph 68 above.
71	J5.3.1	After "Incumbent of a" delete "Third Party"	See paragraph 68 above.
72	J5.4	Various consequential changes marked up in attached drafting	Various consequential changes including re-numbering, changes to headings and changes reflecting the recent changes to Part D.
73	J5.5	Amend reference "Condition J5.4(b)" to "J5.4.1(b)" Amend "Incumbent" to "Network Rail" Amend reference to "J5.4.1(b)" to "J5.3.1(b)"	Consequential change As Network Rail serves the Failure to Use Notice and will receive any counter notice, it makes sense for it to send a copy of the counter notice to the Applicant. Consequential change
75	J6.2.1	After "Failure to Use Notice" delete "or a Third Party Failure to Use Notice, as applicable"	See paragraph 68 above
76	J6.2.2	Amend reference to Condition "J4.7" to "J4.6" After "may specify" insert "the amount by which Network Rail considers, in accordance with Condition J6.2.3," After "an Existing Cordon Cap" delete "that Network Rail considers should be made" and insert "should be reduced" After "Failure to Use Notice" delete "or the Third Party Failure to Use Notice"	Consequential change To make clear that calculation is carried out in accordance with 6.2.3 and also that Cordon Cap Reduction is the amount by which an Existing Cordon Cap should be reduced. See paragraph 68 above.
77	6.2.3	Delete present wording and instead insert: "The Cordon Cap Reduction shall	To incorporate on the face of J6 the formula to calculate a cordon cap

		be calculated in accordance with the following formula: Cordon Cap Reduction = (Rr/R)xC (a) where "Rr" means the number of Level 2 Rights being transferred, "R" means the total number of Level 2 Rights related the cordon cap held by the Part J Access Beneficiary before transfer and "C" means the Part J Access Beneficiary's cordon cap before transfer; and (b) where application of the formula does not result in a whole number, the result shall be rounded down to the nearest whole number."	reduction in relation to J6 from the "Criteria for Interpreting the expression "Reasonable On-going Commercial Need". In addition, we propose to amend the formula so that it changes the cordon cap in proportion with the rights being transferred. If the resulting reduction figure is not a whole figure then we think it should be rounded down – so that there is no risk that the resulting cordon cap is too low.
78	J6.2.4	Amend references to Condition "J4.8(a)" to read "J4.7.1(a)" Amend references to Condition "J5.4" to "J5.3.1(a)"	Consequential changes
79	J6.2.5	Amend reference to Condition "J4.9" to read "J4.8" Amend reference to Condition "J5.4" to "J5.3.1(a)" In (a) after "Cordon Cap Reduction" delete "because it has a reasonable on-going commercial need for its Existing Cordon Cap" and, instead, insert "and setting out its reasons why"	Consequential changes To reflect that we are proposing to remove the reasonable on-going commercial need test
80	J6.2.6	Amend reference to "J4.9.2" to "J4.8.2"	Consequential change
81	J6.2.7	After "Failure to Use Notice" delete "or the Third Party Failure to Use Notice, as applicable"	See paragraph 68 above
82	J7.1.2	In the first line after "Train Operator" insert "who is replacing the Incumbent in the provision of transport services to a third party,"	To clarify in light of uncertainty in appeal of ADP23 as to what was being replaced. The current wording led the ADP to conclude that the applicant had to replace the incumbent with an identical or nearly identical

			use of the quantum firm rights; rather than it being the applicant who is replacing the incumbent as the provider of transport of goods by railway and it was not necessary that applicant's services are identical to the incumbent's.
83	J7.1.3	Delete	We do not think this wording is necessary. It will be obvious whether Part J is being used or not by the fact of reference to it and by the process which is being followed.
84	J7.2	Delete "If Network Rail receives an application from a Part J Access Beneficiary ("the Applicant") requesting" and, instead, insert "Where a Part J Access Beneficiary want to hold" After "(the "Incumbent") then", delete "within 10 Working Days following receipt of the Applicant's application, Network Rail…" and insert "it" After "it shall serve a Third Party Notice on the Incumbent and send a copy of that notice to", delete "Office of Rail Regulation" and, instead, insert "Network Rail" Delete last sentence.	To reflect the fact that process will now be triggered by applicant who will service a notice on incumbent directly without having to go through Network Rail. To reflect the fact that applicant will be serving notice directly on the incumbent. ORR does not require copies of these notices. As the process is now instigated directly between applicant and incumbent, a copy of the notice should be sent to Network Rail.
85	J7.3	Delete present Condition J7.3 and instead insert: "7.3.1 When making an application to the Incumbent of the type described in Condition J7.2, the Applicant shall specify in the application: (a) the Quantum Access Right sought by the Applicant; (b) the Rights Subject to Surrender which the Applicant requires the	This condition merges the old J7.3 and J7.4. (a) and (b) both come from old J7.4. (c) comes from old J7.3 (d) is new and was proposed by a consultee as part of the consultation already carried out in relation to these proposed changes to Part J. As

		Incumbent to Surrender in order to accommodate the Applicant's request; (c) the date on which the Applicant requests that the Quantum Access Right takes effect in its Access Agreement; (d) that it has suitable access to and from the freight customer's relevant facility in accordance with paragraph 6.4 of its Access Agreement; and (e) that the Quantum Access Right sought has the characteristics described in either Condition J7.1.2(a) or Condition J7.1.2(b)(as the case may be). Where Condition J7.1.2(a) is being relied on, the Applicant must attach a letter from the relevant freight customer confirming the circumstances which mean Condition J7.1.2(a) applies."	suitable access is a requirement in the Access Contract then we think it is sensible to require a statement at this stage that suitable access has been secured. (e) reflects old J7.3 but also requires the applicant to provide a letter from the third party customer confirming the commercial arrangement so as to reduce the scope for dispute.
86	J7.4	Delete re-number remaining sub-conditions	Old condition J7.4 has now been merged into new condition J7.3
87	J7.4	In Condition J7.4.1(a) after "to that effect to" insert "the Applicant and copy this to" In (b) and (c) amend reference to "J7.5(c)" to "J7.4.1(c)" and "J7.5(a)" to J7.4.1(a)"	To reflect that process is now between applicant and incumbent. Consequential re-numbering
88	J7.5	Delete sub paragraphs (a) and (b) and, instead, insert "specifying that it objects to the surrender because the incumbent requires the Rights Subject to Surrender to continue to convey traffic for another customer and this currently is the primary purpose for which the Rights Subject to Surrender are used ("Ground for Objection"). The Incumbent shall provide evidence in support of any Ground for Objection."	To reflect the fact that 1) old objection that Third Party Notice invalid is not necessary because, if this was the case, then the process has not been initiated properly and so no counter notice should be served. 2) reasonable ongoing commercial need is no longer going to be set out in separate criteria.

			Therefore puts the defence of the incumbent requiring the Rights Subject to Surrender to continue to convey traffic for another customer onto the face of J7. Also adds a "primary purpose" test into the defence to avoid disputes arising when Rights are used for two different customers.
		After "The Incumbent shall send a copy of any Counter Notice and such evidence", delete "to both the Office of Rail Regulation and, " After "information," insert "to"	ORR does not require a copy of this document.
89	J7.5	Delete Condition J7.5.2 and instead insert " If the Incumbent disagrees with: (a) any Train Slots shown in the Third Party Notice as relating to the Quantum Access Right; or (b) any Ancillary Movements or Stabling the Applicant included in the Third Party Notice as being directly related to the Quantum Access Right and no longer required by the Incumbent following the surrender of the Quantum Access Right; or (c) any Access Proposal shown in the Third Party Notice as relating to the Quantum Access Right, it shall include in the Third Party Counter Notice details of why it disagrees with the Applicant."	Expanded so that Incumbent can disagree with Ancillary Movements or Stabling or any Access Proposal included in the Third Party Notice. Present drafting doesn't allow this which we do not agree with.

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90	J7.5.3	Swap order so old J7.5.4 becomes J7.5.3 and vice-versa Change reference to "Condition J7.6" to "Condition J7.5.4"	Change order so consequence of no counter notice is last in Condition Consequential change
91	J7.5.4	(a) after "Third Party Notice" insert "and the Applicant will notify Network Rail, copied to the Incumbent, that this is the case" (b) change reference to "Condition J7.6.3(c)" to "Condition J7.5.4(c)" (c) change reference to "Condition J7.6.3(a)" to "Condition J7.5.4(a)"	To ensure that Network Rail is notified after the deemed surrender. Consequential change Consequential change
92	J7.6	Delete present text and instead insert new heading and text: "**Network Rail agrees with Incumbent** If Network Rail considers that the Grounds for Objection in the Third Party Counter Notice have been substantiated then, subject to any appeal under Condition J11, the Applicant's application will have failed. Network Rail shall notify the Applicant in writing that this is the case, copied to the Incumbent, within 5 Working Days of receipt of the Third Party Counter Notice and shall set out the reasons for such failure."	To emphasise that it is Network Rail's decision whether the Counter Notice has been substantiated or not
93	J7.7	Delete present text and instead insert new heading and text: "**Network Rail agrees with Applicant** 7.7.1 If Network Rail considers that the Incumbent's Grounds for Objection in the Third Party Counter Notice have not been substantiated, then Network Rail shall notify the Incumbent in writing that this is the case, copied to the Applicant, within 5 Working Days	To explain the alternative route, to that set out in Condition J4.10, and new timeframe of 5 Working Days which Network Rail has to notify Part J Access Beneficiary

		of receipt of the Third Party Counter Notice. 7.7.2 Where the Incumbent has disagreed with the Applicant in accordance with Condition J7.5.2, then Network Rail shall, in the notification referred to in Condition J7.7.1, set out what it determines the Rights Subject to Surrender to be."	
94	J7.8	Delete present 7.8.1 and 7.8.2 and instead insert new heading and text: "**Surrender of Access Rights** 7.8.1 The surrender of the Rights Subject to Surrender will be deemed to have occurred: (a) where either the Incumbent accepts Network Rail's decision made pursuant to Condition J7.7 or there is an ADRR Determination, on the date on which such notice is given to the Office of Rail Regulation pursuant to Condition J7.8.2; or (b) on the date specified in the Office of Rail Regulation Determination, if applicable. 7.8.2 In the event of the Incumbent accepting Network Rail's decision or there is an ADRR Determination in accordance with Condition J7.8.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of the acceptance or of the relevant ADRR Determination, as applicable, and shall include a copy of the relevant ADRR Determination, if applicable, with such notice."	To follow on from the new drafting in J7.6 and J7.7 to deal with the scenarios that either the Part J Access Beneficiary accepts Network Rail's decision or takes Network Rail to dispute under the ADRR
95	J7.9	J7.9.1(a)(i) – amend reference to "J7.6.4(c)" to "J7.4.1(c)" and amend reference to "J7.5.(c)" to "J7.5.4(c)"	Consequential amendments

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		Add in a new J7.9.1(a)(ii) - "the date on which the Applicant requested that the Quantum Access Right take effect in its Access Agreement pursuant to Condition J7.3.1(a); or" and make consequential numbering changes to remaining sub paragraphs	The proposed drafting is aimed at providing a link to the handover of rights to the date from which the applicant specified in its Third Party Notice that it required the rights.
96	J7.10	Amend heading and any reference to "Bid" to "Access Proposal" Amend reference to Condition "D4.7.1" to "D2.4" Amend reference to "J7.9" to "J7.10"	To reflect recent changes to Part D of the Network Code. Consequential changes
97	J8.2.2	After "specify", delete "any reduction to" and instead insert "the amount by which the Applicant considers, in accordance with Condition J8.2.3," After "an Existing Cordon Cap" delete "that Network Rail considers should be made" and insert "should be reduced"	To make clear that calculation is carried out in accordance with 8.2.3 and also that Cordon Cap Reduction is the amount by which an Existing Cordon Cap should be reduced.
98	J8.2.3	Delete present wording and instead insert: "The Cordon Cap Reduction shall be calculated in accordance with the following formula: Cordon Cap Reduction = (Rr/R)xC (c) where "Rr" means the number of Level 2 Rights being transferred, "R" means the total number of Level 2 Rights related the cordon cap held by the Part J Access Beneficiary before transfer and "C" means the Part J Access Beneficiary's cordon cap before transfer; and where application of the formula does not result in a whole number, the result shall be rounded down to the nearest whole number."	To incorporate on the face of J8 the formula to calculate a cordon cap reduction in relation to J6 from the "Criteria for Interpreting the expression "Reasonable On-going Commercial Need". In addition, we propose to amend the formula so that it changes the cordon cap in proportion with the rights being transferred. If the resulting reduction figure is not a whole figure then we think it should be rounded down – so that there is no risk that the resulting cordon cap is too low.
99	J8.2.4	Amend reference to "Condition J7.5" to "Condition J7.4"	Consequential change

PROPOSED CHANGES TO PART J OF NETWORK CODE

100	J8.2.5	Amend reference to "Condition J7.6" to "Condition J7.5" In (a) after "Cordon Cap Reduction" delete "because it has a reasonable on-going commercial need for its Existing Cordon Cap" and, instead, insert "and setting out its reasons why"	Consequential change To reflect that we are proposing to remove the reasonable on-going commercial need test
101	J8.2.6	Amend reference to "Condition J7.6.3" to "Condition J7.5.4"	Consequential Change
102	J8.2.7	Amend reference to "Condition J7.6.4" to "Condition J7.5.3"	Consequential Change
103	J8.3	Decapitalise "Cordon Caps"	Not a defined term
104	J8.4	Heading – Amend this to read: "Office of Rail Regulation's consent to or Determination of a Cordon Cap Reduction or Cordon Cap Increase"	To reflect that this condition is dealing with both Cordon Cap Decreases and Cordon Cap Increases
105	J8.4.1	Change "a" in first line to "any" and delete the "and" in between Cordon Cap Reduction and Cordon Cap Increase in the first line and, instead, insert "or"	
106	J8.4.3	After "Cordon Cap Reduction" in the first line delete the "and" and instead insert "or"	To reflect the fact that it might be one or the other
107	J8.4.3	After "If the Office of Rail Regulation does not consent to the reduction or increase, it shall" delete the remainder of the text and, instead, insert: "(a) issue a notice to the parties setting out why consent has been refused; or (b) issue a notice requiring the parties to the relevant Access Agreement to modify the Cordon Cap Reduction and/or Cordon Cap Increase as specified in the notice, to take effect on the date stated in the notice. No such notice shall have effect unless the Office of Rail Regulation has: (i) consulted the parties to the relevant Access Agreement on a draft of the notice it proposes to issue; (ii) taken into account any representations made by the	This drafting reflects that we are proposing to move ORR's ability for ORR to modify a cordon cap increase or reduction reached under J8, which is presently in Condition J10, to J8 itself.

		parties in response to the consultation under Condition J8.4.3(b)(i); and (iii) notified the parties as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions."	
108	J9	New Condition as set out in attached drafting	The new condition: (a)rather than focusing on the process of J9, specifies the objectives which Network Rail has to achieve in holding the meetings; (b) places an obligation on the relevant Part J Access Beneficiary attendee to participate in the meetings in a collaborative manner to assist Network Rail to meet its objective; (c) provides ORR with the ability to direct Network Rail to hold a Rights Review Meeting and, where Network Rail does not comply, gives ORR the power to seek an order from the High Court securing compliance; and (d) means that Rights Review Meetings should be considered in relation to any Part J Access Beneficiary. This would be an extension of the present system which only applies in relation to freight operators.
109	J10	Deleted and re-number following conditions	We are proposing incorporating ORR's ability to modify cordon cap increases or decreases under J8 directly into J8 (see paragraph 98 above) and we propose incorporating ORR's ability to agree part only of the modifications submitted to it under J2.13

			directly into J2 (see paragraph 29 above)
110	J10	New Condition (based on old Condition J11) as set out in attached drafting	Old Condition J11 has been revised to place an obligation on Network Rail to publish, review and keep the template notices up to date. In addition, we have also given ORR a power to order Network Rail to comply with this obligation and where Network Rail does not so comply for ORR to seek an order from the High Court securing compliance.
111	J11	Delete old conditions 12, 13 and 14 and insert a new Condition 11 as in the attached drafting	Reasons for deleting J12 as set out in ORR's Emerging Conclusions on Part J dated August 2011 and its Final Conclusions on Part J dated December 2011. We have amalgamated old Conditions J13 and J14 and produced a simplified dispute resolution condition which mirrors that in the new Part D.

Annex D: Proposal for change to Part D of the Network Code

Insert as a new Condition 8.5 in Part D:

"8.5 **Removal of Train Slots obtained by a freight Train Operator that are not underpinned by access rights in the Rights Table in Schedule 5 of the freight Train Operator's Access Agreement**

8.5.1 Where:

(a) a freight Train Operator has obtained Train Slots in the Working Timetable by making a Train Operator Variation Request; and

(b) the Train Slots are not underpinned by access rights in the Rights Table in Schedule 5 of the freight Train Operator's Access Agreement; and

(c) Network Rail, after consulting the relevant freight Train Operator and acting reasonably, considers that the Train Slots are not being used;

then Network Rail shall remove the Train Slots from the Working Timetable.

8.5.2 Where a Timetable Participant reasonably believes that sub Conditions 8.5.1 (a) and (b) apply, then it may report this to Network Rail who shall consult with the relevant freight Train Operator and consider whether to remove the Train Slots from the Working Timetable in accordance with Condition D8.5.1."

Present Condition D8.5 would become Condition D8.6.

Annex D: Proposal for change to Part M of the Network Code

Network Code - Part M – Appeals

Explanatory Note

A. Provision is made for parties who are dissatisfied with the outcome of Timetabling Disputes made under Part D of and with ADRR Determinations of disputes under Part J to appeal decisions to the Office of Rail Regulation. Part M sets out general provisions regarding appeals to the Office of Rail Regulation.

B. If the Office of Rail Regulation refuses to hear the appeal, and the Appellant wishes to pursue the appeal, he must, unless agreed otherwise by the parties, do so before the High Court (in Scotland, the Court of Session).

C. This Explanatory Note does not form part of the Network Code.

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In this Part M, except where the context otherwise requires:

"Appellant"	means any dispute party seeking to challenge a determination made in accordance with the ADRR by appeal to the Office of Rail Regulation;
"dispute party"	means any person who fulfilled the definition of "Dispute party" set out in the ADRR;
"Respondent"	means, in relation to any determination which is challenged under this Part M, any other dispute party which is affected by such determination.

CONDITION M1 - APPLICATION OF PART M

The rules in this Part M apply to any appeal to the Office of Rail Regulation under:

(a) any relevant Condition of this code; or

1 Introduction

1.1 0verview

1.1.1 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 or a decision reached by Access Disputes Adjudication in relation to a dispute arising under Part J, can appeal the matter to the Office of Rail Regulation for determination.

1.2 Interpretation

1.2.1 In this Part M:

(a) the singular shall include the plural and vice versa;

(b) the headings are for convenience only and shall not affect interpretation; and

(c) capitalised words have the meanings shown below:

1.2.2 In this Part M, capitalised word have the meanings shown below:

"Appellant"	means any Dispute Party seeking to challenge a determination made in accordance with the ADRR by appeal to the Office of Rail Regulation;
"Dispute Party"	means any person who fulfilled the definition of "Dispute party" set out in the ADRR;
"Respondent"	means, in relation to any determination which is challenged under this Part M, any other dispute party which is affected by such determination.

~~(b) the ADRR.~~

~~**CONDITION M2 - TIME LIMIT FOR APPEALS**~~

2 Notice of Appeal

2.1 Requirements

2.1.1 Any appeal made under this Part M must ~~be made by written notice served in accordance with Condition M3~~:

(a) comply with the requirements of Condition M3; and

(b) be served on the Office of Rail Regulation and the Respondent(s):

(i) ~~(a) in the case of an appeal under Condition D5,~~ within five Working Days of receipt of the ~~determination to be challenged. If Christmas Day occurs within this period then an appeal should be submitted within 10 Working Days~~decision to which objection is made;

~~(b) in the case of an appeal under Condition J13 or J3.13, within 10 Working Days of a relevant ADRR Determination;~~

~~(c) in any other case, within 30 Working Days of receipt of the determination to be challenged,~~

(ii) where the period referred to in Condition M2.1(b)(i) includes Christmas Day, within ten Working Days of that decision.

2.1.2 ~~or such longer period as the~~The Office of Rail Regulation may ~~allow.~~extend the timeframe referred to in Condition M2.1(b) if it considers it appropriate to do so.

~~**CONDITION M3 - NOTICE OF APPEAL**~~

~~**3.1 *Contents***~~

3 **Content of a Notice of Appeal**

3.1 **Content of a Notice of Appeal**

3.1.1 ~~In a~~A notice of appeal ~~the Appellant~~ must:

(a) ~~(a)~~ identify the determination which the Appellant wishes to challenge;

(b) ~~(b)~~ detail why the Appellant believes that the determination is:

(i) ~~(i)~~ wrong; or

(ii) ~~(ii)~~ unjust because of a serious procedural or other irregularity; and

(c) ~~(c)~~ insofar as reasonably practicable, attach any evidence on which the Appellant wishes to rely in support of the appeal.

~~**3.2 *Service***~~

4 **Right of The** ~~Appellant must serve the notice of appeal on the~~ **Office of Rail Regulation** ~~and the Respondent(s).~~**to Refuse to Hear an Appeal**

~~**CONDITION M4 - RIGHT OF THE OFFICE OF RAIL REGULATION TO REFUSE TO HEAR APPEAL**~~

4.1 ~~**4.1**~~ **Grounds of decision**

4.1.1 Within ~~15~~10 Working Days of service of a notice of appeal pursuant to Condition M~~3~~2, the Office of Rail Regulation may decide that the appeal should not proceed to it, including on the grounds that:

(a) ~~(a)~~ the matter in question is not of sufficient importance to the industry;

(b) ~~(b)~~ the reference is frivolous or vexatious;

(c) ~~(c)~~ the conduct of the party making the reference ought properly to preclude its being proceeded with; or

(d) ~~(d)~~ it is appropriate or convenient for the matter instead to be disposed of by the High Court (in Scotland, by the Court of Session).

4.2 ~~4.2~~ **Consequences of decision**

4.2.1 If the Office of Rail Regulation decides that the reference to appeal should not proceed, it shall immediately notify the Appellant and each Respondent of its decision, and:

(a) ~~(a)~~ in the case of decision on any of the grounds specified in Condition M4.1(a), (b) or (c), the decision in accordance with the ADRR shall stand; and

(b) ~~(b)~~ in the case of a decision on the ground specified in Condition M4.1(d), either party to the appeal shall be entitled to apply to the High Court (in Scotland, the Court of Session) for any appropriate relief.

~~CONDITION M5 - RESPONDENT'S NOTICE~~

5 Respondent's Notice

5.1 Requirements

5.1.1 ~~5.1~~ Within ~~30~~10 Working Days of service of a notice of appeal a Respondent may serve on the Appellant, any other Respondent and the Office of Rail Regulation a notice:

(a) ~~(a)~~ stating that he opposes the appeal; and

(b) ~~(b)~~ insofar as reasonably practicable, attaching any evidence on which the Respondent wishes to rely in opposing the appeal.

~~5.2 In the event that:~~

~~(a) a Respondent seeks more time to serve such a notice; or~~

~~(b) the Appellant seeks the appeal to be dealt with more expeditiously than the timescales in Condition M5.1 would allow,~~

5.1.2 In the event that a Respondent seeks more time to serve such a notice the Office of Rail Regulation may, upon the ~~relevant party~~Respondent providing the Office of Rail Regulation with evidence which satisfies it that an extension ~~or expedition~~ of the timeframe for service of the notice is appropriate, grant such ~~shorter or~~ longer period for service of the notice as it considers necessary.

~~**CONDITION M6 - MATTERS TO BE CONSIDERED ON APPEAL**~~

6 Expedited Process

6.1 Appellant or Respondent Request to Expedite

6.1.1 Where a party to the appeal believes that the appeal should be dealt with on an expedited basis, it should make representations to the Office of Rail Regulation, copied to the other party, explaining why it believes this to be the case and its proposed timetable for the appeal. Where the Appellant makes such representations, it should do so as part of its Notice of Appeal. Where the Respondent makes such representations, it should do so within two Working Days of receipt of the Notice of Appeal.

6.1.2 On receipt of representations in accordance with Condition M6.1.1, the Office of Rail Regulation shall give the other party to the appeal an opportunity to make any representations in response.

6.1.3 Having received any representations in accordance with Conditions M6.1.1 and 6.1.2, where the Office of Rail Regulation believes it is in the interests of justice to do so, it shall order that the appeal is heard on whatever expedited timeframe it considers appropriate.

6.2 Power of ORR to order expedited Process

6.2.1 Even where a party to the appeal does not request that the appeal be dealt with on an expedited basis in accordance with Condition M6.1, the Office of Rail Regulation may, where it believes it is in the interest of justice to do so, order that an appeal is heard on whatever expedited timeframe it considers appropriate.

7 Matters to be Considered on Appeal

7.1 ~~6.1~~ Scope

7.1.1 Every appeal will be limited to a review of the decision of the lower tribunal unless the Office of Rail Regulation considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

7.2 ~~6.2~~ Grounds

7.2.1 At any hearing of the appeal, a party may not rely on a matter not contained in the appeal notice or Respondent's notice unless the Office of Rail Regulation gives permission.

~~CONDITION M7 - POWERS OF OFFICE OF RAIL REGULATION~~

8 Powers of the Office of Rail Regulation

8.1 ORR's Powers

8.1.1 The Office of Rail Regulation shall, in determining the matter in question, have the power:

(a) ~~(a)~~ to give directions as to the procedure to be followed in the appeal, including in relation to the time limits within which anything must be done, the making of any written and oral submissions, and the extent to which any evidence or other submissions made by one party to the appeal shall be disclosed to any other;

(b) ~~(b)~~ to appoint any person to act as a legal or technical assessor who it considers has suitable knowledge and experience to assist the Office of Rail Regulation;

(c) ~~(c)~~ to make any interim order as to the conduct or the positions of the parties pending final determination of the matter by the Office of Rail Regulation; and

(d) ~~(d)~~ to make such orders as it shall think fit in relation to the proportions of the costs of the proceedings in question (assessed in such manner as the Office of Rail Regulation shall determine) which shall be borne by each party.

CONDITION M8 - IMMUNITY OF OFFICE OF RAIL REGULATION

9 Immunity of the Office of Rail Regulation

9.1 Immunity of Office of Rail Regulation

9.1.1 The Office of Rail Regulation shall not be liable in damages or otherwise for any act or omission to act on its part (including negligence) in relation to the conduct of any reference to appeal.

CONDITION M9 - OBLIGATION TO COMPLY WITH DETERMINATION OF APPEAL

10 Obligation to Comply with Determination of Appeal

10.1 Obligation to Comply with Determination of Appeal

10.1.1 All Appellants and Respondents shall:

(a) (a) subject to and pending the final determination of any reference to the Office of Rail Regulation, comply with:

(i) (i) any determination made in accordance with the ADRR in relation to any dispute referred ; and/or

(ii) (ii) any interim order of the Office of Rail Regulation; and an

(b) (b) comply with any final determination of the Office of Rail Regulation.

CONDITION M10 - EFFECTIVE DATE OF OFFICE OF RAIL REGULATION'S DECISION

11 Effective Date of Office of Rail Regulation's Decision

11.1 Effective Date of Office of Rail Regulation's Decision

11.1.1 If, in relation to any particular dispute, any interim order or final determination of the Office of Rail Regulation is made during any period of operation of the Working Timetable to which the dispute relates, the Office of Rail Regulation may, if it is of the opinion that in the circumstances of the case the balance of material convenience to all affected persons (taking into account any material prejudice that may thereby result) favours such a course, stipulate that such order or determination shall take effect at a specified time during such period of operation.

Document comparison done by DeltaView on 01 August 2011 16:59:26

Input:	
Document 1	PowerDocs://ORR/421917/1
Document 2	PowerDocs://ORR/422032/5
Rendering set	Standard

Legend:	
Insertion	
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Style change	
Format change	
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Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	115
Deletions	74
Moved from	1
Moved to	1
Style change	0
Format changed	0
Total changes	191

Annex E: Proposal for change to ADDR

Proposed Amendments to Chapter G of ADRR – to speed up the ADA process for Part J disputes

1. Insert at the end of Rule G14:

"In relation to disputes referred under Part J of the Network Code, the oral hearing shall be fixed by the Hearing Chair as soon as practicable after his/her appointment and shall take place, unless exceptional circumstances apply, within 14 days of completion of service of the statements of case referred to in Rules G17(a)-(c) below."

2. Insert at the beginning of Rule G17(a) and Rule G17 (b)

"subject to Rule 17 (h),"

3. Insert at the beginning of Rule G17 (e):

"except in relation to a dispute arising under Part J of the Network Code, "

4. Insert a new Rule G17 (h)

"17 (h) for disputes referred under Part J of the Network Code the timeframes set out in Rules G17(a) and G17(b) shall be reduced to 7 days."

Proposed Amendments to Chapter B of ADRR to remove the requirement of a Procedural Agreement for Timetabling Disputes and disputes arising under Condition B2.4.4 and Part J of the Network Code

1. Delete Rule B5 and instead replace it with the following text:

"5 All Timetabling Disputes shall be referred to a Timetabling Panel in accordance with Chapter H. Following service of a Notice of Dispute relating to such a dispute the process under Chapter H shall commence and the Secretary shall appoint a Timetabling Panel in accordance with Rule H11. If either party raises any objection then the Hearing Chair of the Timetabling Panel shall consider the best way to proceed."

2. Delete Rule B6 and instead replace it with the following text:

"6 All disputes referred to resolution in accordance with these Rules under Condition B2.4.4 of the Network Code shall be referred to an ADA in accordance with Chapter G as a single stage dispute resolution process with no appeal. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the Secretary shall appoint a Hearing Chair for

the dispute in accordance with Rule G9. If either party raises any objection then the Hearing Chair shall consider the best way to proceed."

3. Delete Rule B7 and instead replace it with the following text:

"7 All disputes referred for resolution in accordance with these Rules under Part J of the Network Code shall be referred to an ADA in accordance with Chapter G with a right of appeal to the ORR for determination in accordance with Part M of the Network Code. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the Secretary shall appoint a Hearing Chair for the dispute in accordance with Rule G9. If either party raises any objection then the Hearing Chair shall consider the best way to proceed."

Annex F: Impact assessment

Section 1: The issue

What is the issue?

1.1. Part J of the Network Code provides a number of mechanisms for transfer, adjustment and surrender of access rights. Since its introduction in 2005 there have been partial reviews of Part J but no complete review has been carried out. We have a number of concerns about the usage and functionality of Part J and as a consequence are proposing a number of substantial changes to certain Part J Conditions.

Why are we intervening?

1.2. Following a review of Part J we consulted the industry on a number of specific changes we had identified that could be made to Part J to improve its overall effectiveness and clarity. In addition to identifying a number of drafting changes that could be made to improve clarity and understanding, we identified two main issues that we felt needed particular review, namely the "*use quota and use period*" and the "*Reasonable on-going Commercial Need*" criteria (ROCN). Our proposals for dealing with these two issues will result in a change of approach and consequently have an impact for the industry.

What is the desired outcome?

1.3. That our proposals will provide more clarity to users of Part J and will meet Fs and customers' needs for simpler processes and shorter timescales for the transfer and surrender of access rights and train slots.

When will we review the success of the intervention?

1.4. We will review the success of any changes 3 years after the changes have been introduced. This should provide sufficient time for the amended Part J mechanisms to bed down and any adverse impacts to become apparent – although under Part C of the Network Code either ORR or an access beneficiary can propose a change earlier if it is thought necessary.

Section 2a: The options – use period/quota

In our consultation document, we proposed a number of options for dealing with this issue. For ease of reference these are discussed below.

Option 1: Do nothing

2.1. We could make no proposals to amend Condition J4. The other options are assessed relative to this option.

Option 2: have a requirement that the use period/quota would apply to each day of the week

2.2. The second option is to have a requirement that the use quota/period would apply to each individual day of the week to which the access right relates. For example, for a SX right the use quota/period would be assessed separately for Monday, Tuesday, Wednesday, Thursday and Friday. In comparison with option 1 this would prevent a train slot that is obtained for one day of the week for a SX right, blocking the access right being used by another train operator for the other days of the week. This would also provide for more efficient use of capacity and promote transfers or access rights between FOCs for the benefit of freight customers. In our consultation most support was shown for this option.

Option 3: assessing future requirements on previous usage

2.3. A variation on option 2 would be to assess future requirements of rights on the basis of the preceding year's use so that it would not be possible to retain rights to a path for more days per week than its average use over the 365 days immediately prior to the failure to use. For example, if across a year a SX right is only used to obtain a path once per week on average, the right should not be retained as a SX right and the FOC would need to nominate a single day rather than continue to hold the right in respect of 5 days per week. This would be an improvement on the existing mechanism however there was little support from consultees for this option.

Option 4: Set a minimum percentage for rights usage

2.4. A minimum percentage threshold could be set for use of the rights across the Use Period and a certain percentage use of the rights would be required, for example, 60%. This option is an improvement on option 1 but again there was little support from consultees for this approach.

Option 5: Minimum percentage of rights usage based on commodity

2.5. A variation on option 4 is minimum percentage thresholds for different commodities e.g., the percentage use for coal might be less than percentage attributed to inter-modal. Again there was little support for this option and we consider that it would be too complex to administer. This complexity makes it less attractive than option 1.

Option 6: Tiered use quota depending on constrained capacity

2.6. The last option is to have a tiered use quota/period depending on how constrained is believe to be. The use period would remain at 90 days where there are no known capacity constraints but it could reduce to 30 days where capacity scarcity is evident and 14 days where there is little or spare capacity. Although this option appears attractive compared to the other options, there would be difficulty in establishing the levels of capacity and administering such a system. There was also little support from FOCs.

Section 2b: The options – ROCN criteria and cordon cap ROCN formula

We did not put forward specific options in our consultation document, but in view of the conflicting views received on how to deal with this issue and against the background of the industry's desire to see more straightforward and clear processes we reviewed our thinking and considered other ways of dealing with the issues.

Option 1 – Do nothing

2.7. We could make no proposals to amend ROCN or move the ROCN cordon cap formula. The other options are assessed relative to this option.

Option 2 – Simplify and include the ROCN criteria in the Network Code and move ROCN formula relating to cordon caps to other conditions in Part J

2.8. Option 2 is to simplify the existing ROCN to provide clear outputs, obligations and requirements for freight customers, FOCs and Network Rail. The ROCN criteria relating to cordon caps would be moved to Conditions 6 and 8 which deal with cordon caps and be formula based. Simplification of the ROCN criteria and moving the cordon cap ROCN formula to Conditions J6 and J8 would improve clarity. Most consultees supported simplification of the ROCN criteria and its inclusion directly in the Network Code. Most consultees were supportive the changes to the cordon cap ROCN criteria.

Option 3 – Remove ROCN criteria and move ROCN formula relating to cordon caps to other conditions in Part J

2.9. Option 3 is to remove entirely the existing ROCN criteria from Part J impacting upon J4 and J7. This would mean that in most circumstances the incumbent would automatically lose the access right which it had failed to use. The ROCN criteria relating to cordon caps would be moved to Conditions 6 and 8 which deal with cordon caps and be formula based. The removal of the ROCN criteria will significantly improve the clarity of the operation of J4 for Network Rail, FOCs and rail freight customers. Moving the formula to the relevant Conditions will also aid in this. There was support from most consultees to simplify the ROCN criteria and move the cordon caps formulae.

Section 3: The preferred options

3.1. We recognise that it is not always possible to quantify the financial impacts of policy decisions. However our preferred options make a number of assumptions on the reduction of administrative burdens for FOCs, the benefits of increased certainty of ability of freight customers to move between freight customers and the more efficient use of capacity.

use quota/period

3.2. We have decided that the preferred option amending the use quota/period is option 2 which would apply the use period/quota to each day of the week. We have decided that this option is the most appropriate because it provides the simplest method to ensure that capacity is being used in comparison with other that are listed. This option also had the most support from consultees and would have the most positive impacts on stakeholders. The grid below shows the relative merits of the different options.

	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6
Easy to implement	✓	✓	✓	✓		
Wide support from consultees		✓				
Improvement on option 1		✓	✓	✓	✓	✓

ROCN

3.3. We have decided that the preferred option for simplifying the ROCN criteria is option 3 which removes completely any criteria for retaining an access right. This option is the most radical. However we consider that it provides the necessary clarity for Part J of which most consultees were supportive, and will also benefit freight customers in the long term. [ROCN for Condition J7]. Option 3 would also introduce a simple formula for the calculation of a reduction in cordon caps following a surrender or transfer under Conditions J4 or J7 and improve it clarity over the existing provision. Given the removal of any ROCN criteria from Part J, we also consider that it is desirable to move the cordon cap formulae to the relevant Conditions to improve the overall clarity of Part J.

Impact on stakeholders/duty holder

3.4. **Network Rail –** We do not consider that our changes to Part J will have a significant impact on Network Rail but it should reduce the amount of administrative involvement of Network Rail in an undisputed transfer or surrender of access rights. The introduction of cordon cap formulae will also ease the administrative burden on Network Rail when dealing with cordon cap adjustments

3.5. **Government –** We do not consider that the proposed changes will have any significant impact on government.

3.6. **FOCs –** We consider that the changes will have a beneficial on FOCs because they will provide more clarity on the Part J mechanisms and the

changes to the use quota/period will ensure unused capacity can transfer more readily between FOCs.

3.7. **Franchise and open access operators -** We consider that the proposed changes will not have a significant impact on train operators.

3.8. **Consumers -** We expect that freight customers will benefit from our proposals because the removal ROCN criteria will provide greater clarity and should reduce the number of surrenders or transfers resulting in disputes. We also expect the changes to the use quota/period will ensure unused capacity can transfer more readily between FOCs. We do not expect that the proposals will have any significant impact on passenger customers.

Impact on specific consumer groups

3.9. **Disability** – This policy involves the allocation and utilisation of track access capacity and is disability neutral.

3.10. **Gender** – This policy involves the allocation and utilisation of track access capacity and is gender neutral.

3.11. **Race** – This policy involves the allocation and utilisation of track access capacity and is race neutral.

3.12. **Other** – We do not consider that the impact of this policy would vary across consumer groups, for example low income households.

Impact on health and safety

3.13. We do not consider that there will be an impact on health and safety, as Network Rail and train operators are licensed and have already obtained the necessary safety certifications, and will be planning and running services.

Impact on sustainable development

3.14. We consider that there may be a positive impact on sustainable development from encouraging the industry to better utilise capacity to the benefit of its customers (both passenger and freight).

Impact on competition

3.15. We expect that the proposed changes will have result in greater competition between FOCs as freight customers will have more certainty that they can change their rail haulier.

Geographic impacts

3.16. In implementing our access policy we take account of general guidance provided by the Secretary of State or Scottish Ministers and / or notified strategies and policies of the National Assembly of Wales, depending on the geography of the services concerned, in accordance with our statutory duties. Our application of the access policy may vary by geography as a result.

3.17. The specific policy changes set out in this document do not, however, have a distinct geographic impact.

Statutory duties

3.18. We think the following statutory duties under section 4 of the Railway Act 1993 (as amended) are particularly relevant to this policy proposal:

- otherwise to protect the interests of users of railway services;
- to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [it] considers economically practicable;
- to contribute to the development of an integrated system of transport of passengers and goods;
- to promote efficiency and economy on the part of persons providing railway services;
- to promote competition in the provision of railway services for the benefit of users of railway services; to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;
- to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions under this Part or the Railways Act 2005 that are not safety functions; and
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

Overall impact

3.19. We consider that the overall impact will be to improve clarity and transparency when access rights and train slots are being transferred or surrendered to best meet the needs of freight customers.

Conclusion

3.20. From the impacts described above, we believe that that implementation of this policy will have a net benefit for society.