

Freight customer model track access contract: final conclusions

September 2010

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Executive Summary

1. This document sets out our final conclusions on a model contract for freight customers and contains a model freight customer track access contract for parties to use, together with a revised model freight operator track access contract for use where a freight customer has drawn down its access rights to a freight operator to operate services.
2. Freight customer contracts come under the access provisions of the Railways Act 1993 because they would be seeking permission to use Network Rail's network. As such they need to be approved by ORR, as track access contracts, before they can take effect. That also means that ORR is empowered under section 21 of the Act to develop and establish model freight customer contracts for industry use. ORR's model contracts contain standardised provisions which provide a wide range of benefits to the parties. We explain this in more detail at paragraph 2.11 below.
3. The model contracts, published with this document, are based on the provisions in the model track access contracts previously established for freight operators, but have been tailored to meet the specific requirements of freight customers and their chosen agents. The model contracts will provide freight customers with control over the exercise of their own access rights associated with the movement of their goods for those that want it. In developing them our aim has been to keep the contractual mechanism as simple and transparent as possible for freight customer and to ensure that the process by which a freight customer's track access rights can be drawn down into a freight operator's contract, and subsequently revoked, is as simple, quick and efficient as possible.
4. These conclusions and associated documentation have been arrived at after listening carefully to the views of the industry which were received in response to a consultation in September 2009. They are consistent with our statutory duties and published policies and provide a clear and transparent way for freight customers to hold track access rights in their own name, should they wish to do so.

5. This document, in setting out our final conclusions, explains the main points raised by consultees, ORR's response to these comments and any changes made to the model contracts as a result of the changes. The document also includes a proposal for change in respect of the changes required to the Network Code and identifies changes required to associated documents. To facilitate entry into the new model access contracts we will be introducing a general approval. **Annex G** provides guidance on the application of the proposed general approval which will enable the parties to enter into the new model access contracts quickly and efficiently, with our prior approval, under certain conditions. **Annex G** also provides advice on the types of access applications that may need to be made by freight customers or jointly by a freight customer and Network Rail for access to the network.

1. Introduction

Purpose

1.1 This document sets out ORR's final conclusions on:

- (a) our proposals to introduce a new model freight customer track access contract;
- (b) our proposals to introduce a new model freight operator track access contract for use when a freight customer has drawn down its access rights to a freight operator to operate services; and
- (c) the modifications required to the Network Code to give effect to the new model freight customer track access contract.

1.2 For ease of reference and convenience, the following abbreviations are used throughout the rest of this document:

- (a) *Freight customer access contracts: a consultation paper*, Office of Rail Regulation, London, September 2009, available at <http://rail-reg-master.orr.gov.uk/upload/pdf/400.pdf> (the **September document**).
- (b) freight customer (**FC**);
- (c) freight operator (**FOC**);
- (d) track access contract (**TAC**);
- (e) new model freight customer track access contract (**FCTAC**); and
- (f) new model FOC customer track access contract (**FOCTAC**).

1.3 These conclusions have been arrived at following discussions with various FCs and other interested stakeholders, including an industry wide consultation in September 2009. Most respondents were supportive of the overall thrust of our proposals and we are grateful to the industry for its contributions and the detailed and helpful suggestions received. Throughout this document, we report on the responses received, and set out our conclusions.

- 1.4 We have tried to respond the points made by consultees in a reasonable degree of detail. Even so, the overall volume and detail of responses received means this document cannot deal with every individual point raised although we can assure consultees that all issues raised with us have been considered in finalising these conclusions.

Background

- 1.5 In our corporate strategy¹, one of the strategic themes we identified was the need to focus on passenger and FC requirements. Specifically, as regards FCs, we committed to continue to promote development of a competitive freight market and responsiveness in Network Rail to the needs of freight as a means to deliver improved FC satisfaction.
- 1.6 In addition, FCs have been telling us for some time now that they were interested in holding track access rights in their own name. However, experience has shown that while certain third parties might be interested in developing access contracts, confusion about what such contracts should look like has resulted in stalled discussions between interested parties and Network Rail. This has led to FCs being continually frustrated by difficulties, as they see them, caused by the regulated rail freight industry. We therefore considered that the time was right to develop a model contract to eliminate confusion, reduce transaction costs and encourage the development of third party access.
- 1.7 Consistent with our strategy, we reviewed the track access arrangements relating to FCs and identified ways in which these could be developed to facilitate FCs holding and managing their own track access rights. As our September document explained, we considered that our proposals would:
- (a) afford FCs greater control by providing for them to hold track access rights directly;
 - (b) allow FCs to secure availability of freight paths to meet their rail transport requirements through direct participation in the timetable bidding process if they wish to be involved in that process;

¹ *Promoting safety and value in Britain's railways: Our strategy for 2009-14*, Office of Rail Regulation, London, December 2009, available on our web site at <http://www.rail-reg.gov.uk/upload/pdf/388.pdf>.

- (c) incentivise Network Rail and FOCs to be more responsive to the commercial needs of FCs; and
- (d) promote competition in the freight market between FOCs.

Our proposals

- 1.8 We recognised that the existing freight model track access contract might not be suitable for the majority of FCs owing to the need to engage fully with industry processes and to take on the associated risks, responsibilities and liabilities. To address this issue, we developed a new model FCTAC based on our existing FOC model track access contract, but specifically tailored to the needs of FCs.
- 1.9 This new contract would enable a FC to;
- (a) secure track access rights from Network Rail;
 - (b) allow it or its nominated agent to participate in Network Rail's timetable development process;
 - (c) allow the access rights to be drawn down, under a bespoke mechanism, into a new FOC/Network Rail access contract (the FOCTAC). That mechanism would also allow the access rights to be recovered by the FC and reallocated to another FOC.

We proposed no requirement for certain provisions (e.g. parts of Schedules 4 & 7, and Schedules 8 and 11).

- 1.10 In addition to developing the new FCTAC our September document identified a number of amendments that would need to be made to the existing freight model contract for use where a FC has drawn down its access rights to operate services to a freight operator. We also considered the application of the Network Code and any possible modifications to it that might be required to ensure that FCs with access contracts had the necessary rights and obligations.

The consultation

- 1.11 The September document set out these proposals and sought consultees' views on:

- (a) our proposed policy for FC access contracts;
- (b) our proposed model FCTAC and the associated changes to the existing freight model contract to give effect to the drawdown of a FC's track access rights; and
- (c) our thinking on the application of, and the necessary modifications to, the Network Code.

1.12 We received 19 responses to the consultation from a range of stakeholders, including Network Rail, FOCs, FCs, representative bodies and Transport Scotland. We also received a reply from one passenger owner group First Group plc (First) – their then freight subsidiary (GB Railfreight – now owned by Europorte) replied separately. All respondents, who are listed at **Annex A**, gave permission for us to publish their responses (with one organisation asking for anonymity, shown as Company A) and these have been posted on our website².

Structure of this document

1.13 This document represents our final conclusions and is structured as follows:

- (a) **Chapter 2** provides an overview of consultation responses and general issues arising;
- (b) **Chapter 3** sets out ORR's response to key consultation issues;
- (c) **Chapter 4** explains the changes required to the Network Code and associated documentation, i.e., reasonable on-going need (ROCN) criteria and the Railway Operational Code document;
- (d) **Annex A** lists respondents to the consultation;
- (e) **Annex B** contains the proposal for change of the Network Code;
- (f) **Annex C** contains a table of proposed changes of the Network Code;

² <http://www.rail-reg.gov.uk/server/show/ConWebDoc.9890>

- (g) **Annex D** contains the ROCN criteria showing our proposed amendments;
- (h) **Annex E** contains the Railway Operations Code showing our proposed amendments;
- (i) **Annex F** contains Part H of the Network Code showing our proposed amendments;
- (j) **Annex G** contains an explanatory note and flow chart in relation to a proposed new general approval; and
- (k) **Annex H** contains a revised impact assessment.

Next steps

1.14 We are publishing alongside this conclusions document:

- (a) marked up copies of the model FCTAC and model FOCTAC to show the differences from the versions published with the consultation, together with clean copies incorporating those changes; and
- (b) marked up copies of the various parts of the Network Code showing the proposed amendments.

1.15 We are keen to introduce FCTACs as soon as possible, but clearly before we can do so, we first need to make the changes required to the Network Code. It is our intention to sponsor these changes through the usual democratic change processes set out in Condition C5 of the Network Code. This is explained in chapter 4 of this document and to aid consultees' understanding of the changes, we have set these out (see **Annexes B, C D, E and F**), as far as possible, in the form that the Proposal for Change will take. Our intention is that the formal Proposal for Change can be processed during September 2010 with a view to introducing FCTACs as soon as possible thereafter. We also explain in chapter 4 the potential impact of ORR's separate Proposal for Change to Part D of the Network Code on the Proposal for Change relating to FCTACs.

1.16 We are also keen to reduce as far as possible any regulatory burden relating to the entering into and gaining ORR approval of any contracts. As such we are proposing to develop a general approval relating to the FCTAC and

FOCTACs. An explanatory note explaining our proposals and the process is set out in **Annex G**. The general approval will allow:

- (a) a FC to enter into a FCTAC under section 18 provided that it does not contain firm rights. This replicates similar arrangements that exist for FOCS;
- (b) FOCs and Network Rail to enter into a new FOCTAC under section 18 removing the need for ORR approval, where the new FOCTAC does not contain any firm rights; and
- (c) where a FOC enters into its first FOCTAC, the FOC and Network Rail to agree certain changes to liability provisions in the FOC's own TAC in order for those provisions to work alongside the liability provisions in the new FOCTAC.

We will consult shortly in the usual way on the proposed general approval.

- 1.17 The necessary revisions to the criteria and procedures document (C&Ps)³, including specific draft guidance for prospective FCs, will be made in due course when the necessary changes to the Network Code and associated documents have been made.

³ *Criteria and procedures for the approval of track access contracts*, Office of Rail Regulation, London, November 2009, available at <http://www.rail-reg.gov.uk/upload/pdf/408.pdf>.

2. Overview of consultation responses and general issues arising

Introduction

- 2.1 This chapter provides a brief overview of the responses received, discusses a number of general issues raised by consultees and sets out our views and conclusions on these.

Overview

- 2.2 We received 19 responses to the consultation from a range of stakeholders, including Network Rail, FOCs, FCs, passenger and freight representative bodies and Transport Scotland (TS). Prior to making its response, we had agreed to Freightliner Group Limited's (FL) request for a meeting at which it outlined certain issues it considered had not been covered in the consultation but which it would cover in its response. FL proposed ORR should hold an industry workshop at which all issues could be discussed but given the nature and detail of the responses received we saw no benefit in doing so.
- 2.3 The vast majority of consultees were supportive of our approach with only three consultees, DB Schenker Rail (UK) Limited (DBS), Hull Bulk Holding (HBH) and Scottish & Southern Energy plc (S&SE) directly opposed to our proposals. We also received a reply from one passenger owner group FirstGroup plc (First), who whilst recognising the rights of third parties to hold TACs saw a number of fundamental problems with our proposals. First's (then) freight arm, GB Railfreight Limited (GBRf), who replied separately, broadly supported the concept of FCTACs, but stressed that in their view it was only the first step to achieving a more competitive and fair freight market.
- 2.4 FL submitted a detailed and constructive response in which it acknowledged the right of third parties to hold their own contracts. However, it was concerned that our proposals could raise FC's expectations and that the complexities of the process needed to be clearly understood and set out. International Power Fuel Company Limited (IP) too, whilst supportive of the proposals, was concerned to see a clear process with the various parties' obligations set out and a more accurate analysis of the costs of entering into FCTACs. The Freight Transport Association (FTA) also supported our

proposals, but felt that take up by FCs would be limited and that there are bigger and wider issues that need discussing.

- 2.5 Aggregate Industries (AI), DP World, Hutchison Ports (UK) Limited (HPUK), Rail Freight Group (RFG) and UK COAL PLC (UKC) all had points to make on our proposals but were generally supportive of the proposals and the principles set out in our consultation. Associated British Ports (ABP) stressed the importance of developing proposals that help to increase and maximise the capacity, capability and flexibility of rail freight services connecting ports.
- 2.6 Company A, which asked to remain anonymous, a potential large scale customer of freight services in England and Wales, was very much in favour of the opportunities highlighted in the consultation. It felt that the ability for FCs to seek track access in its own name would give greater financial certainty. Aside from the obvious commercial benefits to the FC, it said that it might also make rail infrastructure projects easier to fund, and therefore more viable. Network Rail too was supportive of our proposals, but based on its experience of working with FCs put forward some variations from those set out in our September document, including some minor drafting changes to our proposed templates.
- 2.7 TS on behalf of the Scottish Government agreed with the overall aims of our proposals and were fully committed to encouraging the transfer of freight from road to rail where this would be a viable alternative. Finally, the Access Disputes Committee (ADC) response, given its role within the industry, focused on those areas relating to potential disputes and the process for dealing with them.
- 2.8 All the consultees raised a variety of issues of concern over our approach, particularly in relation to the mechanics of how it would work in practice and fit in alongside existing industry arrangements. Briefly, the key issues were:
 - (a) whether our proposals would promote the most efficient use of capacity on the network, e.g., the use of access rights for multiple customers;
 - (b) whether there would be one track access contract for each FOC within which all the different customer rights are shown separately or whether FOCs would hold separate track access contracts for each customer;
 - (c) the draw down and revocation processes;

- (d) liabilities;
- (e) transaction costs; and
- (f) lack of FC expertise.

These, together with a number of the other key issues raised by consultees, are dealt with in **Chapter 3**. However, first we deal with a number of general points.

The need for FCTACs?

- 2.9 DBS said that there was no requirement for our proposed policy and that FCs' right to obtain their own access rights is already enshrined in legislation. Further, our proposed policy is on significantly more favourable terms than those that are applied to FOCs and is therefore in breach of our section 4 duties. DBS also expressed concern that our September document appeared to suggest that "ORR had already decided to implement its proposed policy despite the outcome of the consultation process being uncertain".
- 2.10 FL said that it was disappointed that the ORR had not involved FOCs earlier in the process as clearly many months of work must have gone into producing the consultation documentation. It believed that earlier engagement would have enabled issues to be addressed in the consultation that "have not been adequately considered".

ORR's response to consultees' views

- 2.11 The concept of introducing FCTACs is not a new idea and has been around for a number of years and is envisaged as part of our published strategy for 2009 – 14 which outlines our wider commitment to focus on customer needs⁴. We refute the suggestion that our proposals favour FCs over FOCs, are discriminatory and conflict with our section 4 duties. As DBS knows the guiding principle for establishing model contracts is to:

"...create contracts that provide a sound, straightforward basis for supporting and facilitating a more effective and efficient working relationship between Network Rail and its customers purchasing access to the network, ensure the

⁴ <http://www.rail-reg.gov.uk/upload/pdf/388.pdf>

appropriate allocation of risk, include incentives for efficiency and, overall, encourage a culture of compliance and improved delivery⁵.

Acting in accordance with our established policy was always our intention in developing model clauses for FCs.

- 2.12 As a number of consultees acknowledged, the Railways Act allows third parties, such as FCs, to hold access contracts and section 21 of the Act specifically provides ORR with a legal right to prepare, publish, encourage and require the use of model contracts. ORR is therefore obliged to take note of what the industry is telling us. Based on what has been said to us by a number of FCs, as well as Network Rail, over the last year or so, it was clear to us that there is a demand for such contracts. As RFG points out, FCs are becoming increasingly proactive in determining how their goods travel by rail. Indeed, as Network Rail says, an application for the first such contract has been the subject of industry consultation and has been submitted to ORR for consideration and approval. We are currently assessing to what extent the development of our FCTAC can inform our decision in this regard.
- 2.13 This is why we considered that the time was right for the development of a model contract that would eliminate confusion, ensure consistency and transparency within the industry and encourage third parties to hold their own contracts **if that is what they want**. We recognise that not all FCs will want to take on the responsibility of having their own rights, but it is important that for those that do there is available to them a straightforward, simple process that is nonetheless in line with existing industry mechanisms. Model contracts are in our view the best way of achieving this.
- 2.14 The proposed model contracts were therefore developed in the light of the demand and against the background of our statutory duties and published policies. We have to take a holistic view of the requirements of the rail industry and its customers and other end users. In doing so we must balance our statutory duties. The specific issues about discrimination, risk, liabilities, application of the Network Code, are dealt with elsewhere in this document.
- 2.15 In relation to FL's point about the lack of consultation, this is of course a consultation about the introduction of FCTACs and how we could help FCs

⁵ See paragraph 2.33 of our [C&Ps](#).

hold them, if indeed that is what they want. FL is correct in assuming that we put a considerable amount of effort into preparing our proposals. This included holding a number of discussions with FCs themselves and with Network Rail who would clearly have to manage the process, as they do for all other TACs. We considered that the best way to tackle the issue was to produce proposals based on what we understood FCs wanted, subject to them being consistent with existing industry processes, and then put them out to the wider industry for comment. Nevertheless, FL's point that we should have involved FOCs earlier in the process is well made and we will take this on board for any future consultations of this nature.

- 2.16 Although on the basis of the consultation, we are happy that there is justification to proceed with our policy, the introduction of our proposals was by no means a foregone conclusion at the time of our consultation. It is clear from the responses received that this consultative approach has proved very effective and we are grateful to FL and other consultees for their contributions.

What is a customer?

- 2.17 DBS said that our definition of a FC was "very widely drawn" to include persons who are not actually customers of FOCs and who put no actual freight on rail, e.g., port and terminal owners. This will introduce extra complexity and create an additional layer of bureaucracy and costs which can not be in the interest of the rail freight market. FL also questioned the extent to which the proposal applied to those that are not FOC customers. It also questioned whether the granting of access rights to a port or a terminal, who is not also a customer, contravened the Railways Infrastructure (Access and Management) Regulations 2005 ('the Regulations'), citing Part 5 Regulation 16(6) as the port or terminals would in effect become a trader of paths. On that basis, FL did not agree that a port or terminal operator should be able to hold access rights, unless they are also the customer of the FOC. UKC also sought clarity on what our definition of a customer was.

ORR's response to consultees' views

- 2.18 We think it is important to clarify our position to avoid any misunderstandings. The lack of a definition was deliberate so as to allow for a wide application. In considering who could hold a FCTAC, our starting position was the legislation, which allows for anyone to apply for rights. Accordingly, we are obliged to consider any applications on their merits. Although we did consider that it may

be more appropriate for some types of freight customers, to hold the rights, we see no good reason why anyone who wants to use rail for the purposes of moving goods by rail should not have the opportunity to own its own access rights providing it is prepared to enter into a FCTAC and fit in with the existing industry arrangements.

- 2.19 On FL's point about contravening the regulations, we would expect any FC entering into a FCTAC with Network Rail to meet the relevant legislative requirements. We acknowledge that Part 5 paragraph 16 of the Regulations does contain a specific prohibition in relation to the trading of capacity between 'applicants'. In relation to access to Network Rail's network, that prohibition would apply to trading of access rights and associated train paths between FCs (and FOCs). However, we are satisfied that the contractual architecture of the model contracts we have developed under our policy does not provide an opportunity to enter into the trading of capacity or encourage such trading.

Competition

- 2.20 A number of respondents commented on our commitment to "*promoting the development of a competitive freight market*". DBS said that the additional costs, bureaucracy, inefficiency, fragmentation and lack of certainty for FOCs will lead "to the overall cost of rail freight having to be increased and is contrary to the ORR's duty to allow businesses to plan with a reasonable degree of assurance". This in turn will lead "to higher prices to customers and increase the competitive advantages of the modal competition (i.e. road)". As a result FCs will use ORR's proposed policy to gain leverage over their own competitors, for example, by obtaining access rights from certain terminals to prevent their competitors from operating to/from that terminal. DBS says it is already aware of FCs who see ORR's proposed policy as a mechanism to allow them to gain competitive advantage over other FCs in the same market.
- 2.21 FL said that there is considerable competition between FOCs which drives them on to be responsive to FCs' commercial needs and pointed out that in many markets the major competitor was road freight. GBRf agreed that competition already exists between FOCs, but believes that key elements remain to be tackled to better rail's position in the overall freight market and its main competitor, road, including a much simpler and more effective Part J of the Network Code (which deals with changes to, including the transfer of

access rights), easier access to FOC-owned terminals, improved access to the network at key customer times, a more clearly defined charging process for terminal access and a process that allows disputes to be settled quickly.

- 2.22 AI said that our proposals would promote competition between FOCs, provide FCs with a less challenging experience should they wish to change FOC, allow FCs to delay the selection of a FOC until a later stage in project development and provide a direct relationship with Network Rail in relation to charges levied for access. Company A said that the freight hauliers' market in the UK does not benefit from high levels of competition - in reality only 2 main players are available to FCs. As a result, there is very little opportunity to benefit from competitive tension at the point of award and even more limited control to the customer if the service given by the FOC is not what was envisaged by the contract. Whilst the ultimate sanction for failure to provide an adequate service would be termination, this option is not wholly practicable where track access rights are held by the FOC on your behalf.
- 2.23 DP World agreed that those FCs who are large enough to contract for regular trainload traffic from FOCs should be able to have more direct control over their traffic by "owning" the freight paths and therefore encourage true competitive tenders between FOCs to operate traffic on these paths. It also felt that our proposals would bring the rail freight industry more closely in line with that of the road freight industry where FCs just wish to buy a service and do not wish/need to know all the complexities of DVLA compliance, licensing, drivers' hours, fleet management etc.; such matters are left to road transport operators. FCs should be able to buy a service and directly compare using one FOC's service and costs on the same train path with another and also be able to initiate any long term change of service to meet their requirements if necessary. This should allow the emergence of a truly competitive market between FOCs and will give large FCs the choice to change FOC periodically easily if required after seeking competitive tenders.
- 2.24 UKC's main concern was to ensure that no one FOC should be able to behave in an anti-competitive manner through controlling freight access slots, not using them and thereby depriving other FOCs. It suggested that for any one movement the track access should be split into three separate sections, the sending point, the receiving point and the main rail network. This should be done via an approach by which the track access paths into and out of premises are owned by their operator, leaving the mainline rail network path

to be operated by the train operator on a use it or lose it basis. HBH raised similar concerns about terminal access and such third parties using their rights to restrict its ability to meet its customer's requirements. It wants to avoid any party being in a position to block or otherwise hinder another party's wish and need to run trains.

- 2.25 FTA supports measures to increase competition in rail freight provision because the evidence suggests that it will bring about further innovation in service, cost reductions for the shipper and improved service quality. RFG said that the emergence of a competitive market between FOCs gives real choice and many customers change rail operator periodically. In some cases, operators are sharing performance incentives more closely with customers and joint solutions to improve performance are sought. FCs are also investing in rail, in some cases in the network, and also in equipment and terminals. This has led to some FCs wishing to have more direct control over their rail operations, as they do with their road based operations.
- 2.26 TS agreed on the need to promote development of a competitive freight market and responsiveness in Network Rail to the needs of freight as a means to deliver improved FC satisfaction, which will make rail a more attractive alternative to less sustainable modes.

ORR's response to consultees' views

- 2.27 It is clear from many of the responses received that the heart of the issue is linked to who controls the rights. To a large extent this issue is addressed in some detail below in this document, particularly in **Annex B** where we talk about Part J of the Network Code. However, we feel it would be useful to make a number of general points.
- 2.28 Our regulatory approach has been to focus on encouraging competition in the rail freight market, and on requiring Network Rail to deliver specific freight related outputs and treat FOCs fairly compared with passenger operators. In our experience, FCs point to similar factors which either encourage or discourage them to use rail freight. The results of the freight user survey which we conducted in the Autumn of 2009 show that the factors that FCs deem most important are costs, responsiveness to their needs, and flexibility. They also recognised the importance of competition in leading to lower costs, greater choice, and better service quality.

- 2.29 We are carrying out a rail freight market study to consider the future potential for rail freight and to review in detail the key drivers of growth and the main obstacles to delivering the full growth potential. This is a key initiative and a major piece of work that is part of our 2010-11 business plan⁶. We are looking at the impact of competition (and blockages to competition) between train operators on rail markets, including the extent to which and where greater on-rail competition increases the competitiveness of rail freight with other modes. We will look for how regulation can respond effectively and swiftly to changing market needs and develop our approach accordingly.
- 2.30 Allied to the rail freight market study, we will carry out a study to review freight sites to consider whether control of facilities by freight operators has had an impact on on-rail competition including any impact on customers' ability to exercise choice between rail freight hauliers. We will then be able to consider, in the light of our findings, the effectiveness of existing regulatory and contractual mechanisms.

Network Rail's role

- 2.31 A number of respondents also picked up on the issue of Network Rail's *"responsiveness to the needs of freight as a means to deliver improved FC satisfaction"*. TS were concerned to ensure that the industry seeks to make best use of capacity even with an increase in the number of access rights holders. It said that it was in the best interests of a FOC to make efficient use of capacity and there is an onus on Network Rail to ensure that this happens through strict application of Part J of the Network Code.
- 2.32 DBS were doubtful that our proposals would improve Network Rail's responsiveness to FCs' requirements, particularly if it did not increase its resources accordingly. Rather they would dilute customer service and there would be deterioration as Network Rail tried to balance the demands of FCs, FOCs and any timetable agent.

ORR's response to consultees' views

- 2.33 Along with many members of the rail freight industry, we would like to see an infrastructure manager who is proactively customer-focused. We are aware

⁶ *"Promoting safety and Value in Britain's railways – our plan for 2010-11 year two of our strategy"*, Office of Rail Regulation, London March 2010, available from our web site at www.rail-reg.gov.uk/upload/pdf/business-plan-2010.pdf.

from the recent customer survey conducted by Ipsos MORI for Network Rail that only a quarter of FOCs are satisfied with Network Rail. FOCs quote a number of examples of lack of responsiveness of Network Rail, e.g. timetable planning and persistence of freight-specific speed restrictions, though they recognise there has been some improvement.

- 2.34 We accept that Network Rail has no strong financial incentive to be responsive to freight needs given that it only receives income based on the marginal costs of freight operation. We also agree that Network Rail needs to become more customer-focussed. It does now have freight customer satisfaction as part of its management incentive plan after prompting by ourselves. Network Rail has also published its commitment⁷ to plan for freight growth and to accommodate it on its network. We welcome its recent publication⁸ in which it recognises and accepts a role of promoting greater use of the network for freight. Its stated vision is to increase the modal share of rail and take freight off Britain's roads. And we note its duties and responsibilities through licence conditions provide a strong incentive to act in a fair and responsible way. Our freight market study might identify areas for Network Rail to address in order to facilitate further freight growth, which in turn for example through proposing modifications to the Network Licence.
- 2.35 By providing the industry with a clear policy and contractual structure that is consistent with existing industry mechanisms we consider we have made it easier for Network Rail to manage FC requirements and expectations. It must also be noted that Network Rail itself is very supportive of our proposals and has been working closely with a number of FCs and encouraging ORR to develop a model FCTAC for some time now.

⁷ Freight Route Utilisation Strategy - on Network Rail's web site at <http://www.networkrail.co.uk/aspx/4449.aspx>.

⁸ Value and Importance of Rail Freight - on Network Rail's web site at: <http://www.networkrail.co.uk/aspx/9080.aspx>.

3. ORR's response to key consultation issues

Introduction

- 3.1 This chapter provides an overview of the key issues, the responses received and sets out our views and conclusions on these.

Use of capacity

- 3.2 The first issue is whether an increased number of access rights holders, each holding fewer rights, could lead to a less efficient use of network capacity. This could arise if there were less opportunity for an access rights holder who was a FOC to use rights flexibly for alternative requirements.

Consultees' views

- 3.3 Many consultees responded to this question. Of those, four (DBS, First, HBH and S&SE) felt that more access right holders would lead to a less efficient use of capacity. DBS said that current practice is to maximise capacity by using fewer, longer trains and combining traffic of different customers and to offer return loads. Consequently there would not be any incentive for one FC to allow another to use its access rights as competitors. FL made a similar point saying that it had reservations, particularly in relation to certain markets where additional paths, rights and resources would be required to separate out business between customers. HBH pointed out that the current system was very flexible and may be lost if third parties acquired their own FCTACs. S&SE said that current capacity issues would be exacerbated and additional issues created. First said it was a very significant risk because of the variety and type of FCs and traffic.
- 3.4 Although RFG said that our proposals were likely to lead to more efficient use they also said that it could be less efficient if FOCs are using paths interchangeably between different customer contracts. ADC made a general point that it would be unfortunate if the new arrangements were to lead to an inefficient use of capacity through more trains running than need be with consequential impacts on FOC costs and the environment.

- 3.5 DP World said that only major customers who have sufficient trainload traffic to justify “owning their own paths” would seek to hold FCTACs and changes of FOC would happen infrequently. It felt that network usage efficiency would actually improve as there will be less need to create new paths for the possible transfer of traffic prior to any potential change of FOC for that same particular traffic. In any event, the creation of new paths for existing traffic will not have to be carried out by a potential new FOC. Based on its own experience AI was also concerned at a situation on an increasingly congested network where a FOC could retain all or some pathing for alternative use.
- 3.6 GBRf said that it tends to be terminal rather than network capacity which dictates the number of train slots. Where there are network restraints and a single operator secures the pathways to a terminal then competition is more difficult under the existing process. HPUK said that the ‘use it or lose it’ mechanism (UIOLI) would mean that unused rights could be removed and that FCs holding rights should help improve utilisation of trains. Network Rail did not feel that it would place any additional requirement on it. Victa also said that the proposals would not lead to less efficient use of capacity as FCs would only be looking to replicate existing services. FCs might seek other rights which more accurately reflected their needs but which had reduced flexibility. TS said that the industry needs to ensure that best use is made of capacity even with an increase in the number of access rights holders.

ORR’s response to consultees’ views

- 3.7 We acknowledge that there may be circumstances where FCs holding access rights could, in theory, lead to less efficient use of network capacity. This could happen, for example, where one or several customers using an operator’s service elect to own their own access rights and seek to have their own service, especially if that decision provided competitive or market advantages. That could mean several services moving the same goods moved currently by one service. That could only happen where sufficient capacity on the network is identified by Network Rail and offered to FCs.
- 3.8 It might also, in theory, have the effect of restricting the flexibilities enjoyed by FOCs to carry new customers’ goods on existing multi-customer services and it could also impact on an operator’s ability to use its established paths in the timetable for different and changing customer requirements. We also recognise that where one current multi-customer service has adequate

terminal access the introduction of separate customer services, even though they could be accommodated on the network, could create terminal or port capacity access and timing issues.

- 3.9 A move away from multi-customer services to customer specific services might also, in theory, affect the financial viability of an existing service given the resultant reduction in goods carried. Whilst it is possible that this could result in some loss of certain rail freight goods movements to road haulage, we believe that FCs will have already considered the costs of seeking to have their own access rights and services which may prove to be prohibitive in the first instance. It is for this reason that we consider that FCs seeking to move whole-train goods, such as coal and aggregates, will have the greatest interest in holding a FCTAC. Part J will apply equally to FCTACs and the TAC under which drawn down access rights are contained. One of our considerations in determining access to Network Rail's network is the efficient use of capacity over time⁹ and we will consider new FCTACs under the same criteria as other, existing or competing, applications for access rights.
- 3.10 However, in practice, there are very few instances of FOCs hauling traffic for more than one customer in the same train. The largest such example is intermodal traffic, in which trains often convey containers for a number of customers, a traffic which does not normally lend itself to whole-train customers, although there are exceptions to this. Otherwise, there are limited examples of multi-user services, known as "wagon load freight", and for each of these the quantity of traffic offered by any one customer is too small to warrant the costs involved in running a company-specific train.

ORR's conclusion

- 3.11 For the reasons given above, we remain of the view that the proposed new arrangements would not lead to a less efficient use of capacity. It is significant that Network Rail, which is of course responsible for timetabling and capacity allocation, also did not see this issue as a problem. However, we will keep the situation under review as and when we receive applications. FOCs will be required to provide information on the make up of trains so we are able to assess what, if any, impact freight customer contracts are having on capacity.

⁹ See paragraph 2.11 of our C&Ps.

Form of model FCTAC

- 3.12 In our September document we said that we should use the existing freight model contract as a basis for developing the model FCTAC. We proposed a draw down model rather than a back-to-back arrangement because it provided the potential for FCs to hold and manage track access rights without imposing the burden of engaging in operational processes and certain FCs had indicated that the draw down model was their preferred choice of access contract. We also proposed that the model FCTAC should be structured as a track access option, which would enable FCs to secure track access rights from Network Rail and subsequently to appoint one or more FOCs to exercise such track access rights on their behalf. We proposed the development of a flexible model FCTAC which could be adopted in simplified or complex form depending on whether the FC wishes to participate more fully in industry processes, such as timetable bidding.

Consultees' views

- 3.13 Again many consultees responded on this issue with only three (DBS, First and S&SE) opposed to the draw down model. Indeed, DBS and First were opposed to our proposed form of contract. DBS was concerned that we had already decided that FCs would be required to use the proposed draw down model rather than the back to back arrangement. It felt that draw down would be discriminatory because FCs would be insulated from any risk associated with holding access rights. If FCs wanted to hold access rights they should be subject to same terms and conditions as FOCs. S&SE did not think that an agreement would solve existing problems, but thought that a modification of the existing dispute resolution process would.
- 3.14 First said that standard model clauses were not appropriate for a body that had no intention of operating trains or holding a licence to do so. Network Rail should develop an agreement which gives third parties adequate assurance that its preferred contractor can have adequate access to network. FCs should only be able to reserve capacity where they could demonstrate a genuine commercial need to do so. Taking our proposed approach would make timetabling and access agreements far more complicated – bidding for

a timetable should be carried out by the logistics company arranging the resources to move the goods¹⁰.

- 3.15 Of those in favour, FL said that ORR had underestimated the detail that would need to go into an unregulated agreement. DP World, HPUK and RFG supported the approach but all said that it would need to be tested in practice. HPUK thought that further details of any proposed UIOLI provisions were required with FCs required to show that they had agreed access with the relevant terminal owner before any rights were granted. RFG emphasised that the contract should not confer long term rights, that FCs should not have any additional rights or obligations in the timetable process compared with operators, and paths allocated to FCs should be treated in the same manner as those allocated to train operators. Network Rail agreed that our proposed approach was the most appropriate, but said that it had to be flexible enough to cater for a full spectrum of end-users and suggested that ORR should produce guidance to assist understanding of the contract. GBRf, whilst not against our approach, saw it as the first step and that other processes would need to be tackled to ensure sufficient flexibility.

ORR's response to consultees' views

- 3.16 We do not accept DBS's suggestion that we had already decided the approach. Our September document set out the pros and cons of the two and came up with what we considered to be a reasoned and considered proposal (paragraphs 2.8 to 2.18) and specifically sought consultees' views (paragraph 2.28). As explained in paragraph 2.16 above, we had not reached any final conclusions on our proposals at the time of our September document – that is what this document is about. Nor do we accept we are being discriminatory.
- 3.17 In terms of risks, we agree with DBS that all parties should be treated equally and it is not our intention to “strip out all risks”. Far from it. Our proposals are designed to ensure that FCs are taking their fair share of responsibility and risk by involving and integrating them fully into existing industry processes. We believe that having standard FC model clauses is the way to achieve this and ensure a consistency of approach. As our C&Ps state:

¹⁰ Given this was First's answer to a number of the questions in our September document we will only address any new points in the rest of this document.

“The guiding principle for establishing model contracts was to create contracts that provide a sound, straightforward basis for supporting and facilitating a more effective and efficient working relationship between Network Rail and its customers purchasing access to the network, ensure the appropriate allocation of risk, include incentives for efficiency and, overall, encourage a culture of compliance and improved delivery.” (paragraph 2.33)

“Our aim is to see access contracts established that present the parties' obligations and remedies in a clear and legally robust form and which are straightforward for the parties to follow and use. This will foster a culture of compliance and efficiency, and lead to the delivery of better services.” (paragraph 6.1)

- 3.18 However, we accept that FCs' requirements may differ depending on their business needs and that we will have to consider to what extent we would allow customisation of the FCTAC. But this is no different to the approach currently taken. Again as our C&Ps make clear:

“model contracts are intended to be a model and not a straitjacket”.

We are always willing to consider bespoke departures from the published model and look at each application on its merit, taking into account the circumstances of each case. Furthermore, if the industry wished to develop a back to back model we would be happy to consider it. The proposer of such a model would need to ensure that any necessary changes to the Network Code were identified at the same time. These would form the basis of a Part C proposal for change.

- 3.19 A FC applying for access rights would have to follow our usual process as set out in the C&Ps for seeking access rights and this would include demonstrating that they had a genuine need for them.
- 3.20 The issues raised relating to the draw down mechanism, unregulated agreements and Part J of the Network Code are dealt with elsewhere in this document.

ORR's conclusion

- 3.21 The general consensus from consultees, including the majority of FCs, was in favour of the draw down approach. We remain of the view that developing this model offers the potential to deliver benefits to FCs without imposing unnecessary burdens. It does so by enabling FCs to secure track access rights and to appoint FOCs to run services on their behalf without having to engage with industry processes at an operational level. It would also ensure that ORR has regulatory oversight of the FCTAC, including the draw down of rights, and would be able to ensure consistency with existing industry processes. We of course recognise the importance of ensuring that FCs understand what is involved and the processes that need to be tackled. Our C&Ps will be amended by the end of 2010 to include full guidance (see paragraph 1.17 above).

Local Output Commitments (LOCs)

- 3.22 In the draft FCTAC and FOCTAC published alongside the September document, we proposed that the requirement for establishing a LOC should be removed from the FCTAC but should remain in the FOCTAC.

Consultees' views

- 3.23 Network Rail, whilst agreeing that it was the right approach to remove the requirement for the establishment of a LOC from the FCTAC, did not agree that it should remain as part of the associated FOCTAC. It proposed detailed drafting comments in mark ups to both FC and FOCTACs.

ORR's response and conclusion

- 3.24 We consider that Network Rail's concerns are misplaced and that the contract as drafted in this respect is correct. Our interpretation of Part L of the Network Code is that a LOC covers all the train operator's services generally rather than just those services provided under a particular access agreement (see Conditions L2, L3 and L4). Accordingly, our view is that the wording of the FOCTAC is correct and requires no amendment.

Multiple or single contracts

- 3.25 A consequence of adopting the draw down model would be that any FOC that wishes to operate services on behalf of a FC using that FC's track access

rights will need to enter into a new TAC into which those rights can be drawn. This will be in the form of the existing freight model contract, amended as indicated in the September document (paragraphs 3.44 to 3.60), to give effect to the draw down of rights. We said that entering into such a new TAC in these circumstances would ensure clarity and contractual simplicity which will be attractive to a FC. We also said that if a FOC is appointed by more than one FC it will need to enter into separate TACs for each customer.

Consultees' views

- 3.26 DBS and FL both felt that the proposed approach would lead to increased costs and additional bureaucracy and workload for all parties. FL also suggested that it would lead to confusion, particularly in relation to charging arrangements, performance regime delay and attribution and setting of caps. First said that it would not be desirable or efficient.
- 3.27 GBRf said that it needed to be a simple document that sat alongside an operator's existing TAC and that only those FCs that enter into a FCTAC with Network Rail should be in a separate contract. Victa agreed that a separate contract was preferable, but thought it unnecessarily bureaucratic to enter into one for each FC service. HPUK wanted to know why this was not the same for 'full' track access options. RFG also agreed that rights and obligations should be kept separate from others held by the same FOC. Network Rail was strongly in favour of having separate TACs because of its transparency and simplicity of distinguishing the rights.

ORR's response to consultees' views

- 3.28 Whilst we recognise the points made by consultees, particularly those from FOCs, it is important to remember that these model contracts are being introduced for the benefit of FCs not FOCs – it is of course up to them whether or not they want to use them. Bearing this in mind, one of our overriding concerns in developing our proposals, as reflected in the September document, was to keep the contractual mechanism as simple and transparent as possible for FCs. We were also keen to ensure that the process by which a FC's track access rights could be drawn down into a FOC's TAC, and subsequently revoked, was as simple, quick and efficient as possible.

- 3.29 Whilst we acknowledge that drafting complexity should not, on its own, be considered a barrier to using the most appropriate option to achieve policy objectives, we believe that it is important to keep the process as simple as possible for FCs. Consultees have made clear their desire to avoid any overly-complex arrangements. Based on our analysis of the complexities of single versus multiple contracts, we do not believe that requiring multiple FOCTACs would result in additional time and costs, particularly in light of the limited expected take-up of them. Indeed, we believe that the commercial and operational amendments required to a single FOCTAC would result in greater time and costs compared to the multiple contract approach.
- 3.30 In summary, our reasons for favouring multiple contracts are:
- (a) that they will be more transparent, with their rights being clearly stated;
 - (b) that they will allow for easier reallocation of rights and avoid a situation whereby that process can be frustrated, as has happened in the past with FOCs trying to retain some or all of the rights by citing an on-going commercial need – a point raised by a number of consultees;
 - (c) as Network Rail say, having separate agreements would help to avoid any arguments over which rights were the subject of any Default and Suspension Notices;
 - (d) that they will require less complex drafting. For example, a FOC's existing TAC would need additional drafting to differentiate between the rights that attach to each FC service. This would entail changes not just to Schedule 5, but also to the liability and performance regimes, cordon caps as appropriate and the expiry date.

ORR's conclusion

- 3.31 In conclusion, whilst the single contract approach is possible, we believe that from a FC perspective requiring multiple new FOCTACs is the more transparent contractual mechanism. We believe that this approach is structurally more simple and easier in drafting terms to achieve and less complex to manage. Although we acknowledge that this will result in more TACs, we do not believe that the number will be such as to become burdensome – as a number of consultees themselves acknowledge, we are

not expecting there to be a flood of applications from FCs, certainly not in the short term.

- 3.32 Nevertheless, we certainly do not wish to propose a mechanism which, by virtue of the time and cost involved, acts as a barrier to people making use of it. Accordingly, we would have no problem with a FOC proposing their own bespoke provisions to amend their existing contract to enable one or more FCs to draw their access rights down into that contract. This would of course be subject to our usual approach of looking at each case on its merits, having regard to the particular circumstances, including the views of the FC.
- 3.33 Furthermore we believe that consultees' concern over the time, costs etc involved in adopting a multiple FOCTAC approach can potentially mitigated, by issuing a general approval for the terms of a new FOCTAC to be entered into specifically and solely for the purpose of enabling a FC to draw down its rights into that TAC. An explanatory note and flow chart for how we expect this process to work is set out in **Annex G** to this document.

Conditions precedent

- 3.34 We proposed not to set out a requirement for the parties to satisfy any conditions precedent in the proposed FCTAC. Under the existing freight model contract, these conditions precedent deal, among other things, with the requirement for both Network Rail and a FOC to hold a licence and safety authorisation/safety certificate prior to the commencement of train operations. Since Network Rail already meets these requirements and there are no equivalent requirements to be met by a FC, we considered that this provision was not required.

Consultees' views

- 3.35 DBS said that a FC should have identified a licensed FOC to haul the traffic and negotiated a contract, secured any access contracts with any third party facility owners needed to enable its proposed services to run and, undergone financial and good repute checks before the access rights were activated. GBRf said that there needed to be a clause requiring that a party to the FCTAC should ensure that party they appoint to operate the drawn down access rights holds a license and safety authorisation/safety certificate. HPUK said that before any rights could be sought a FC must have confirmation in writing that the terminal owner at each end of the route had agreed access.

Network Rail agreed that conditions precedent were not required, but said that there might be certain circumstances that required conditions to be fulfilled prior to the exercise of the drawn down rights. It proposed an amendment to clause 5 to reflect this. RFG also said that there might be specific issues which arose on a case by case basis.

ORR's response to consultees' views

3.36 We do not believe that it is necessary for there to be any conditions precedent. It is not necessary to hold a licence or be a train operator in order to obtain access rights. Individuals and undertakings may obtain rights to be exercised on their behalf by a licensed operator. However, in line with our C&Ps, in considering whether to approve those rights, we would want:

- (a) to know the likely identity of that operator (where known);
- (b) to be advised of the arrangements that exist or will exist to enable it to operate the rights for which the applicant is applying;
- (c) to be sure that there is a clear intention to exercise the access rights being sought; and
- (d) to know that there is no material or insurmountable obstacle to their being exercised (to avoid capacity being wasted).

3.37 Nevertheless, we accept the arguments put forward by consultees that there may be certain circumstances where there is a need to include one or a number of conditions precedent.

ORR's conclusion

3.38 We do not believe that a specific model conditions precedent clause is required. However, we agree with Network Rail that there may be circumstances that required conditions to be fulfilled prior to the exercise of the drawn down rights and have therefore included some additional wording within Clause 5 (5.1.9) of the FCTAC to cater for this possibility.

The draw down and revocation processes

3.39 Our September document proposed two new provisions in clauses 5.1 (paragraphs 3.8 – 3.16) and 5.6 (paragraphs 3.19 – 3.23) which are bespoke

to the FCTAC and which set out the basis on which the FC's track access rights can be exercised.

Consultees' views

- 3.40 DBS was against this approach because it did not take account of any commercial contract between a FOC and FC that might govern whether or not and when such processes could be activated. First thought that what was necessary was for FOCs to have contingent rights to bid into slots when sanctioned by customers who have the right to do so. GBRf were concerned that Network Rail's notification obligation in clause 5.1.7 should be within the minimum time that a FC could be expected to change operator. It also said that revocation notice timeframes should allow for Transfer of Undertakings (Protection of Employment) Regulation timescales. Victa repeated its view that it was unnecessary to enter into separate contracts for each FC's services. HPUK, Network Rail and RFG all agreed with the approach.
- 3.41 In respect of our proposal that the FC should be able to switch between FOCs through the service of Drawdown Notices and Revocation Notices as appropriate, DBS said that to allow the removal of access rights from a FOC in 20 days or less would lead to a culture of short term customer contracts or long term contract with short break clauses which would offer little or no certainty for FOCs and would undermine investments. It considered that this would be contrary to ORR's section 4 duties. First said that protection was required so that the existing haulier could not hold a FC to ransom. FL said that the FOC should also sign the draw down notice. Victa repeated its earlier answers about the bureaucracy of entering into separate contracts. DP World, GBRf, HPUK, Network Rail and RFG were broadly content.
- 3.42 On our proposal that FOCs should be able to enforce their rights to receive notices in accordance with the terms of clause 18.4, there was general agreement to this provision. Although FL said that it was logical for all relevant notices to be copied to operators it couldn't see which clause gave operators this right to receive notices. First said that because of its general view on the contract this question was not applicable. Victa said that the FOC should also sign the draw down notice.
- 3.43 As to the form of the Drawdown and Revocation Notices and who should have to sign them, with the exception of First, respondents were content with the

form of the notices. However, there was a range of views on who should sign them. DBS felt that both Network Rail and FOCs should also sign, DP World and FL both saw merit in asking the FOC to sign the draw down notice and GBRf said that a FOC receiving a revocation notice should sign and state if it agrees to the notice and will surrender the paths. This could take place within 7 days of the notice being issued and would help early identification of disputes. Victa suggested that it would seem cleaner if the FC and FOC needed to sign the draw down notice and only the FC should need to sign the revocation notice. On the other hand, Network Rail said that neither Network Rail nor the FOC should be required to sign the notices as this would add another unnecessary step in the process

ORR's response to consultees' views

- 3.44 As explained above (particularly paragraph 2.14), in applying our section 4 duties ORR will have regard to all relevant users of the railway. Those FCs wishing to make use of the new arrangements and hold their own FCTAC are therefore entitled to the same consideration as FOCs, including the ability to plan their businesses with a reasonable degree of assurance. Any associated commercial agreement entered into by the parties is entirely a matter for them and it is for those parties to ensure such agreements fit with the regulatory regime.
- 3.45 We do not accept that the proposals will lead to a culture of short term contracts or longer term ones with break clauses because FCs themselves are responsible for ensuring the certainty they require going forward for their own businesses and/or investments. By providing a clearly regulated regime aligned to that already in existence for operators will provide them with the necessary assurance and certainty. However, we accept GBRf's point about ensuring consistency in timescales and have therefore changed the requirement on Network Rail in clause 5.1.8 to 20 Working Days.
- 3.46 ORR agrees that the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations") may apply to revocation of drawdown of services depending on the facts of a particular case. However, it considers that the issue of any liability arising from lack of consultation under the Regulations in a particular case would be a matter to be addressed between the FOC and FC in the associated commercial agreement and is not an issue which affects the drafting of the FCTAC.

- 3.47 In terms of who should sign the notices, there was clearly no consensus on this issue, with some respondents suggesting FOCs and/or Network Rail should also sign them. On balance we have decided to leave the position as originally proposed with the requirement to sign the notices on the FC only. We agree with Network Rail that requiring others to sign will only complicate the process and add further delay.

ORR's conclusion

- 3.48 We are satisfied that the efficient movement of access rights between a FC and the FOC it has chosen to move its goods can be achieved under the process we have established in Schedule 3 to the FCTAC. We believe the ability of a FC to control the use of its access rights can effectively be achieved through the Drawdown Notice and Revocation Notice processes we have developed, taking into account consultees' responses to our earlier document. We have however, made a few drafting changes to Schedule 3 to the FCTAC to clarify the position in relation to train slots which have already been secured in the working timetable by the FC and any train slots to which the FC is entitled, but which are going to be flexed under Condition D4.5.3 of Part D of the Network Code.
- 3.49 We also consider that these mechanisms will provide a speedy, consistent, seamless and transparent approach for a FC to allocate, for use by a FOC, and recover, its access rights.
- 3.50 We will set out and explain in detail the mechanics of the draw down and revocation processes in our C&Ps document by the end of 2010 (see paragraph 1.17 above).

Timetable agent

- 3.51 Our September document set out our proposals for a FC to appoint a timetable agent should it decide that it does not want to be involved in the timetabling process. Broadly, these provisions provided for a mechanism by which the FC may appoint a third party that is not necessarily an operator to exercise its Schedule 5 bidding rights as its agent.

Consultees' views

- 3.52 DBS were concerned that FCs, Network Rail and any agents will not have enough knowledge of access planning to bid for slots which a FOC could

operate most efficiently. GBRf expressed some reservations particularly in that it was not clear where ORR thought that liabilities that arose from the rights in the FCTAC being transferred at short notice should sit. Also, it sought confirmation that operator A could be an agent and operator B the haulier. If so, how would this work? FL too had various concerns about the role and responsibilities of any timetable agent.

- 3.53 Network Rail said that the default position should be that FOC will act as bidder unless informed to the contrary by the customer. It also thought that the definition of “Bidder” and wording of Condition D1.2 of the Network Code should make clear the terms under which an agent might be appointed. RFG said that a FC should be able to appoint a FOC as their agent even if rights had not been drawn down into their contract. Victa asked why only one timetabling agent might be appointed at any one time.

ORR’s response to consultees’ views

- 3.54 Although it is certainly our intention to create as simple a process as possible, it must be one that is aligned with existing industry and regulatory processes. We are sure that FCs understand this and will factor it into any decision they may make. For example, ORR agrees with FL that FCs or their agents will have to deal with issues such as Rules of the Route and Rules of the Plan and carry out bidding for revised paths around engineering work.
- 3.55 As we made clear in our consultation document, we will be amending the Network Code, including Part D (see chapter 4 below) to ensure that it applies to FCs and/or their appointed agents. Certainly the consequences of any agent failing to bid in accordance with the Network Code would be a matter for the FC.
- 3.56 ORR agrees that participation in the process requires a sufficient level of knowledge of the rail access planning and bidding process. However, this is a matter for FCs who will need to ensure that whoever they appoint understands what is required. Allowing FCs the option to appoint a timetable agent on their behalf was to ensure that they could opt out of this particular process, should they so wish, and put it in the hands of those with the necessary experience and knowledge and who would perhaps be better placed to look after their interests. It would not be in the interests of FCs to appoint agents who do not have such experience and knowledge and so

generally it could be expected that FCs will use the FOC which will carry their goods as their timetabling agent.

- 3.57 In terms of liabilities and whether one FOC could be an agent and another one the haulier, again both of these issues would be a commercial matter for the parties.
- 3.58 We are content that the drafting in clause 5.6.5 already makes the default position sought by Network Rail clear. We do not consider that any further drafting changes either to the FCTAC or Condition D1.2 of the Network Code are necessary as the general principles of agency law would permit an agent to bid on behalf of a FC.
- 3.59 Finally, the issue of having more than one timetable agent was raised. We believe that having more than one agent could cause confusion and conflict of interests and that it would therefore be better to have no more than one at any one time, unless the timetable agents involved were the FOCs contracted to operate different trains on the FC's behalf. Ultimately, it would be for the FC to ensure that its choice(s) of timetable agent did not give rise to any confusion and/or conflicts."

ORR's conclusion

- 3.60 On the basis of the above, we have concluded that making provision for a FC to appoint an agent is appropriate and that consequently no change to the drafting is required.

Liabilities

- 3.61 Although clause 11 of the proposed contract is based largely on clause 11 of the existing freight model contract, those provisions relevant only to the operation of services have not been included. This includes clause 11.6 relating to the Claims Allocation and Handling Agreement as the FC will not be a party to this. Clause 11.5 gives effect to Schedule 9 which deals with limitation on liability. We considered that FCs should have the same default level of the annual cap as FOCs: £5 million (2009-10 prices), indexed as necessary, to ensure adequate liability should track access rights not be made available to the FC in accordance with its access contract.

Consultees' views

- 3.62 DBS said that the terms should be the same as those for FOCs including taking direct responsibility with Network Rail for liabilities relating to operation and performance. DP World drew attention to the equivalent road freight situation where the Highways Agency can have no claim against the FC in any circumstance, although the Highways Agency is not reserving operating paths. First said that FCs are best placed to answer the level of protection they need and the risk they have. Network Rail did not agree saying that the combination of a cap in Schedule 9 of FCTAC contract and a similar cap in the FOCTAC would mean that Network Rail faced an aggregate liability greater than that which would have existed had it only been dealing with a FOCTAC. It proposed a “no liability” (with certain listed exceptions) in the FCTAC with amended liability provisions applying in the FOCTAC. FTA said that its members had concerns over liability arrangements proposed for a FC.

ORR's response to consultees' views

- 3.63 ORR's aim is to ensure, as far as possible, that:
- (a) a FC entering into an access contract is not in a better position as regards potential recovery for liability than a FC which does not hold access rights; and
 - (b) Network Rail or a FOC is not in a worse position as regards potential exposure to liability simply because a FC holds an access contract.

In essence, ORR's focus is on maintaining the status quo as regards liability as far as possible.

- 3.64 To this end, ORR has considered the arguments put forward by DBS but considers that it is not appropriate for exactly the same liability terms to apply to FCs as apply to FOCs, as FCs will not be operating trains on the network.
- 3.65 ORR has also considered Network Rail's proposal of “no liability” in the FCTAC. Whilst ORR has some sympathy that Network Rail could theoretically face an aggregate liability from the FCTAC and FOCTAC which is greater than its possible liability arising from the existing freight model contract, ORR does not consider that it is appropriate to answer this with a “no liability” provision in the FCTAC. Instead, to ensure that Network Rail is not exposed to “double liability”, whilst at the same time providing a FC with financial

recourse against Network Rail, where applicable, ORR has added some new drafting into the FCTAC and FOCTAC. This drafting means that Network Rail shall not be liable to the FC to the extent it is also liable to the FOC and has discharged its liability in this regard.

- 3.66 Network Rail also raised the point that if there were to be liability provisions in the FCTAC then, in order not to increase Network Rail's liability, any claim made under a FOCTAC in a particular year should also be counted in relation to the liability cap in the related FCTAC and vice versa. We have considered this proposal. Although we accept that without dealing with this point Network Rail's potential liability may increase, we do not consider that it is appropriate to connect the liability caps in the FCTAC and FOCTAC and in any case we consider that increased risk of financial loss for Network Rail will be minimal. This is because the potential increase in liability in these circumstances is a natural consequence of having another contractual interface. However, this point has led us to consider the effect of our conclusion that a FOC would draw down rights from different FCs into separate access agreements on liability caps. We consider that some additional drafting is required in the FOCTAC to connect liability caps in other FOCTACs held by the same FOC. We set out our conclusions in this regard below.

ORR's conclusion

- 3.67 We have concluded that it is appropriate for FCs to have the same default level of annual liability cap as FOCs: £5 million (2009-2010 prices), indexed as appropriate. However, we consider that the additional drafting referred to in paragraph 3.65 above should be included in the FCTAC and FOCTAC to protect Network Rail from potentially being liable to a FC and FOC in respect of the same breach.
- 3.68 In light of our conclusion to remain with multiple contracts, we also consider that additional drafting should be included in the FOCTAC which imposes a common liability cap on all FOCTACS which are entered into by that FOC. This will have a mutual effect so will mean that both Network Rail's and a FOC's potential liability is not increased because of a FOC entering into separate access agreements with Network Rail in respect of any rights drawn down to it from a FC. It should be noted that the common liability cap would also apply to a FOC's existing TAC for its own account. This means that if the FOC has a TAC for its own account, this will need to be amended to reflect

the common liability cap wording when a FOCTAC is first entered into by that FOC. Our general approval (see **Annex G**) provides our prior approval of this amendment to the FOCs own account TAC.

- 3.69 We also consider that the Indemnity Incident Cap in the FOCTAC (clause 11.6.4) should also be a common cap sitting across all FOCTACs entered into by the FOC and the FOC's TAC. This is because it is possible that services operated by a FOC under different FOCTACs or TAC could be affected by the same incident.
- 3.70 We have also considered how claims under Schedule 9 of the FOCTAC will be dealt with where their value exceeds the aggregate limit in the common liability cap and we have provided drafting in paragraph 10.2 of Schedule 9 explaining how this will work. In essence any competing claims would generally be pro-rated by reference to the amount left in the common liability cap.

Schedule 4 and compensation arrangements

- 3.71 Under the existing freight model contract, Schedule 4 sets out the process for planning variations to services and the means whereby a FOC is compensated by Network Rail for variations to its services due to unavailability of the network, for example due to disruptions on the network or temporary restrictions of use. We did not consider that these compensation provisions needed to be retained in the FCTAC as the FC will not be operating the services. As such, any compensation which would ordinarily be payable under Schedule 4 should be paid through the TAC of the FOC responsible for operating the affected service instead.
- 3.72 We did, however, consider that the FC should be able to rely on the "Alternative Train Slot" provisions in paragraph 5 of Schedule 4 of the existing freight model contract allowing a FC who has yet to appoint a FOC to participate fully in the bidding process to establish an alternative train slot. Once the FC has appointed a FOC it can then draw down the right to operate that alternative train slot into the operator's contract.
- 3.73 In addition, we sought to prevent both the FC and FOC exercising equivalent Schedule 4 rights in relation to the same service and establishing two alternative train slots for that service.

Consultees' views

- 3.74 There was general agreement to this approach. However, FL suggested that the wording should include possessions which are notified with less than 84 days notice because it will not be known when the FC will draw down the rights to the FOC. HPUK thought that there needed to be flexibility about who receives the compensation (i.e. FC or FOC). Network Rail was concerned that paragraph 5 excluded any variation which has been requested by the FC and provided some drafting. Victa said that Network Rail and the FC should have a proper commercial contract with monetary consideration passing between them. Where Network Rail was unable to provide a path due to a restriction of use then compensation should pass directly to the end customer.

ORR's conclusion

- 3.75 Given the general agreement to this approach, we will proceed on the basis of the proposals in the September document, subject to a few minor clarificatory amendments, together with an amendment to Part 3 of Schedule 4 to reflect FL's point about possessions notified under 84 days.

Schedule 7 (access charges)

- 3.76 Again, as FCs will not be operating services, we considered that most of the provisions relating to track access charges in the existing model freight contract should not be included in the model FCTAC. This was because the access charges provisions contained in the TAC between Network Rail and the FOC responsible for operating the FC's services will adequately govern charges related to the running of those services. As such, we considered that it would be for the FC and FOC to ensure that any arrangements they consider necessary for the pass through of these costs are dealt with under the unregulated commercial contract between them.
- 3.77 One exception, where we retained (and amended) the Schedule 7 provisions, relates to incremental costs (paragraph 2.8 of Schedule 7 of the FCTAC). This provision is intended to ensure that, if a FC decides to take part in the bidding process before drawing down its rights in respect of a particular service, any incremental costs incurred by Network Rail due to a requirement of the FC to run that service outside of the operating constraints are identified. The FC is entitled to procure payment of incremental costs by any FOC into whose track access contract it has drawn down rights, rather than pay those incremental

costs itself. We also included in Schedule 7 (paragraph 3) an access charges re-opener which is intended to allow us to make changes to the FC contract as part of an access charges review.

Consultees' views

- 3.78 DBS was firmly of the view that if a FC requires access rights then it should also be responsible for paying track access charges. It noted that we proposed to leave the issue of charges for any commercial agreement between the FC and the FOC. GBRf similarly felt that access charges could be billed directly between Network Rail and FC. Incremental costs should be paid by FC directly as these costs will be identified with individual pathways long before FOC commences using them. Victa said that Network Rail and the FC should have a proper commercial contract with monetary considerations passing between them. Network Rail agreed that it was appropriate to include Incremental Costs provisions in the FC contract, but it was concerned that having a clause allowing for the introduction of charges following an Access Charges Review might act as a disincentive to prospective customers.

ORR's response to consultees' views

- 3.79 We understand the views of some consultees' about FCs having responsibility for payment of access charges directly to Network Rail but we do not agree that responsibility should rest there. In the way that FOCs are billed by Network Rail for the operation of services, we expect the same billing process to be applied after access rights are drawn down into a FOCTAC. At that stage the established billing processes will be triggered by Network Rail. To change those processes to include FCs could, in our view, introduce additional for Network Rail in the operation of its billing system with no clear benefit. Whilst we note consultees' views that incremental costs should be paid directly by the FC to Network Rail in the circumstances described in paragraph 3.79, we consider that for the same reasons we have stated in relation to access charges, money flows for the operation of rights should be contained between Network Rail and the FOC. Any incremental costs incurred by FCs should be passed on to FOCs through a track access agreement even if this has to wait until rights are drawn down. We have included an access charges reopener, which all our model contracts contain, to enable

consistency of treatment of access contract holders during future periodic reviews.

ORR's conclusion

- 3.80 For the above reasons we propose no change to the billing arrangements for access charges and incremental costs under our model contracts and we are content that the unregulated commercial contract between the FC and the FOC should cover the pass through of these charges.

Schedule 8 (performance)

- 3.81 We considered that the provisions contained in the TAC between Network Rail and a FOC appointed to operate services on behalf of a FC would adequately govern performance related to the operation of services by that FOC on behalf of the FC. We said that it would be for the FC and the FOC to ensure that any arrangements they consider necessary for the pass through of the costs and risks relating to these provisions were dealt with under the unregulated commercial contract between them.

Consultees' views

- 3.82 DBS disagreed and said that if a FC required access rights then it should also be subject to and be responsible for administering a performance regime. Other respondents agreed, including GBRf, who said that any services drawn down by a FOC into a separate TAC between it and Network Rail should be accounted for on a standalone basis. A FC who had chosen to have a FC contract should not gain from benchmarks that existed in the FOC contract with Network Rail. Victra said that performance was strictly the domain of the FOC and a lack of effort on its part would probably lead to a revocation

ORR's response to consultees' views

- 3.83 We do not agree with consultees' comments that the FC should have its own performance regime in its FCTAC with Network Rail. FOCs, as train operators, and Network Rail are both incentivised under the Schedule 8 performance regimes to minimise delay and disruption and clearly these are the two principal parties who are best placed to take action in response to these incentives. We therefore consider that this is where these incentives should remain and not be transferred to non-train operators. Furthermore, we recognise that FOCs have expertise in considering and agreeing delay

attribution with Network Rail and that they are currently best placed to undertake more efficiently these industry processes. Consistent with our decision in respect of access charges, we consider that in the likelihood of any network performance effects being caused by FCs to FOCs in relation to the operation of services, the associated compensation payments due to Network Rail could be covered in the unregulated commercial contract between the FC and the FOC.

- 3.84 We consider that GBRf's concerns that a FC should not gain from benchmarks in a FOC contract with Network Rail are unfounded. The freight performance regime introduced for all FOCs at the commencement of CP4, and which is replicated in the FOCTAC, introduces a standardised regime. It has a freight operator benchmark common to all freight operators. Network Rail's benchmark has also been set at a standardised level across all freight operators so as to be normalised between operators running different total mileages. In these circumstances, the application of the benchmarks and the regime as a whole will have the same effect as if services are operated under access rights held in a FOCTAC (as is currently the case for all FOCs) or a new FCTAC or by a new freight operator entering the market.

ORR's conclusion

- 3.85 We have taken into account the points raised by consultees but do not consider that there is any justification for changing the approach we proposed in the September document.

Clause 5.10

- 3.86 Our September document (paragraphs 3.51 to 3.53) proposed a new clause 5.10 for the FOCTAC setting out the various mechanisms, rights and responsibilities relating to the FC access rights.

Consultees' views

- 3.87 DBS thought that these proposals were bureaucratic, cumbersome and impractical. It was particularly concerned about the FC's role in the access planning process. GBRf also did not agree with the proposals and said that an obligation should be placed on Network Rail to provide information to a FOC that was the recipient of a drawdown notice of any alterations that affected the

pathway between the date of the notice taking effect and the relevant T-18 date. Network Rail made a number of comments on the drafting.

ORR's response to consultees' views

- 3.88 As we have explained elsewhere in this document, a FC should be under no illusion that if they wish to own and manage their own access rights then they will have to participate fully in the relevant processes, including those under Parts D and H. This is why we are proposing changes to the Network Code. It is also for the FC to manage any arrangements that may be required with their operator of choice.
- 3.89 We have made a number of changes to the drafting of Clause 5.10 to reflect some of the suggestions made by Network Rail. However, we do not agree with its view that changes made to the FOCTAC by way of clauses 5.10.1, 5.10.8 and 5.10.9 should be subject to ORR's approval. We believe that having approved the mechanism in the contract for changes to take place by way of these clauses it is unnecessary for us subsequently to have to agree each individual change. In any event, the amendments would have to occur automatically for the drawdown and revocation to work in practice. Neither do we agree with the proposal that the FOCTAC should be terminated if all the rights have been either revoked or have expired. We believe that there is considerable merit in leaving in place a shell agreement that can be picked up at a later stage.
- 3.90 We understand the point which GBRf makes about placing an obligation on Network Rail to notify the FOC identified in a draw down notice of any alterations to a path or paths in the timetable. This would enable the FOC in question to consider whether it was able to revise and resource its planned train operations accordingly. Part D of the Network Code places an obligation on Network Rail to notify the person who made the original bid for the path in the timetable of any such proposed changes and we accept that under a FCTAC the bidder could be the FC or its agent. As mentioned in paragraph 3.88 above, we expect a FC (or its agent) who is actively engaging in timetable processes to be alert to the need to inform its FOC of such proposed changes. If a FC failed to do so, it would be acting against its own interests or, where an agent is acting, its clients interests, as their goods could be delayed or fail to be moved at all. As such, a FC (or its agent) would be incentivised to act quickly on receipt of proposed path alteration notices and

liaise with its FOC to ensure timely delivery of its goods. We see this as one of many aspects of liaison between a FOC and a FC. We therefore see no reason to include the provision which GBRf seeks.

ORR's conclusion

- 3.91 We have taken into account the points raised by consultees and have agreed certain changes to clause 5.10. For the reasons mentioned above we see no need for our approval of the drawn down of access rights allowed under the FCTAC nor an ability to terminate a FCTAC which is a shell agreement. Neither do we consider there should be any requirement of Network Rail to always notify the relevant FOC of path alteration proposals.

Impact assessment, complexity and lack of FC expertise

- 3.92 In our September document we consulted on our draft impact assessment which provided information on the costs and benefits of our proposed policy and reasons for our intervention. The following views provided by consultees have assisted in the development of our policy.

Consultees' views

- 3.93 There was a general feeling from respondents, particularly from the FOCs, that we had underestimated the costs of the proposed policy. DBS said that our proposed policy would create a significant cost to all parties and lead to an increase in the price of rail freight haulage. This would undermine both Government and ORR policy to increase freight by rail and the efforts and investments of the rail freight industry causing a modal shift from rail to road. In particular, it pointed to the additional costs the parties could face.
- 3.94 DBS was concerned that FCs, Network Rail and timetable agents "will not have sufficient knowledge of the resource plan required to operate their services efficiently and, therefore, will no doubt bid for and be given train slots that are significantly more costly to resource for the FOC". Nor will FCs understand the resource and time commitment required of them to participate in the relevant timetable and engineering planning meetings. This was because our policy did not provide for FOCs to make bids on behalf of the FC where that FC had opted to participate in the timetabling process. DBS also disagreed with ORR that the Part J process is lengthy and difficult.

- 3.95 GBRF repeated that FCs alone would not stimulate the competition that ORR sought, it would only be a building block and we would need to be careful that added complexity did not work against the industry. FC frustration was perhaps being driven by an inadequate Network Code. FL said that FOCs would need more staff, have to draw up more complex contracts, have more contracts to manage and have to have more interaction with the customer on railway processes. A culture of short term contracts would be more expensive.
- 3.96 HBH said that creating ownership of particular paths on the Network increased the administration cost and bureaucracy of running an efficient and effective rail service. IP said that the charging process outlined appeared to underestimate potential costs for taking on a FCTAC and other areas lacked detail, particularly relating to ‘adequacy’ clauses, resource planning and especially Part J. S&SE also felt that our costings took no account of the fact that TACs would have to be managed on an on-going basis and of the costs associated with increased bureaucracy and complexity to the management of freight flows across the network.
- 3.97 Network Rail agreed that it was funded via the PR08 determination for costs associated with additions or amendments to TACs provided that the concept of “no double liability” was taken forward. It considered that the number of FC access contracts in first two years would be below the figure of 10 suggested in our September document.
- 3.98 FL, FTA and IP all raised the importance of ensuring that our proposals and the complexities of the process were clearly understood and set out. FL noted that no FCs had thus far chosen to hold their own access rights, it believed because they had been put off by the complexities involved. Whilst acknowledging that ORR had attempted to simplify the process, it felt that there were many issues that had not been addressed in the September document. FL was seriously concerned that FCs would continue to have an expectation of simplicity and would continue be put off when they got involved in the detail. This could put customers off using rail altogether.
- 3.99 AI said that the regulated, contractual and industry processes were complex and far beyond that required from other transport modes and would therefore be a challenge for all parties. DP World felt that FCs should not need to understand Part J or employ a consultant or lawyer to achieve the possibility of changing their FOC. In terms of administration of a TAC or the Network

Code, UKC said that it did not currently have the knowledge and expertise required and the administrative burden would mean they would initially have to pass these on to the FOC to administer on their behalf.

ORR's response to consultees' views

3.100 Regarding the comments on increasing costs, we acknowledge that there could be an increase in certain costs as a result of our policy. However, we consider these would be limited in the first instance to initial 'start-up' costs but any new but any new customer of a FOC and the FOC of choice would have to bear start-up costs under existing arrangements. For existing FOCs entering into new FOCTACs, we consider that costs would be minimal given our understanding of current levels of expertise held within each FOC to enable them to quickly and easily deal with new access contracts applications. There may be other FCTAC and FOCTAC management costs but we consider these could be kept to a minimum and, again, these would be similar to what new FOC entrants would have to bear. Although Network Rail accepts it is funded to undertake work on track access applications, we expect the relatively small take up of FCTACs to have negligible financial impact on Network Rail. More generally, we note that consultees have not specifically disputed the cost estimates we included in our draft impact assessment nor have they provided evidence of, or estimates of, alternative costings.

3.101 Therefore, we have made the judgement that the competition/customer benefits will outweigh the costs; that the costs will in any case be relatively small, and that it is a policy we can review. Despite what we believe could be a small amount of uncertainty identified with the implementation of our policy we consider it worth proceeding with. It is worth repeating that the approach we have adopted is not mandatory and if a FC developed alternative arrangements for holding its own access rights then we would handle such a bespoke application in the same way we consider another bespoke amendments to published model contracts and seek justification for any departures from the model contract (see paragraph 3.18 above). The purpose of the FCTAC is to provide an incentive for rail freight and the Act envisages that FC may hold access rights and TACs in their own right. Given that any additional costs are likely to be passed back to the FC, a FC would need to consider whether the benefits of holding access rights will outweigh the additional costs.

3.102 We agree that the process should be kept as simple, transparent and straightforward as possible and as we made clear in our September document that has been our aim. However, we have to find a balance, provide consistency across the industry and ensure that our policies are in line with our statutory obligations. In respect of DBS's point about FCs' participation in the various planning processes, it is entirely a matter for the FC to decide how they manage this.

3.103 We envisage that some FCs will welcome the opportunity to play a full part in industry processes. In such instances, the FCs concerned will need to ensure that they understand fully the role they have to play and the responsibilities an access contract holder will be expected to meet. Alternatively, the FC may wish to engage the services of an agent, which could also be its FOC of choice, to undertake those duties on its behalf. Our FCTAC caters for both options. Of course, if a FC is concerned about costs then it can elect to continue with its current arrangements.

3.104 Many of the specific concerns raised, for example in relation to Part J, are dealt with elsewhere in this document.

ORR's conclusion

3.105 We have updated the draft impact assessment we published in our September document. The final impact assessment is attached at **Annex H**.

4. The Network Code

Introduction

- 4.1 As explained in Chapter 1 of this document we are keen to make the necessary changes to the Network Code quickly to ensure the earliest possible introduction of FCTACs. To facilitate this and to aid the industry's understanding of the changes required we have set these out in **Annex B**, in the form of a proposal for change. To further aid the industry's understanding of the changes, we have also produced a table of changes at **Annex C**. We are sponsoring these changes through the usual democratic change processes set out in Condition C5 of the Network Code. In **Annex B** we mention the potential impact of changes being implemented to Part D, as a result of the wider industry-led Part D review¹¹, on changes we are also proposing to Part D under these final conclusions.
- 4.2 However, we thought it would also be helpful to provide in this Chapter a brief overview of the responses received on our proposals for amending the Network Code and to address a number of specific issues raised by consultees, which are not covered by the proposal for change.

Overview

Consultees' views

- 4.3 All consultees who responded on the Network Code related questions recognised that if FCs were to have their own access rights then changes would be required to the Network Code. However, there was a range of views on the extent or otherwise of the changes required. The specific issues raised by consultees in relation to Parts C and J are dealt with in **Annex B**. In general terms, DBS said that if FCs required their own access rights then they should be subject to the same terms and conditions as FOCs, including the full extent of the Network Code. Notwithstanding this view, it said that Part E of the Network Code would be applicable to those FCs wanting to convey dangerous goods and that the entirety of Parts D and H would be relevant to

¹¹ On our web-site at: <http://www.rail-reg.gov.uk/server/show/nav.2253> "Proposals for revising Part D of the Network Code"

FCs so they could participate in making Short Term Bids etc. during times of disruption.

- 4.4 FL said that the responsibilities within Parts D, F and G would have to be laid out in the unregulated contract between the FOC and FC. Any contingency plans (Part H and ROC) would need to involve the FOC as they managed the trains on a day to day basis. It also assumed that FCs would be expected to contribute to the running of the Access Dispute Resolution Committee as they would be potential users (Part M). GBRf agreed that whilst ORR had identified relevant sections of Network Code it considered that further work was needed and that the amendments/modifications proposed by ORR were insufficient.
- 4.5 DP World again repeated that FCs should not need to understand the Network Code or employ a consultant or lawyer to achieve the possibility of changing their FOC, and First that specific drafting would need to be considered. RFG reiterated its point about ensuring that stakeholders understood the importance of the modifications. HPUK felt that the issues that arose in paragraphs 4.16 - 4.18 of the September document needed to be worked through to agree appropriate changes and that written confirmation needed to be obtained from the relevant terminal owner at each end of the route to confirm they had agreed access at the times requested in the contract before any rights were sought by either a FC or FOC.

ORR's response to consultees' views and conclusion

- 4.6 We remain firmly of the view that certain parts of the Network Code and associated documentation must apply to Access Option Holders such as FCs holding a FCTAC to enable them to participate in the necessary Network Code processes. It is only right and proper that FCs take on and have the same rights and responsibilities as others participating in the timetable process. We set out in **Annex B** where we propose to make changes to the Network Code and our reasons for doing so.
- 4.7 Please note that where we have identified the need for change this document does not explain every amendment and modification, just the substantive ones. However, all the changes can be found detailed in the table at **Annex C** and highlighted in the marked-up copies of the relevant parts of the Network Code (Parts A, C, D, H, J, together with ROCN and ROC) that we are

publishing on our website alongside this document. No changes are proposed to Parts B, E, F, G, K, L and M.

- 4.8 As explained in Chapter 1, we will be sponsoring these changes through the proposal for change process set out in Condition C5 of the Network Code. The process for taking forward these amendments is set out in more detail in **Annex B**.
- 4.9 In relation to Part J, the amendments proposed are only those required to effect the introduction of FCTACs. In considering changes to the Network Code, we identified a number of other areas of drafting which could benefit from clarification, but which are not linked specifically to the amendments relating to FCTACs. Those which are related to Part J will be taken on board as part of a wider review of Part J that we are proposing for later in the year (see paragraph 4.21 below).
- 4.10 Turning to those issues raised by consultees, but not dealt with in **Annex B**.

Part C

- 4.11 We proposed a number of changes to Part C to ensure that where modifications were being made to the Network Code, FCs would be treated in the same way as access option holders and would be able to participate fully in the Part C process.

Consultees' responses

- 4.12 DBS was the only respondent who disagreed with our view that changes were required. It said that as our proposals would limit the application of the Network Code to FCs, it would be inappropriate for them to be given the right to amend parts of the Network Code which didn't apply to them. First said that although it generally agreed, specific drafting would have to be considered. DP World repeated its point that FCs should not need to understand the Network Code or employ a consultant or lawyer to achieve the possibility of changing their FOC. RFG emphasised the need to ensure that this important modification to benefit FCs was understood by those members who voted on it and ORR might wish to consider composition of the committee if FCs did not take up the option of holding rights. Victa made the point that if change was not made then there might be a tendency amongst FCs not to appoint

operators to all its services in order to protect its interests by remaining a Class Member.

ORR's conclusion

- 4.13 We have considered further whether a FC's rights to make proposals for change and entitlement to vote should be limited to proposals in respect of those parts of the Network Code that are binding on FC. We have concluded that FCs and Access Option Holders should be treated the same way, since a FC is effectively holding an Access Option that can be drawn down into a FOCTAC, and the representative of their class should be able to vote on any matter in the code. We think that as voting is done on a representative basis, any issues of a FC or Access Option Holder not having an interest in the part of the code which is proposed to be changed would be an issue of how the representative, if a FC or Access Option Holder, was directed to vote by other class members or be relevant to the appointment of the class representative by the others. The changes required to Part C are detailed in **Annex B**.

Part E

- 4.14 In our September document we said that we did not consider that any modifications were required to Part E and that it would be for the FOC to comply with these environmental protection provisions when operating any services on behalf of the FC. Only Condition E1.2, which requires Network Rail to provide a copy of its environmental policy to any Access Beneficiary (which includes both Train Operators and Access Option Holders), would apply.

ORR's conclusion

- 4.15 DBS said that Part E would apply to those FCs wanting to convey dangerous goods because it required Train Operators, among other things, to notify Network Rail of any materials they propose to transport which would be likely to give rise to environmental damage. At present, this part does not apply to Access Option Holders and would therefore not apply to any FC that entered into FCTAC. We consider that a FC should be treated in the same way as other Access Option Holders and that, as the FOC would actually be operating the services in question, it would be its responsibility to comply with these provisions. Accordingly, no changes are proposed to these parts.

Parts F and G

- 4.16 No consultees commented specifically on our view that Parts F and G should apply to any FCs entering into the model FCTAC. As these parts already apply in their entirety to Access Option Holders, they will automatically apply to FCs and therefore no drafting changes are required.
- 4.17 FL did comment that the responsibilities within Parts D, F and G would have to be laid out in the unregulated contract between the FOC and FC. Whilst we recognise that this is true of Part D, it is not clear to us what elements of Parts F and G would need to be included.

Part J

- 4.18 In the September document we proposed that Part J should apply to FCs to ensure that capacity on Network Rail's network was not being sterilised. There were two issues to consider when making such a change. Firstly, whether when access rights were removed from a FOCTAC they should also be removed from the FCTAC and secondly, whether removing rights from the FOCTAC and FCTAC would give the FC the opportunity to demonstrate it had a reasonable ongoing commercial need to retain the access rights.

Consultees' views

- 4.19 DBS believed that the Part J freight transfer mechanism was adequate to address the specific circumstances proposed and therefore did not require amending. It did however, say that amendments would be required to ensure that it allowed access rights to be removed from FCTACs where the rights were not being used or intended to be used. First said that if more access rights were to be created, a comprehensive review should be considered. It would need to include UIOLI provisions for FCs. FL said that Part J should only be applicable in this way when a FC wished to change FOC, not when a FC wished to retain the same operator. Part J should apply absolutely equally to FOCs and FCs. More generally, FL acknowledged that there had been some problems with the Part J process; but that these would still exist if FCs owned their own rights. Nonetheless, it was keen to see a review of Part J to tighten it up and to prevent game playing. DP World was concerned about the ability of FCs to switch trainload traffic between FOCs - while theoretically possible, it felt that it was extremely difficult, because of the problem of transferring relevant paths between FOCs. It also felt that FCs should not

need to understand Part J or employ a consultant or lawyer to achieve the possibility of changing their FOC. GBRf said that Part J needed a complete overhaul.

- 4.20 Network Rail said that change was essential and that it was important to ensure that any amendment minimised the possibility of the incumbent using the “reasonable on-going commercial need” (see Annex D) defence. RFG said that the ability of customers to change FOC was key and that there had been numerous cases where it could be difficult to ensure that the relevant paths ‘moved with the traffic’. There were various causes for this, but the complex nature of freight track access rights could make it difficult to identify with certainty those paths which were necessary for the traffic. Aside from time and cost issues, RFG said that this could lead to inefficient use of network capacity as the incoming operator might have to bid for new paths if existing ones were not voluntarily released. FTA raised questions over the validity of the one in 90 days utilisation criteria, the load utilisation of trains, the difficulties in transferring rights, particularly Level Two rights, and terminal access. Based on its own experiences, IP expected to see further tightening of the Part J process, including the participation of FCs and other interested end users.

ORR’s response to consultees’ views

- 4.21 A number of consultees said that there was a need for a wider review of Part J. We agree and will be carrying out such a review later this year. As consultees will be aware, Part J has not been subject to any significant change since it was introduced in 2004. Although an industry working group was established in 2007, little common ground for change was found and as a result very little changed. Nevertheless, the reasons that prompted the original review (essentially in relation to the freight mechanisms) remain and we still have serious concerns about the overall accessibility, usage and functionality of Part J. Although our views are not necessarily shared by the whole industry, there is clearly a belief that the time is right to review Part J. Our review will aim to produce a Part J that is clear and transparent and as far as possible written in plain English. It will be consistent in its use of language with all terms properly defined and understood. We will also look to ensure that the processes are simplified as far as possible, and timescales are clear and where possible reduced. Our provisional timetable is for the industry to be consulted later this year.

- 4.22 In the meantime, we consider it important to press ahead with the changes required to implement our FC proposals. Given the number and nature of the changes required to Part J we will ensure that our C&Ps explain the process in some detail, including the practical issues around transferring rights (e.g., how a FC can transfer from a FOC contract to a third party access contract without changing the FOC). The changes required to Part J are detailed in **Annex B**.

Part K

- 4.23 No consultees commented specifically on our view that Part K should apply to any FCs entering into the model FCTAC. As this part already applies to Access Parties which includes Access Option Holders, it will automatically apply to FCs with a FCTAC and therefore no drafting changes are necessary.

Part L

- 4.24 In our September document, we said that Part L, which deals with performance, would not apply to any FCs entering into FCTACS because its application is limited to train operators and they are best placed to manage performance matters. We remain of the view that no changes are required to Part L.

Part M

- 4.25 In our September document, we proposed that Part M, which deals with appeals to ORR under the Network Code, and the Access Dispute Resolution Rules (ADRR), which are annexed to the Network Code, should apply to FCs entering into a FCTAC.

Consultees' views

- 4.26 As mentioned briefly above, ADC's response essentially focused on matters impacting upon the areas of potential disputes and the process for dealing with them. It was concerned that the proposed new arrangements might result in an increased number of disputes and might introduce new areas of possible dispute especially arising from Parts D and J of the Network Code. In particular it referred to paragraph 4.21 of our September document where we indicated that the dispute resolution route will be the relevant Access Dispute Resolution Rules (ADRR) panel for all disputes and asked whether this would include issues such as declining a drawdown notice. It also said that the

nature of commercial parties might mean disputes were more complex, time consuming and/or expensive. As a result ADC sought confirmation that these factors would be taken into account through an obligation on the parties to a FCTAC to comply with ADRR processes and to contribute to their costs and funding. Such arrangements would also require a change to Part C of the Network Code to enable FCs to have membership and voting rights to ensure that they were fairly represented.

- 4.27 FL also asked whether it was the intention for ADRR to apply to FCs and if so would they be expected to contribute towards running costs as all other beneficiaries do.

ORR's conclusion

- 4.28 We acknowledge the points made and recognise that the nature of disputes involving FCs may change and that any increase in the number of disputes will impact on funding and possibly timescales. As already indicated above, we do not believe that there will be a large number of FCs taking up FCTACs and certainly not so many that they will lead to significantly more disputes. In addition, paragraph 4.21 of our September document was set against the context of the Network Code where the ADRR are the basis for dispute resolution. In line with the new ADRR, which were introduced on 1 August 2010, FCs can use the ADRR upon payment of a fair and reasonable sum (if not paying the Railway Safety Levy) - see paragraph 45 of Chapter J to the ADRR.
- 4.29 Nevertheless, we agree that those FCs who do take up FCTACs participate fully in all relevant industry processes, including ADRR. This is why we recommended in paragraph 4.22 of our September document, that FCs familiarise themselves with the ADRR¹².
- 4.30 Further we note that the definitions in Part M cross-refer to those in the ADRR and that a FC could fall within the ADRR by making a payment for resolution services in accordance with Part J of the rules, in the same way that other holders of TACs do. We therefore expect FCs to use the ADRR in the same way as other holders of TACs. No drafting changes are required to Part M or the ADRR in this respect.

¹² Information on the activities and functions of the Access Disputes Committee and a copy of the rules can be found at <http://www.accessdisputesrail.org/>.

Annex A: respondents to the September 2009 document

The following organisations responded to the September 2009 document:

Access Disputes Committee	17 November 2009
Aggregate Industries	26 October 2009
Associated British Ports	18 November 2009
DB Schenker	18 November 2009
DP World	4 November 2009
First	18 November 2009
First GBRf (now GBRf)	18 November 2009
Freight Transport Association	16 November 2009
Freightliner	18 November 2009
Hutchison Ports UK	18 November 2009
Hull Bulk Handling Ltd	18 November 2009
International Power Fuel Company Limited	17 November 2009
Network Rail	17 November 2009
Rail Freight Group	November 2009
Scottish and Southern Energy	18 November 2009
Transport Scotland	20 November 2009
UK COAL Mining	13 November 2009
Victa Shortlines Ltd	4 November 2009
"Company A"	18 November 2009

Annex B - proposal for change of the Network Code

1. ORR is sponsoring, in accordance with Condition C5.1 of the Network Code, a Proposal for Change (the proposal) to give effect to changes to Parts A (General), C (Modifications to the Network Code), Part D (timetabling, Part H (operational) and Part J (changes to access rights), together with associated amendments to the ROC and ROCN, of the Network Code.

Proposal

2. The Proposal comprises:
 - (a) the information set out in **Chapter 4** to this document;
 - (b) the information set out in this Annex, including the table of proposed changes at **Annex C** below; and
 - (c) marked-up copies of the current Parts A, C, D, H and J, together with the ROC and ROCN criteria to show those proposed changes as tracked. These have been posted separately on our website¹³.

Reasons for the Proposal

Part A

3. The change proposed to Part A of the Network Code, which sets out certain definitions, general provisions and rules of interpretation that apply generally to the Network Code, adds a definition of “Freight Customer Access Option Holder” into Condition A1.2 as this term is used in later parts of the Network Code.

Part C

4. The first proposed change to Part C is regarding the allocation of FCs that have a FCTAC to a particular “Band” of Class for voting purposes under Part C. Under the current drafting of Part C, Access Option Holders are assigned to a particular “Band” by reference to the forecast amount of annual track

¹³ <http://rail-reg-master.orr.gov.uk/server/show/ConWebDoc.9824>.

access charges payable. We note, in passing, that it is not clear in practice how this method of assignment would work when estimates of forecast track access charges are not always available in respect of Access Option Holder's rights. As any correcting drafting is outside the ambit of associated FC changes, ORR wishes to highlight this to the industry for them to take forward.

5. As FCs will not be paying track access charges, we propose that FCs are automatically assigned to the Non-Passenger Class representing the final 25% of the aggregate annual Track Charges payable by all members and have proposed drafting to effect this.
6. The second change proposed to Part C of the Network Code deals with a certain circumstance where a FC that enters into a model FCTAC should be treated differently from Access Option Holders generally.
7. As we explained in our September document, Condition C1.6.2 states:

"Where an Access Option Holder exercises its rights under its access option, it shall only be eligible to be a Class Member in respect of any unexercised rights that remain within its access option".

As a result if a FC was treated as an Access Option Holder, once the FC has drawn down its track access rights into a FCTAC, it would cease to be able to participate as a Class Member in the Part C process. However, a FC entering into the model FCTAC may wish to express different views on changes to the Network Code from those expressed by FOCs and we believe that it is important to allow both the FC and its chosen FOC to participate in the Part C process. Changes to Condition 1.6 are therefore proposed so that a FC is still eligible to be a Class Member even after it has drawn down its rights to a FOC.

Part D

8. The changes proposed to Part D of the Network Code, which deals with the timetabling process, ensure that a FC is able to engage fully in the bidding and timetable development process should they wish to do so either themselves or through an appointed agent or FOC bidding on its behalf. It should be noted that the proposed changes to Part D will only be required if ORR's separate Proposal for Change to Part D, which proposes a complete overhaul of Part D and was issued in July 2010 ("Part D Proposal for Change

2010”) is not already implemented by the date this Proposal for Change has effect. If the Part D Proposal for Change 2010 has already been implemented then the changes proposed to Part D in this proposal will have been superseded and will no longer be required.

9. In our September document, we stressed the importance of Part D applying to the FC to enable it to engage fully in the bidding and timetable development process should they wish to do so either themselves or through an appointed agent or FOC bidding on its behalf. Generally the term “Bidder” is used in Part D which will encompass a FC. However, one issue we identified was that Condition D1.5.3 appears to treat Access Option Holders differently from Train Operators as follows:

“Any Train Operator wishing to propose significant alterations to its services or any Bidder wishing to introduce significant new services shall consult with Network Rail at the earliest opportunity to assist Network Rail in deciding whether or not to invoke an early start to the pre-bidding consultation process and, if so, in deciding when that process should begin”.

We said that a FC that has yet to appoint a FOC but wishes to propose significant alterations to its services should be able to consult with Network Rail at an early stage in accordance with this condition and that, as a consequence, this condition would need to be amended to provide for this.

10. We have concluded that FCs as an Access Option Holder be granted the same rights as Train Operators and therefore we have proposed amendments to this Condition to effect this.

Condition D4.5.3, 4.5.4, 4.5.5:

11. We also consider that D4.5.3 and D4.5.4 should apply to FCs who have entered into a FCTAC.
12. These Conditions deal with spots bids being made for a train slot to be used for the carriage of passengers for a sporting or public event and the obligations of the train operator who already holds the train slot in question. As a FC will not be carrying passengers it is not likely to be exercising these rights. We have therefore reviewed these Conditions from the point of view that they only need to be realigned to cover FCs where they are the party

whose train slot is flexed and we propose amendments to Conditions 4.5.3 and 4.5.4 to effect this.

13. We also considered whether an amendment is required to Condition 4.5.5 which deals with compensatory payments to be paid by Network Rail to the train operator whose right has been flexed further to Condition D4.5.3 and D4.5.4. We have concluded that Network Rail should only be obliged to pay compensation in respect of a FC's Service that is affected by the exercise of Network Rail's Flexing Rights if, by the time the FC Service is scheduled to be operated, the FC has drawn down the access rights relating to that affected Service into a FOC's TAC so that such FOC can run the Service (subject to the flex) on behalf of the FC. In these circumstances, the compensation would be payable by Network Rail to the FOC under its TAC (rather than directly from Network Rail to the FC), leaving the recovery of that amount by the FC from the FOC to the commercial agreement between them. This is the approach we have been taken in relation to cancellations under Schedule 4 of the FCTAC (see paragraph 5.6 of Schedule 4). Accordingly, no change is required to this condition.

Part H

14. The proposed changes to Part H of the Network Code, which deals with the Railway Operational Code ("ROC"), ensure that FCs who hold a FCTAC have to comply with certain sections of ROC and provide FCs with the ability to make proposals to vary the ROC. We consider these changes are necessary as a FC might wish to be involved in certain issues covered by the ROC, especially in circumstances where the FC has yet to appoint a FOC and it has undertaken its own planning before the trains have begun to operate.
15. Much of Part H is, of course, now in the ROC and we have concluded that the following ROC sections should apply to FCs:
 - (a) Introduction and General Section; and
 - (b) Paragraph 7.1 in Section on Control Arrangements.

We have also identified that other sections of ROC, such as arrangements to deal with adverse weather and train regulation policies, may be of interest to FCs. However, we do not propose that these sections apply to FCs at this stage. If, at a later date, a FC considers that it would like these, or other

sections, to apply to them then they can propose such changes through the ROC change process.

16. The ROC is of course the responsibility of Network Rail. We will be seeking Network Rail's assistance in proposing the changes to it we consider are now required. We thought that it would be helpful for the sake of completeness and transparency if we provided a mark up of the ROC showing the necessary drafting changes, as well as those to Part H itself. These are at **Annexes E and F**: deleted text is shown as ~~strikethrough~~, new text is double underscored.

Part J

17. The proposed changes to Part J of the Network Code, which deals with Changes to Access Rights, are to ensure that any FC entering into the model contract would be subject to Part J in the same way as a FOC.
18. As we explained in our September document, Part J does not currently apply to Access Option Holders and therefore would not apply to any FC that enters into the model FCTAC. Given the nature and purpose of Part J, we considered that it was important for Part J to apply to FCs so that capacity on the Network is not sterilised in cases where access rights are not 'drawn down' into a FOC's contract for current or 'near future' use.

Definitions

19. Part J now contains a number of new definitions including "Appointed Operator", "Office of Rail Regulation's Model Track Access Contract (Freight Customer Access)" and "Part J Access Beneficiary". In addition, many of the other definitions have been widened so that they not only refer to Train Operators but also to Freight Customer Access Option Holders. These changes are all necessary to extend the scope of Part J to FCs with a FCTAC.

Condition J1A

20. We are proposing some new drafting to ensure that where any of the Part J processes concern an access right that has been drawn down from a FC to a FOC, any decision affecting the right is made in consultation with the FC. In addition, we are proposing that any relevant documents regarding the access right should be served on the FC copied to the appointed FOC. Further, we

have also expressly provided that any non-receipt of copy documents by the appointed FOC does not affect the validity of service of documents on the FC.

Condition J2

21. Condition J2 sets out a process by which a Train Operator can request information about voluntary surrender or adjustment of its access rights and can secure the surrender or adjustment. We are proposing amendments to this condition so that it also applies to FCs with a FCTAC.

Condition J3

22. This Condition ensures that confidential information relating to a proposed surrender or adjustment of access rights is dealt with in a way that protects the interests of all parties where disclosure would, or might, in Network Rail's reasonable opinion, seriously and prejudicially affect the interests of a Train Operator. We are proposing changes to this condition so that references to a Train Operator are widened also to cover FCs with a FCTAC. In addition, in Condition 3.9(a)(ii) we are proposing changes which mean that where a Disputes Chairman is considering making a confidentiality order he has to consider whether the prejudice outweighs or is likely to outweigh the interests of FCs who hold FCTAC and potential FCs as well as operators and potential operators of railway assets.

Condition J4

23. We are proposing amendments to extend the present "failure to use" test to FCs with a FCTAC. This will mean that there will be a "failure to use" by a FC with a FCTAC in two circumstances. The first is where the FC fails to secure one or more train slots in respect of its access rights in any First Working Timetable (as defined in Part D) established by Network Rail after the Commencement Date of the FC's FCTAC.
24. The second circumstance is where a train slot has been included in the Working Timetable, but the FC either fails to draw down its access rights to use the train slot to a FOC resulting in the train slot not being used by the FOC or where the FC has drawn down the rights to a FOC but that FOC has used the train slot for less than the "Use Quota" for the relevant period. The "Use Quota" is that which is applicable to Train Operators and is published by Network Rail.

Condition J5

25. This condition deals with the circumstances where a third party wishes to use capacity on the network which it considers is not being used by the incumbent and where the third party can not otherwise gain the access it wishes. We are proposing amendments to extend this condition so that a FC could be a third party applicant for a failure to use or a FC with a FCTAC could be the incumbent.

Condition J6

26. This condition provides for the reduction of the incumbent's cordon cap where it loses rights under the UIOLI mechanism. We are proposing amendments so that an incumbent can include a FC with a FCTAC.

Condition J7

27. This condition sets out a mechanism for the transfer of rights where a freight train operator wins existing freight traffic from an incumbent freight train operator. We are proposing drafting to widen this so that it would also apply where a FC wishes to secure access rights from an incumbent freight train operator providing services to, or on behalf of, that FC so that it can hold those rights in an access agreement and draw them down to a FOC of its choosing. A FC will only be able to do this when its commercial contract with its present FOC expires or is terminated. This is reflected in the amendments we have proposed to the "reasonable on-going commercial need" ("ROCN") criteria whereby, in order to meet the ROCN criteria, a freight operator in such circumstances would have to demonstrate that it is still required to convey the traffic for the FC under a continuing commercial arrangement with the FC.

Condition J8

28. The only change that we are proposing to this condition is to condition J8.4.1 to make it clear that any cordon cap increase resulting from condition J8 may result in modifications to the access agreement of the FOC to whom the FC has drawn down its rights to.

Condition J9

29. We propose that FCs with FCTACs have to attend a Rights Review Meeting if required by Network Rail under condition J9 and that they also have the right

to require Network Rail to convene a Review Meeting with other FCs and/or Train Operators.

Condition J12

30. We propose amending condition J12 so that FCs with FCTACs have to be consulted by Network Rail regarding any revisions to the ROCN criteria. We are also proposing changes to ROCN itself to similarly reflect FCs role in Part J. Although J12 places the requirement on Network Rail to revise ROCN, we thought that it would be helpful to set out the changes that we believe are required to ROCN (**Annex D**) as part of this document so that the industry can consider them alongside the PFC. Where text has been deleted from the existing ROCN criteria we have identified this using '~~striketrough~~' and new text is identified as 'double underline'. Our proposals for change to the ROCN criteria in this regard will not affect current, established, processes within Part J.

Condition J13

31. We are proposing amendments to condition J13 so that FCs with FCTACs can access the dispute resolution procedure set out in that condition.

Implementation

32. Further detail as regards these reasons in relation to these Parts is set out in the comments column of the table of proposed changes in **Annex C**.
33. As explained in Chapter 4, no similar consequential changes appear to be needed for other parts of the Network Code (Parts B, E, F, G, K, L and M).
34. Subject to approval by the CRC in accordance with Condition C6, and by the ORR in accordance with Condition 7 it is proposed that these changes be implemented as soon as practicable. It should be noted, as stated at paragraph 8 above, that if the Part D Proposal For Change 2010 has already been implemented by the date of implementation of this Proposal for Change then the changes proposed to Part D in this proposal will have been superseded and will no longer be required.
35. Given the nature of the proposed changes, no transitional arrangements are considered necessary.

Annex C – table of proposed changes of the Network Code

The changes proposed in the table below to Part D are only required if ORR's Proposal for Change to Part D, which proposes a complete overhaul of Part D and was issued in July 2010, is not already implemented. If it is, then no changes to Part D will be required as part of this Proposal for Change.

Table of proposed changes

Part A			
Item no	Condition	Proposal for change	Comment
1	A1.2 - Definitions	<p>Insert the following new definition:</p> <p>““Freight Customer Access Option Holder” means an Access Option Holder who:</p> <p>(a) is a freight customer; and</p> <p>(b) has entered into an Access Agreement with Network Rail pursuant to which that Access Option Holder can exercise its rights under its access option by drawing down rights under its Access Agreement to enable a Train Operator to operate freight railway services for or on behalf of that Access Option Holder;”.</p>	This new definition has been added as this term is proposed to be used in later parts of the Network Code.
Part C			
Item no	Condition	Proposal for change	Comment
2	Definitions – “Band”	In paragraph (b)(i), after the words “an Access Option Holder” add the words “(other than a Freight Customer Access Option Holder)”, and insert “;and” at the end of this paragraph.	To reflect the change at item 3 below

3	Definitions – “Band” – insert new paragraph	<p>After paragraph (b)(i) insert the following new paragraph:</p> <p>“(ii) a Freight Customer Access Option Holder who is not also a Train Operator already falling within paragraph (a) or (b) above, will be assigned, as a member of the Non-Passenger Class, to the Non-Passenger Class band representing the final 25% of the relevant annual Track Charges referred to in paragraph (a) above.”.</p>	This change is proposed so that Freight Customer Access Option Holders are automatically assigned to the Non-Passenger class representing the final 25% of the aggregate annual Track Charges payable by all members.
4	C1.6.2	After the words “Where an”, insert “Access Option Holder other than a Freight Customer”.	To reflect the change at item 5 below
5	C1.6 – insert new condition C1.6.3	<p>Insert new paragraph:</p> <p>“1.6.3 Where a Freight Customer Access Option Holder exercises its rights under its access option, it shall be and remain eligible to be a Class Member of the relevant Class notwithstanding the exercise of such rights.”.</p>	To allow a Freight Customer Access Option Holder to still be eligible to be a Class Member even after it has drawn down its rights to a freight operator
Part D	See comment at beginning of Annex about ORR’s separate Proposal for Change to Part D.		
Item no	Condition	Proposal for change	Comment
6	Explanatory Note D	<p>Delete the existing wording and insert:</p> <p>“Network Rail has the role of managing the Working Timetable. It is responsible for accommodating within the timetable the contractual service specification of each Bidder. Such specification will normally allow a degree of flexibility to both Network Rail and the Bidder, both in terms of the timing and other characteristics of the services. A Bidder’s Train</p>	To reflect the use of the term Bidder in Part D, which already captures an Access Option Holder

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		<p>Slots are protected insofar as they are based on Firm Rights which are not inconsistent with the applicable Rules of the Route and/or applicable Rules of the Plan, provided that the Firm Rights have been asserted no later than the Priority Date. Any such flexibility will operate within the confines of the applicable Rules of the Route and applicable Rules of the Plan which, like the service specification, will constrain Network Rail's ability to flex the timetable."</p> <p>(Proposed changes shown in bold italics.)</p>	
7	Explanatory Note I	Delete the words "Train Operators" and replace with the word "Bidders".	To reflect the change at item 10 below.
8	Explanatory Note K	After the words "Train Operator", wherever they may occur in this explanatory note, add the words "or Freight Customer Access Option Holder".	To reflect the change at item 14 below.
9	Explanatory Note L	Amend by deleting the two references to "Train Operator's" and inserting "Bidder's".	To reflect the change at item 10 below
10	Definitions – "Revised Bid"	Delete "Train Operator" and insert "Bidder".	To ensure that Access Option Holders can submit revised bids
11	D1.5.3	After the words "Any Train Operator" add the words "or Access Option Holder".	To ensure that Access Option Holders can propose significant alterations to their services
12	D1.7 (a)	After the words "Train Operators" add the words "or Freight Customer Access Option Holders".	To ensure the accreditation procedures can apply to planners employed by Freight Customer Access Option Holders
13	D1.7	Amend the final sentence underneath paragraph (b) by adding to the end "and Freight Customer Access Option Holders" after the words "Train Operators".	To reflect the change in item 12 above
14	D4.5.3 (a);	Amend by adding the words "or Freight	To extend these conditions to that they apply to Freight

	D4.5.3 (b); and D4.5.4	Customer Access Option Holder” after the words “Train Operator”.	Customer Access Option Holders, where they are the party whose train slot is flexed.
Part H			
Item no	Condition	Proposal for change	Comment
15	Definitions – “established”	In paragraph (a), after the words “affected Train Operators” add the words “and Freight Customer Access Option Holders”.	To reflect the fact that parts of the ROC will apply to Freight Customer Access Option Holders.
16	H2	<p>Delete existing wording and insert the following new wording:</p> <p><i>“H2 Obligation to observe the Railway Operational Code</i></p> <p><i>H2.1 Network Rail and each Train Operator shall comply with the Railway Operational Code.</i></p> <p><i>H2.2 Each Freight Customer Access Option Holder shall comply with those ROC Sections that are expressed in the Railway Operational Code to apply to Freight Customer Access Option Holders.”</i></p> <p>(Proposed changes shown in bold italics.)</p>	To extend this condition so that Freight Customer Access Option Holders will have to comply with certain sections of ROC.
17	H3.1 (a)	After the words “Train Operators” add the words “and Freight Customer Access Option Holders”.	To reflect the fact that parts of the ROC will apply to Freight Customer Access Option Holders.
18	H4.1; H4.1(b); and H4.1 (final paragraph)	After the words “Train Operator” add the words “or Freight Customer Access Option Holder”.	To provide Freight Customer Access Option Holders with a right of appeal.
19	H4.2	After the words “Train Operator’s” add the words “or Freight Customer Access Options Holder’s”.	To apply the time limits for appeals to Freight Customer Access Option Holders.
20	H4.2 (a)	After the words “Train Operator” add the words “or Freight Customer Access Options Holder”.	To apply the time limits for appeals to Freight Customer Access Option Holders.

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21	H4.3 (a)	<p>Delete the existing wording and insert the following new wording:</p> <p>“in the case of a referral to the relevant ADRR Panel under Condition H4.1, Network Rail shall provide the Train Operator <i>or Freight Customer Access Option Holder</i> and the Secretary with the name and address of every other Train Operator <i>and Freight Customer Access Option Holder</i> who Network Rail reasonably considers may be affected by the ROC Section variation within 7 days of the making of the reference; and”.</p> <p>(Proposed changes shown in bold italics.)</p>	To extend this condition so that it applies to Freight Customer Access Option Holders.
22	H4.5	After the words “Train Operator” add the words “and Freight Customer Access Option Holder”.	So that Freight Customer Access Option Holders receive a copy of an adjusted ROC.
23	H5.1 (a)(i)	After “Network Rail” delete the word “and” and replace with “,”. In addition, after the words “Train Operators” add the words “and Freight Customer Access Option Holders”.	So that Freight Customer Access Option Holders’ needs are considered under this condition.
24	H5.2; and H5.3	After the words “Train Operator”, wherever they occur in this entire condition, add the words “or Freight Customer Access Option Holder”.	To provide Freight Customer Access Option Holders with the ability to make proposals to vary the ROC.
25	H5.3 (a)	<p>Amend by deleting the existing wording and inserting the following new wording:</p> <p>“evaluate and discuss the proposed variation with that Train Operator <i>or Freight Customer Access Option Holder</i> for such period as is reasonable having due regard to the likely impact of the proposed variation on <i>any</i> of Network Rail, other operators of trains <i>and other Freight Customer Access Option Holder</i>; and”.</p>	To reflect that Freight Customer Access Option Holders have the ability to make proposals to vary the ROC.

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		(Proposed changes shown in bold italics.)	
26	H5.3 (b) H5.4 (a), H5.4 (b), and H5.5 (b)(i)	After the words "Train Operator", wherever they occur in this entire condition, add the words "or Freight Customer Access Option Holder".	H.5.3(b) –the change is to reflect that Freight Customer Access Option Holders have the ability to make proposals to vary the ROC H.5.4(a) and (b) – the changes are to provide that a Freight Customer Access Option Holder can agree a variation to the ROC which affects only that Freight Customer Access Option Holder H.5.5(b)(i) – to provide a Freight Customer Access Option Holder with a right of appeal where it is dissatisfied as to any matter concerning the variation
27	H5.6 (a); and H6.6 (b)	After the words "Train Operator" insert "and Freight Customer Access Option Holder".	To ensure that where Network Rail is proposing a variation to the ROC it has to send details of it to, and consult with, Freight Customer Access Option Holders.
28	H5.7	After the words "Each Train Operator" insert ", Freight Customer Access Option Holder".	To reflect the change at item 27.
29	H5.9	After the words "Train Operator" insert "and Freight Customer Access Option Holder".	To ensure that Network Rail sends a copy of any revised ROC section to Freight Customer Access Option Holders.
Part J			
Item no	Condition	Proposal for change	Comment
30	Explanatory Note - A	Delete the existing wording and insert the following new wording: "Part J provides a number of mechanisms by which the track access rights of a Train Operator or a Freight Customer Access Option Holder (each referred to in this Part J as a "Part J Access Beneficiary") can be changed, either at the Part J Access Beneficiary's instigation or in circumstances where the Part J Access Beneficiary would prefer to retain the rights concerned. The processes relating to each mechanism are illustrated in the flow charts	To reflect the changes at items 63-112 below.

		appended to this Explanatory Note. Before any of the mechanisms are activated, parties are encouraged to enter into informal discussions to consider the most appropriate manner to address specific issues.”	
31	Explanatory Note - B	<p>Delete the existing wording and insert the following new wording:</p> <p>“Condition J1A is intended to ensure that, with respect to the track access rights of a Freight Customer Access Option Holder (whether or not those track access rights have been drawn down into the Access Agreement of an Appointed Operator):</p> <p>(i) any notices to be sent under Part J in connection with those track access rights are sent to (or by) that Freight Customer Access Option Holder (with a copy to the relevant Appointed Operator in certain circumstances); and</p> <p>(ii) any determinations or decisions to be made in connection with those track access rights are made by reference to, and (if required by Part J) in consultation with, that Freight Customer Access Option Holder.”</p>	To reflect the changes at items 61-62 below.
32	Explanatory Note - C	<p>Delete the existing wording and insert the following new wording:</p> <p>“Condition J2 sets out a process by which a Part J Access Beneficiary can request information</p>	To reflect the changes at items 63-76 below.

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		about the voluntary surrender or adjustment of its access rights and, if it wishes to take up that opportunity, can secure the surrender or adjustment.”	
33	Consequential Re-lettering of Explanatory Notes	Re-letter old paragraph “C” as new paragraph “D”, old paragraph “D” as new paragraph “E”, old paragraph “E” as new paragraph “F”, old paragraph “F” as new paragraph “G”, old paragraph “G” as new paragraph “H”, old paragraph “H” as new paragraph “I”, old paragraph “I” as new paragraph “J”, old paragraph “J” as new paragraph “K”, old paragraph “K” as new paragraph “L”, old paragraph “L” as new paragraph “M”, old paragraph “M” as new paragraph “N”, old paragraph “N” as new paragraph “O”.	To reflect new Explanatory Note B has been added.
34	Explanatory Note - D	Delete the words “Train Operator” and insert the words “Part J Access Beneficiary”.	To reflect the changes at items 76-80 below.
35	Explanatory Note - E	Delete the words “Train Operator” wherever they occur and replace with the words “Part J Access Beneficiary”.	To reflect the changes at items 81-89 below.
36	Explanatory Note - F	Delete the words “Train Operator” wherever they occur and replace with the words “Part J Access Beneficiary”.	To reflect the change at items 90-91 below.
37	Explanatory Note - G	Delete the existing wording and insert the following new wording: “Condition J7 applies only to freight Train Operators and Freight Customer Access Option Holders. The purpose of the mechanism is to ensure the smooth transfer of rights were either (i) a freight Train Operator wins existing freight traffic from an incumbent freight Train Operator or (ii) a Freight Customer Access Option Holder wishes to secure access rights from an	To reflect the changes at item 92-101 below.

		incumbent freight Train Operator providing services to, or on behalf of, that Freight Customer Access Option Holder to enable that Freight Customer Access Option Holder to hold those access rights in its own Access Agreement and draw them down into the Access Agreement of a freight Train Operator of its choosing.”	
38	Explanatory Note - H	After the word “freight Train Operator” add the words “or Freight Customer Access Option Holder.”	To reflect the changes at item 102 below.
39	Explanatory Note - K	<p>Delete the existing wording and insert the following new wording:</p> <p>“Condition J9 is confined to freight Train Operators and Freight Customer Access Option Holders. It sets out a process by which Network Rail, freight Train Operators and Freight Customer Access Option Holders will hold six-monthly rights review meetings at which they will consider whether the freight Train Operator or Freight Customer Access Option Holder has rights for which it no longer has a reasonable on-going commercial need. A rights review meeting will also consider whether there should be any reduction in the freight Train Operator’s or Freight Customer Access Option Holder’s cordon caps. If Network Rail fails to schedule rights review meetings at six-monthly intervals with a freight Train Operator or Freight Customer Access Option Holder, any Train Operator or Freight Customer Access Option Holder may issue a notice to Network Rail requiring Network Rail to schedule a rights review meeting within 10 Working Days of receipt of such notice. The rights review meeting does not have to be scheduled to be actually held within the 10</p>	To reflect the changes at items 103-112 below.

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		Working Day period.”	
40	Explanatory Note – M	After the reference to “freight Train Operators”, in line 4 add the words “and Freight Customer Access Option Holders”. In addition after the words “appropriate franchising authority” delete the word “and” and replace with “,”. In addition, after the words “freight Train Operators and” in line 7 add the words “Freight Customer Access Option Holders and”	To reflect the changes at items 113-115 below.
41	Explanatory Note - N	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend this to apply to Freight Customer Access Option Holders
42	Appendices 1 - 7	Delete the existing appendices and replace with new appendices – see annex 1.	To reflect the proposed changes to Part J in the relevant items below
43	Definitions – new definition	Insert the following new definition: ““Appointed Operator” means a Train Operator into whose Access Agreement a Freight Customer Access Option Holder has drawn down some or all of its Access Rights in accordance with that Freight Customer Access Option Holder’s Access Agreement;”.	This new definition is required as it is now used later in Part J when referring to a freight operator to whom the Freight Customer Access Option Holder has drawn down its rights.
44	Definitions – “Commencement Date”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
45	Definitions – “Counter Notice”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
46	Definitions – “Failure to Use Notice”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
47	Definitions – new definition	Insert the following new definition: ““Office of Rail Regulation’s Model Track Access Contract (Freight Customer Access)” means the	This new definition is required as reference is now made later in Part J to the model track access contract for freight customer access published by ORR

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		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;”.	
48	Definitions – new definition	Insert the following new definition: ““Part J Access Beneficiary” means a Train Operator or a Freight Customer Access Option Holder;”.	This new definition is required in order to extend the scope of Part J to Freight Customer Access Option Holders
49	Definitions – “Quality Adjustment”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
50	Definitions – “Quantum Adjustment”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
51	Definitions – “relate” and “in respect of”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
52	Definitions – “Relevant Enquiry”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
53	Definitions – “Relevant Surrender”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
54	Definitions – “Review Proposal”	After the words “means a” insert the word “proposed”, and delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To clarify that means a proposed surrender or reduction in rights and to extend the scope of Part J to Freight Customer Access Option Holders
55	Definitions – “Review Operator”	Delete the word “Operator” in the definition and replace with “Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
56	Definitions – “Rights Review Meeting”	Delete the words “Train Operator” and replace with the words “Part J Access Beneficiary”.	To extend the scope of Part J to Freight Customer Access Option Holders
57	Definitions –	In paragraph (d)(ii)(B) delete the words “Train	To extend the scope of Part J to Freight Customer Access

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	"Rights Subject to Surrender"	Operator" and replace with the words "Part J Access Beneficiary".	Option Holders
58	Definitions – "Third Party Failure to Use Notice"	Delete the words "Train Operator" and replace with the words "Part J Access Beneficiary".	To extend the scope of Part J to Freight Customer Access Option Holders
59	Definitions – "Use Period"	Amend by adding the word "and" at the end of the definition.	To move the word "and" of the end of the definition of "Use Quota" to the end of the definition of "Use Period".
60	Definitions – "Use Quota"	Delete ";and" from the end of the sentence and replace with "."	See item 59 above
61	J1 – New Conditions: 1A; 1A.1; 1A.1(a); 1A.1(b); 1A.1(b)(i); and 1A.1(b)(ii)	Insert the following new wording: "1A. Freight Customer Access Option Holders 1A.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	This new condition is required to ensure that where any of the Part J processes concern an access right that has been drawn down from a Freight Customer Access Option Holder to an Appointed Operator, any decision affecting the right is made in consultation with the Freight Customer and any relevant documents should be served on the Freight Customer copied to the Appointed Operator.

		<p>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):</p> <p>(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</p> <p>(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)."</p>	
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62	J1 – New Condition: 1A.2	<p>Insert the following new wording:</p> <p>1A.2 Non-receipt by an Appointed Operator of a copy notice or document pursuant to Condition J1A.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)."</p>	To reflect that any non-receipt of copy documents by the Appointed Operator does not affect the validity of service of documents on the relevant Freight Customer.
63	J2.1	Delete the words "Train Operators" and replace with the words "Part J Access Beneficiaries".	To extend this condition so that it also applies to Freight Customer Access Option Holders
64	J2.1.1	<p>Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary". In addition, amend by adding the following wording to the end of the existing condition:</p> <p>" , 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."</p>	To extend this condition so that it also applies to Freight Customer Access Option Holders and to ensure that surrender of any access right which has been drawn down from a Freight Customer Access Option Holder to an Appointed Operator can not be surrendered by that Appointed Operator without the consent of the Freight Customer.
65	J2.1.2	Delete the words "Train Operator" and replace with the words "Part J Access Beneficiary".	To extend this condition so that it also applies to Freight Customer Access Option Holders
66	J2.1.3	<p>Delete the existing wording and insert the following new wording:</p> <p>"Network Rail shall notify the Office of Rail Regulation of the relevant modification to the</p>	To extend this condition so that it also applies to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer's access agreement they may also be removed from the Appointed Operator's agreement

		<p><i>Part J Access Beneficiary's (and, if applicable, Appointed Operator's)</i> Access Agreement no more than 10 Working Days after the date on which the <i>Part J Access Beneficiary</i> gives notice to Network Rail agreeing to the Relevant Surrender pursuant to Condition J2.1.2."</p> <p>(Proposed changes shown in bold italics.)</p>	
67	J2.2; J2.3 (a); J2.3 (b); and J2.3(c)	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these conditions so that they also apply to Freight Customer Access Option Holders
68	J2.4(d)(i)	After the words "operator of trains" add the words "or Freight Customer Access Option Holder".	To extend this condition so that it also applies to Freight Customer Access Option Holders
69	J2.4 (f); J2.4(g); J2.4 (final paragraph); and J2.6 (a)	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these conditions so that they also apply to Freight Customer Access Option Holders
70	J2.6 (b)(i)	<p>Delete the existing wording and insert the following new wording:</p> <p>"other operators of trains, <i>other Freight Customer Access Option Holders and other</i> persons whom it has reason to believe intend to become operators of trains <i>or Freight Customer Access Option Holders</i>; and".</p> <p>(Proposed changes shown in bold italics.)</p>	To extend this condition so that it also applies to Freight Customer Access Option Holders
71	J2.7.1(a); J2.7.1(b); J2.7.1(final)	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these conditions so that they also apply to Freight Customer Access Option Holders

	paragraph; J2.8(a); J2.8(b); J2.9; J2.9(a); J2.11.1; and J2.11.2		
72	J2.11.3	<p>Delete the existing wording and insert the following new wording:</p> <p>“Network Rail shall notify the Office of Rail Regulation of the relevant modification to the <i>Part J Access Beneficiary’s (and, if applicable, Appointed Operator’s)</i> Access Agreement no more than 10 Working Days after the date on which the <i>Part J Access Beneficiary</i> gives notice to Network Rail agreeing to the Specified Relevant Surrender pursuant to Condition J2.11.2.”</p> <p>(Proposed changes shown in bold italics.)</p>	To extend this condition so that it also applies to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer’s access agreement they may also be removed from the Appointed Operator’s agreement
73	J2.12; and J2.12.1	Delete the words “Train Operator” wherever they occur in this entire condition and replace with the words “Part J Access Beneficiary”.	To extend this condition so that it also applies to Freight Customer Access Option Holders
74	J2.12.2	<p>Delete the existing wording and insert the following new wording:</p> <p>“If the <i>Part J Access Beneficiary</i> 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 <i>Part J Access Beneficiary’s (and, if applicable, Appointed Operator’s)</i> Access Agreement no more than 10 Working Days after</p>	To extend this condition so that it also applies to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer’s access agreement they may also be removed from the Appointed Operator’s agreement

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		the date of such notice. Network Rail shall include a copy of the relevant ADRR Determination, if applicable, with the notification.” (Proposed changes shown in bold italics.)	
75	J2.13.2	After the words “Access Agreement” add the words “or Access Agreements”.	To clarify that amendments could occur to more than one access agreement
76	J2.13.2 (a); J2.13.2 (b); J2.13.3; J3.1 (a); J3.1 (final sentence); J3.2; J3.2.1; J3.2.2; J3.3.1; J3.3.1(b); J3.3.2; J3.4; J3.7.1; J3.7.2; J3.9 (a)(i); and J3.9(a)(ii)	Delete the words “Train Operator” wherever they occur in this entire condition and replace with the words “Part J Access Beneficiary”.	To extend these conditions so that they also apply to Freight Customer Access Option Holders
77	J3.9(a)(ii)	After the words “outweigh the interests of” add the words “Freight Customer Access Option Holders, potential Freight Customer Access Option Holders,” And after the words “operators and potential operators of railway assets” add the words “, in each case”	To ensure that a Disputes Chairman who is considering making a confidentiality order, has to consider whether the prejudice outweighs or is likely to outweigh the interests of Freight Customer Access Option holders and potential Freight Customer Access Option Holders as well as operators and potential operators of railway assets.
78	J3.10.1; J3.13;	Delete the words “Train Operator” wherever they occur in this entire condition and replace with the	To extend these conditions so that they also apply to Freight Customer Access Option Holders

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	J3.14.2; J3.15.1 (b); J3.16.1 (e); and J3.16.1 (final sentence)	words "Part J Access Beneficiary".	
79	J3.16.2 (a)	<p>Delete the existing wording and insert the following new wording:</p> <p>"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 <i>the</i> Office of Rail Regulation's Model Passenger and Model Freight Track Access Contracts <i>and clause 14.2(a)-(l) of the Office of Rail Regulation's Model Track Access Contract (Freight Customer Access)</i>), in each <i>case</i> subject to the conditions which apply to such disclosures under that Clause;"</p> <p>(Proposed changes shown in bold italics.)</p>	To reference the disclosure gateways listed in the model track access contract for freight customer access published by ORR which will be relevant if the person providing the undertaking is a Freight Customer Access Option Holder
80	J3.16.3 (a); J3.16.4; J4.2.1 (a); J4.2.1 (b); J4.2.2; and J4.2.3.	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these conditions so that they apply to Freight Customer Access Option Holders
81	J4.2 – New condition	<p>Insert the following new condition:</p> <p>"4.2.4 For the purposes of Condition J4.2.1(b) and J4.2.3, a Freight Customer Access Option Holder fails to make use of a Train</p>	To set out the circumstances in which a Freight Customer Access Option Holder would fail to make use of a Train Slot.

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		<p>Slot if either:</p> <p>(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</p> <p>(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 J4.2.3.”.</p>	
82	J4.4; J4.5; J4.5 (a); J4.6(a)(i); J4.6(b); J4.7(b); and J4.8;	Delete the words “Train Operator” wherever they occur in this entire condition and replace with the words “Part J Access Beneficiary”.	To extend the present “failure to use” test to Freight Customer Access Option Holders.
83	J4.8(c);	<p>Delete the existing wording and insert the following new wording:</p> <p>“Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the <i>Part J Access Beneficiary’s (and, if applicable, Appointed Operator’s)</i> Access Agreement no more than 10 Working Days after the date on which the <i>Part J Access Beneficiary</i> agrees to the surrender pursuant to Condition J4.8(a).”.</p> <p>(Proposed changes shown in bold italics.)</p>	To extend the present “failure to use” test to Freight Customer Access Option Holders

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84	J4.9.1; J4.9.1(c)(ii); J4.9.1 (final sentence); J4.9.2 (a); J4.9.2 (c); and J4.10.2	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend the present "failure to use" test to Freight Customer Access Option Holders
85	J4.10.2 (a)	Amend by adding the words ", in the case of Train Operators only" after the words "Condition J4.10.1 (b)".	To clarify that this ground is only relevant to Train Operators
86	J4.11; and J4.11(b)	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend the present "failure to use" test to Freight Customer Access Option Holders
87	J4.12.1	Delete the existing wording and insert the following new wording: "If it is Determined that the Part J Access Beneficiary has no Grounds for Objection in respect of all or any of the Rights Subject to Surrender, then the rights that are to be surrendered will be surrendered, and removed in their entirety from the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement, from the date:". (Proposed changes shown in bold italics.)	To extend the present "failure to use" test to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer's Access Agreement they may also be required to be removed from an Appointed Operator's agreement
88	J4.12.2	Delete the words "Train Operator's" and replace with the words "Part J Access Beneficiary's (and, if applicable, the Appointed Operator's)".	To extend the present "failure to use" test to Freight Customer Access Option Holders
89	J5.1(a); and J5.1(b)(ii)	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend this condition so that a Freight Customer Access Option Holder could be a third party applicant for a failure to use or a Freight Customer Access Option Holder could be the

			incumbent.
90	J6.1; J6.2.1; J6.2.2; J6.2.3; J6.2.4; J6.2.5; and J6.2.7	Delete the words “Train Operator” wherever they occur in this entire condition and replace with the words “Part J Access Beneficiary”.	To reflect that an incumbent can include a Freight Customer Access Option Holder
91	J6.3.2	Delete the words “Train Operator’s” and replace with the words “Part J Access Beneficiary’s (and, if applicable, the Appointed Operator’s)”.	To reflect that an incumbent can include a Freight Customer Access Option Holder and to reflect that where rights are removed from a Freight Customer’s Access Agreement they may also be required to be removed from an Appointed Operator’s agreement
92	J7.1.2	<p>Delete the existing condition and replace with the following new condition:</p> <p>“7.1.2 This Condition J7 applies only to an application for a Quantum Access Right from an Applicant which is either:</p> <p style="padding-left: 40px;">(a) a Train Operator, where the Quantum Access Right relates to the provision of transport services by the Applicant (in place of the Incumbent) to a third party (subject, where applicable, to any competitive tendering process amongst other parties); or</p> <p style="padding-left: 40px;">(b) a Freight Customer Access Option Holder, where the Quantum Access Right sought is:</p> <p style="padding-left: 80px;">(i) currently held by an Incumbent which is a</p>	To widen this condition so that it would also apply where a Freight Customer Access Option Holder wishes to secure access rights from an incumbent freight train operator providing services to, or on behalf of, that the Freight Customer so that it can hold those rights in an access agreement and draw them down to a freight operator of its choosing

		<p>(ii) <i>Train Operator for the provision of transport services to or on behalf of that Freight Customer Access Option Holder; and 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.</i></p> <p>(Proposed changes shown in bold italics.)</p>	
93	J7.1.3; and J7.2	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these conditions to apply to Freight Customer Access Option Holders
94	J7.3(b)(ii)	Delete the following wording from the existing condition:	To reflect the new criteria in condition 7.1.2

		<p>“is for the provision of transport services to a third party that the Applicant will (subject, where applicable, to any competitive tendering process) replace the Incumbent in providing”,</p> <p>and replace with the following new wording:</p> <p>“has the characteristics described in either Condition J7.1.2(a) or Condition J7.1.2(b) (as the case may be).”.</p>	
95	J7.5 (b)	After the words “from the Incumbent’s” add the words “(and, if applicable, Appointed Operator’s)”.	To reflect that where rights are removed from a Freight Customer’s Access Agreement they may also be required to be removed from an Appointed Operator’s agreement
96	J7.5 (c)	<p>Delete the existing wording and insert the following new wording:</p> <p>“Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the <i>Part J Beneficiary’s (and, if applicable, Appointed Operator’s)</i> Access Agreement no more than 10 Working Days after the date on which the <i>Part J Beneficiary</i> agrees to the surrender pursuant to Condition J7.5(a).”.</p> <p>(Proposed changes shown in bold italics.)</p>	To reflect that an incumbent can include a Freight Customer Access Option Holder and to reflect that where rights are removed from a Freight Customer’s Access Agreement they may also be required to be removed from an Appointed Operator’s agreement
97	J7.6.3(b)	After the words “from the Incumbent’s” add the words “(and, if applicable, Appointed Operator’s)”.	To reflect that where rights are removed from a Freight Customer’s Access Agreement they may also be required to be removed from an Appointed Operator’s agreement
98	J7.6.3(c)	<p>Delete the existing wording and insert the following new wording:</p> <p>“Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the</p>	To reflect that an incumbent can include a Freight Customer Access Option Holder and to reflect that where rights are removed from a Freight Customer’s Access Agreement they may also be required to be removed from an Appointed Operator’s agreement

		Incumbent's, Applicant's <i>and, if applicable, Appointed Operator's</i> Access Agreements no more than 10 Working Days after the date on which the <i>Part J Access Beneficiary</i> is deemed to have agreed the surrender pursuant to Condition J7.6.3(a).". (Proposed changes shown in bold italics.)	
99	J7.6.4	Delete the following wording from the existing condition: "is for the provision of transport services to a third party which are", and replace with the following new wording: "has the characteristics described in either Condition J7.1.2(a) or Condition J7.1.2(b) (as the case may be) and is".	To reflect the new criteria in condition 7.1.2
100	J7.6.4(b)	After the words "the third party" add the words "or Freight Customer Access Option Holder (as the case may be)".	To reflect that the rights sought by the Applicant may have been drawn down from a Freight Customer Access Option Holder to an Appointed Operator, in which case the relevant Freight Customer Access Option Holder shall have a right under this condition
101	J7.8.1; and J7.8.2	Delete the words "Train Operator's" and replace with the words "Part J Access Beneficiary's (and, if applicable, the Appointed Operator's)".	To reflect that an incumbent can include a Freight Customer Access Option Holder and to reflect that where rights are removed from a Freight Customer's Access Agreement they may also be required to be removed from an Appointed Operator's agreement
102	J8.4.1	After the words "to the Incumbent's" delete the word "and" and replace it with ",". In addition, after the word "Applicant" add the words "and, if applicable, Appointed Operator's".	To reflect that where rights are removed from a Freight Customer's Access Agreement they may also be required to be removed from an Appointed Operator's agreement
103	J9.1.2	Delete the words "Train Operator" wherever they	To provide that Freight Customer Access Option Holders have

		occur in this entire condition and replace with the words "Part J Access Beneficiary".	to attend a Rights Review Meeting if required by Network Rail
104	J9.1.4	<p>Delete the existing wording and insert the following new wording:</p> <p>"If Network Rail fails to schedule Rights Review Meetings with a <i>Part J Access Beneficiary</i> (the "Review <i>Beneficiary</i>") in accordance with Condition J9.1.3, the Review <i>Beneficiary</i> or any other <i>Part J Access Beneficiary</i> may, by issuing a notice to Network Rail, request that Network Rail schedules a Rights Review Meeting with the Review <i>Beneficiary</i>. Network Rail shall schedule a Rights Review Meeting with the Review <i>Beneficiary</i> within 10 Working Days of receipt of such a notice. If, however, Network Rail considers a notice issued by a <i>Part J Access Beneficiary</i> in accordance with this provision to be invalid, it shall, within 10 Working Days of the receipt of the notice, issue a notice to the <i>Part J Access Beneficiary</i> rejecting the request and setting out its reasons for doing so."</p> <p>(Proposed changes shown in bold italics.)</p>	To provide that Freight Customer Access Option Holders also have the right to require Network Rail to convene a Review Meeting with other Freight Customer Access Option Holders and/or Train Operators
105	J9.2.1; J9.3; J9.3.1; and J93.1(b)	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these conditions so that they apply to Freight Customer Access Option Holders.
106	J9.3.1(c)	<p>Delete the existing wording and insert the following new wording:</p> <p>"Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the <i>Part J Access Beneficiary's (and, if applicable, Appointed Operator's)</i> Access</p>	To extend this provision so it applies to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer's Access Agreement they may also be required to be removed from an Appointed Operator's agreement

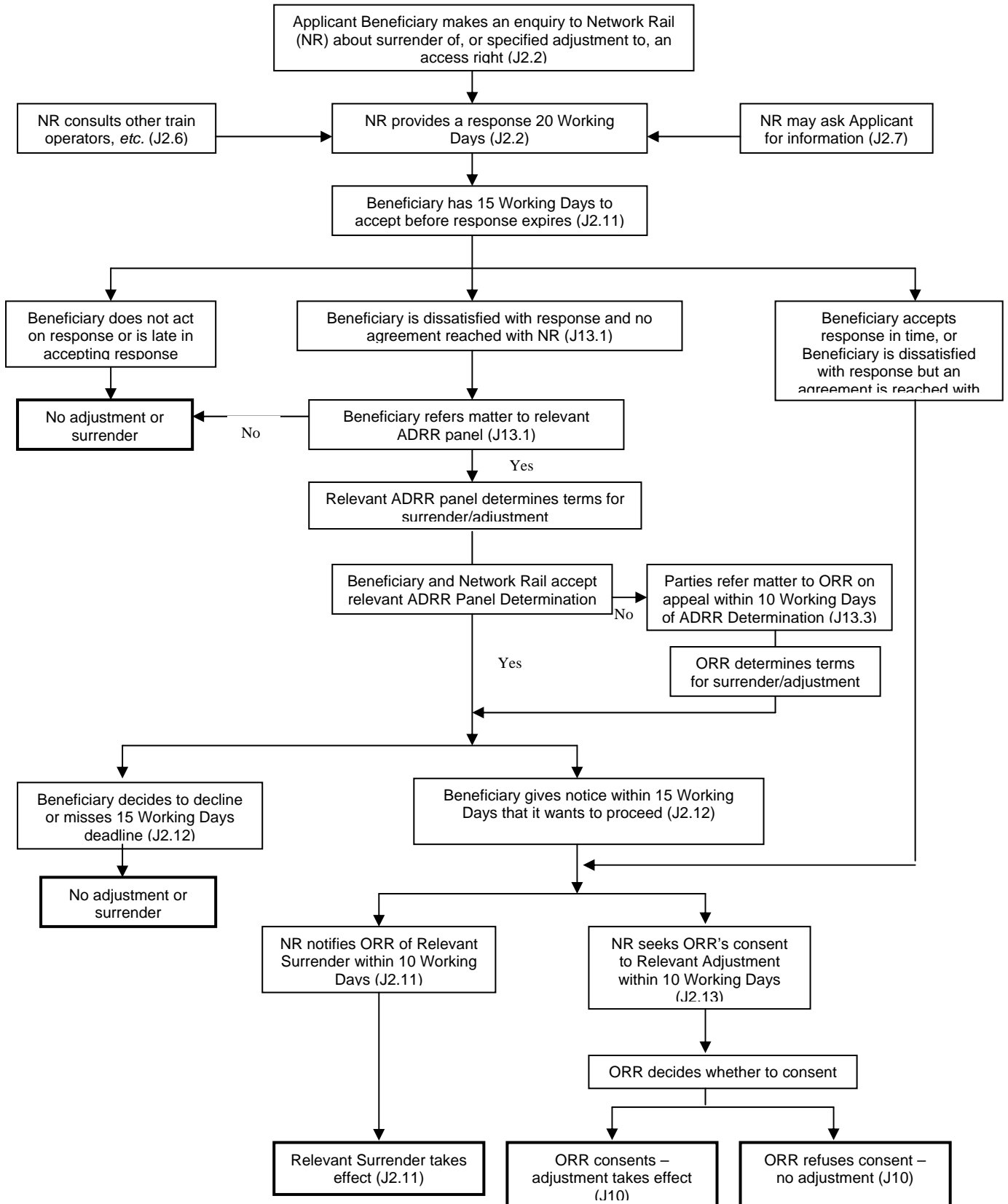
		<p>Agreement no more than 10 Working Days after it receives notice from the Part J Access Beneficiary in accordance with Condition J9.3.1(a).".</p> <p>(Proposed changes shown in bold italics.)</p>	
107	J9.3.2; J9.4; J9.4.1; J9.4.2; and J9.4.2(a)	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these provisions to apply to Freight Customer Access Option Holders
108	J9.4.2(d)	<p>Delete the existing wording and insert the following new wording:</p> <p>"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 is deemed to agree to the Review Proposal pursuant to Condition J9.4.2(a).".</p> <p>(Proposed changes shown in bold italics.)</p>	To extend this provision so it applies to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer's Access Agreement they may also be required to be removed from an Appointed Operator's agreement
109	J9.5; J9.6.1; and J9.6.2	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these provisions to apply to Freight Customer Access Option Holders
110	J9.6.2(b)	Delete the words "Train Operator's" and replace with the words "Part J Access Beneficiary's (and, if applicable, Appointed Operator's)".	To extend this provision so it applies to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer's Access Agreement they may also be required to be removed from an Appointed Operator's agreement
111	J9.7.1	Delete the existing wording and insert the following new wording:	To extend this provision so it applies to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer's Access Agreement they

Freight customer model track access contract: final conclusions

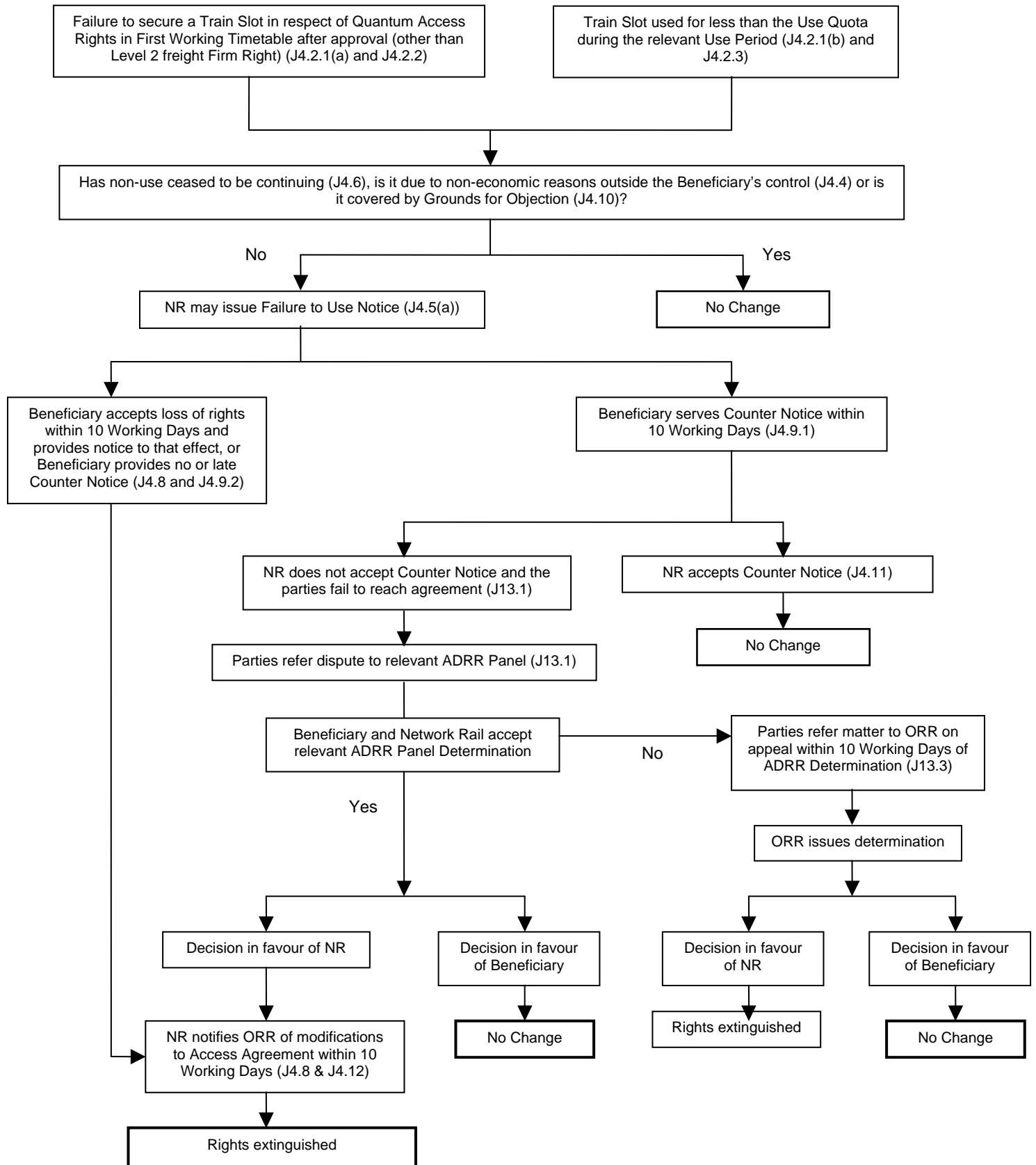
		<p>"If it is Determined that the <i>Part J Access Beneficiary</i> has no reasonable on-going commercial need for all or any of the Rights Subject to Surrender and/or Existing Cordon Caps specified in the Review Proposal, then the rights that are to be surrendered will be surrendered, and removed in their entirety from the <i>Part J Access Beneficiary's (and, if applicable, Appointed Operator's)</i> Access Agreement, and/or the Existing Cordon Cap shall be reduced, from the date:".</p> <p>(Proposed changes shown in bold italics.)</p>	may also be required to be removed from an Appointed Operator's agreement
112	J9.7.2	Delete the words "Train Operator's" and replace with the words "Part J Access Beneficiary's (and, if applicable, Appointed Operator's)".	To extend this provision so it applies to Freight Customer Access Option Holders and to reflect that where rights are removed from a Freight Customer's Access Agreement they may also be required to be removed from an Appointed Operator's agreement
113	J12.1(a)	After the words "franchising authority" delete the word "and" and replace with "," In addition, after the words "by railway" add the words "and Freight Customer Access Option Holders".	To require any consultation regarding revisions to "reasonable on-going commercial need" criteria to include consultation with Freight Customer Access Option Holders
114	J12.5(a)	After the words "franchising authority" delete the word "and" and replace with "," In addition, after the words "by railway" add the words "and Freight Customer Access Option Holders".	See item 113 above
115	J12.5(c)	After the words "franchising authority" delete the word "and" and replace with "," In addition, after the words "Train Operators" add the words "and those Freight Customer Access Option Holders".	To require that any notifications regarding conclusions of revisions to "reasonable on-going commercial need" criteria include notifications to Freight Customer Access Option Holders
116	J13.1(a); J13.1 (h); and J13.3	Delete the words "Train Operator" wherever they occur in this entire condition and replace with the words "Part J Access Beneficiary".	To extend these provisions to cover Freight Customer Access Option Holders

ANNEX 1

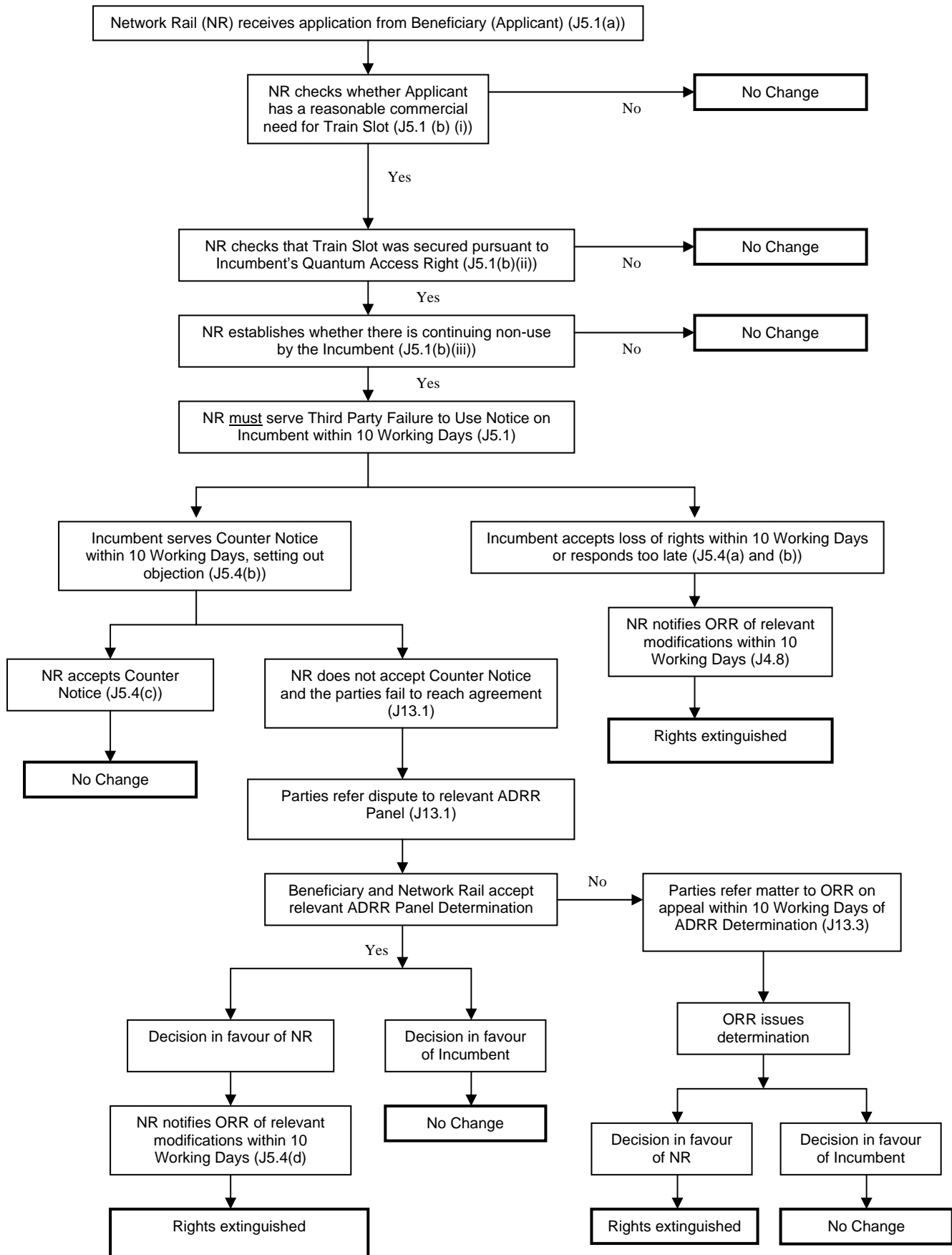
Appendix 1: Condition J2 process for voluntary surrender or adjustment of rights



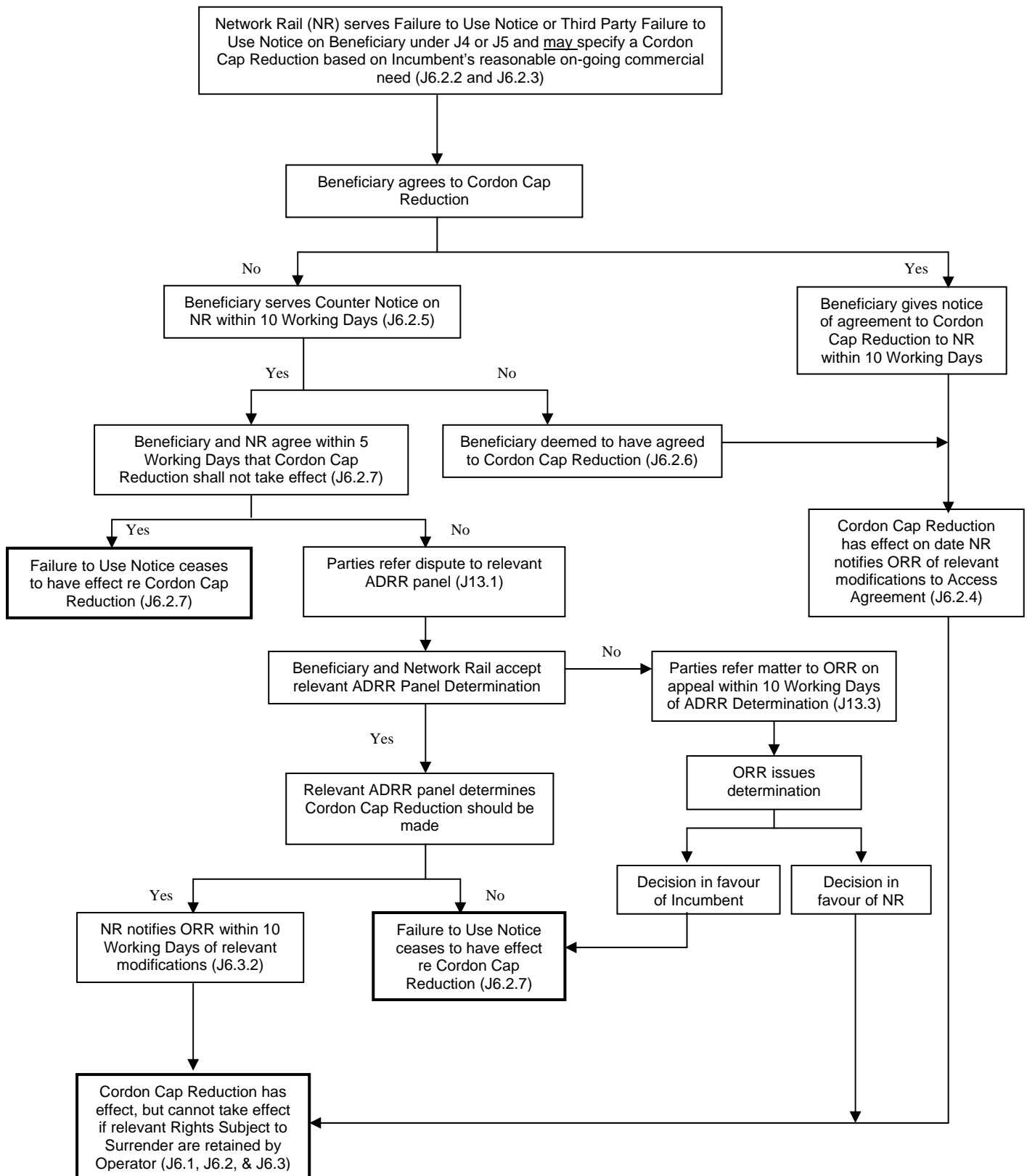
Appendix 2: Condition J4 UIOLI process for unused rights or where slots are not sought by another beneficiary



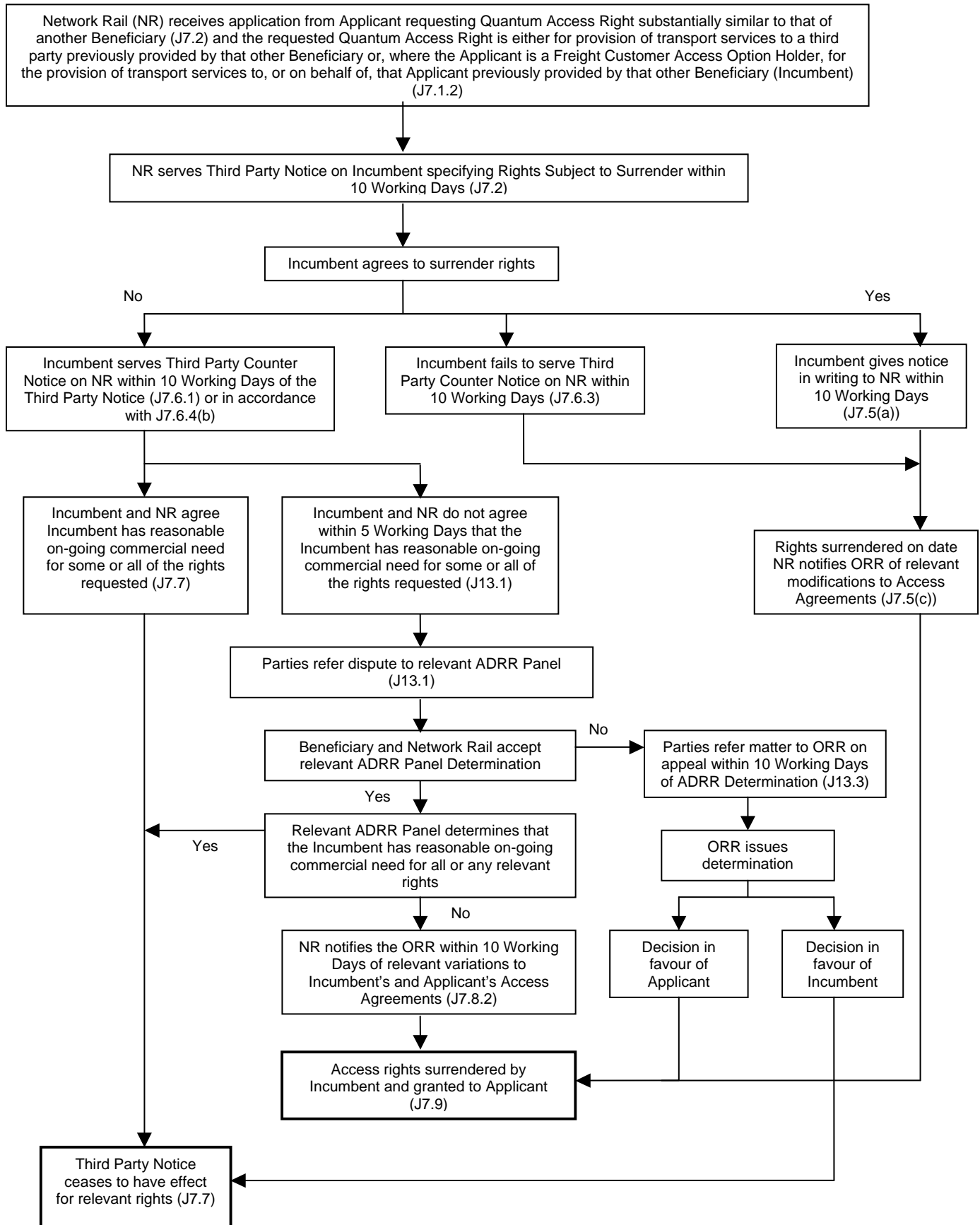
Appendix 3: Condition J5 UIOLI process where slots are sought by another beneficiary



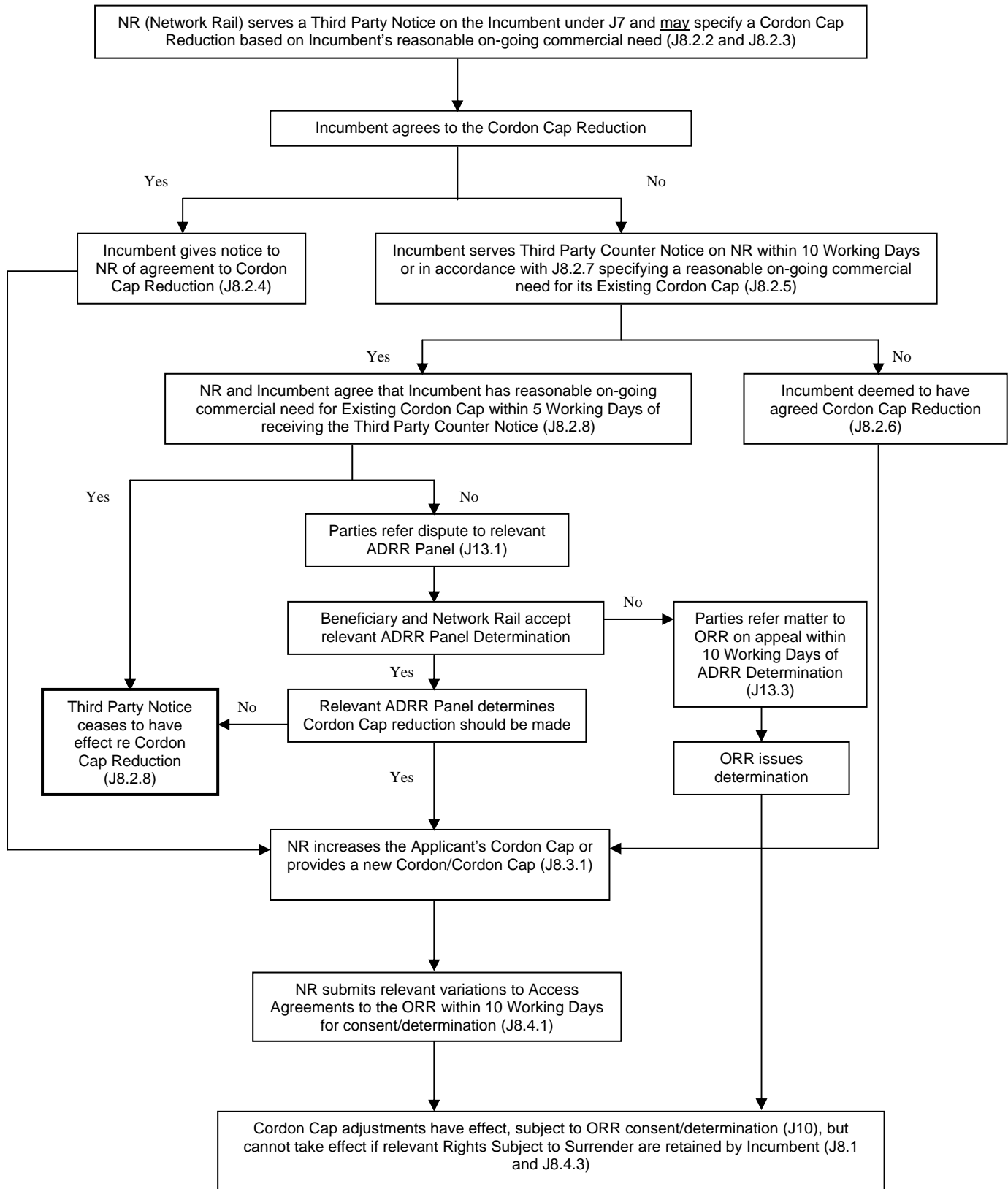
Appendix 4: Condition J6 process for reducing cordon caps under UIOLI mechanism



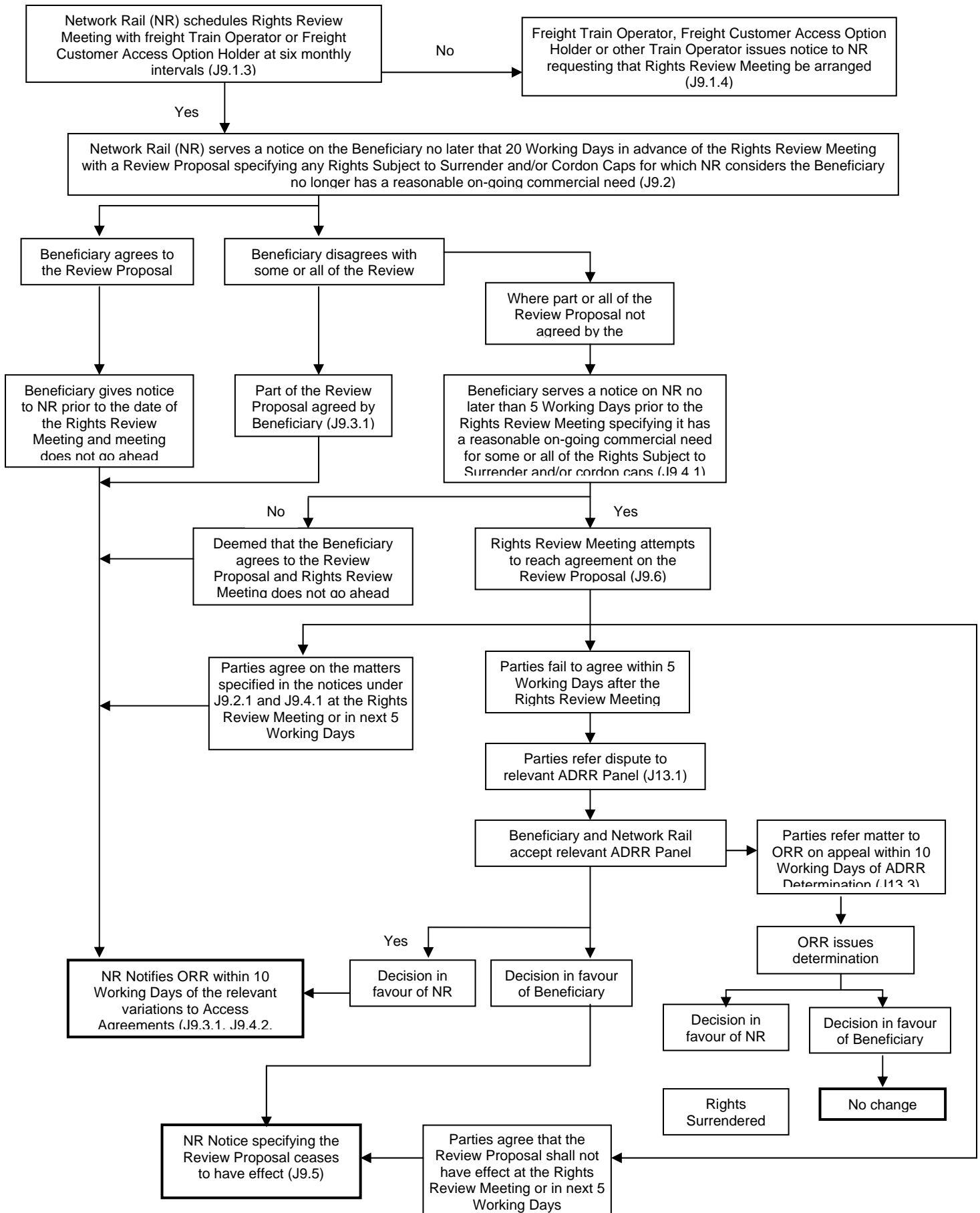
Appendix 5: Condition J7 freight transfer mechanism



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



Appendix 7: Condition J9 process for rights review meetings



Annex D – Reasonable On-going Commercial Need

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

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

Explanatory Note

Context

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

Principles

The then Regulator’s foreword to Part J of the network code: conclusions and notice of changes, July 2004¹⁴ provides key principles on the overall purpose of Part J and focuses upon physical capacity usage and the importance of releasing that which is under-used. On this basis the rules or criteria need to link well to the efficiency of actual usage of rights. Physical under-utilisation of rights is, therefore a reasonable key indicator that there is not a reasonable on-going commercial need.

Characteristics

The criteria should have all of the following characteristics:

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

¹⁴ Available at www.rail-reg.gov.uk/upload/pdf/208.pdf.

- *existence of a contract or evidence of commitment from the end-customer*
- *capability to deliver and resource availability.*

Criteria

Definitions

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

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

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

In order to demonstrate:

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

a ~~Train Operator~~ Part J Access Beneficiary must be able to show all of the following:

- (i) **Commitment** - It has a commitment with a third party which cannot be satisfied, in whole or in part, without use of the relevant Rights Subject to Surrender and/or Existing Cordon Caps in respect of which it claims that it has a “reasonable on-going commercial need”, or it has a reasonable prospect of entering into such a commitment in respect of an identifiable traffic flow which is suitable for conveyance by rail. Evidence of commitment can include:
 - Traffic covered by grant support e.g. a facility or connection.
 - Customer/third party contract. A letter from a ~~FOC Director and the end its~~ customer/third party confirming the nature of the commitment.
 - Reasonable prospect of a customer/third party contract, e.g. Heads of Terms, good faith contract drafting (with lawyers instructed).
- (ii) **Acceptable reasons for failure to use** – May include:

- Seasonal factors, e.g. commodities for which demand varies during the course of the year.
 - Non-economic issues beyond the ~~train operator's~~ Part J Access Beneficiary's control (such as a fire).
 - A strike or other industrial action.
- (iii) **Committed resources** - It has the necessary committed resources, including suitable locomotives and wagons and traincrew with relevant route and traction knowledge, to satisfy the commitment referred to in paragraph (i) above, **or** that it has a reasonable prospect of obtaining such resources in the relevant timescales, **or it has a contract in place for a contractor to supply them.**
- (iv) **Reasonable on-going prospect of use** - Reasonable prospect of using the relevant Rights Subject to Surrender and/or Existing Cordon Caps in respect of which it claims that it has a "reasonable on-going commercial need", including reasons for such reasonable prospect, within 90 days from the issue of the Counter Notice (Condition J4.9) or ~~Train Operator~~ Part J Access Beneficiary notice (Condition J9.4).

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

Cordon Cap Reduction Calculation

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

- (a) Cordon caps up to and including 8
 Where $C - A > 1$
 Cordon Cap reduction = $C - (A + 1)$
 Otherwise Cordon Cap reduction = 0
- (b) Cordon caps over 9
 Where $C - A > 2$
 Cordon Cap reduction = $C - (A + 2)$
 Otherwise Cordon Cap reduction = 0

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

Reasonable on-going commercial need

To demonstrate, for the purposes of Condition ~~J6.2(d)(i)~~ J6.2.5 or Condition J9.4.1(a), that it has a “reasonable on-going commercial need” to retain some or all of its Existing Cordon Cap a Train Operator Part J Access Beneficiary must be able to show all of the following:

- (i) **Commitment** - It has a commitment with a third party which cannot be satisfied, in whole or in part, without use of the relevant cordon cap in respect of which It claims that it has a “reasonable on-going commercial need”. Evidence of commitment can include:
 - Customer/third party contract. A letter from ~~its~~ a FOC Director and its ~~and~~ customer/third party confirming the nature of the commitment.
- (ii) **Acceptable reasons for failure to use** – May include:
 - Seasonal factors, e.g. commodities for which demand varies during the course of the year;
 - Non-economic issues beyond the ~~train operator's~~ Part J Access Beneficiary's control (such as a fire); and
 - A strike or other industrial action
- (iii) **Committed resources** - It has the necessary committed resources, including suitable locomotives and wagons and traincrew with relevant route and traction knowledge, to satisfy the commitment referred to in paragraph (i) above, **or** that it has a reasonable prospect of obtaining such resources in the relevant timescales or it has a contract in place for a contractor to supply them.
- (iv) **Reasonable on-going prospect of use** – reasonable prospect of using the relevant cordon cap in respect of which it claims that it has a “reasonable on-going commercial need”, including reasons for such reasonable prospect, within a defined timescale, i.e. for cordon caps associated with condition J4 or J9 – use within 90 days of issue of the Counter Notice (Condition J4.9 or Condition J9.4)); or cordon caps associated with Condition J5 – use within 30 days of issue of the Counter Notice (Condition J5.4**~~(b)~~5**).

Condition J7 (Freight Transfer Mechanism)

(a) Where the Applicant is a Train Operator

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

Reasonable on-going commercial need

To demonstrate, for the purposes of Condition J7.6.1(**~~a~~b**), that it has a “reasonable on-going commercial need” all or any of the Rights Subject to Surrender, a Train

Operator must be able to demonstrate in respect of each of such rights that they are required to continue to convey traffic for another customer or other customers which is also being conveyed using each of the rights in question.

(b) Where the Applicant is a Freight Customer Access Option Holder

Reasonable on-going commercial need

To demonstrate, for the purposes of Condition J7.6.1(b) that it has a “reasonable on-going commercial need” for all or any of the Rights Subject to Surrender, a Train Operator must be able to demonstrate in respect of each of such rights that it is required to continue to convey traffic on behalf of the Freight Customer Access Option Holder under a continuing commercial agreement or is required to convey traffic for another customer or other customers using each of the rights in question.

Condition J8 (Cordon Cap Reduction (transfer))

Cordon Cap Reduction

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

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

Note - cordon cap reduction not to exceed R_r

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

Reasonable on-going commercial need

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

- (i) **Commitment** - It has a commitment with a third party which cannot be satisfied, in whole or in part, without use of the relevant cordon cap in respect of which it claims that it has a “reasonable on-going commercial need”. Evidence of commitment can include:
 - Customer third party contract. A letter from its a ~~FOC Director~~ and its end customer confirming the nature of the commitment.
- (ii) **Acceptable reasons for failure to use** – May include:

- Seasonal factors, e.g. commodities for which demand varies during the course of the year.
 - Non-economic issues beyond the ~~train operator's~~ Part J Access Beneficiary's control (such as a fire).
 - A strike or other industrial action.
- (iii) **Committed resources** - It has the necessary committed resources, including suitable locomotives and wagons and traincrew with relevant route and traction knowledge, to satisfy the commitment referred to in paragraph (i) above, or that it has a reasonable prospect of obtaining such resources in the relevant timescales.
- (iv) **Reasonable on-going prospect of use** - Reasonable prospect of using the relevant cordoned cap in respect of which it claims that it has a "reasonable on-going commercial need", including reasons for such reasonable prospect, within 30 days of the date of surrender of rights by the incumbent operator.

Annex E – Railway Operations Code

RAILWAY OPERATIONAL CODE

INTRODUCTORY AND GENERAL SECTION

1. CONTENTS

Introduction	1
Definitions	2
Interpretation	2
Common Elements	3

ROC Sections:

a procedure for notification of and communication in relation to Disruptive Events or reasonably foreseeable Disruptive Events;

train regulation policies;

emergency timetable procedure in the event of Extended Disruption;

arrangements for clearance of track blockages and assistance for failed trains;

arrangements for the provision of equipment to deal with adverse weather conditions; and the preparation for and response to seasonal disruptions;

control arrangements;

other matters, which it is necessary or expedient should be covered in order to promote achievement of the Objective.

2. INTRODUCTION

The Railway Operational Code and its Objective

The Railway Operational Code (ROC) is established under Condition HA. Condition HA1 became part of the Network Code on 10 January 2005. The remaining provisions of Condition HA came into effect from 17 February 2005. Network Rail and each Train Operator shall comply with the various sections of the ROC as they are established and come into effect under Condition HA.

The objective (Objective) of the ROC is to sustain and, where necessary, restore expeditiously the operation of Services in accordance with the Working Timetable and in a manner consistent with the ORR ROC Criteria, having regard to:

- (a) the needs of passengers and freight customers;
- (b) the interests of safety and security; and
- (c) the efficient and economical operation of the Network and of trains operating on it.

3. Definitions

3.1 Unless the context otherwise requires:

- 3.1.1 words and expressions defined in the Network Code shall bear the same meanings in the ROC; and
- 3.1.2 “Contingency Plan” shall bear the meaning given in the ROC Section dealing with “control arrangements” when that section becomes effective and until then it shall bear the same meaning as in Part H of the Network Code.

4. Interpretation

4.1. Unless the context otherwise requires:

- 4.1.1 the ROC shall be interpreted in the same way as the Network Code (under Part A);
- 4.1.2 references to a ROC Section or to a section shall be to a section of this ROC;
- 4.1.3 references to a paragraph shall be to a paragraph of a section; ~~and~~
- 4.1.4 references to a Condition shall be to a Condition of the Network Code;

4.1.5 each reference to a Train Operator in:

(a) this “Introductory and General Section” of the ROC; and

(b) paragraph 7.1 of the section “Control arrangements”.

shall, unless otherwise expressly stated, also be deemed to be a reference to a Freight Customer Access Option Holder; and

4.1.6 each reference to a train being operated by a Train Operator in this “Introductory and General Section” of the ROC and each of the ROC Sections identified in paragraph 4.1.5 above shall, to the extent such reference to the Train Operator is, in accordance with paragraph 4.1.5 above, also deemed to be a reference to a Freight Customer Access Option Holder, be deemed to be a reference to a train being operated by a Train Operator on behalf of that Freight Customer Access Option Holder.

- 4.2 In the event of any conflict of interpretation between the Network Code and the ROC, the Network Code will prevail.

5. Common Elements - Variations

- 5.1 In proposing a variation to a ROC Section under Condition HA8.1, Network Rail must comply with Condition HA8.5. In doing so, it must, if the variation falls within any modification procedure contained in the relevant ROC Section, follow that procedure.
- 5.2 The modification procedure set out in this paragraph 5 shall apply to every variation of each section of the ROC, including this section, unless the relevant section otherwise provides.
- (a) In order to start the modification procedure, Network Rail shall give notice of the proposed variation. The notice shall specify the reason for the variation and the timing for implementing the variation (which shall be not less than 30 days from the date of notification of the proposed variation). Such notice shall be given to each Train Operator who may reasonably be expected to be affected by such variation and to those persons entitled to be consulted under paragraph 5.3.2 and shall be copied to the Office of Rail Regulation. As soon as reasonably practicable on or after the date on which it gives that notice, Network Rail shall:
- 5.3.1 consult each such Train Operator in relation to the parts of the proposed variation relevant to such Train Operator, and invite the submission to it of representations or objections in respect of the proposed variation;
- 5.3.2 if the Strategic Rail Authority, the HSE, the Office of Rail Regulation, any Passenger Transport Executive or the Scottish Executive gives notice to Network Rail that it wishes to be consulted on any matter concerning the relevant ROC Section(s), consult with that body; and
- 5.3.3 specify in a notice to all parties who are entitled to be consulted a date for concluding the consultation, and conclude the consultation by that date.
- 5.4 If Network Rail wishes to hold a meeting or if any relevant Train Operator gives notice to Network Rail requesting such a meeting within 10 days of the

date on which the proposed variation is notified to that Train Operator (and that request is not withdrawn), Network Rail shall:

- 5.4.1 give at least 10 days' notice to all parties who are entitled to be consulted under paragraph 5.3 of a meeting to discuss the proposed variation; and
 - 5.4.2 attend that meeting.
 - 5.5 Each Train Operator or other body so consulted shall:
 - 5.5.1 consider the matters on which Network Rail has consulted it; and
 - 5.5.2 give notice to Network Rail of any representations and objections it wishes to make in relation to the consultation no later than the specified date for concluding the consultation.
 - 5.6 Following consideration of all representations and objections received under the preceding paragraph, Network Rail shall:
 - 5.6.1 decide whether the proposed variation is to be made and if so, in what form; and
 - 5.6.2 if the proposed variation is to be made, then, subject to Condition HA5.3, republish the relevant ROC Section(s) as varied and send a copy to each affected Train Operator and any other party entitled to be consulted under paragraph 5.3,
- and so, subject to paragraph 5.7, establish the variation.
- 5.7 The establishment of the variation is subject to a right of appeal for any Train Operator. If and while Condition HA8.5 specifies that right of appeal, the specified right shall apply accordingly. If and while Condition HA8.5 provides that the right of appeal shall be contained in this modification procedure, then paragraph 5.8 shall apply.
 - 5.8 Any Train Operator who is dissatisfied as to any matter concerning or in connection with the variation may bring an appeal in relation to the variation. Such appeal must be brought within 30 days of the later of the date on which it is published and the date on which it is notified to that Train Operator under paragraph 5.6.2. Condition HA7 applies to the appeal.

6. Common Elements - Reviews

- 6.1 The review procedure set out in paragraphs 6.2 and 6.3 below is to be treated as incorporated in each section of the ROC, excluding this present section, unless the relevant section otherwise provides.

- 6.2 Network Rail shall review the effectiveness of the relevant ROC Section after a period of 6 months from its establishment, and then at annual intervals afterwards. In undertaking such a review, Network Rail shall consult Train Operators and such other persons as it shall consider appropriate and shall inform all consultees of the outcome of such review.
- 6.3 If the outcome is such that Network Rail reasonably considers that it may be necessary that changes be made to the relevant ROC Section:
- 6.3.1 to promote the achievement of any objective which that ROC Section is to secure; or
- 6.3.2 to modify that objective for the better achievement of the Objective;
- then Network Rail will identify and pursue the steps required for a proposal to be made for such changes.
- 6.4 The effectiveness of this present “Introductory and General Section” shall be reviewed continuously by Network Rail and the industry ROC working group during the development of the ROC and the establishment of the remaining sections. After the establishment of the final section Network Rail will review this present section at annual intervals. In undertaking such an annual review, Network Rail shall consult Train Operators and such other persons as it shall consider appropriate and shall inform all consultees of the outcome of such review. Paragraph 6.3 will then apply.

7. Common Elements – Conflict with Railway Group Standards

- 7.1 If there is any conflict between the ROC and the provisions of any Railway Group Standard, the provisions of that Railway Group Standard shall, to the extent of any inconsistency, prevail.

8. Common Elements – Relationship with performance regimes

- 8.1 The provisions of the ROC shall have effect without prejudice to any regime established between Network Rail and a Train Operator in or pursuant to their Access Agreement in relation to any incentives and payments associated with the performance of their respective obligations under that agreement.

Annex F - Part H (Railway Operational Code)

Explanatory Note

- A. *Part H sets out a requirement for Network Rail, in consultation with the industry, to establish a Railway Operational Code (the “ROC”). The ROC has the objective of sustaining operation of train services on the network in accordance with the working timetable, as well as where necessary restoring operation in accordance with the working timetable, having regard to the needs of passengers and freight customers; the interests of safety and security; the efficient and economical operation of the network and of trains operating on it; and criteria published by the Office of Rail Regulation.*
- B. *The ROC is to be kept under regular review, and covers such issues as notification of disruptive events; contingency plans; clearance of track blockages and assistance to failed trains; emergency timetabling procedures; control arrangements; train regulation; seasonal-preparedness; and other matters necessary or expedient to achieve its objective.*
- C. *Part H also sets out a procedure for varying the ROC, which includes all ROC Sections and Subsidiary Documentation. A ROC Section may also set out its own procedure for varying the ROC Section in question or Subsidiary Documentation produced under that ROC Section. Subsidiary Documentation may itself also contain procedures governing its own variation which are additional to or are intended to replace the procedures set out in Part H.*
- D. *Guidance on the management of operational disruption is now contained in the ROC, which can be found on Network Rail’s website.*
- E. *This Explanatory Note does not form part of the Network Code.*

DEFINITIONS

In this Part H, unless the context otherwise requires:

“appeal” means, in relation to a ROC Section, the exercise by a person of a right under this Part H to make a reference in that respect in accordance with the ADRR;

“Appeal Body” means the dispute resolution forum from time to time constituted or appointed to make the decision in accordance with the ADRR;

“Disruptive Event” means any event or circumstance which materially prevents or materially disrupts the operation of trains or any part of the Network in accordance with the Working Timetable;

“established” means, in relation to a ROC Section, or a variation to a ROC Section, as the case may be, that the ROC Section or the variation has come into effect whether:

- (a) following publication of the ROC Section or the variation (or if publication is not required notification of the ROC Section or the variation to affected Train Operators and Freight Customer Access Option Holders) with no appeal being lodged within the time limit for such appeal or, if such an appeal has been lodged, it has not been proceeded with; or
- (b) following any interim or final determination of an appeal in that respect if an appeal is lodged and proceeded with,

and subject always to:

- (i) adjustment following final determination of an appeal under Condition H4; or
 - (ii) variation under Condition H5,
- and “establish” and “establishment” shall be construed accordingly;

“Extended Disruption”	means a Disruptive Event which is likely to be of sufficient duration as to make it practicable to adopt a revised timetable;
“Objective”	means the objective of the Railway Operational Code specified in Condition H1.2;
“ORR ROC Criteria”	means any document published by the Office of Rail Regulation from time to time specifying the matters to which the Office of Rail Regulation will expect to have regard and the relative weight which it will expect to be placed on such matters when any reference made under Condition HA7 is considered by an Appeal Body;
“Permitted Exemptions”	has the meaning ascribed to it in Condition H3.3;
“Railway Operational Code”	has the meaning ascribed to it in Condition H1.1;
“ROC Plan”	<p>means a plan for the establishment of the Railway Operational Code which shall:</p> <ul style="list-style-type: none">(a) comply in all respects with this Part H;(b) be consistent with the ORR ROC Criteria;(c) specify a clear and achievable timetable for the establishment of each ROC Section and the full Railway Operational Code; and(d) show in reasonable detail the proposed organisation of the Railway Operational Code; and
“ROC Section”	means a section of the Railway Operational Code covering one or more of the matters specified in Condition H3 or any part of them.
“Subsidiary Documentation”	means all plans, procedures and documents which are required to be produced under one or more ROC Sections and designated as Subsidiary Documentation under them.

H1 *Railway Operational Code and its Objective*

H1.1 *Railway Operational Code*

The Railway Operational Code is a code established under this Part H and references to the Railway Operational Code include each ROC Section when it is established and all Subsidiary Documentation.

H1.2 *Objective*

The objective of the Railway Operational Code is to sustain and, where necessary, restore expeditiously the operation of Services in accordance with the Working Timetable and in a manner consistent with the ORR ROC Criteria, having regard to:

- (a) the needs of passengers and freight customers;
- (b) the interests of safety and security; and
- (c) the efficient and economical operation of the Network and of trains operating on it.

H1.3 *Relationship to the Network Code*

The Railway Operational Code:

- (a) may only be varied under Part H of the Network Code; and
- (b) does not form part of the Network Code.

H2 *Obligation to observe the Railway Operational Code*

H2.1 Network Rail and each Train Operator shall comply with the Railway Operational Code.

H2.2 Each Freight Customer Access Option Holder shall comply with those ROC Sections that are expressed in the Railway Operational Code to apply to Freight Customer Access Option Holders.

H3 *Scope of Railway Operational Code*

H3.1 The Railway Operational Code contains:

- (a) a specification of the procedures and policies by which Network Rail, in cooperation with Train Operators and Freight Customer Access Option Holders, will promote achievement of the Objective, including:

- (i) a procedure for notification of, and communication in relation to, Disruptive Events or reasonably foreseeable Disruptive Events;
- (ii) train regulation policies;
- (iii) an emergency timetable procedure in the event of Extended Disruption;
- (iv) arrangements for clearance of track blockages and assistance for failed trains;
- (v) arrangements for:
 - (A) the provision of equipment to deal with adverse weather conditions; and
 - (B) the preparation for and response to seasonal disruptions;
- (vi) control arrangements; and
- (vii) other matters which it is necessary or expedient should be covered in order to promote achievement of the Objective;
- (b) procedures for reviewing and monitoring the effectiveness of the Railway Operational Code; and
- (c) procedures for the production, review, approval and publication of Subsidiary Documentation.

H3.2 *Publication*

The ROC shall be published on its website by Network Rail subject to:

- (a) Condition A3 of the Network Code; and
- (b) Permitted Exemptions.

H3.3 *Permitted Exemptions*

Permitted Exemptions are any matters contained in a ROC Section in respect of which the ORR ROC Criteria provide that general publication under Condition H3.2 is not required.

H3.4 *Subsidiary Documentation*

All Subsidiary Documentation shall:

- (a) be of a standard which is consistent with promoting the achievement of the Objective and the requirement for compliance under Condition H2; and
- (b) be subject to procedures for review and (where applicable) approval which are in accordance with the ORR ROC Criteria.

H4 ***Appeals***

H4.1 *Right of appeal in accordance with the ADRR*

Subject to Condition H4.3, if any Train Operator or Freight Customer Access Option Holder is dissatisfied as to any matter concerning or in connection with:

- (a) any variation of a ROC Section issued under Condition H5; or
- (b) any decision by Network Rail not to implement a variation proposed by a Train Operator or Freight Customer Access Option Holder under Condition H5.2,

the Train Operator or Freight Customer Access Option Holder may refer the matter for determination in accordance with the ADRR (as supplemented or varied by this Condition H4).

H4.2 *Time limits for appeal*

A Train Operator's or Freight Customer Access Option Holder's right of appeal under Condition H4.1 shall lapse if the relevant matter is not referred in accordance with the ADRR in the case of a variation under Condition HA5:

- (a) if Condition H5.5(a) applies, within 30 days of the later of the date on which it is published and the date on which it is notified to that Train Operator or Freight Customer Access Option Holder under Condition H5.9, or
- (b) if Condition H5.5(b) applies, within the period specified for such appeal in the relevant ROC Section.

H4.3 *Information to be sent in relation to the appeal*

Without prejudice to Condition H4.6, if there has been a reference for determination in accordance with the ADRR under Condition H4.1:

- (a) in the case of a referral under Condition H4.1, Network Rail shall provide the Train Operator or Freight Customer Access Option Holder and the Secretary with the name and address of every other Train Operator and Freight Customer Access Option Holder who Network Rail reasonably considers may be affected by the ROC Section variation within 7 days of the making of the reference; and
- (b) the person making the reference shall:
 - (i) include with his reference a statement in reasonable detail as to the matter in question and his reasons for making the reference; and
 - (ii) within 14 days of the reference Network Rail shall publish a copy of the reference and the statement specified in Condition H4.4(b)(i).

H4.4 *Criteria for appeal*

Any matter referred under Condition H4.1 shall be determined by reference to the most effective manner of promoting the achievement of the Objective.

H4.5 *Issue of adjusted ROC Section*

When any appeal brought under this Condition H4 has been finally concluded, Network Rail shall promptly publish on its website and, if the outcome of the appeal is the adjustment of the ROC Section, send to each affected Train Operator and Freight Customer Access Option Holder and any other person who notified Network Rail that it wished to be consulted under Condition H5.6(c) and the Office of Rail Regulation) the ROC Section as adjusted by the outcome of such appeal.

H5 ***Variations to Railway Operational Code***

Conditions H5.1 to Conditions H5.4 inclusive apply to all variations to the Railway Operational Code including all Subsidiary Documentation. Notwithstanding the provisions of Conditions H5.1 to H5.4 inclusive:

- (a) additional procedures for varying Subsidiary Documentation may be contained in and required by a ROC Section or the Subsidiary Documentation itself, and
- (b) procedures for varying Subsidiary Documentation in substitution for those under all or any of Conditions H5.1 to H5.4 inclusive may also be

contained in and required by the relevant Subsidiary Documentation itself.

Conditions H5.5 and H5.9 apply only to variations to ROC Sections.

H5.1 *Mandatory Variations*

Network Rail shall propose variations to the Railway Operational Code:

- (a) at any time if it reasonably considers that this is necessary in order better to promote the achievement of the Objective, striking a balance between:
 - (i) the need for Network Rail ~~and~~ Train Operators and Freight Customer Access Option Holders to be able to plan their businesses with a reasonable degree of assurance; and
 - (ii) the need for flexibility to address new requirements, including new timetables, introduction of new rolling stock and changes to the infrastructure and traffic patterns; and
- (b) at any time, whether or not paragraph (a) above applies, if required to do so by notice from the Office of Rail Regulation.

H5.2 *Variations proposed by a Train Operator or Freight Customer Access Option Holder*

A Train Operator or Freight Customer Access Option Holder may propose to Network Rail variations to the Railway Operational Code if it reasonably considers that this is necessary in order better to promote the achievement of the Objective and any such proposal shall include:

- (a) the reasons why it is proposed to make the variation; and
- (b) details of the proposed variation.

H5.3 *Procedure for variations proposed by a Train Operator or Freight Customer Access Option Holder*

Following receipt of a proposed variation to the Railway Operational Code from a Train Operator or Freight Customer Access Option Holder under Condition H5.2 Network Rail shall:

- (a) evaluate and discuss the proposed variation with that Train Operator or Freight Customer Access Option Holder for such period as is reasonable having due regard to the likely impact of the proposed variation on ~~either or both~~ any of Network Rail ~~and~~ other operators of trains and other Freight Customer Access Option Holder; and
- (b) following the evaluation and discussion;
 - (i) implement the variation under Condition H5.4; or
 - (ii) propose a variation under Condition H5.1 to implement the proposed variation; or
 - (iii) inform the Train Operator or Freight Customer Access Option Holder that Network Rail does not propose to implement the proposed variation, giving reasons for its decision.

H5.4 *Variations by agreement*

- (a) Subject to the provisions of Condition H5.4(b), if Network Rail and any relevant Train Operator or Freight Customer Access Option Holder agree a variation to the Railway Operational Code which affects only that Train Operator or Freight Customer Access Option Holder:
 - (i) Network Rail shall notify the Office of Rail Regulation of the proposed variation; and
 - (ii) the variation shall become effective on the date agreed for its implementation (which shall be not less than 7 days from the date of Network Rail's notice under Condition H5.4(a)(i));
- (b) If Network Rail and any relevant Train Operator or Freight Customer Access Option Holder agree a variation to the Railway Operational Code which affects only that Train Operator or Freight Customer Access Option Holder and is a variation to Subsidiary Documentation only, the variation shall become effective on the date agreed for its implementation and Condition H5.4(a)(i) and (ii) shall not apply.

H5.5 *Variations proposed by Network Rail*

Where any change to the Railway Operational Code under Condition H5.1 is a change to a ROC Section, Network Rail shall:

- (a) follow the procedure for establishing the variation under Conditions H5.6, H5.7 and H5.8; or
- (b) if the proposed variation falls within any modification procedure contained in the relevant ROC Section as established, Network Rail shall follow that procedure provided that such modification procedure contains:
 - (i) a right of appeal for any Train Operator or Freight Customer Access Option Holder who is dissatisfied as to any matter concerning or in connection with the variation and a time limit for bringing that appeal; and
 - (ii) a mechanism for establishing the variation,

and in either case, Network Rail shall specify the reason for the variation and the timing for implementing the variation (which shall not be less than 30 days from the date of notification of the proposed variation in accordance with the relevant procedure).

H5.6 *Consultation on a ROC Section variation*

Where Condition H5.5(a) applies, Network Rail shall:

- (a) publish and send details of the proposed variation to each affected Train Operator and Freight Customer Access Option Holder, the Secretary of State, the Office of Rail Regulation, any Passenger Transport Executive, the Scottish Ministers, Transport for London and the Welsh Assembly Government;
- (b) consult each Train Operator and Freight Customer Access Option Holder likely to be affected by the proposed variation, and invite the submission to it of representations or objections within a period or not less than 30 Working Days from the date of notification; and
- (c) if the Secretary of State, the Office of Rail Regulation, any Passenger Transport Executive, the Scottish Ministers, Transport for London or the Welsh Assembly Government gives notice to Network Rail that it wishes to be consulted on any matter concerning the ROC Section, consult with that party.

H5.7 Each Train Operator, Freight Customer Access Option Holder or other party consulted under H5.6 shall:

- (a) consider the matters on which Network Rail has consulted it; and
- (b) give notice to Network Rail of any representations or objections it wishes to make in relation to the consultation no later than the date for concluding the consultation specified under Condition H5.6(b).

H5.8 Following consideration of all representations and objections received under Condition H5.7, Network Rail shall consider whether the proposed variation should be implemented and if it concludes that it should, then Network Rail shall act in accordance with Condition H5.9 and thereby, subject to Condition H4, establish the variation.

H5.9 *Issue of varied ROC Section*

Network Rail shall publish on its website in accordance with Condition H3.2 any variation to a ROC Section, and send a copy of the revised ROC Section to each affected Train Operator and Freight Customer Access Option Holder, the Office of Rail Regulation and any other person who notified Network Rail that it wished to be consulted under Condition H5.6(c).

H5.10 *Consequential changes to ROC Sections*

Where any changes are made to this Part H that require consequential changes to be made to any ROC Section, those consequential changes shall be made and be effective from the date on which the relevant change to Part H is established. Network Rail shall, within 30 Working Days of the establishment of the revised Part H, make any necessary changes to the Railway Operational Code and publish and issue any revised ROC Sections in accordance with Condition H5.9.

Annex G – Proposed general approval and specific approvals: explanatory note

General approvals giving prior approval of ORR to enter into a FCTAC and FOCTAC and make changes to a FOCs existing TAC

1. We expect to publish shortly a general approval which will allow the access arrangements relating to FCs to be put in place without our specific approval. It will allow a:
 - FC to enter into an agreed FCTAC with Network Rail for spot bid rights;
 - FOC to enter into a FOCTAC with Network Rail; and
 - FOC to amend certain provisions in its own track access contract relating to liability.

We discuss these options below in more detail. Additionally, for completeness, we cover circumstances where agreement over a FCTAC for firm rights (Level 1 and/or Level 2) and/or contingent (Level 3) rights can and cannot be agreed with Network Rail. The attached flow-chart explains the stages of how we envisage new, agreed, access contracts can be established under a general approval. Whilst we explain below the options open to FCs where disagreement emerges, for whatever reason, over the provision of access rights by Network Rail, we have not provided a flow chart to cover those circumstances. The 'section 17' and 'section 22A' flow charts in Annex B to our C&Ps cater for these circumstances.

2. If a FC and FOC intend to put in place the contractual arrangements before the general approval has been issued, then in the interim a FC and FOC may seek specific approval from us.

FC and Network Rail agree to enter into a FCTAC: spot bid rights

3. The general approval will provide our prior approval for the parties to enter into a FCTAC under section 18 of the Railways Act 1993 ("the Act"). This will apply where the parties accept the terms of the model FCTAC which, in respect of access to the network, will be limited to allow the FC to have spot bid rights only. Typically, a FC might want this contract where it does not yet

know the characteristics of the firm rights it is seeking or it has yet to choose a FOC to operate its services but nevertheless wishes to spot bid for a path in the working timetable. Or a FC might also require such a contract where it is awaiting the outcome of the freight transfer mechanism process for the transfer of access rights from a FOC to it under Part J of the Network Code. Holding a spot bid FCTAC would enable the seamless transfer of those rights for future draw down to the FOC of its choice.

4. Also, establishing such an access contract would form the basis for a FC to later negotiate and agree firm rights with Network Rail for inclusion in its FCTAC. This would only be possible once Network Rail had undertaken its industry consultation process and subject to ORR's approval of a section 22 amendment. There may be other examples where it would be advantageous to hold a spot bid FCTAC. We have not attempted to list them all here.

FOC and Network Rail agree to enter into a FC specific FOCTAC

5. Our general approval will provide our prior approval for the parties to enter into a FOCTAC under section 18 of the Act. This will apply where the parties accept the terms of our model FOCTAC which will allow the FOC to exercise the customer-specific access rights which are the subject of a draw down notice from a FC. The general approval will allow this to be quickly established to enable the FOC to move the FC's goods.

FOC to amend certain provisions in its own track access contract relating to liability

6. In this instance, our general approval will provide our prior approval, under section 22 of the Act, for the parties to amend the liability provisions in the FOC's existing freight model contract. This will prevent its aggregate liability from increasing given it would have more than one track access contract. It is therefore important that the main amendments are effected no later than when the FOC enters into its *first* FOCTAC with Network Rail.

Specific approvals – agreed applications

FC and Network Rail agree to enter into a FCTAC: firm or contingent (Level 3) rights

7. Where Network Rail and a FC are able to agree the terms of a new FCTAC which contains firm and/or contingent (Level 3) rights they will need to seek our specific approval of that access contract. In such instances, our specific

approval is granted under section 18 of the Act: our prior approval under the general approval will not apply. Network Rail will undertake established industry processes, including consultation. These are detailed in Annex B to our C&Ps.¹⁵

New firm and/or contingent (Level 3) rights proposed included in an existing FCTAC

8. Where Network Rail and a FC are able to agree to include new firm rights in an existing FCTAC they will need to seek our specific approval of that change. In such instances, our specific approval is granted under section 22 of the Act: our prior approval under the general approval will not apply. Again, Network Rail will undertake established industry processes, including consultation. These are detailed in our C&Ps.

Specific approvals – where agreement of terms cannot be reached

FC and Network Rail fail to agree to enter into a FCTAC: firm or contingent (Level 3) rights

9. Where a FC is unable to agree the terms of a new FCTAC with Network Rail, the FC is able to apply to us to direct Network Rail to enter into a FCTAC in terms it has specified in its application. This application would be made under section 17 of the Act. Our C&Ps explain the statutory processes we will need to undertake in such instances.

FC and Network Rail fail to agree changes to an existing FCTAC for new firm and/or contingent (Level 3) rights

10. Where a FC is unable to agree changes to its existing FCTAC with Network Rail for 'more extensive use'¹⁶ of its network, the FC is able to apply to us to direct Network Rail to enter into an amendment to its FCTAC in terms it has specified in its application. This application would be made under section 22A of the Act. Again, our C&Ps explain the statutory processes we will need to undertake in such instances.

¹⁵ Available at <http://www.rail-reg.gov.uk/server/show/nav.2409>.

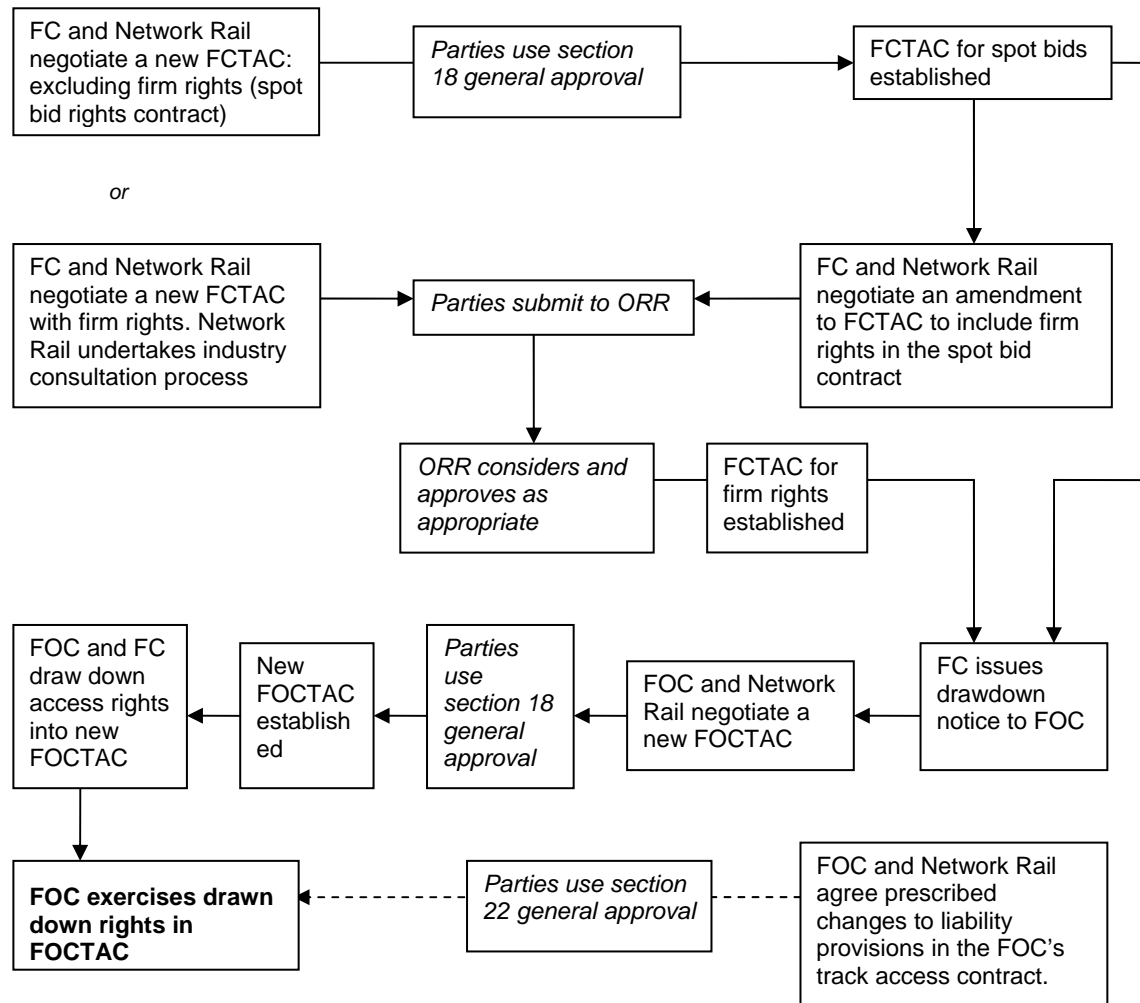
¹⁶ As defined in section 22A(2) of the Act.

Other amendments to FCTACs and FOCTACS

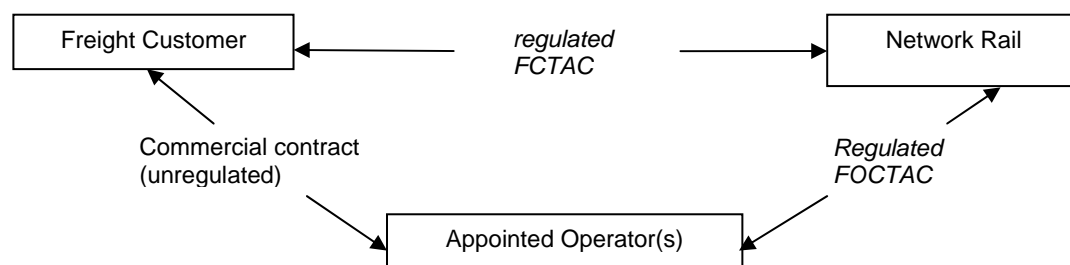
11. We have already established a number of general approvals which allow FOCs and Network Rail to make certain agreed changes to their track access contracts with our prior approval. For example, our established general approval¹⁷ will allow for the downgrading of access rights, from, say, Level 1 to Level 2, and the removal of access rights no longer required by a FOC. But it will not allow for the upgrading or inclusion of new access rights. As mentioned above, these types of changes require our specific approval.
12. To enable changes to FCTACs and FOCTACs in line with changes which have our prior approval under our current freight track access general approval, we will undertake to review it. A wider review is planned for later during 2010. Meanwhile, the types of changes allowed to freight operator's access contracts under the freight access general approval could be quickly specifically approved.

¹⁷ On our web-site: [The Freight Access \(Changes to Track Access Contracts\) General Approval 2009](http://www.rail-reg.gov.uk/server/show/nav.2006) at <http://www.rail-reg.gov.uk/server/show/nav.2006>

Process for FCTAC contractual arrangements (simplified)



FCTAC contractual structure



Annex H – Final Impact Assessment

In accordance with paragraphs 4.9 and 4.10 of 'ORR Approach to Producing Impact Assessments' published in July 2009¹⁸, we have updated the draft impact assessment on our proposed FCTAC policy published in our September document. The changes, which relate to consultees comments received on our proposed policy, are reflected in Section 3 below.

Section 1: The issue

What is the issue?

- 1.1. With the exception of the four existing track access options for future access rights held by the Secretary of State for Crossrail, Transport for London for East London Line, Transport for London for North London Line and Roadways Container Logistics Limited for Birch Coppice, only train operators have access contracts. However, and as identified above, the Railways Act 1993 provides that access contracts need not be limited to train operators. We consider that more third party freight customers, including logistics companies, port and terminal operators, power stations, providers of bulk goods, retailers, and major contractors, may also want to hold and can have access contracts.

Why are we intervening?

- 1.2. A number of freight customers have expressed an interest in obtaining access rights in their own names. However our experience has shown that while freight customers might be interested in developing access contracts, uncertainty about what such contracts should look like, and perhaps the cost of developing bespoke agreements, has resulted in stalled discussions between interested parties and Network Rail. Because of this, and because there seems to be an increasing interest by freight customers in obtaining access rights, we have decided it would benefit industry if we assume responsibility for developing a model contract.
- 1.3. This is consistent with our five year corporate strategy from 1 April 2009 in which we have committed to ensuring the industry focus on the needs of

¹⁸ On our web site at: <http://www.rail-reg.gov.uk/server/show/nav.2227>

freight customers by ensuring they benefit fully from improved safety, performance, efficiency and capacity. The difficulty and complexity of obtaining access is cited by freight third parties (rail freight consumers) as one of the key problems limiting the use of rail (SRA/ORR freight survey 2003¹⁹). Freight customer freight access contracts are a key way to improve access to the network for freight customers.

What is the desired outcome?

- 1.4. Our immediate aim is to produce a model freight customer track access contract. This should enable freight customers to have greater control over freight movements and will enable freight customers to change train operators if they are not happy with the service they are receiving, incentivising freight train operators to be responsive to the customer requirements. Having their own track access rights will also enable freight customers to have greater certainty about business matters as it will enable them to ensure continued availability of train paths to support specific business requirements and to participate in industry processes, such as timetable development, if they choose. Another desired outcome is that freight customer access contracts should stimulate competition between freight operators.

When will we review the success of the intervention?

- 1.5. Over the next two years we plan to undertake a review of the level of uptake to determine whether the existence of the model is appropriately encouraging freight customers to acquire track access rights in their own name. We will also evaluate at that time whether the provisions of the model are working as they were intended and whether any modifications to the model are necessary.

Section 2: The options

- 2.1. In considering how access contracts could be developed to meet FC requirements to hold access rights we identified three possible approaches.

Option 1: Do nothing

¹⁹ Available at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.5406>

- 2.2. We considered taking no action. If this option were implemented freight customers and Network Rail would be free, as now, to develop bespoke contracts for track access rights. We did not consider this the preferred option as the current uncertainty of what such contracts should contain has led to aborted discussions between interested parties and Network Rail.
- 2.3. In the current system it can be difficult for freight customers to change train operators if they choose because access rights are contained in the freight operator's contract. While a freight customer can seek out a different freight operator the new operator must obtain the necessary rights through the Network Code Part J transfer mechanism if they are not otherwise relinquished by the original operator. This is a lengthy and difficult process as the original operator may be using these rights for different purpose or may otherwise be able to demonstrate on-going business need. The uncertainties about reliable availability of paths may make rail freight unattractive to potential customers and suppress use of rail.

Option 2: 'Back to back' contract

- 2.4. We considered developing a model contract under which a freight customer would assume many of the rights and obligations in the existing freight track access contract, including performance and charges. These would then be 'passed through' to the train operator nominated to make the train movements in an unregulated commercial contract. This model would require the freight customer to be significantly involved in industry processes. Our assessment of currently interested freight customers suggested that this would not be the model of most immediate benefit to the majority of interested parties because it would require a relatively demanding involvement, including in timetabling, negotiating variations to services and being directly involved in performance commitments and payments, hence it was not selected as the preferred option.

Option 3: Drawdown agreement

- 2.5. We considered developing a model contract which was, to the degree possible, focused on the expression of rights. These rights would then be drawn down into a track access contract(s) of one or more train operator nominated to run services. The rights and obligations in the standard freight operator contract such as performance and charges would remain with nominated train operators. Responsibilities between nominated train

operators and the freight customer would be contractualised in an unregulated commercial contract. This model would enable freight customers to remain removed from the majority of industry processes. Our assessment of currently interested freight customers suggested that this would be the model of most immediate benefit to the majority of interested parties as it would effectively secure capacity on the network to be utilised for freight customer's business needs and it would minimise transfer of operational risk to a freight customer, hence it was selected as the preferred option.

Section 3: The preferred option

Impact on stakeholders/duty holder

- 3.1. **Network Rail** – In our September document we said we considered that the main impact on Network Rail would be staff time to review model contract and related policy at the outset; administrative costs of managing draw down of rights; the potential need to enter into additional track access agreements; and the cost of developing and maintaining relationships with new stakeholders. All this might require additional resources or the diversion of existing resources. However we noted that Network Rail is funded for all the activities set out above by the PR08 determination and that it is required to provide them under its network licence and hence we would not expect an additional charge to operators. We suggested that there could be a cost saving as with a model contract there will be a reduced likelihood of a third party requiring the development of a bespoke contract.
- 3.2. Whilst we accept that there may be a certain degree of uncertainty around the costs we have identified for the purposes of this impact assessment, we estimated that the total costs to Network Rail of developing the policy and processing the applications is around **£31,000** (present value), based on the following assumptions:
 - we have assumed 10 applications will be made in the two years following implementation of this policy;
 - a basic salary of £35,000 for staff involved in the re-sourcing requirement;

- an on-cost uplift of double the base salary to take into account national insurance contributions, pension contributions, allowances, support staff costs and accommodation costs;
 - we have assumed the 'on-going' costs; namely those costs involved once the contract is enforced; as negligible; and
 - the total number of days involved over the next two years is estimated at 92 days, split as follows:
 - 2 days developing the policy for Network Rail;
 - 90 days applying and processing the estimated 10 applications over the next two years.
- 3.3. In response, Network Rail agreed that it was funded via PR08 determination for costs associated with additions or amendments to TACs provided that the concept of "no double liability" was taken forward. It considered that the number of FC access contracts in the first two years would be below the figure of 10 which we suggested in our September document.
- 3.4. As such, we have identified no increase in the level of estimated total costs to Network Rail resulting from our new policy and its requirement to process access applications. Neither have we identified any costs for a FC above those associated with a new FOC entering the rail freight market.
- 3.5. **Government** – If the Government chooses to consider and respond to our policy document some minimal one-off staff resource might be used. ORR as an office has developed the policy and will have on-going costs associated when new applications are submitted to assess and make a decision on the access rights.
- 3.6. We estimate that the total costs to ORR of developing the policy and processing the applications is equal to around **£56,000** (present value), based on the following assumptions:
- we have assumed 10 applications will be made in the two years following implementation of this policy;
 - we have assumed the same staff and on-costs as Network Rail; and

- the total number of days involved over the next two years is estimated at 85 days, split as follows:
 - 35 days developing the policy for ORR;
 - 50 days applying and processing the estimated 10 applications over the next two years.
- 3.7. **FOCs** – In our September document we said that we considered that FOCs may incur some additional costs from reviewing the model contract and related policy and the development of new processes to manage the new type of contract. We said we did not expect these costs to be significant. We identified that there may be a decrease in long term certainty if freight customers hold rights in their own name as business could move with short notice. As such, FOCs may need to compete for business in a new way and could be more vulnerable to losing business if they are not responsive to the needs of customers. We also said we did not think that this would necessarily impose additional costs on FOCs, although it could transfer any surplus accruing to operators from existing contracts to be competed away. Any potential disbenefits to operators would be transferred to freight customers and society as a whole.
- 3.8. In response, consultees expressed a general feeling that our proposed policy would create a significant cost to all parties and lead to an increase in the price of rail freight haulage. It was suggested that this would undermine both Government and ORR policy to increase freight by rail and the efforts and investments of the rail freight industry causing a modal shift from rail to road. FOCs would need more staff to set up and manage additional and more complex contracts and interact with the FC on railway processes. A culture of short-term customer contracts would be more expensive.
- 3.9. Concerns were also raised over the level of expertise FCs, Network Rail and timetable agents would have to plan and operate services efficiently and the increased cost that would have FOC resourcing. Additionally, FCs would be unaware of their role in timetable and engineering planning meetings. Our policy did not provide for FOCs to make bids on behalf of the FC where that FC had opted to participate in the timetabling process.
- 3.10. We have acknowledged that there will be certain ‘start-up’ costs and, possibly, some further administrative responsibilities with additional costs for a FC

wishing to hold a FCTAC. We also recognise that a FC electing not to partake in industry processes who appoints an agent to act on its behalf will also incur on-going costs. FOCs will also have some costs to bear but given their current levels of expertise in managing model contracts we think this will be minimised. Notably, consultees have not provided us with any estimate of costs above those we have already estimated will arise. Nor have we been provided with any evidence to suggest that short-term customer contracts would be more expensive. We anticipate customer contracts would be subject to periodic review and revision in any case. Therefore, we are content that the estimated costs realistically represent an acceptable financial impact of our policy.

- 3.11. We do not consider our policy would cause a modal shift from rail to road and we discuss this in greater detail in paragraph 3.30 below. We are content that the benefits a FC would have in holding a FCTAC and being able to exercise greater control over which FOC would move its goods outweighs these costs. In support of our policy and to minimise costs we will publish model clauses and a general approval to allow the seamless and efficient entry into track access contracts. A FC will always be able to revert to the current contractual arrangements for movement of its goods.
- 3.12. **Passenger train operators** – We do not consider that there would be a significant impact on passenger train operators.
- 3.13. **Consumers** – In our September document we said that we considered that FCs would require additional staff time to review the model contract and related policy and maintain relationships with Network Rail and the wider industry. FCs would however benefit from the greater control of their rights, to be more engaged with rail industry processes, and have more certainty for the purposes of business planning as they will know rights are available for their business needs.
- 3.14. We also considered that the main additional costs to FCs would be the costs of developing applications and that the additional cost would be around **£30,000** (present value), based on the following assumptions:
 - We have assumed 10 applications will be made the two years following implementation of this policy;
 - We have assumed the same staff and on costs as Network Rail;

- the total number of days involved over the next two years is estimated at 90 days, split as follows:
 - 90 days applying and processing the estimated 10 applications over the next two years.
- 3.15. FCs provided various responses to our consultation. One remarked on the complex regulated, contractual and industry processes which were far beyond that required from other transport modes and would therefore be a challenge for all parties. Another suggested FCs should not need to understand Part J or employ a consultant or lawyer to achieve the possibility of changing their FOC. Another said that it did not currently have the knowledge and expertise required to administer a FCTAC incorporating the Network Code, a burden which they would initially have to pass these on to the FOC to administer on their behalf.
- 3.16. We acknowledge the points raised by FCs and consider we have addressed these in paragraphs 3.10 and 3.11 above. A FC not wishing to hold a FCTAC, which could or could not involve it in being involved in industry processes, could continue with the current contractual arrangements it has with its FOC and rely on Part J of the network code to facilitate access rights transfers between FOCs (see paragraph 3.26 below).

Impact on specific consumer groups

- 3.17. **Disability** – This policy involves allocation and utilisation of track access capacity only and is disability neutral.
- 3.18. **Gender** – This policy involves allocation and utilisation of track access capacity only and is gender neutral.
- 3.19. **Race** – This policy involves allocation and utilisation of track access capacity only and is race neutral.
- 3.20. **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

- 3.21. As only licensed operators, who have already obtained necessary safety certifications, will be running services we do not consider that there will be an impact on health and safety.

Impact on sustainable development

- 3.22. We consider that there may be a positive impact on sustainable development from encouraging freight customers to move freight by rail that might otherwise be moved using some other transport mode, such as road. The quantification of this impact is included under the assessment of overall impacts.

Impact on competition

- 3.23. In our September document we said that we would expect the policy to result in increased competition between freight operators as operators could need to compete more regularly for the opportunity to operate services on behalf of freight customers. This should result in FOCs being increasingly customer focused. It would also result in an increase in market participants with freight customers having direct relationships with Network Rail rather than solely with freight operators.
- 3.24. In response, one consultee considered that FCs would only act in part to stimulate competition within the railfreight industry but warned against the complexity of the policy working against it. FC frustration may, it suggested, be driven by an inadequate Network Code.
- 3.25. Whilst we accept that there are certain levels of complexity to the new contractual arrangements, we still consider that our new policy will create incentives on FOCs to meet customer satisfaction given the ease in which another FOC could be engaged to move a FC's traffic. Under this stimulus, poor performing FOCs would be faced with improving performance and service and/or the prospect of losing their customer contracts to competitor FOCs.
- 3.26. We have taken the reference to 'an inadequate Network Code' to relate to the freight transfer mechanism in Part J7 of the Network Code under which access rights can move from one FOC to another where the customer contract also moves. We are aware that some difficulties have been

encountered in effecting transfers under this process and we are currently reviewing the parameters of the mechanism with a view to make it faster and more effective and efficient. For the reasons mentioned in paragraph 3.24, we consider that FCs may still prefer to enter into a FCTAC. Any changes which we make to Part J having the effect of creating greater customer focus for FOCs could be in addition to those we have identified being created by holding a FCTAC.

- 3.27. The quantification of the benefits brought about through increased competition is included under the assessment of overall impacts.

Geographic impacts

- 3.28. We do not consider that the policy would have a distinct geographic impact.

Statutory duties

- 3.29. We think the following statutory duties under section 4 of the Railways Act 1993 are relevant to this policy proposal:

- to promote improvements in railway service performance;
- to protect the interest 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 facility, to the greatest extent that [ORR] considers economically practicable;
- to promote efficiency and economy on the part of persons providing railway services;
- to promote competition in the provision of railway service for the benefit of users of railway services; and
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

Overall impact

- 3.30. In total we estimate that the total costs of the policy are around **£117,000** for the two years after implementation. As explained in the main policy document, FCs believe there are monetary benefits from them obtaining the access rights to the route in questions. These are mainly achieved from having greater flexibility and control over the freight movements. Any benefit to

freight customers would have an impact on the attractiveness of rail as a mode of transport, and the associated transfer of traffic from road to rail would deliver benefits to wider society.

- 3.31. We conservatively assume that the move to FCTACs reduced the costs of rail transport of the customers involved by the equivalent of **0.1%**. If we assume that the 10 FCS covered by FCTACs cover around **25%** of the market (we have assumed that the larger customers are those most likely to apply for contracts), then this is equivalent to around £200,000 cost savings per year.
- 3.32. The benefit of transferring traffic from road to rail has been estimated on the basis of sensitive lorry miles.²⁰ These represent the economic benefit of reduced road traffic in terms of congestion, infrastructure costs and environmental benefits. Based on information in the MDS Transmodal report *the impact of access charge increases on rail freight*²¹, a 0.1% reduction in costs for 25% of the market could lead to an increase in rail freight tonne kilometre (tkm) by 0.03%. Assuming an average sensitive lorry mile value of 1.5 pence per tonne km gives a benefit of around £140,000 per year.
- 3.33. Hence, we conservatively estimate that the benefits of this policy, in the form of cost reductions associated with increased competition and reductions in lorry miles, to be around **£340,000** per year.

Conclusion

- 3.34. From the impacts described above, we believe that the implementation of this policy will have a net benefit for society and is therefore a viable option to proceed with.
- 3.35. If we identify or are presented with information which could affect our cost/benefit estimations in respect of this policy we may consider reviewing it

²⁰ Sensitive lorry miles are described in more detail in DfT appraisal guidance. This can be accessed at: <http://www.dft.gov.uk/webtag/documents/expert/unit3.13.php#>

²¹ The impact of access charge increases on rail freight, MDS Transmodal, 2006. This report can be accessed at: <http://www.rail-reg.gov.uk/upload/pdf/mds-freight-nov06.pdf>