



OFFICE OF RAIL REGULATION

# **Review of Part J (changes to access rights) of the Network Code – emerging conclusions**

**August 2011**

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# Executive summary

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1. This document:
  - (a) sets out our emerging conclusions on the review of Part J of the Network Code, on which we consulted in December 2010; and
  - (b) consults the industry on a draft proposal for change (PfC) for the amendments required to the Network Code and the associated Access Dispute Resolution Rules (ADDR).
2. Part J of the Network Code contains a number of mechanisms intended to ensure that rights to capacity, which are either not being used or which are being significantly under-used, can be removed from the train operator concerned and made available to others through changes to track access rights. These mechanisms were also intended to provide protection for train operators so that rights cannot be removed or adjusted without justification and to provide them with a process to challenge any proposed change.
3. The original aim of this review was to address issues which have arisen with Part J of the Network Code, since its last review in 2005, to ensure that it remains effective and fit for purpose. Our consultation document identified a number of issues and questions for consultees. However, after carefully considering the views of the industry, it became apparent that more radical and fundamental changes were needed. Our view was confirmed by the findings and recommendations of the recently published Rail Value for Money Study (“VFM Study”)<sup>1</sup>, which was clear about the need to review and streamline industry contractual change processes and, where feasible, simplify them, particularly in terms of language used, clarity and timescales.
4. Our emerging conclusions and proposals are explained in detail in the following section to this document, but briefly the key changes we are proposing to make are:
  - (a) **Condition J4 (*Failure to Use*)** - to incorporate and to simplify the ‘use it or lose it’ (UIOLI) process into J4;
  - (b) **Condition J6 (*Cordon Cap Reduction (Failure to Use)*) and Condition J8 (*Cordon Cap Reduction (transfer)*)** - to incorporate the present formulae to calculate cordon cap reduction into J6 and J8;
  - (c) **Condition J7 (*Freight Transfer mechanism*)** - to amend J7 to clarify and simplify the process for transferring freight track access rights;

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<sup>1</sup> Available from Department of Transport’s website at <http://www.rail-reg.gov.uk/upload/pdf/rail-vfm-detailed-report-may11.pdf>.

- (d) **Condition J9** (*rights review meetings*) - to replace J9 with a simplified and more accessible process focussing on the outputs we want to see from the industry;
- (e) The deletion of **Condition J10** (*Office of Rail Regulation consent or Determination*);
- (f) **Condition J11** (*obligation of Network Rail to publish documents*) – now Condition J10 under our proposal, which sees the introduction of template notices and an obligation on Network Rail to maintain them;
- (g) the removal of **Condition J12** (*Reasonable on-going commercial need*) and the discontinuance of the separate document entitled “Criteria for Interpreting the Expression “Reasonable on-going Commercial Need”; and
- (h) the amalgamation and simplification of **Condition J13** (*Dispute resolution*) and **Condition J14** (*Appeal procedure*).

As a result of our emerging conclusions we are also proposing related changes to Parts D and M and the associated ADRR to the Network Code.

5. We believe that our emerging conclusions are consistent with our statutory duties and published policies and that they build on the other areas that ORR and the industry have been working, including the VFM Study. In arriving at our views we have been very aware of the importance of ensuring that the industry has available appropriate mechanisms to ensure optimum use of the network. We believe that our proposals will help to improve the accessibility, usage and functionality of Part J and ensure that the transfer of rights is as quick, cost efficient and as fair as possible to all parties.

**Office of Rail Regulation**  
**August 2011**

# Introduction

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## Purpose

- 1.1 This document sets out ORR's reasons and emerging conclusions on our Review of Part J, together with our proposals for amending the Network Code to ensure that it remains fit for purpose and meets the needs of today's railway.
- 1.2 Our emerging conclusions have been reached after an industry wide consultation with all interested stakeholders, including subsequent discussions on specific points and issues. We received 10 responses from a range of stakeholders. All respondents, who are listed at **Annex A**, gave permission for their response to be published and these have been posted on our website<sup>2</sup>.
- 1.3 Respondents were generally supportive of the overall thrust of our proposals and we are grateful to the industry for its contributions and the detailed helpful suggestions received. But, as explained below, there was a wide divergence of views on how to deal with specific issues. Throughout this document we report on the responses received and set out our emerging conclusions.
- 1.4 Although we have tried to respond to the points made by consultees in a reasonable degree of detail we cannot deal with every individual point raised. However, we can assure the industry that all issues raised with us have been considered and taken into account.

## Background

- 1.5 Part J of the Network Code came into effect on 10 January 2005. The principal purpose of Part J was to enable access rights either to be surrendered or transferred between train operators to ensure that capacity that was not being used, or was being significantly under-used, could be

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<sup>2</sup> Available at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.10282>.

released. A chronology setting out the history of Part J and all its changes was included at **Annex A** of our consultation document<sup>3</sup>.

- 1.6 The objective of our Part J review, which was in line with Themes 1 and 5 of our Corporate Strategy,<sup>4</sup> was to ensure that the mechanisms available to the industry remained appropriate against the changing requirements of the railway and its passengers and customers. This is particularly important as the network becomes fuller and competition for space increases. It was not originally our intention to carry out a wholesale rewrite of Part J, i.e., along the lines of the one recently completed for Part D, because we felt that it was generally clear and worked with only certain aspects requiring clarification. That is why we identified a number of issues in our consultation document and sought consultees' views on a number of specific questions.
- 1.7 However, as we explained in our letter of 9 June 2011<sup>5</sup> there was a wide divergence of views and a number of consultees raised significant and valid points requiring further investigation. In many cases there was no consensus, although everyone agreed that there was a need for improved clarity and simplification of the various Part J mechanisms. As a result of the points raised it was felt that the changes required needed to be more extensive than originally envisaged. Furthermore, we also thought it sensible to take the opportunity to review our proposals in the light of the VFM Study. Therefore, we reviewed our proposed approach and timescales as follows:
- (a) to delay publication of this document by a month – our original intention was to publish our final conclusions towards the end of June; and
  - (b) to publish first our emerging conclusions and proposals in *draft* and to give stakeholders a further opportunity to comment - our original intention was of course to publish the formal PfC alongside our final conclusions.

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<sup>3</sup> *Review of Part J (changes to access rights) of the Network Code – A consultation document - December 2010*, Office of Rail Regulation, available at [http://www.rail-reg.gov.uk/upload/pdf/partj\\_review\\_consultation\\_december2010.pdf](http://www.rail-reg.gov.uk/upload/pdf/partj_review_consultation_december2010.pdf).

<sup>4</sup> “Promoting safety and value in Britain’s railways: Our strategy for 2009-14”, available at <http://www.rail-reg.gov.uk/server/show/nav.78>

<sup>5</sup> Available at [http://www.rail-reg.gov.uk/upload/pdf/part\\_j\\_review\\_update\\_090611.pdf](http://www.rail-reg.gov.uk/upload/pdf/part_j_review_update_090611.pdf).

We will then consider any responses received and decide whether there should be any changes to our proposals or whether there are any other issues that we need to address with a view to submitting the formal PfC during November 2011.

## Structure of document

- 1.8 This document represents our emerging conclusions and is structured as follows:
- (a) **Chapter 2** summarises the issues identified in our consultation document by Part J Condition, provides an overview of consultees' responses and sets out our emerging conclusions;
  - (b) **Annex A** lists the stakeholders who responded to our consultation;
  - (c) **Annex B** contains a draft PfC for modifying Part J. Amendments to the text in existing Part J are shown in marked up text and completely new proposed text is shown in red;
  - (d) **Annexes C, D and E** contain related changes to Parts D and M and the ADRR which follow on from these emerging conclusions;
  - (e) **Annex F** contains a summary of questions.
  - (f) **Annex G** contains an impact assessment.

## Draft PfC

- 1.9 With this document we have included at **Annexes B, C, D and E** a draft PfC, in the form of marked up copies of the various Parts of the Network Code (Parts J<sup>6</sup>, D, M and ADRR), showing the proposed amendments. It is our intention to sponsor these changes through the usual democratic change processes set out in Condition C5 of the Network Code. In addition to the actual drafting, there are also a number of specific questions throughout the document on which we would welcome consultees' comments. These are summarised at **Annex F** for ease of reference.

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<sup>6</sup> Please note that in respect of Part J, in order to avoid confusion with too many deletions, Conditions J9 through to 14 have been deleted in their entirety and replaced with the new Conditions J9, 10 and 11. The Introduction is also new.

- 1.10 Responses to this consultation should be sent in both hard copy and electronic format, to be received as soon as possible, but no later than **Friday 30th September 2011**, to:

Paul Carey  
Office of Rail Regulation  
One Kemble Street  
London  
WC2B 4AN  
Email to: [paul.carey@orr.gsi.gov.uk](mailto:paul.carey@orr.gsi.gov.uk).

- 1.11 Copies of this document, including the draft PfC are available from our website<sup>7</sup>.
- 1.12 Please note when sending documents to us in electronic format, as they will be published on our website, we would prefer that you email us your correspondence in **Microsoft Word format**. This is so that we are able to apply web accessibility standards to the content on our website. If you email us a PDF document, where possible please:
- (a) create it from the electronic Word file (preferably using Adobe Acrobat), as opposed to an image scan; and
  - (b) ensure that the PDF's security method is set to **no security** in the document properties.
- 1.13 We shall make all responses available on our website and we may quote from them. If you wish all or part of your response to remain confidential, you should set out clearly why this is the case. Where your response is made in confidence, it should be accompanied by a statement summarising the submission (excluding the confidential information) which we can then use as above. We will publish the names of respondents in future documents or on our website, unless you indicate that you wish your name to be withheld.

## Next steps

- 1.14 After the close of the above consultation on the draft PfC, we will consider any responses and decide whether there should be any changes to our proposals

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

or whether there are any other issues that we need to address. Our aim would be to submit the PfC in accordance with Condition C5 during November 2011.

- 1.15 Any changes introduced to the Network Code could necessitate consequential changes to other ORR documents, including our Criteria and Procedures<sup>8</sup>, and these will be made as soon as possible.

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

## **Chapter 2 - overview of consultation responses and ORR's emerging conclusions – by Part J condition**

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### **Introduction**

2.1 This section of the document:

- (a) summarises the issues identified in our consultation document;
- (b) provides an overview of the responses received; and
- (c) sets out our views and emerging conclusions on these.

### **Condition J2 (voluntary surrender and adjustment of access rights)**

2.2 Condition J2 provides for a train operator to surrender access rights voluntarily and apply to Network Rail for a specified adjustment of its access rights with compensation if appropriate. In our consultation document we noted that J2 had not been used and that the work to establish compensation criteria was never concluded. We asked what the industry thought the issues were with J2 and what could be done, if anything, to make it more attractive.

### **Consultees' views**

- 2.3 Consultees generally agreed that J2 should remain as it is – at least for the time being. DB Schenker Rail (UK) Limited (DBS) said that it never used J2 because it considered the mechanism was unwieldy and the compensation arrangements uncertain and FOCs were unlikely to surrender any rights which would leave them unable to meet their contractual obligations. In any event, DBS said that it already met its obligation to surrender unused access rights through its regular rights review meetings with Network Rail.
- 2.4 GB Railfreight (GBRf) took a similar view saying there was little or no incentive to voluntarily surrender access rights given the availability of other mechanisms and the likely low amount of compensation payable. Freightliner Group Limited (Freightliner) acknowledged that if constrained capacity is not

being managed effectively then it maybe necessary to revisit the “*finer points*” of Part J.

- 2.5 Network Rail also felt that the absence of any value on the access rights, the lack of any clear compensation criteria and the fear, particularly from FOCs, that using the mechanism might result in capacity being lost permanently to passenger operators were all factors leading to the non use of J2. It suggested that the development of Strategic Capacity and its recent incorporation into the Network Code could help alleviate FOCs’ concerns and that any changes to J2 should be left for the time being. It should be noted that Freightliner said that it did not see the necessity for any review of Part J until such time as Strategic Capacity has settled in and been put to practical use. Our view on this issue is dealt with in paragraphs 2.6 & 2.7.

### **ORR’s response to consultees’ views**

- 2.6 Based on the responses received ORR has decided to leave J2 as it is until other initiatives such as Strategic Capacity have bedded in. However, we do not agree that the success or otherwise of the Strategic Capacity initiative should postpone this review of Part J. As explained in our consultation document, we believe that there is clear, compelling evidence to show that significant changes can be made to Part J that will have an immediate impact on the overall effectiveness of the mechanisms, timescales, clarity and costs to the parties. This view appears to be borne out by the nature and content of consultees’ responses to the consultation.
- 2.7 We think it is also important to look at this workstream in the context of a fast evolving railway. As we have made clear on a number of occasions, we must ensure that our regulatory approach remains appropriate for the changing requirements of the railway and its passengers and customers, particularly as the network becomes fuller and competition for capacity increases. As we say in our introduction, this Review builds on the other areas that ORR and the industry have been working on and reflects some of the issues to come out of the McNulty Rail Value for Money Study<sup>9</sup>, particularly in relation to the industry’s desire for improved contractual change processes, clearer deadlines and timescales and consultation processes.

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<sup>9</sup> Available at <http://www.rail-reg.gov.uk/upload/pdf/rail-vfm-detailed-report-may11.pdf>.

## **ORR's emerging conclusion**

- 2.8 Subject to our proposals in paragraph 2.9 below, no change. However, we have noted DBS's suggestion of taking a cross-industry view, perhaps through an industry working group, should it be considered necessary at a future date to review J2.
- 2.9 As part of our review of J10 below we consider that it is only necessary for ORR to have to give consent in relation to modifications which are Quality Adjustments arising out of J2.13 because of the possible impact on third parties. We believe that ORR should only be involved where it can add value and/or there are implications for other users of the railway. Accordingly, we have:
- (a) amended J2.13 so that ORR's consent is only required in relation to modifications which are Quality Adjustments;
  - (b) amended the definition of Quantum Adjustment so that it does not include the grant of any other Access Right to the Part J Access Beneficiary. This because we think that in the context of J2, Quantum Adjustments should only be about the surrender of access rights and not about the grant of additional Access Rights to a Part J Access Beneficiary; and
  - (c) moved from present J10 to J2, the power for ORR to consent to part only of the modifications presented to it in relation to the Quality Adjustment.
- 2.10 **Do consultees agree that ORR's role should be reduced as outlined in paragraph 2.9 above? If not please say why.**

## **Condition J3 (confidentiality)**

- 2.11 Condition J3 sets out the process and requirements for the handling of any confidential information shared under J2. Our consultation document asked if consultees were aware of any issues with J3.

## **Consultees' views**

- 2.12 Consultees raised no issues.

## **ORR's response to consultees' views & emerging conclusion**

- 2.13 As J2 had not been used, and because consultees have not raised any issues regarding the related provisions in J3, subject to our proposals in paragraph 2.14 below, no change is required at this time.
- 2.14 We have deleted J3.13 which provided that any dispute arising from the Allocation Chair's decision about the confidentiality of information provided under the J2 process should come to ORR on appeal. We have also made consequential amendments to the rest of J3 flowing from this deletion. We think this is consistent with the approach taken elsewhere in the Network Code and with the industry's wish to see disputes dealt with, as far as possible, by the industry itself - appeals to the ORR should be a last resort. Disputes regarding the confidential nature of information can arise in other circumstances under the Network Code and we see no particular reason why those arising under Condition J3 should not be dealt with in the same way as the others under the ADRR.
- 2.15 **Do consultees agree with the removal of J3.13? If not please say why.**

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

- 2.16 Condition J4 sets out the process for Network Rail to seek the surrender of a train operator's unused rights. In our consultation document we proposed a number of changes to clarify definitions and simplify the process, including a number of options (see paragraph 1.44 of the consultation document) for amending the Use Quota and Use Period ("use quota/period"), and asked consultees if they had any views how the process could be made quicker and more effective.

## **Consultees' views**

- 2.17 Freightliner, GBRf and Network Rail all agreed with our proposal to amend the definition of **Quantum Access Right**. Although DBS did not have any difficulty with the definition as it stood, it accepted that it could be improved. Whilst attracted to ORR's proposal it suggested that the drafting should be consistent with the wording in Condition D4.2.2 (d) and suggested "...*any Firm Right, Contingent Right or any right under an Access Agreement*".

- 2.18 Freightliner, GBRf and Network Rail agreed that reference to **level 2 and level 3 rights** in J4.2.1 (a) should be deleted. However, DBS, whilst agreeing to the removal of level 3 rights, disagreed with the removal of level 2 rights arguing that to do so would effectively make cordon caps redundant. This was on the basis that where an access beneficiary makes an access proposal for the total number of level 2 rights in its access contract and Network Rail will only accommodate those level 2 rights up to the level of the cordon cap, the remainder of the level 2 rights should not be subject to a failure to use.
- 2.19 On **use quota/period** and the options we put forward, consultees had divergent views. Of the FOCs who responded:
- (a) DBS was content with the existing arrangements and said that it was unaware of any new compelling evidence since the last review to suggest that a change was necessary. However, of the five other options, it said there would be merit in exploring options b) and f) but that c), d) and e) would all introduce “additional and unwarranted complexity”;
  - (b) Freightliner was opposed to all the options, particularly the application of the use quota/period to each day, arguing that it believed that this would have a detrimental effect on freight customers whose demand fluctuated or where other commercial needs required greater flexibility. However, it was strongly in favour of the use quota being amended from 1 to 10 days in 90 days; and
  - (c) GBRf considered that the 90 day use period was adequate, but supported option b) relating to use quota/periods applying to each individual day of the week. It was opposed to the other options.
- 2.20 Network Rail said that the use quota/periods should be set as low as possible to ensure the most efficient use of capacity. In particular, it felt that the use period of 90 days was too long and suggested that it should be 30 days for the West and East Coast routes and even lower where there is little or no spare capacity. Network Rail also said that Part J does not satisfactorily address the issue of the “partial surrender” of rights and supported ORR’s option b) of the use quota/period applying to each individual day of the week to which the access rights apply.

- 2.21 Transport for London (TfL) raised general concerns about what they perceived to be the number of unused paths across the network and favoured option f), a tiered Use period depending on how constrained capacity is on a particular route. It felt that such an approach would speed up the process, but not at the expense of operational efficiency. TS strongly supported option b) and were also in favour of the principle behind option f), but requested further explanation of how this would work in practice.
- 2.22 On whether Part J could be made **quicker and more effective**, DBS considered that all train slots that do not meet the use quota and use period should be subject to J4 (and J5), *“irrespective of whether or not they are backed by Firm Rights or Contingent Rights”*. Therefore, applying the Use It or Lose It provisions (UIOLI) to all train slots would “dramatically” improve the effectiveness of J4 (and J5) and promote more efficient use of capacity. Based on its own experience of trying to use the Failure to Use mechanism, DBS thought that its proposed amendment to the definition of ‘Quantum Firm Right’ would go some way to address this issue (see paragraph 2.17 above).

### **ORR’s response to consultees’ views**

- 2.23 Given the wide range of views about how UIOLI should work and the concerns raised about how it has operated in the past, we have revisited the whole approach on this issue in Part J. It may first be helpful if we look at the purpose of Part J and the reasons why it was introduced.
- 2.24 Regulation 26 of the Railways Infrastructure (Access and Management) Regulations 2005 (the regulations)<sup>10</sup> requires the provision of a UIOLI provision in respect of allocated capacity which states that:
- “In particular for congested infrastructure, the infrastructure manager shall require the surrender of a train path which, over a period of at least one month, has been used less than a threshold quota to be laid down in the network statement, unless this was due to non-economic reasons beyond the operator’s control”*
- 2.25 Essentially, Part J sets out a number of mechanisms, including a UIOLI provision, which are intended to ensure that

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<sup>10</sup> Available at <http://www.opsi.gov.uk/si/si2005/20053049.htm>

*“capacity which is not being used – or is being significantly under-used – can be removed from the operator concerned and made available to others”.*

As well as acting as a process for freeing up capacity these mechanisms were intended to provide protections for train operators so that rights cannot be removed or adjusted without good cause and so that the operator can, on sound and justifiable grounds, challenge a proposed surrender or adjustment of rights. These mechanisms are particularly relevant to freight operators, where competition between them requires fair and effective means of securing the surrender or transfer of rights for which an operator no longer has a Reasonable On-going Commercial Need (ROCN).

2.26 However, based on the responses received and our own experience of the operation of the UIOLI provisions, we believe that they are not proving to be the most effective and efficient way of ensuring best use is being made of capacity. They appear to be the source of disputes, particularly arising from the application of the ROCN criteria, and take too long to process. We are therefore proposing a simpler and more straightforward approach to UIOLI, which involves the removal of ROCN as a concept from Part J.

2.27 We recognise the need to have some controls in place, but J4.4 already provides a carve-out provision that states that:

*“Any period of non-use shall be disregarded for the purpose of determining whether a Failure to Use has occurred under Condition J4.2.1(a) or (b) if, and to the extent that, such non-use is attributable to non-economic reasons beyond the Part J Access Beneficiary’s control.”*

2.28 We believe that this (which is J4.3 in our revised drafting), slightly tightened up to ensure that the non-use that is disregarded is only of a temporary nature, together with the continuance of the existing use quota/period of one in 90 days (see paragraph 2.37 below) provides sufficient protections for operators. After all, failure to use should be an historic statement of fact with no room for argument. We believe that 3 months is more than enough time for an operator to justify the need for a right(s) and means that in those cases where a train operator has secured a path in the timetable, but has not used it, then that operator should lose the path, and the future right to that path. This is particularly important in cases where another operator already has business to

move and wants to use that path – we firmly believe that that operator should have priority even in those cases where the incumbent operator may have firm expectations of future business. In such circumstances the capacity should still be released by the incumbent who should then apply to resurrect any contractual right lost when it has a contract and is ready to move business. This can be done initially through the timetable variation process set out in Part D of the Network Code.

- 2.29 Consistent with this, we are also proposing that a Cessation of a Failure to Use (J4.5) can now only occur in relation to J4.1.1(b) - where the Use Quota is met before a Failure to Use Notice is served. At present a cessation of failure to use can also occur where a Train Slot has not been secured in the New Working Timetable but an access proposal in relation to the Access Right is made in relation to the subsequent New Working Timetable before a Failure to Use notice is served. However, we believe that such a provision is open to abuse and game playing and that removing it is line with our objective of making the UIOLI test as straightforward as possible.
- 2.30 We believe that having a simpler, mechanistic and straightforward approach which is clear and unambiguous will reduce industry costs, reduce the degree of monitoring required and generally reduce the administrative burden and room for dispute.
- 2.31 We did consider other options, including the retention of ROCN (albeit on the face of Part J) and the possibility of providing a further period of grace after the 90 days, in effect treating the Failure to Use as a first warning. However, we came to the view that these options were as complex as the present criteria and were likely to result in similar difficulties of interpretation and, ultimately, disputes.
- 2.32 **We welcome any alternative suggestions from consultees that would achieve the aims set out in paragraph 2.30 above for improving the UIOLI process.**
- 2.33 Turning to the specific points raised on J4, we note the general support for a change to the definition of **Quantum Access Right** and DBS' suggestion to amend ORR's proposed drafting. However, we do not think that DBS' suggestion is clearer as it suggests that there is in fact another category of rights, other than Firm or Contingent rights.

- 2.34 We also note the widespread support for the proposal to remove **level 3 rights from the present J4.2.2**. However, DBS disagreed with the **removal of level 2 rights** (see paragraph 2.18 above) from that condition. To ensure that we fully understood its reasons we asked DBS to provide further information and examples to support its position. In its response DBS reiterated its view that level 2 rights needed to continue to be excluded from the application of J4.2.1(a) because, in its view, level 2 rights are not as ‘firm’ as level 1 rights and there are circumstances where Network Rail would not always be in breach of contract where it cannot accommodate such rights.
- 2.35 However, the debate about the wording of J4.2.2 has made us reconsider whether the whole sub-condition is actually desirable in its entirety. At the moment it means that level 2 rights, contingent rights or level 3 rights which Network Rail has been unable to accommodate in a New Working Timetable cannot be subject to a Failure to Use. However, we do not think rights, whatever their status, which have not been accommodated in the timetable and are therefore not being used should be protected from the Failure to Use process. If an operator disagrees with Network Rail’s initial decision not to accommodate any right(s) in a New Working Timetable then they have the right of appeal through the industry dispute mechanism. Accordingly, we consider that the whole of J4.2.2 should be deleted.
- 2.36 **Do consultees have any comments on our proposal to delete J4.2.2?**
- 2.37 Turning to the issues of the **use quota/period**, it is clear that there is no consensus across the industry. As has been pointed out, we have not seen any new evidence to support a change in the overall principle. Accordingly, it is our intention to keep the use quota/period as it is, essentially 1 in 90 days. However, we believe that there is merit in ensuring that the use quota/period applies to each individual day of the week to which the access right relates. In other words, and for example, an operator with rights to use the same path on each day of the week will need to have used at least one path in a period of thirteen consecutive weeks on *each* day for which it has rights. This will ensure that best use of capacity is occurring. Our proposal means that the use quota/period for a Train Slot will actually be 1 in 13 consecutive weeks in which such Train Slot is included in the Working Timetable which equates to 1 in 91 days.

- 2.38 We have also considered whether there is any benefit in the use quota/period being set out in a separate notice<sup>11</sup>. The reason why the use quota/period was originally set outside of Part J, by means of a separate notice, was because it was decided at the time that they should only be determined by ORR and should not be vulnerable to amendment by the industry through the PfC process under Part C of the Network Code. However, we no longer believe that this is a valid argument, particularly given the need for any such proposal to have ORR approval. We are therefore proposing that the use quota/period should be on the face of Part J meaning that the industry can propose changes to them and take control of them, in line with Better Regulation principles. We also think that including them on the face of J4 makes it much clearer what they are and easier for a new entrant to the market to understand the J4 process.
- 2.39 Finally, we have considered DBS' suggestion that J4 would be made **quicker and more effective** if it applied to all train slots, not just those backed up by Firm or Contingent Rights. We think DBS makes a good point and that train slots obtained via Train Operator Variation Requests for which the operator does not have specific access rights should also be removed if an operator is not using them. This fits with our objective, explained in the preceding paragraphs, of achieving a clearer and more straightforward process. However, we think that Part D rather than Part J is the right place to deal with this issue because Part J is fundamentally concerned with the transfer or removal of access rights rather than train slots. On that basis we have proposed the insertion of a new Condition 7.5 in Part D (the existing one becomes 7.6), which applies to train slots which have been obtained via Train Operator Variation Requests pursuant to paragraph 2.5 of Schedule 5 of the freight contract. The proposed condition would mean that where Network Rail, acting reasonably, considered that the train slots have not been used and are not likely to be used, it has the ability to remove them from the Working Timetable after first consulting with the relevant freight operator.
- 2.40 **Do consultees agree that Part D is the appropriate place for this provision? If not, please say why.**

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<sup>11</sup> Available from our website at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.10282>.

## ORR's emerging conclusion

2.41 We therefore conclude that:

- (a) the definition of **Quantum Access Right** should be amended as we proposed in our December 2010 consultation (but also see our proposed additional amendment at paragraph 2.9b) above;
- (b) present **J4.2.2** should be deleted;
- (c) the **use quota/period** should:
  - (i) remain as it is but apply to each day of the week. This will mean that the use quota/period will actually be 1 in 13 consecutive weeks in which the Train Slot is included in the Working Timetable which equates approximately to 1 in 90 days; and
  - (ii) appear on the face of J4.
- (d) we agree that train slots obtained by Train Operator Variation Requests pursuant to paragraph 2.5 of Schedule 5 of the freight contract should also be capable of being removed from the timetable if they are not subsequently used. We think this should be dealt with in Part D and have proposed a change to Part D in this respect.

2.42 **Consultees are invited to comment on the proposed drafting changes to J4 at Annex B and to Part D at Annex C.**

## Condition J5 (failure to use - third party application)

2.43 Condition J5 sets out the process for a third party to seek the surrender of a train operator's unused rights. In our consultation document we asked consultees for their experiences of using J5 and proposed that J4 and 5 should merge.

## Consultees' views

2.44 DBS said that in its experience J5 had worked well and that problems generally arose because the parties had not followed the processes laid down - leading in some cases to **invalid notices** being served.

- 2.45 Given the similarity of J4 and J5 DBS, Network Rail and TfL said that its views and **experiences on J4 also applied to J5**. In addition, GBRf said that its experience of the J5 process was that the incumbent could frustrate and delay the start of a competing service and it suggested changes to the process. GBRf asked to comment on this further in the light of a referral to access disputes adjudication (ADA).
- 2.46 There was some support from DBS, Freightliner and Network Rail for **combining J4 and J5**. However, GBRf were against combining because *“they are instigated by two separate parties and normally work to differing timescales”*. Freightliner also said that consideration should be given to **supplementing J5 to allow operators to transfer access rights between themselves**, without Network Rail’s involvement, where there is no dispute - similar to our proposals for J7. If adopted this might suggest that J4 and J5 should remain separate.

#### **ORR’s response to consultees’ views**

- 2.47 We have considered Freightliner’s suggestion that the J5 process should be more akin to the process we are proposing for J7, in that it **should allow operators to transfer access rights between themselves**, only involving Network Rail when they do not agree. We do not think this would be a good idea for J5. This is because we think it could encourage trading of access rights between operators which is forbidden under The Railways Infrastructure (Access and Management) Regulations 2005<sup>12</sup>. We also think that such an approach could mean that Network Rail would lose its role of supervision of the use of rights which we think needs to be carried out centrally by the infrastructure manager. We also think that the J7 process can be distinguished from that under J5 because it is dealing with specific rights which are used in relation to a particular commercial contract which has transferred from the incumbent to another particular operator.
- 2.48 We have also revisited our suggestion that J4 and J5 could be **combined**. Having considered the practical effect further we agree with GBRf that combining the two, when they are instigated by different parties, would actually lead to a more complicated process and drafting.

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<sup>12</sup> Available at <http://www.legislation.gov.uk/ukxi/2005/3049/contents/made>.

- 2.49 Our proposed **changes to J4** set out above will also address many of the issues which consultees said they had faced with J5. In addition, our proposal, set out in paragraphs 2.109 to 2.110 below, to have templates for Part J notices should help prevent invalid notices being served.

#### **ORR's emerging conclusion**

- 2.50 For the reasons given above we are not proposing any substantive change to J5. The changes to J5 which we are proposing are consequential to the changes we are proposing to other conditions in Part J.

#### **Condition J6 (reduction of cordon caps (failure to use))**

- 2.51 Condition J6 sets out the process for the reduction of a FOC's cordon caps where Network Rail serves a failure to use notice relating to a Level 2 right under J4 or J5 and specifies under that notice that there should be a reduction in the level of cordon caps. In our consultation document we asked whether consultees were aware of any issues with J6 that needed to be addressed.

#### **Consultees' views**

- 2.52 Consultees raised no issues.

#### **ORR's emerging conclusion**

- 2.53 Although there were no specific issues raised regarding J6, our proposals below under J12 include taking the present formula to calculate a cordon cap reduction in relation to J6 from the 'Criteria for Interpreting the expression "Reasonable On-going Commercial Need"' and including it within J6 itself.
- 2.54 In doing so we have also reviewed the formula and we do not think the present formula is correct. We think that the formula should change the cordon cap in proportion with the rights being transferred. We therefore think that the formula to work out the amount by which a cordon cap should be reduced should be  $(R_r/R) \times C$  where "R<sub>r</sub>" means the number of Level 2 Rights transferred, "R" means the number of Level 2 Rights the incumbent held before the transfer and "C" means the incumbent operator's cordon cap before transfer. If the resulting reduction figure is not a whole figure then we think it should be rounded down to the nearest whole number.

- 2.55 We appreciate that this approach is mechanistic but we think that it would work in the majority of cases and, of course, if parties to an access agreement did not think it worked in their particular case then they could always come to ORR for specific approval of their change.
- 2.56 **Consultees' comments are invited on our proposal to include the formula at J6.2.3 (drafting at Annex B).**

### **Condition J7 (freight transfer mechanism)**

- 2.57 Condition J7 applies to FOCs and is intended to enable the smooth transfer of rights where a FOC wins existing traffic from an incumbent FOC. In our consultation document we sought consultees' views on a number of issues, mainly arising from the access disputes determination, ADP23, relating to clarity of drafting, burden of proof and 'Y' paths. We also proposed a number of changes to the process.

#### **Consultees' views**

- 2.58 Freightliner, GBRf and Network Rail supported the need for more clarity in **J7.1.2**. However, DBS did not consider any further clarification was necessary, but that it would be happy to consider any improvements suggested.
- 2.59 DBS, GBRf and Network Rail agreed that requiring an applicant to produce a **letter from the third party customer** confirming any commercial arrangement would reduce the scope for dispute. Freightliner considered that the relevant customer(s) should be a party to any dispute. On the content of any letter from a third party, GBRf said more consideration should be given to evidence that FOCs had suitable access arrangements for other facilities and where access to a facility was via another facility owner's network, then this should be treated as national network.
- 2.60 On the issue of **Y-paths**, DBS felt that the problem was overstated as they only generally occur where an incumbent FOC operates flows on behalf of a customer to either two different destinations from the same origin or a common destination from a number of origins but where only one traffic flow will operate on any given day as specified by the customer. If a customer decides to award one of the traffic flows to another FOC, meaning that two FOCs have a requirement for a Train Slot with a common arrival or departure

time, DBS argued that it is possible to transfer only that part of the Y-path required by the other FOC for the traffic it will now operate. The customer will decide what traffic flow operates and when.

- 2.61 DBS said that when such situations have occurred, it has been dealt with by way of an appropriate ‘special condition’ specified in the Schedule 5 Rights Table<sup>13</sup>. DBS, therefore, considers that Rights Subject to Surrender should refer to Y-paths in cases where the Applicant is taking over from the Incumbent all traffic flows associated with the Y-path or just part of a Y-path in cases where the Applicant is taking over only some of the traffic flows associated with the Y-path options. DBS believes criteria such as those proposed by ORR are not necessary and could result in unintended consequences.
- 2.62 Freightliner agreed that it was not clear how Y-paths are dealt with and noted that there was no such thing as a ‘Y-right’. GBRf said that a FOC applying for a level 1 right should not be frustrated by another FOC holding level 2 or 3 rights. It suggested that combining this requirement with a letter from the customer, given that Y-paths are usually for one customer, would form a solid basis for a transfer of rights. Network Rail supported the proposal to clarify the definition and supported ORR’s proposal to develop and include criteria for dealing with ‘Y-paths’ in Part J.
- 2.63 Most FOCs and Network Rail said that **J7 and the processes could be improved** and supported Network Rail being less involved in the J7 process especially where there was no dispute. However, consultees raised a number of specific points on our proposals for J7.
- 2.64 DBS said that it supported the proposals to speed up the process up to a point, but suggested that the incumbent’s counter-notice should be served directly on Network Rail rather than the applicant, potentially saving 5 working days.
- 2.65 Freightliner questioned how access beneficiaries would be protected against vexatious applications if Network Rail was not involved. It was also concerned

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<sup>13</sup> At our request DBS provided further information and examples.

about shortening the timescales at the expense of a fair and considered process.

- 2.66 GBRf said that the present timescales are too slow and quite often contracts will have changed hands. It believed that the access right should automatically transfer to the new FOC after 10 working days with the incumbent FOC having the ability to dispute the transfer through the existing ADRR. GBRf also would like to see a clause in Part J which allowed for a situation where a FOC transfers staff under TUPE (Transfer of Undertakings (Protection of Employment) Regulations) then the associated access rights also transfer.
- 2.67 Network Rail also agreed that the process could be improved if it was not used as a “post-box” and the process was more focused on engagement between the applicant and incumbent FOCs. However, even with such a change it was still concerned that in the event of a dispute Network Rail would have to decide the outcome and that this would lead to a referral under ADRR and no shortening of timescales.

#### **ORR’s response to consultees’ views**

- 2.68 Whilst we agree that our Determination of ADP 23 has provided the necessary clarity on **J7.1.2**, we believe that we should take the opportunity of the current review to amend the Condition.
- 2.69 On **third party customer** involvement, no one dissented from the view that an applicant should produce a letter from the relevant freight customer confirming any commercial arrangement. We agree with GBRf’s suggestion that any such letter should include confirmation that a FOC has suitable access to and from the facility, including where necessary, the associated infrastructure. However, the facility owner’s network can not be classified as part of the national network.
- 2.70 We do not agree with Freightliner’s suggestion that customers should necessarily be a party to any dispute. We believe that the position should remain that it is at the discretion of the ADA panel to determine whether any other party should be involved in the dispute and the reasons for this. We think that this maintains the flexible approach that is required for these matters.

- 2.71 We received conflicting views on problems with **Y-paths**. We remain of the view that the present drafting of “Rights Subject to Surrender” does not make clear that it includes relevant “Y-paths”. In order to clarify the position we are proposing amendments to the definition of “Rights Subject to Surrender” to cover “Y-paths” and we are proposing a definition of “Y-paths” be included in Part J.
- 2.72 **We would welcome comments on our proposed definition of “Y-paths”.**
- 2.73 We have considered further whether we require any criteria to help establish which Y-paths should transfer as part of the Rights Subject to Surrender. On reflection we consider that criteria are not required. This is because inserting the term “Y-paths” into paragraph (ii) of the definition of Rights Subject to Surrender means that it is either the “Y-paths” which the applicant considers are directly associated with the rights it is seeking and will no longer be required by the incumbent or, where the incumbent does not agree with the Applicant and Network Rail becomes involved in the process, the “Y-paths” which Network Rail considers are directly associated with the rights and the incumbent will no longer require. If one of the parties did not agree with Network Rail’s decision in this regard then they could appeal on this point.
- 2.74 Consultees were generally supportive of how the **J7 process** could be made quicker and more effective by only involving Network Rail when the applicant and incumbent do not agree. We note Network Rail’s disagreement that, where there is dispute between the Part J Access Beneficiaries, it should have to decide the outcome as in its view this prolongs the process. However, we think that where the Part J Access Beneficiaries are in dispute there has to be a decision made which is capable of referral for determination to an ADA. We firmly believe that Network Rail, as the common contractual party, is best placed to carry out this role.
- 2.75 We agree with DBS that where the parties do not agree the counter-notice can be served directly on Network Rail. We have also considered Freightliner’s concern about balancing shorter timescales with a fair and balanced consideration and consider that our proposals below achieve this. As to GBRf’s proposal that where a new FOC provides transport services for a customer, the access rights associated with that service should automatically

transfer too, our proposal to remove ROCN (see paragraphs 2.121 to 2.126 below) will help to meet this concern.

2.76 Note that we propose the deletion of the existing provision (J7.10.1 (ii)), relating to Restrictive Provisions, because we do not believe that it serves any useful purpose as any conditions will transfer with the rights anyway.

2.77 **Consultees are invited to let us know if they consider J7.10.1 (ii) should be retained and if so why?**

2.78 Finally, we considered GBRf's suggestion that the J7 process should incorporate TUPE requirements. TUPE deals with protection of employees' terms and conditions of employment when a business is transferred from one owner to another; we do not see that Part J, or indeed the Network Code, is the appropriate place for TUPE detail.

### **ORR's emerging conclusion**

2.79 We therefore conclude that:

- (a) **J7.1.2** should be amended;
- (b) an applicant should produce **a letter from a third party customer** confirming any commercial arrangement;
- (c) the definition of Rights Subject to Surrender should be amended to include "**Y-paths**". We are also proposing that a definition of "Y-path" is included in Part J; and
- (d) the **J7 process** can be shortened and improved by making it between the applicant and incumbent in the first place, involving Network Rail only where the parties can not agree. We have proposed changes to the Part J7 process so that:
  - (i) the applicant serves a Third Party Notice directly on the Incumbent; where the incumbent agrees to the transfer or it fails to respond to the application within 10 working days, the applicant notifies Network Rail who notifies ORR and the relevant access rights will be transferred;

- (ii) where the incumbent does not agree to the transfer then, within 10 working days of receipt of the application, it serves a counter notice on Network Rail, copied to the Applicant; and
  - (iii) Network Rail then has five working days to say whether the rights should transfer or not. Either the incumbent or applicant can appeal this decision; and
- (e) a new provision (J7.10.1 (ii)) should be provided to link the handover of rights to the date from which the applicant specified in its Third Party Notice that it required the rights.

**2.80 Consultees are invited to comment on the proposed drafting changes to J7 at Annex B.**

**Condition J8 (adjustment of cordon caps (freight transfer mechanism))**

- 2.81 Condition J8 provides a process for the adjustment of cordon caps where a notice has been served under J7 and Network Rail considers that there should also be an adjustment to the incumbent FOC's cordon cap. In our consultation document we said that we were not aware of any issues with J8.

**Consultees' views**

- 2.82 Consultees raised no issues.

**ORR's emerging conclusion**

- 2.83 Although there were no specific issues raised regarding J8, our proposals below under J12 include taking the present formula to calculate a cordon cap reduction in relation to J8 from the 'Criteria for Interpreting the expression "Reasonable On-going Commercial Need"' and including it within J8 itself.
- 2.84 In doing so we have also reviewed the formula and we do not think the present formula is quite right. We think that the formula should be the same as the formula adopted for a cordon cap reduction under J6. We are therefore proposing that the formula we explained above in relation to J6 at paragraph 2.54 above is incorporated into J8.2.3.

2.85 We also propose below under J10 that the ability for ORR to modify a cordon cap increase or reduction reached under J8 should be included within J8 itself. We have therefore proposed amendments to J8.4.3 to reflect this.

2.86 **Consultees are invited to comment on the proposed drafting changes to J8 at Annex B.**

### **Condition J9 (access rights review meetings)**

2.87 Condition J9 sets out the process for holding regular rights review meetings between a FOCs and Network Rail. In our consultation document we asked consultees for their views on how well they felt J9 was working and their views on proposals to focus on the output rather than the process.

#### **Consultees' views**

2.88 There was a wide range of views on **how J9 is currently drafted**. DBS agreed with Network Rail's view, as expressed in the consultation document, that J9 is too prescriptive and adversarial. DBS meets with Network Rail on a regular basis and their discussions are not restricted to the surrender of access rights, but also cover new and amended rights to meet customer requirements. DBS also believes that J9 should apply equally to all passenger operators. Freightliner said that whilst it supported a more collaborative approach, it felt that it was important to retain a formal process to protect against an intransigent FOC.

2.89 Network Rail considered that the existing commercial arrangements were adequate and that using J9 would potentially be an additional burden given the existing reviews of access rights, use of other Part J processes and the need to collate and interpret all of the information. Network Rail also considered that the J9 process could be viewed as being too adversarial and it found it difficult to envisage when a third party or ORR might force a rights review meeting. GBRf had no comments to make on the current drafting of J9 and believed that if J4, 5 and 7 were sufficiently robust then J9 would be virtually redundant. TfL supported regular reviews of FOCs access rights with any unused or rarely used paths being subject to surrender under J4.

2.90 There was little consensus on our proposals to **focus on outputs** and allow ORR to force a rights review meeting. DBS agreed with our view that the important thing was the need to ensure that access rights are reviewed

regularly rather than the process by which this was carried out. DBS said that making J9 focus on outputs would improve matters considerably and allow Network Rail to tailor the review to suit each individual FOC. Network Rail said that it was unclear what the benefits in terms of industry costs would be from redrafting J9 and in its experience FOCs preferred to use other Part J mechanisms and the review should focus on making those mechanisms more effective, so reducing the need for J9.

- 2.91 There was also little consensus on **what a rights review meeting should involve**. DBS thought that they should include the full range of access rights believing that it is unproductive to include only one type of change. On **frequency of rights review meetings**, DBS felt that access rights should be reviewed, *“at least once if not twice per year”* – DBS currently carries out regular rights reviews with Network Rail on a Service Group by Service Group basis and this appears to work well. However, DBS said that the major issue for it was the amount of time it took Network Rail internally to process any changes – in some cases the rights would need to be reviewed again before the first had been finalised. Freightliner made similar points saying that 6 monthly meetings were impractical as the access rights were quite often out of date by the time the supplemental agreement was submitted.
- 2.92 Network Rail reiterated the point that the existing commercial arrangements provided sufficiently for contractual review. To be required to hold regular meetings is likely to place a cost and time burden on the industry and a standard frequency may not suit differently sized FOCs. GBRf said that these meetings did not offer the industry any value providing other Part J mechanisms were robust.
- 2.93 With the exception of TfL, consultees were not supportive of timetable participants having the ability to **force a rights review meeting** because of potential vexatious applications and this might increase industry costs. Network Rail did not believe it was necessary. DBS and Freightliner both made the point that if ORR had the ability to force Network Rail to hold a rights review meeting than this would be sufficient, although DBS said that a timetable participant could be given the right to apply to ORR for a rights review meeting.

- 2.94 DBS also considered that ORR should have the ability to force a rights review, but not timetable participants, who it felt would perhaps not be so well placed to take an objective view as to whether such a review was required. Freightliner was not aware of any evidence to suggest that this was necessary, but agreed that it could be useful.

### **ORR's response to consultees' views**

- 2.95 There was general agreement that J9 needs to be revisited. We think that a more effective J9 is necessary in order to place a clear obligation on Network Rail to review regularly the rights which operators and customers hold. We also consider that, as the present J9 is too prescribed and unattractive to use, it should be re-vamped so that it is more accessible and **focuses on outputs**; what we want Network Rail, working with the industry, to achieve rather than the means by which it is done.
- 2.96 As to **how frequently the reviews should take place**, we do not want to make the J9 process too prescribed, consider that the reviews should take place as often as needed, and that their exact frequency will be a question of judgment for Network Rail, based on the need to ensure that capacity on the network is shared in the most efficient and economical manner in the overall interest of users, providers, potential providers and funders of railway services. This is consistent with the present drafting of the objective proposed for the Part D Decision Criteria. Obviously if that changes in due course as a result of our consultation on the proposed Decision Criteria then we would amend J9 accordingly.
- 2.97 Having considered the points made about **forcing a rights review meeting to take place**, we think that ORR but not third party operators/freight customers should be able to do this. If third parties feel a review should be taking place then they can report this to ORR. We propose giving ORR the ability to direct Network Rail to hold a rights review meeting with recourse to the High Court if Network Rail does not comply.
- 2.98 Finally, DBS asked that we consider extending J9 to passenger operators (including open access) as a regular review of rights could only be of benefit. We agree that J9 should come into play where any operator has access rights which it is not using and it should not be restricted just to the freight market. The drafting that we are proposing for the new J9 reflects this.

## **ORR's emerging conclusion**

- 2.99 We are proposing that the current J9 is deleted and instead replaced with a new J9, which is attached at **Annex B**. This new condition:
- (a) rather than focusing on the process of J9, specifies the objectives which Network Rail has to achieve in holding the meetings;
  - (b) places an obligation on the relevant Part J Access Beneficiary attendee to participate in the meetings in collaborative manner to assist Network Rail to meet its objectives;
  - (c) provides ORR with the ability to direct Network Rail to hold a Rights Review Meeting and, where Network Rail does not comply, gives ORR the power to seek an order from the High Court securing compliance; and
  - (d) means that Rights Review Meetings should be considered in relation to any Part J Access Beneficiary. This would be an extension of the present system which only applies in relation to freight operators.

2.100 **Consultees are invited to comment on the proposed drafting changes to J9 at Annex B.**

## **Condition J10 (ORR's consent and determination)**

2.101 Condition J10 provides that ORR can elect to give its consent to part only of the modifications submitted to it under J2 and to modify the cordon cap adjustment for which its consent is sought under J8. In the consultation document we said that J10 would no longer be required if our proposals for J2 were accepted and we incorporated ORR's ability to modify a cordon cap increase or decrease directly into J8.

## **Consultees' views**

2.102 Freightliner, GBRf and Network Rail agreed with our proposals. DBS agreed that ORR's consent should not be required for Relevant Surrenders, but said that it should still be required for Relevant Adjustments as these could impact on another access beneficiary or network capacity. It cited the 'part only' consent in J10.1.1 referring to J2.13 which appears specifically to concern

Relevant Adjustments rather than Relevant Surrenders. DBS agreed with our proposals regarding cordon cap modification.

### **ORR's response to consultees' views**

2.103 We agree with DBS that J2.13 concerns Relevant Adjustments rather than Relevant Surrenders. However, our view is that ORR should only be required to consent to modifications which are Quality Adjustments. Under Condition J2 above we propose amending J2.13 to reflect this. We think that ORR's ability to consent to part only of the modifications submitted under J2 could be set out in J2 itself.

### **ORR's emerging conclusion**

2.104 We propose deleting J10. We propose incorporating ORR's ability to modify cordon cap increases or decreases under J8 directly into J8 (see paragraphs 2.85 above) and we propose incorporating ORR's ability to agree part only of the modifications submitted to it under J2.13 directly into J2 (see paragraph 2.9(a) above).

2.105 **Consultees are invited to comment on the proposal to delete J10.**

### **Condition J11 (publication of documentation)**

2.106 Condition J11 sets out the circumstances in which Network Rail must publish notices received and issued under Part J. In our consultation document we asked for consultees' views on our proposal to produce template notices and to amend J11 to place an obligation on Network Rail to publish, review and keep the template notices up to date.

### **Consultees' views**

2.107 DBS, GBRf and Network Rail welcomed the development of template notices. DBS said that it would reduce the cases of invalid notices and that Network Rail should be obliged to review and keep them up to date. Freightliner, whilst accepting that there might be benefits, said that there would be an administrative burden attached to maintaining the templates and noted that other notices for Network Change were only loosely used by the parties. It was also concerned that template notices may not suit the different types of Part J applications.

## **ORR's response to consultees' views**

- 2.108 We consider that having template notices would be of benefit to the industry as they would go some way to preventing some disputes occurring. We consider that this benefit far outweighs any time which will have to be invested in reviewing and updating the notices.

## **ORR's emerging conclusion**

- 2.109 We have revised J11 (J10 in the revised draft), to place an obligation on Network Rail to publish, review and keep the template notices up to date. In addition, we have also given ORR a power to order Network Rail to comply with this obligation and where Network Rail does not so comply for ORR to seek an order from the High Court securing compliance. We consider that this is necessary as a previous review of Part J concluded that Network Rail should produce template notices and this has not occurred. A draft of the proposed new J10 is attached in **Annex B**.
- 2.110 When we issue our formal PfC in respect of the amendments to Part J, we intend publishing draft template notices in respect of each notice under Part J. We will be inviting any feedback from the industry on the drafts. The feedback and drafts will then be taken forward by Network Rail.

## **Condition J12 (reasonable on-going commercial need)**

- 2.111 Condition J12 provides for rules or criteria to be established for the interpretation of ROCN, which is used in several of the mechanisms in Part J. In the consultation document we sought consultees' views on their experiences of using ROCN and asked whether they agreed with our proposals to simplify the ROCN criteria.

## **Consultees' views**

- 2.112 Most **consultees' experiences** of using ROCN appeared to be unfavourable. Based on its considerable experience of using it, DBS said that whilst it had worked well for J7, which were simple and relatively easy to understand, it had worked less well for J4 and J5 (and by inference J6, 8 and 9). It felt that one of the problems experienced related to the four elements of ROCN that a FOC must demonstrate - three of which were forward looking and one of which was backward looking – and that if these were applied separately it could have

unintended perverse consequences and result in an incumbent FOC losing access rights it actually needed. In DBS's view all four elements needed to be considered together placing ROCN on a similar footing to the Part D Decision Criteria, thereby allowing Network Rail to make a balanced judgement and arrive at a fair decision. GBRf said that as currently drafted ROCN was "*open to some very liberal interpretations*" and it was too easy for an incumbent operator to frustrate and delay the process. Network Rail said that it did not enable the parties to clearly understand the criteria, leading to disputes.

- 2.113 Given the above it was not surprising that there was general support for **simplifying ROCN**. GBRf said that ROCN should be simplified but expanded (it did not specify how) without creating more uncertainty. TfL and Network Rail both agreed that ROCN would benefit from simplification. TfL said also that the onus should be on incumbent FOCs to provide robust evidence that they required the rights in question, but that ROCN should not apply to access rights that had been lost or to future contracts. High Speed 1 (HS1), which had incorporated the ROCN concept in its own Network Code, acknowledged that the ambiguous wording and lack of transparency could lead to disputes. It therefore welcomed ORR's proposal for providing a "*simple and transparent process with clear outputs, obligations and requirements*".
- 2.114 Consultees supported the **inclusion of ROCN within the Network Code**. DBS suggested that this would allow Part J Access Beneficiaries to propose changes to ROCN through the C5 change process. Freightliner was concerned that the issues set out in the consultation document only held good for full train loads for a single customer especially against the background of less than train load traffic, making it difficult to meet the basic principles set out in paragraph 1.105 of the consultation document. It nevertheless supported the application of the principles and incorporation of ROCN into the Network Code.
- 2.115 Consultees had divergent and strong views on our questions relating to **call-off contracts**. GBRf and Network Rail agreed with the two points we made in our consultation document, namely that services to fulfil a call-off contract should not operate under a firm right and holding a call-off contract was insufficient justification for ROCN. TfL said that for evergreen call-off contracts a FOC should seek a timetable variation when the traffic was ready to be hauled.

- 2.116 The Confederation of UK Coal Producers (CoalPro) said that if FOCs had to rely on capacity being available at short notice for coal haulage this might discriminate against coal flows and have wider implications for the ability of electricity generators to meet fluctuations in demand. CoalPro also noted that some source points have limited stocking capacity which may cause production to be suspended if coal cannot be moved. CoalPro were of the view that adopting the approach in the consultation document needed careful consideration and at the very least a robust, deliverable alternative must be put in place.
- 2.117 DBS said that whilst rights for a call-off contract should not typically be level 1, the concept of level 2 rights, and associated cordon caps, were developed specifically to address the competing issues of contractual certainty for FOCs and to prevent Network Rail overselling or tying up capacity that might not be used very frequently. If ROCN were amended in line with its proposal (see paragraph 2.112 above) to allow Network Rail to balance the four elements of the criteria, then this would allow the FOC to demonstrate that it still had a reasonable ongoing prospect of use.
- 2.118 Freightliner disagreed strongly, arguing that call-off contracts were essential to maintain the viability of many types of freight traffic. It considered that any such restriction would be against ORR's specific section 4 duty to enable operators to plan the future of the business with a reasonable degree of assurance<sup>14</sup>. To take such a step would, in Freightliner's view, preclude the existence of call-off contracts, and suggested that amending the use quota/period to 10 in 90 days would provide a fair test of usage. To help inform our conclusions Freightliner, at our request, provided an example of the difficulties our proposals would cause.
- 2.119 In relation ROCN and **cordon cap reduction**, DBS agreed that the criteria for cordon cap reductions could be simplified and incorporated within Part J, but preferably in one place in J12. Network Rail also supported the inclusion of these criteria in Part J but said they should be included in the relevant conditions (J6 and J8).

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<sup>14</sup> <http://www.rail-reg.gov.uk/server/show/nav.94>.

2.120 Freightliner raised an additional issue as to whether ROCN could also be determined for regularly empty or near empty passenger services which it considered could be regarded and treated similarly to empty freight trains. With capacity becoming increasingly scarce Freightliner felt that such trains should *“become the equal for attention in the fashion that Part J is used for freight services”*.

### **ORR’s response to consultees’ views**

2.121 After much consideration and as explained under our views and emerging conclusions in relation to J4, J6, J7 and J8 above, we do not consider that it is necessary to have a separate condition or criterion dealing with ROCN. As we have observed above under J4, we do not believe that the **J4 process** benefits from a ROCN defence. We believe that where there has been a Failure to Use then the rights should automatically be lost. Where a train slot has not been used by an operator for non-economic reasons beyond that train operator’s control we believe that there is already protection, by way of present J4.4. (J4.3 in the proposed revision), in that that period of non-use is disregarded for the purposes of determining whether there has been a Failure to Use in the first place. We are suggesting an amendment to J4.3 which would also require such non-use to be temporary in nature. This is because if the non-use is not temporary and there is no prospect of the use re-starting, we consider that the Failure to Use test should apply so that the rights are freed up for another purpose.

2.122 In relation to the present ROCN for **Cordon Cap reductions** we consider that the only thing that is essential to maintain is the formula. As explained above in paragraphs 2.53 and 2.83 we are proposing that the formula is stripped out of J12, and, with some amendments, incorporated in to the relevant places in J6 and J8.

2.123 In relation to **J7** we have considered whether, if we dismantle the ROCN criteria, the present ROCN test, or something similar, should be incorporated into J7. The present test is that the Train Operator or Freight Customer Access Option Holder:

“is required to convey traffic to fulfil a third party commitment which can not be satisfied, in whole or in part, without the use of each of the rights in question.”

- 2.124 We do not consider that this test is actually necessary in relation to J7, which can be triggered in two circumstances. The first is where a Train Operator replaces an incumbent in the provision of transport services to a third party customer. If this takes place then the purpose of J7 is to transfer the rights which are necessary for the operation of the transport services to the operator who will be undertaking the services. The rights should be marked in the rights table as being used for the specific transport services purpose<sup>15</sup>. We therefore have difficulty understanding why a use of those rights for another purpose should prevent them being transferred to provide the services for which they were granted in the first place.
- 2.125 The second way that J7 can be triggered is by a Freight Customer Access Option Holder who wants to gain the access rights from a train operator who is providing services on behalf of that Freight Customer Access Option Holder so that the latter can hold the access rights itself. Again, the incumbent's use of the access rights in these circumstances would be for the freight customer so it is difficult to see in what circumstances their use for another purpose should frustrate the transfer to the customer.
- 2.126 Our proposals mean that the issue of whether call-off contracts are sufficient justification for ROCN is academic. That is because, in relation to J4, whether the rights transfer or not would depend solely on whether a Failure to Use had been established. Therefore if rights are held in relation to call-off contracts and they are being used then they would not be at risk of transfer if the use quota/period are met.

### **ORR's emerging conclusion**

- 2.127 For the reasons given above, we are proposing both to remove J12 and to discontinue the separate document entitled "Criteria for Interpreting the Expression "Reasonable On-going Commercial Need".
- 2.128 **Do consultees agree the removal of J12? If not please say why.**

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<sup>15</sup> In the Rights Table, the first four columns are marked as being non-contractual. Column C is marked "Customer", and this is usually redacted from the versions that are put on the website. However, it should be populated in the copies we and Network Rail hold, so there should be no difficulty identifying the customer for whose traffic the rights were intended.

## **Condition J13 (dispute resolution) and Condition J14 (appeal procedure)**

- 2.129 Condition J13 sets out certain circumstances under Part J where, if the relevant parties have failed to reach agreement, they may refer their dispute for determination in accordance with the ADRR and, in the event that any of the parties is dissatisfied with the ADRR determination, they may appeal to ORR under Part M.
- 2.130 Condition J14 is wider than Condition J13 and gives any Access Party the right to refer “any matter concerning the operation of Part J” for determination in accordance with the ADRR and, in the event that any Access Party is dissatisfied with the decision reached under the ADRR, they may appeal to ORR under Part M.
- 2.131 In the consultation document we sought consultees’ views on our proposals:
- (a) that J13 and 14 should be amalgamated and simplified;
  - (b) for shortening the timescales of the ADA process: and
  - (c) for giving ORR express power within Part M to expedite its appeal procedure.

### **Consultees’ views**

- 2.132 Consultees agreed that J13 and J14 should be **amalgamated and simplified**. DBS drew attention to the confusing drafting of J13. Freightliner was concerned that giving third parties the ability to appeal may result in appeals by a party who is seeking to challenge the precedent being set by the decision. Network Rail said that there was a degree of overlap between the J13 and J14 which could lead to confusion, and proposed that the incumbent or third party should have the ability to make a referral.
- 2.133 In relation to **shortening timescales**, there was general support for resolving Part J disputes as quickly as possible. DBS supported our proposals, subject to the inclusion of appropriate safeguards to allow for extensions of deadlines if there was good reason. Freightliner was concerned that if the timescales were shortened they must not leave the process any less robust. GBRf said

that the current process was too long and needed to be made as quick and fair as possible.

2.134 Network Rail said that although the existing rules specified timescales, there was scope for the parties to adopt a quicker process should they feel it is necessary. The ADC said that the laid down timescales for ADAs does not satisfactorily serve the commercial dynamics of freight, and the ability of the Hearing Chair depended on the parties' "co-operation" which might be unreliable. The ADC was broadly supportive of ORR's proposals and also said that more time could be saved by dispensing with the requirement to enter into a procedure agreement and by removing the stage where the claimant and defendant respond to the other's claims as much of this information would have been included in the initial stages of the process.

2.135 In relation to the ability of ORR to **expedite its Part M appeal procedure**, there was again general agreement. Freightliner said that any hastening of the process should not be at the expense of robust decisions. However, both GBRf and Network Rail were concerned to ensure that ORR only expedited its procedure where it related to issues of industry importance, affected commercial considerations or was in the interests of justice. Network Rail suggested that it would be helpful if ORR issued guidance on the criteria that would apply. HS1 too was concerned that expedition could have an adverse effect on the ability of the parties to a dispute to make their case.

### **ORR's response to consultees' views**

2.136 Having considered J13 and J14 further, we consider that the conditions should be **amalgamated and simplified** and have produced drafting to this effect (now Condition J11 - see **Annex B**).

2.137 The draft condition gives a Part J Access Beneficiary who is a party to the dispute, or Network Rail, the right to refer a dispute arising under Part J for determination in accordance with the ADRR. The referral has to be made within 5 working days of receipt of the decision to which the objection is made and should be limited to those who are party to the dispute. The second part of the condition then gives a Part J Access Beneficiary who is a party to the dispute, or Network Rail a right of appeal to ORR against the ADA determination and this must be made within 5 working days of receipt of the ADA determination. The timeframe for such appeals at the moment is 10

working days. However, the timeframe for Part D appeals to ORR is within 5 Working days of receipt of the ADA determination and we think the Part J timeframe should be made consistent with this.

2.138 As to **shortening timescales** in the ADRR, at **Annex E** we are proposing amendments to Chapter G of the ADRR which ensure that in relation to disputes arising under Part J:

- (a) the timeframe for service of statements of case is 7 days; and
- (b) the Hearing date is to be set by the Hearing Chair as soon as practicable after he is appointed and should, unless there are exceptional circumstances, take place within 14 days of the statements of case being served.

2.139 These changes will reduce the present process by up to 5 weeks.

We propose that they only apply to disputes arising under Part J because the parties in a Part J dispute will already have developed their cases in producing the paperwork which has already passed between them in relation to the Part J process and therefore should require less time to prepare dispute paperwork.

2.140 We have also considered the ADC's point that the requirement for a Procedural Agreement in Part J disputes could be dispensed with as the dispute resolution procedure for Part J disputes is already established within the ADRR. We agree that this is the case and that the requirement to have a Procedural Agreement for Part J disputes appears to extend unnecessarily the length of the dispute resolution process<sup>16</sup>.

2.141 Finally, we think it would be beneficial to have an explicit power in Part M for **ORR to expedite its appeal process** either where the appellant or respondent has requested it, or where ORR thinks that it would be in the interests of justice to do so. We anticipate that such a power would be

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<sup>16</sup> It should be noted that the changes we are proposing to Chapter G of the ADRR (paragraph 2.138) are only in relation to Part J disputes. However, in relation to the changes we are proposing to Chapter B of the Rules, to remove the need for Procedural Agreements (paragraph 2.140), we are also proposing amendments in relation to disputes arising under Condition B2.4.4 of the Network Code, Timetabling Disputes and Part J disputes. This is because all these types of dispute already have determined dispute resolution routes and therefore do not need a Procedural Agreement.

exercised where there was an urgent need for ORR's decision, which would usually be in cases where the issue in dispute was preventing trains from running or concerned trains that were due to run before an appeal following the standard procedure would be determined. We do not propose putting explicit criteria in Part M setting out when such a power might be exercised and, instead, propose that we only exercise this power where we believe it would be "in the interests of justice" to do so.

2.142 In line with the general objective of reduced timeframes, we are proposing amendments to a number of the timescales in Part M as follows:

- (a) Slightly amended the requirements of an appeal (M2.1), so that an appeal must now to be served within 5 working days of the decision being challenged. This makes it consistent with Part D;
- (b) the period in which ORR has to determine whether to hear an appeal (M4.1) has been reduced from 15 to 10 working days; and
- (c) the period in which the Respondent has to serve notice (M5.1) has been reduced from 30 to 10 Working Days.

In addition, we have included an introductory overview to Part M and are proposing some other minor tidying-up amendments.

### **ORR's emerging conclusion**

2.143 We think that:

- (a) the present J13 and J14 should be deleted. We are proposing a new condition J11 setting out a new dispute resolution condition for Part J;
- (b) certain timescales in the ADRR process should be shortened and the requirement for a Procedural Agreement to be drawn up in Part J cases dispensed with. We think these changes will make the Part J process quicker and more effective. Our proposed amendments to the ADRR are attached at **Annex E**; and
- (c) Part M should have an explicit power for ORR to expedite its appeal process and some of the timescales should be shortened. This is reflected in the drafting at **Annex D**.

- 2.144 **Consultees are invited to comment on our proposals for amalgamating J13 and J14 and the proposed drafting changes which are at Annexes B, D and E.**

## **Other Proposed Changes to Part J**

### **Overview**

- 2.145 The present version of Part J has an Explanatory note at the beginning of it which sets out a summary of the various conditions. The Explanatory Note states that it does not form part of the Network Code. On occasion the status of the information contained in the Explanatory Note has caused dispute.
- 2.146 In the new Part D, which was implemented in October 2010, we moved away from having an Explanatory Note and instead put an overview of the Part at the beginning of it. The overview does form part of the Network Code which means it is clear that its content can be used to inform what is in the rest of the Part. We are therefore proposing that Part J also has an overview at the beginning of it instead of an Explanatory Note. We have proposed drafting for the Overview (see **Annex B**).

### **Appendices**

- 2.147 The current Part J has appendices to the Explanatory Note which set out flow diagrams for each of the processes in the Part. Before we spend time revising the flow-charts to reflect the changes that are being made to Part J, we would like feedback as to whether they are useful and should be kept. If we keep them, we propose that they should be moved to the back of Part J.

- 2.148 **Do consultees agree that we should retain the flow diagrams?**

### **Transitional drafting**

- 2.149 Any revisions to Part J will need to come into effect on a transitional basis because there could already be processes in progress that had been commenced under the present version of Part J. We are proposing that a transitional provision is inserted as a new J1.4. The draft provision provides that where, on the date of implementation of the revisions, any notice has already been served under the previous Part J, the previous Part J shall apply to that notice and to any consequential notice, decision or appeal flowing from it. The draft provision also goes on to state that it should be deleted from Part

J on the Principal Change Date 2012, which is far enough in the future to be sure that there won't be any live notices which were commenced under the previous version of Part J.

## ***Annex A: List of consultation respondents***

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<b>Organisation</b>	<b>Date received</b>
Transport Scotland	14 February 2011
Access Disputes Committee	14 March 2011
GB Railfreight Limited	16 March 2011
Network Rail	16 March 2011
Transport for London	16 March 2011
High Speed 1 Limited	16 March 2011
DB Schenker	17 March 2011
Freightliner Group Limited	22 March 2011
Coal Pro	14 March 2011
Passenger Focus	10 January 2011

## ***Annex B: Draft proposal for change to Part J of the Network Code***

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1.4	<a href="#">Transitional Provision</a>	11¶
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... [1]

## 1 Introduction

### 1.1 Overview

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

- (a) the Part J Access Beneficiary itself as set out in Condition J2;
- (b) Network Rail as set out in Condition J4; or
- (c) by a third party Part J Access Beneficiary who wishes to use the rights in question. Condition J5 sets out a process where a Part J Access Beneficiary can apply for rights held by another Part J Access Beneficiary where that Part J Access Beneficiary has not used them and the applicant has a commercial need for them. Condition J7 sets out a process whereby a freight operator can apply for rights held by another freight operator if it wins the existing freight traffic. In addition, Condition J7 provides that a Freight Customer Access Option Holder can apply for the rights held by a freight operator where it wants to hold the rights itself to draw down to a Train Operator of its choice.

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

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

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

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

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

## 1.2 Interpretation

1.2.1 In this Part J:

- (a) the singular shall include the plural and vice-versa; and
- (b) the headings are for convenience only and shall not affect the interpretation.

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

"ADRR Determination"	means a determination made <u>in</u> accordance with the ADRR following a reference made under Condition J11.1, where such determination has not been referred to the Office of Rail Regulation under either Condition J11.2 within the time limit for such referral;	Formatted: Left Deleted: 3 Deleted: or J14.1 Deleted: 3.3 of J14.2
"Access Proposal"	<u>has the meaning ascribed to it in Part D of this code;</u>	Formatted: Left
"Access Right"	means, in relation to an Access Agreement, permission to use track for the purpose of the operation of trains on that track by a beneficiary and rights ancillary thereto which are provided or charged for in the Access Agreement in question;	Formatted: Left
"Affected Person"	means, in relation to Qualifying Information, the person to whose affairs the information relates;	Formatted: Left
"Allocation Chair"	<u>has the</u> meaning ascribed to it in the ADRR;	Formatted: Left Deleted: H
"Ancillary Movements"	has the meaning ascribed to it in Part D <u>of this code;</u>	Formatted: Left
"Applicant"	has the meaning ascribed to it in:	Formatted: Left

	(a) Condition J5.1(a); or	
	(b) Condition J7.2, as applicable;	
"Appointed Operator"	means a Train Operator into whose Access Agreement a Freight Customer Access Option Holder has drawn down some or all of its Access Rights in accordance with that Freight Customer Access Option Holder's Access Agreement;	Formatted: Left
"beneficiary"	has the meaning ascribed to it in section 17(7) of the Act;	Formatted: Left
"Commencement Date"	means the date on which the relevant Quantum Access Right takes effect in accordance with the Part J Access Beneficiary's Access Agreement;	Deleted: "Bid" ... [2] Formatted: Left Formatted: Left Formatted: Left
"Confidentiality Direction"	has the meaning ascribed to it in Condition J3.8.1;	Formatted: Left
"Confidentiality Undertaking"	has the meaning ascribed to it in Condition J3.15.1;	Formatted: Left Deleted: 6
"Contingent Right"	has the meaning ascribed to it, if any, in the relevant Access Agreement;	Formatted: Left
"Cordon Cap Increase"	has the meaning ascribed to it in Condition J8.3.1;	Formatted: Left
"Cordon Cap Reduction"	has the meaning ascribed to it in: (a) Condition J6.2.2; or (b) Condition J8.2.2, as applicable;	Formatted: Left
"Counter Notice"	means a notice given by the Part J Access Beneficiary to Network Rail under Condition J4.8, J5.4(b), J6.2.5 or J8.3.2;	Formatted: Left Deleted: 9
"Determination"	means an ADRR Determination or an Office of Rail Regulation Determination, as the case may be and "Determined" (and cognate expressions) shall be construed accordingly;	Formatted: Left
"Disputes Chairman"	has the meaning ascribed to it in the Access Dispute Resolution Rules;	Formatted: Left
"Existing Cordon Cap"	means, in relation to an Access Agreement, a	Formatted: Left

	cordon cap specified in that Access Agreement concerning a location to which any Rights Subject to Surrender which are Level Two Rights under that Access Agreement relate;	
"Failure to Use"	has the meaning ascribed to it in Condition J4.1.1;	Formatted: Left Deleted: 2
"Failure to Use Notice"	means a notice given by Network Rail to a Part J Access Beneficiary under Condition J4.4;	Formatted: Left
"Firm Right"	has the meaning ascribed to it in the relevant Access Agreement, and any reference in an Access Agreement to "Firm Contractual Right" shall be deemed to be a reference to a "Firm Right";	Formatted: Left
"Funder"	means the appropriate franchising authority, each Passenger Transport Executive and any local, national or supra-national authority or agency (whether of the United Kingdom or the European Union) or other person which provides money by way of grant or loan with the primary purpose of securing the provision of services relating to railways;	Formatted: Left
"Grounds for Objection"	means the grounds set out in Condition J4.9 or Condition J7.6.1, as applicable;	Formatted: Left Deleted: 10
"Incumbent"	has the meaning ascribed to it in: (a) Condition J5.1(b)(ii); or (b) Condition J7.2, as applicable;	Formatted: Left
<u>"J9 Direction"</u>	<u>has the meaning ascribed to it in Condition J9.2.1;</u>	Formatted: Left
<u>"J10 Direction"</u>	<u>has the meaning ascribed to it in Condition J10.3.1;</u>	Formatted: Left
"Level Three Right"	has the meaning ascribed to it, if any, in the relevant Access Agreement;	Formatted: Left
"Level Two Right"	has the meaning ascribed to it, if any, in the relevant Access Agreement;	Formatted: Left
"network statement"	has the meaning ascribed to it in regulation 11 of the Railways Infrastructure (Access and	Formatted: Left

	Management) Regulations 2005;	
<u>"New Working Timetable"</u>	<u>has the meaning ascribed to it in Part D of this code;</u>	Formatted: Left
"Notice of Objection"	means a notice given by an Affected Person to Network Rail of the kind referred to in Condition J3.5.1(b);	Formatted: Left
"Office of Rail Regulation Determination"	means a determination made by the Office of Rail Regulation following a reference made under either Condition J11.2;	Formatted: Left Deleted: 3.3 or J14
"Office of Rail Regulation's Model Passenger Track Access Contract"	means the model passenger track access contract published by the Office of Rail Regulation under section 21 of the Act, as amended from time to time;	Formatted: Left
"Office of Rail Regulation's Model Freight Track Access Contract"	means the model freight track access contract published by the Office of Rail Regulation under section 21 of the Act, as amended from time to time;	Formatted: Left
"Office of Rail Regulation's Model Track Access Contract (Freight Customer Access)"	means the model track access contract for freight customer access published by the Office of Rail Regulation under section 21 of the Act, as amended from time to time;	Formatted: Left
"Part J Access Beneficiary"	means a Train Operator or a Freight Customer Access Option Holder;	Formatted: Left
"Period for Objections"	means the period specified in Condition J3.5.1(b);	Formatted: Left
"protected right"	has the meaning ascribed to it in Condition C8.3.3;	Formatted: Left
"Qualifying Information"	means information which Network Rail has acquired in relation to the affairs of any Affected Person under an Access Agreement between Network Rail and that person;	Formatted: Left
"Quality Adjustment"	means the alteration of any aspect of the Access Rights of the Part J Access Beneficiary (whether in relation to performance, the quality or condition of the Network, the liability of any person to any other person, or in any other respect) other than a Quantum Adjustment in a manner which is not inconsistent with this code;	Formatted: Left

"Quantum Access Right"	means <u>any right</u> under an Access Agreement in respect of a number (or quantum) of Train Slots in any specified period (including rights to Train Slots in respect of additional trains or relief services), and includes part of such a <u>right</u> ;	Formatted: Left Deleted: Firm Right, any Contingent Right or any Level Three Right as such Deleted: Firm Right, Contingent Right or Level Three Right
"Quantum Adjustment"	means the surrender of any Access Right of the Part J Access Beneficiary in question;	Formatted: Left Deleted: and the grant to it of any other Access Right
"relate" and "in respect of"	in relation to a Train Slot and a Quantum Access Right where these terms are used together, means that the Train Slot in question has been secured by the Part J Access Beneficiary in accordance with Part D in the exercise of that Quantum Access Right;	Deleted: "reasonable ongoing commercial need" ... [3] Formatted: Left Formatted: Left Formatted: Left
"Released Capacity"	means track capacity made available to Network Rail as a consequence of the making of a Specified Relevant Surrender or a Specified Relevant Adjustment, and "release of capacity" shall be construed accordingly;	Formatted: Left
"Relevant Adjustment"	means a Quality Adjustment or a Quantum Adjustment, and "adjust" shall be construed accordingly;	Formatted: Left
"Relevant Enquiry"	means an enquiry made of Network Rail by the Part J Access Beneficiary under Condition J2;	Formatted: Left
"Relevant Financial Consequences"	means the cost savings or costs incurred referred to in Condition J2.4.1(a);	Formatted: Left
"Relevant Information"	means information which complies with the provisions of Condition J2.4;	Formatted: Left
"Relevant Response"	means Network Rail's answer to a Relevant Enquiry under Condition J2;	Formatted: Left
"Relevant Surrender"	means the surrender to Network Rail of Access Rights possessed by the Part J Access Beneficiary;	Formatted: Left
"Restrictive Provisions"	means any provisions in the Incumbent's Access Agreement that restrict the operation of the transferring <u>Access Right</u> , and specific timings relating to the transferring <u>Access</u>	Formatted: Left Deleted: a Deleted: r Deleted: a

	<u>Right;</u>	Deleted: r
		Deleted: "Review Propo ... [4]
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"Rights Review Meeting"	means a meeting held between <u>Network Rail and a Part J Access Beneficiary for the purpose of reviewing the Quantum Access Rights held by that Part J Access Beneficiary and its use of them;</u>	Deleted: the Part J Access Beneficiary and Network Rail pursuant to Condition J9
		Formatted: Left
"Rights Review Notice"	<u>has the meaning ascribed to it in Condition J9.1.2;</u>	
"Rights Subject to Surrender"	means, in relation to: (a) a Failure to Use Notice; (b) a Third Party Failure to Use Notice; or (c) a Third Party Notice, as applicable, the Quantum Access Right to which such notice refers and: (i) any Train Slot or part of it in the Working Timetable which relates to that Quantum Access Right; (ii) any Ancillary Movements, <u>Stabling or Y-Path</u> that Network Rail <u>(or the Applicant in relation to Condition J7.4) considers;</u> (A) are directly associated with the relevant Quantum Access Right; and (B) will no longer be required by the relevant Part J Access Beneficiary following the surrender or reduction of the Quantum Access Right, as applicable; and (iii) any <u>Access Proposal</u> relating to any such Quantum Access Right;	Formatted: Left
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"Rights under Review"	<u>shall have the meaning shown in Condition J9.1.2;</u>	Formatted: Left
"Service Characteristics"	for the purposes of a right surrendered under Condition J7.8, has the meaning ascribed to it in the Incumbent's Access Agreement;	Formatted: Left
"Specified Relevant Adjustment"	means a Relevant Adjustment specified in <del>a</del> Relevant Enquiry;	Formatted: Left
"Specified Relevant Surrender"	means a Relevant Surrender specified in <del>a</del> Relevant Enquiry;	Formatted: Left
"Stabling"	has the meaning ascribed to it in the relevant	Formatted: Left

	Access Agreement;	
"Third Party Counter Notice"	means a notice given by the Incumbent to Network Rail under Condition J7.6.1 or Condition J8.2.5;	Formatted: Left
"Third Party Failure to Use Notice"	means a notice given by Network Rail to a Part J Access Beneficiary under Condition J5.1;	Formatted: Left
"Third Party Notice "	means a notice given under Condition J7.2;	Deleted: by Network Rail to the Incumbent
"Train Slot"	has the meaning ascribed to it in Part D of <u>this code</u> ;	Formatted: Left Formatted: Left
"Use Period"	<u>has the meaning ascribed to it in Condition J4.2.3;</u>	Formatted: Left Deleted: means, in relation to any Use Quota, the period of
"Use Quota"	<u>has the meaning ascribed to it in Condition J4.2.2; and</u>	Deleted: time during which the Use Quota is to be satisfied, as published by Network Rail in accordance with Condition J4.3; and
<u>"Y-Path"</u>	<u>means where two or more Train Slots incorporated in the New Working Timetable share a common portion of route and timings but serve different origins and/or destinations.</u>	Formatted: Left Deleted: means the minimum expected quota for use of a Train Slot, as published by Network Rail in accordance with Condition J4.3.
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### 1.3 Freight Customer Access Option Holders

#### 1.3.1 Where there is any reference in this Part J:

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

required to serve any notice or other document on any other party, and the notice or other document in question relates to, or otherwise affects, any Access Right of a Freight Customer Access Option Holder that has been drawn down into an Access Agreement of an Appointed Operator, then (save in respect of Condition J3):

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

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

#### 1.4 **Transitional Provision**

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

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

## **2 Adjustment of Access Rights**

### **2.1 Obligation of Part J Access Beneficiaries to surrender Access Rights**

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

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

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

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

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

### **2.3 Contents of Relevant Enquiries**

2.3.1 Each Relevant Enquiry shall contain:

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

- (c) a request that Network Rail provides the Part J Access Beneficiary with Relevant Information in relation to:
  - (i) any Specified Relevant Surrender; and
  - (ii) any Specified Relevant Adjustment;
- (d) a specification of the dates with effect from which the Specified Relevant Surrender or Specified Relevant Adjustment may be expected to take place;
- (e) a statement whether or not any Specified Relevant Surrender or Specified Relevant Adjustment is to be temporary; and
- (f) in the case of a temporary Specified Relevant Surrender or Specified Relevant Adjustment, a specification of the date on which the temporary Specified Relevant Surrender or Specified Relevant Adjustment shall cease to have effect, being no later than the second anniversary of the date when it is to take effect.

## 2.4 Information to be provided by Network Rail

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

- (a) the costs which Network Rail may reasonably expect to save or incur if any Specified Relevant Surrender or Specified Relevant Adjustment is made;
- (b) the times at which and the periods over which the Relevant Financial Consequences will have effect;
- (c) the steps which Network Rail would expect to take to achieve the Relevant Financial Consequences within the times referred to in Condition J2.4.1(b) and the opportunities which Network Rail has to accelerate or postpone the effect of the Relevant Financial Consequences;
- (d) the extent to which any Released Capacity may reasonably be expected to be used:
  - (i) by any other operator of trains or Freight Customer Access Option Holder; and
  - (ii) in relation to the maintenance, re-alignment, re-configuration, repair or renewal of any part

of the Network;

- (e) the reasonably foreseeable financial effects on Network Rail of the release of capacity;
- (f) Network Rail's proposals as to the amounts (if any) which should be payable by or to the Part J Access Beneficiary under the Access Agreement as a consequence of the making of any Specified Relevant Surrender or Specified Relevant Adjustment and its reasons for them, including in relation to the sharing between Network Rail and the Part J Access Beneficiary of the Relevant Financial Consequences; and
- (g) whether any other person has made an enquiry of Network Rail pursuant to an agreement between that person and Network Rail in relation to the surrender or adjustment of Access Rights under that agreement which, if made, might reasonably be expected to affect the interests of the Part J Access Beneficiary in relation to the Specified Relevant Surrender or Specified Relevant Adjustment in question,

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

## **2.5 Pre-existing obligations of confidence**

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

## **2.6 Consultation by Network Rail**

2.6.1 In preparing each Relevant Response, Network Rail shall:

- (a) except to the extent otherwise requested by the Part J Access Beneficiary and in accordance with such (if any) conditions as the Part J Access Beneficiary shall specify; and
- (b) subject to Condition J3,

carry out such consultation of:

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

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

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

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

## **2.7 Obligation to co-operate**

### **2.7.1 If:**

- (a) Network Rail has made any enquiry of a Part J Access Beneficiary in relation to a Relevant Enquiry made by that Part J Access Beneficiary or any other Part J Access Beneficiary under this Condition J2; and
- (b) the enquiry is one which the Part J Access Beneficiary may reasonably be expected to answer,

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

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

## **2.8 Estimated costs of providing Relevant Response**

### **2.8.1 Network Rail:**

- (a) shall provide the Part J Access Beneficiary, if so requested by it and as soon as reasonably practicable after the request, with:
  - (i) its best estimate of its costs of providing a Relevant Response; and
  - (ii) having provided such an estimate, its best estimate of the costs which it has incurred in preparing the Relevant Response in question up to the date of the request or any other date specified in the request; and

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

## **2.9 Payments of costs of Relevant Responses**

2.9.1 The Part J Access Beneficiary shall:

- (a) be entitled to make any request of the kind referred to in Condition J2.8 at the time of making the Relevant Enquiry in question and at any time and from time to time thereafter, and the failure of the Part J Access Beneficiary to make any such request on any occasion shall not prejudice its right to make such a request on a later occasion;
- (b) pay to Network Rail an amount calculated pursuant to Condition J2.10; and
- (c) be entitled to receive from Network Rail, on request, a certificate from its auditors verifying that the costs referred to in Condition J2.10 have been incurred in providing the Relevant Response.

## **2.10 Division and payments of costs**

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

- (a) the date upon which the Relevant Response shall be provided; and
- (b) the date upon which Network Rail requests payment of the amount in question in an invoice which is sufficient for the purposes of Value Added Tax.

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

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

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

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

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

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

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

- (a) wishes to make a Specified Relevant Surrender; and
- (b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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### **3 Confidentiality**

#### **3.1 Affected Persons and their interests**

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

- (a) it is necessary for it to disclose to the Part J Access Beneficiary any Qualifying Information; and
- (b) such disclosure would or might, in Network Rail's reasonable opinion, seriously and prejudicially affect the interests of the Affected Person,

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

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

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

- (a) that the Relevant Response be provided to it without the Qualifying Information; or
- (b) that Network Rail should give notice to the Affected Person in question pursuant to Condition J3.4 and thereafter comply with the procedures established in this Condition J3.

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

#### **3.3 Relevant Response without Qualifying Information**

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

- (a) Network Rail shall proceed to prepare and provide the Relevant Response so as to omit the Qualifying Information; and
- (b) if, having received a Relevant Response of the kind referred to in Condition J3.3.1(a), the Part J Access Beneficiary wishes Network Rail to revise it so as to

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

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

**3.4 Relevant Response with Qualifying Information**

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

**3.5 Contents of notice to Affected Person**

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

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

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

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

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

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

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

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

- (a) a copy of the Notice of Objection;
- (b) an explanation by Network Rail as to its reasons for the belief referred to in Condition J3.1; and
- (c) a request for directions of the kind referred to in Condition J3.7.4.

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

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

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

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

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

3.9.1 A Confidentiality Direction shall only have effect if:

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

- (i) the disclosure to the Part J Access Beneficiary of the Qualifying Information in question would or might seriously and prejudicially affect the interests of the Affected Person; and
  - (ii) such prejudice outweighs or is likely to outweigh the interests of Freight Customer Access Option Holders, potential Freight Customer Access Option Holders, operators and potential operators of railway assets, in each case on the part of the Network in question in its disclosure to the Part J Access Beneficiary, having due regard to the matters about which duties are imposed on the Office of Rail Regulation by section 4 of the Act; and
- (b) the Allocation Chair has complied with the requirements specified in Conditions J3.11 and J3.12.

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

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

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

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

### 3.11 Hearing on confidentiality representations

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

3.12 Written reasons for decision

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

3.13 Immunities of the Allocation Chair

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

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

- (a) indemnify and hold harmless the Allocation Chair, against every claim which may be made against any of them in relation to any of the matters referred to in Condition J3.13.1; and
- (b) to the extent that it is the creditor in the indemnity in Condition J3.13.2(a), hold the benefit of that indemnity upon trust as bare trustee for the benefit of the Allocation Chair.

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

3.14 Preservation of confidentiality of Qualifying Information pending determination

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

- (a) any hearing of the kind contemplated by Condition J3.11 shall be conducted in such a way as not to disclose any part of the Qualifying Information; and
- (b) the reasons for the Allocation Chair's determination shall, if given to the parties, not disclose to the Part J Access Beneficiary any part of the Qualifying Information.

3.15 Obligation to provide Confidentiality Undertaking

3.15.1 If:

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

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

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

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

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

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3.15.2 A Confidentiality Undertaking shall:

- (a) contain an undertaking that the person giving it will hold the Qualifying Information disclosed to it strictly confidential and will not, without the consent of the Affected Person, disclose it to any person except in any of the circumstances referred to in Clause 14.2(a)-(k) (entitlement to divulge) of the Office of Rail Regulation's Model Passenger and Model Freight Track Access Contracts and clause 14.2(a)-(l) of the Office of Rail Regulation's Model Track Access Contract (Freight Customer Access)), in each case subject to the conditions which apply to such disclosures under that Clause;
- (b) contain no limitations on the liability of the person who gives it in the case of its breach; and
- (c) in every other respect, be unqualified.

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3.15.3 A Confidentiality Undertaking shall be:

- (a) given to Network Rail by the Part J Access Beneficiary as soon as reasonably practicable after Network Rail has requested the Part J Access Beneficiary to provide it; and
- (b) held by Network Rail upon trust for the Affected Person.

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

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## 4 Failure to Use

### 4.1 Failure to Use

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

- (a) in any New Working Timetable established by Network Rail after the Commencement Date, the Part J Access Beneficiary fails to secure the quantum of Train Slots which the Quantum Access Right permits; or
- (b) the Part J Access Beneficiary fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right.

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<#>Conditions J4 and J5 shall apply to a Failure to Use where the condition in Condition J4.2.1 is satisfied in whole or in part before the date on which these Conditions take effect.¶

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

4.1.3 For the purposes of Condition J4.1.1(b) and J4.1.2, a Freight Customer Access Option Holder fails to make use of a Train Slot if either:

- (a) it fails to draw down the Access Rights to use such Train Slot into the Access Agreement of an Appointed Operator resulting in such Train Slot not being used by an Appointed Operator; or
- (b) it draws down the Access Rights to use such Train Slot into the Access Agreement of an Appointed Operator and that Appointed Operator fails to make use of that Train Slot within the meaning of condition J4.1.2.

### 4.2 Use Quota and Use Period

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

4.2.2 The Use Quota shall be one.

4.2.3 The Use Period shall be thirteen consecutive weeks for which a Train Slot is included in the Working Timetable. Where a Train

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Slot is derived from a Quantum Access Right which permits a Train Slot to be obtained on more than one day of the week, the use of the Train Slot on each relevant day of the week shall be assessed separately.

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

#### 4.3 Certain periods to be disregarded

4.3.1 Any period of non-use shall be disregarded for the purpose of determining whether a Failure to Use has occurred under Condition J4.1, 1(a) or (b) if, and to the extent that, such non-use is:

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

(b) is temporary in nature.

#### 4.4 Service of Failure to Use Notice

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

#### 4.5 Cessation of Failure to Use

4.5.1 Before a Failure to Use Notice has been served in accordance with Condition J4.4, there will be a cessation of a Failure to Use if, in relation to a Failure to Use under Condition J4.1, 1(b), the Part J Access Beneficiary makes use of a relevant Train Slot such that the Use Quota is met.

#### 4.6 Contents of a Failure to Use Notice

4.6.1 A Failure to Use Notice shall specify:

- (a) the Failure to Use which Network Rail considers has occurred; and
- (b) the Rights Subject to Surrender which Network Rail requires the Part J Access Beneficiary to surrender.

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

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## 4.7 Acceptance of surrender

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

- (a) it shall, within 10 Working Days, give notice to that effect to Network Rail and the Office of Rail Regulation;
- (b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J4.7.1(c); and
- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary agrees to the surrender pursuant to Condition J4.7.1(a).

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## 4.8 Counter Notice

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

- (a) it considers the Failure to Use Notice to be invalid;
- (b) there has been no Failure to Use or there has been a cessation of a Failure to Use in accordance with Condition J4.5; and/or
- (c) any Ancillary Movements, Stabling and/or Y-Path specified in the Failure to Use Notice as being Rights Subject to Surrender:
  - (i) are not directly associated with the relevant Quantum Access Right; and/or
  - (ii) would still be required by the Part J Access Beneficiary following the surrender of the relevant Quantum Access Right; and/or
- (d) there are Grounds for Objection to the proposed surrender within Condition J4.9, detailing the Grounds for Objection on which it relies,

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

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

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- (a) the Part J Access Beneficiary will be deemed to have agreed to the surrender specified in the Failure to Use Notice;
- (b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J4.8.2(c); and
- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary is deemed to have agreed to the surrender pursuant to Condition J4.8.2(a).

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#### 4.9 Grounds for Objection

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

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- (a) the Rights Subject to Surrender are essential for the fulfilment of the Train Operator's Franchised Services; or
- (b) the Rights Subject to Surrender relate to an enhancement of the Network for which the Train Operator is contracted to pay through access charges.

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

4.10.1 If Network Rail agrees:

- (a) that the matters set out in Condition J4.8.1(a), (b) or (c) have been substantiated; or
- (b) that the Part J Access Beneficiary's Grounds for Objection have been substantiated in respect of any or all of the Rights Subject to Surrender,

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<#>set out in Condition J4.10.1(b), in the case of Train Operators only; or¶¶  
<#>that it has a reasonable on-going commercial need in respect of any or all of the Rights Subject to Surrender.¶¶  
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the Failure to Use Notice shall have failed and Network Rail shall notify the Part J Access Beneficiary in writing that this is the case within 5 Working Days of receipt of the Counter Notice.

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

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##### 4.11.1 If Network Rail considers that:

- (a) the matters set out in Condition J4.8.1(a), (b) or (c) have not been substantiated; and
- (b) the Part J Access Beneficiary's Grounds for Objection have not been substantiated in respect of any or all of the Rights Subject to Surrender,

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

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#### 4.12 Surrender of Access Rights

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

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

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

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#### 4.13 Access Proposals

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

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### 5 **Failure to Use: third party application**

#### 5.1 **Third Party Failure to Use Notices**

5.1.1 If:

- (a) Network Rail receives an application from a Part J Access Beneficiary (the "Applicant") for a Quantum Access Right to a Train Slot; and
- (b) the Train Slot:
  - (i) is one in respect of which the Applicant can demonstrate a reasonable commercial need; and
  - (ii) was secured in exercise of a Quantum Access Right of another Part J Access Beneficiary (the "Incumbent"); and
  - (iii) is one in respect of which there is a Failure to Use by the Incumbent,

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then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a Third Party Failure to Use Notice on the Incumbent and send a copy of the notice to the Office of Rail Regulation. If the Applicant's application does not comply with this Condition J5.1, then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a notice on the Applicant rejecting its application and setting out its reasons for rejecting the application.

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## 5.2 Cessation of Failure to Use

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

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## 5.3 Contents of a Third Party Failure to Use Notice

5.3.1 A Third Party Failure to Use Notice shall specify:

- (a) the Failure to Use which Network Rail considers has occurred;
- (b) the Rights Subject to Surrender, which Network Rail requires the Incumbent to surrender; and
- (c) the date on which the surrender is intended to take effect.

## 5.4 Application of Conditions

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

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

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(b) J4.8 (Counter Notice);

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(c) J4.9 (Grounds for Objection)

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

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

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

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

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5.5 Counter Notice

5.5.1 Subject to the redaction of any commercially sensitive information, the Incumbent shall send a copy of any Counter Notice issued under Condition J5.4.1(b) to the Applicant.

6 Cordon Cap Reduction (Failure to Use)

6.1 Application of this Condition J6

6.1.1 This Condition J6 shall not apply if, in accordance with Conditions J4 or J5, the Part J Access Beneficiary and Network Rail agree or it is Determined that in relation to the relevant Failure to Use there are no Rights Subject to Surrender.

6.2 Cordon Cap Reduction procedure

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

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

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

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Cordon Cap Reduction = (Rr/R) x C

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

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

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

- (a) it shall give notice to that effect to Network Rail, served in accordance with Condition J4.7.1(a) or J5.4.1(a), as applicable;
- (b) Network Rail shall give notice to the Office of Rail Regulation, served in accordance with Condition J4.7.1(c) or J5.4.1(a), as applicable; and
- (c) the Cordon Cap Reduction shall have effect from the date on which notice is given to the Office of Rail Regulation by Network Rail pursuant to Condition J6.2.4(b).

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6.2.5 If the Part J Access Beneficiary does not agree to the Cordon Cap Reduction, it shall serve a Counter Notice, in accordance with Condition J4.8 or J5.4.1(b), as applicable:

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- (a) specifying that it objects to the Cordon Cap Reduction and setting out its reasons why; and
- (b) providing evidence in support of its objection.

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

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

### 6.3 Effective Date of Cordon Cap Reduction

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

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

6.3.2 In the event of an ADRR Determination in accordance with Condition J6.3.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access

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

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

## 7 Freight transfer mechanism

### 7.1 Application of this Condition J7

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

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

- (a) a Train Operator, who is replacing the Incumbent in the provision of transport services to a third party, where the Quantum Access Right relates to the provision of those transport services (subject, where applicable, to any competitive tendering process amongst other parties); or
- (b) a Freight Customer Access Option Holder, where the Quantum Access Right sought is:
  - (i) currently held by an Incumbent which is a Train Operator for the provision of transport services to or on behalf of that Freight Customer Access Option Holder; and
  - (ii) one which that Freight Customer Access Option Holder intends (subject, where applicable, to any competitive tendering process amongst other parties, including, if applicable, the Incumbent) to draw down into the Access Agreement of a Train Operator (whether or not the Incumbent) so that such Train Operator can become an Appointed Operator to provide those transport services to or on behalf of the Freight Customer Access Option Holder.

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## 7.2 Third Party Notice

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

## 7.3 Applicant's responsibilities

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

- (a) the date on which the Applicant requests that the Quantum Access Right takes effect in its Access Agreement; and
- (b) that the Quantum Access Right sought has the characteristics described in either Condition J7.1.2(a) or Condition J7.1.2(b) (as the case may be). Where Condition J7.1.2(a) is being relied on, the Applicant must attach a letter from the relevant freight customer confirming:
  - (i) the circumstances which mean Condition J7.1.2(a) applies ; and
  - (ii) that the Part J Access Beneficiary has suitable access to and from the relevant facility including, where necessary, the associated infrastructure.

## 7.4 Contents of Third Party Notice

- 7.4.1 A Third Party Notice shall specify:

- (a) the Quantum Access Right sought by the Applicant; and
- (b) the Rights Subject to Surrender, which the Applicant requires the Incumbent to surrender in order to accommodate the Applicant's request.

## 7.5 Acceptance of surrender

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

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

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- (b) the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's (and, if applicable, Appointed Operator's) Access Agreement on the date on which notice is given to the Office of Rail Regulation pursuant to Condition J7.5.1(c); and
- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Beneficiary agrees to the surrender pursuant to Condition J7.5.1(a).

## 7.6 Third Party Counter Notice

7.6.1 The Incumbent may, within 10 Working Days of receipt of a Third Party Notice, serve a Third Party Counter Notice on Network Rail specifying that it considers the Third Party Notice to be invalid ("Grounds for Objection"). The Incumbent shall send a copy of any Counter Notice, subject to the redaction of any commercially sensitive information, to the Applicant.

7.6.2 If the Incumbent disagrees with:

- (a) any Train Slots shown in the Third Party Notice as relating to the Quantum Access Right; or
  - (b) any Ancillary Movements, Stabling or Y-Path the Applicant included in the Third Party Notice as being directly related to the Quantum Access Right and no longer required by the Incumbent following the surrender of the Quantum Access Right; or
  - (c) any Access Proposal shown in the Third Party Notice as relating to the Quantum Access Right,
- it shall include in the Third Party Counter Notice details of why it disagrees with the Applicant.

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

- (a) may notify Network Rail of this process; and
- (b) if it has done so, the period of 10 Working Days referred to in this Condition J7.6.4, shall be deemed to commence on the date that the third party or Freight Customer Access Option Holder

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<#>specifying that it considers the Third Party Notice to be invalid; or¶  
<#>specifying that it objects to the surrender of the Rights Subject to Surrender because it has a reasonable on-going commercial need for all or any of the Rights Subject to Surrender; and¶  
<#>providing evidence in support of its opinion or objection as appropriate. ¶  
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(as the case may be) indicates, at the end of the relevant tendering process, its intention to contract.

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

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- (a) the Incumbent will be deemed to have agreed to the surrender of the Rights Subject to Surrender specified in the Third Party Notice and the Applicant will notify Network Rail, copied to the Incumbent, that this is the case;
- (b) the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's (and, if applicable, Appointed Operator's) Access Agreement with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J7.6.4(c); and
- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Incumbent's, Applicant's and, if applicable, Appointed Operator's Access Agreements no more than 10 Working Days after the date on which the Part J Access Beneficiary is deemed to have agreed the surrender pursuant to Condition J7.6.4(a).

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7.7 Network Rail agrees with Incumbent

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

7.8 Network Rail agrees with Applicant

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

7.8.2 Where the Incumbent has disagreed with the Applicant in accordance with Condition J7.6.2, then Network Rail shall, in the notification referred to in Condition J7.8.1, set out what it determines the Rights Subject to Surrender to be.

7.9 Surrender of Access Rights

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

- (a) where either the Part J Access Beneficiary accepts Network Rail's decision made pursuant to Condition J7.8 or there is an ADRR Determination, on the date on which such notice is given to the Office of Rail Regulation pursuant to Condition J7.9.2; or
- (b) on the date specified in the Office of Rail Regulation Determination, if applicable.

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

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<#>on which notice is given to the Office of Rail Regulation pursuant to Condition J7.8.2, in the event of an ADRR Determination; or¶  
specified in the Office of ... [7]

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7.9.2 In the event of the Part J Access Beneficiary accepting Network Rail's decision or there is an ADRR Determination in accordance with Condition J7.9.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of the acceptance or of the relevant ADRR Determination, as applicable and shall include a copy of the relevant ADRR Determination, if applicable, with such notice.

### 7.9.3

## 7.10 Grant to Applicant

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

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

(i) notice is given to the Office of Rail Regulation pursuant to Condition J7.5(c), J7.6.4(c) or J7.9.2 or the date specified in the Office of Rail Regulation Determination (as applicable);

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

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

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

(c) for a period of time:

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

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

whichever is the shorter.

## 7.11 Access Proposals

7.11.1 Where any Rights Subject to Surrender surrendered under this Condition J7 include the surrender of an Access Proposal,

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Network Rail's obligations under Condition D2.4, shall, in respect of that Access Proposal;

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- (a) cease to have effect in relation to the Incumbent as from the date the surrender takes effect in accordance with this Condition J7; and
- (b) be deemed to have effect in relation to the Applicant as from the date the Access Proposal is granted to the Applicant in accordance with Condition J7.10.

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## 8 Cordon Cap Reduction (transfer)

### 8.1 Application of this Condition J8

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

### 8.2 Existing Cordon Cap adjustments procedure

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

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

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

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

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

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

8.2.4 If the Incumbent agrees to the Cordon Cap Reduction it shall give notice to that effect to Network Rail, as part of its notice served in accordance with Condition J7.5.

8.2.5 If the Incumbent does not agree to the Cordon Cap Reduction, it shall serve a Third Party Counter Notice, as part of its notice served in accordance with Condition J7.6:

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

(b) providing evidence in support of its objection.

8.2.6 Condition J7.6.3 shall apply as if that Condition referred to a Cordon Cap Reduction rather than a surrender.

8.2.7 Condition J7.6.4 shall apply.

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

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

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### 8.3 Cordon Cap Increase

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

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

- (a) specifying that it objects to the Cordon Cap Increase; and
- (b) providing reasons for its objection.

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

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

- (a) as from the date of the corresponding Relevant Surrender; and
- (b) for a period of time:
  - (i) equal to that which the Incumbent would have enjoyed had its Existing Cordon Cap remained unchanged; or
  - (ii) until the expiry of the Applicant's Access Agreement,

whichever is the shorter.

8.4

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

8.4.1 Subject to Condition J8.4.2, any Cordon Cap Reduction or Cordon Cap Increase shall have effect only with the Office of Rail Regulation's consent in accordance with Condition J10. Such consent shall be sought by Network Rail submitting the relevant modifications to the Incumbent's, Applicant's and, if applicable, Appointed Operator's Access Agreements to the Office of Rail Regulation for consent within 10 Working Days after the later of:

- (a) the Incumbent's acceptance of the Cordon Cap Reduction under Condition J8.2.4;
- (b) the Incumbent's deemed acceptance of the Cordon Cap Reduction under Condition J8.2.7; or
- (c) the relevant ADRR Determination.

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

- (a) whether or not to give its consent to the modifications in question; and
- (b) the date from which those modifications shall have effect.

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

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

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

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

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

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

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## **9 Rights Review Meetings**

### **9.1 The Rights Review Meeting**

- 9.1.1 Network Rail shall hold Rights Review Meetings as frequently as necessary in order for it to ensure that capacity on the network is shared in the most efficient and economical manner in the overall interest of users, providers, potential providers and funders of railway services.
- 9.1.2 Network Rail shall give a Part J Access Beneficiary at least 5 Working Days written notice of a Rights Review Meeting ("Rights Review Notice"). Network Rail shall, in the Rights Review Notice, list the Quantum Access Rights, related Train Slots or associated Ancillary Movements, Stabling or Y-Paths which are going to be the subject matter of the meeting ("Rights under Review").
- 9.1.3 A Part J Access Beneficiary shall attend a Rights Review Meeting if requested to do so by Network Rail in a Rights Review Notice and shall participate in the meeting in a collaborative manner in order to assist Network Rail to meet its objectives set out in Condition J9.1.4 below.
- 9.1.4 In holding a Rights Review Meeting, Network Rail's objectives shall include:
  - (a) establishing why any Rights under Review are not being used;
  - (b) assessing whether it is appropriate for Network Rail to commence the Failure to Use procedure under Condition J4 in relation to any of the Rights under Review; and
  - (c) assessing whether it is appropriate for any Relevant Adjustment to be made to the Part J Access Beneficiary's Access Rights.
- 9.1.5 Further to a Rights Review Meeting, Network Rail shall, where it considers it appropriate, commence and pursue the Failure to Use procedure under Condition J4 to remove any of the Rights under Review from the Part J Access Beneficiary.

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

- 9.2.1 If the Office of Rail Regulation considers that a Part J Access Beneficiary is not using any of its Quantum Access Rights, related Train Slots or associated Ancillary Movements, Stabling or Y-Paths and Network Rail has not held a Rights Review

Meeting related to this, then the Office of Rail Regulation may, in writing, direct Network Rail to hold a Rights Review Meeting ("J9 Direction").

- 9.2.2 Network Rail shall comply with a J9 Direction within 10 Working Days of receipt of its receipt.
- 9.2.3 If any third party Part J Access Beneficiary reasonably believes that another Part J Access Beneficiary is not using any of its Quantum Access Rights, related Train Slots or associated Ancillary Movements, Stabling or Y-Paths and Network Rail has not held a Rights Review Meeting related to this, then it may report the matter to the Office of Rail Regulation. The Office of Rail Regulation will then consider whether it is appropriate for it to direct, pursuant to Condition J9.2.1, Network Rail to hold a Rights Review Meeting.
- 9.2.4 Where Network Rail has failed to comply with a J9 Direction in accordance with Condition J9.2.2, the Office of Rail Regulation may apply to the High Court (in Scotland, the Court of Session) for it to make such order as it thinks fit for requiring the failure to be made good.

### 9.3 **Notification**

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

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

### 10.1 **Template Notices**

- 10.1.1 Network Rail shall publish promptly templates, and any revision to them, for any notices required under this Part J.
- 10.1.2 Before publishing templates or any revisions to them in accordance with Condition J10.1.1, Network Rail shall consult with relevant Part J Access Beneficiaries.

## **10.2 Publication of Other Documentation**

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

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

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

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

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

## **11 Appeals**

### **11.1 Appeal in accordance with the ADRR**

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

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

- (a) within 5 Working Days of receipt of the decision to which objection is made; or
- (b) where the period referred to in Condition J11.1.2(a) includes Christmas Day, within 10 Working Days of such receipt.

## 11.2 Appeal to the Office of Rail Regulation

11.2.1 Where either Network Rail or any Part J Access Beneficiary is dissatisfied with the decision reached in accordance with the ADRR under Condition J11.1, it may refer the matter to the Office of Rail Regulation for determination under Part M:

- (a) within 5 Working Days of receipt of the written determination reached in accordance with the ADRR to which objection is made; or
- (b) where the period referred to in Condition J11.2.1(a) above includes Christmas Day, within 10 Working Days of such receipt.

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“Bid”	has the meaning ascribed to it in Part D;	

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“reasonable ongoing commercial need”	is interpreted as set out in Condition J12.1;	

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“Review Proposal”	means a proposed surrender or reduction in the Part J Access Beneficiary’s Right Subject to Surrender and/or Existing Cordon Caps specified by Network Rail in a notice served under Condition J9.2.1;	

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it may serve a Failure to Use Notice on the Part J Access Beneficiary requiring the Part J Access Beneficiary to surrender Rights Subject to Surrender; and

if it does so, it shall send a copy of the notice to the Office of Rail Regulation.

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A Failure to Use shall cease to be continuing for the purpose of Condition J4.5 if:

in relation to a Failure to Use under Condition J4.2.1(a):

the Part J Access Beneficiary Bids for a Train Slot in respect of the relevant Quantum Access Right before the compilation of a subsequent First Working Timetable; and

Network Rail has not served a Failure to Use Notice before the Bid under Condition J4.6(a)(i) is made; and

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it is Determined that the Incumbent has no reasonable on-going commercial need for 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, the Appointed Operator's) Access Agreement, from the date:

on which notice is given to the Office of Rail Regulation pursuant to Condition J7.8.2, in the event of an ADRR Determination; or

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

In the event of an ADRR Determination in accordance with Condition J7.8.1(a), and providing no appeal is made to the Office of Rail Regulation in accordance with Condition J13.3, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to be the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 15 Working Days after the date of that ADRR Determination and shall include a copy of the relevant ADRR Determination with such notice.

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

## ***Annex C: Draft proposal for change to Part D of the Network Code***

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Insert as a new condition 8.5 in Part D:

“8.5 Removal of Train Slots obtained by Train Operator Variation Request pursuant to Paragraph 2.5 of Schedule 5 of a freight Train Operator’s Access Agreement

8.5.1 Where a freight Train Operator obtained Train Slots in the Working Timetable by making a Train Operator Variation Request pursuant to paragraph 2.5 of Schedule 5 of its Access Agreement and Network Rail, acting reasonably, considers that the Train Slots are not being used and are unlikely to be used then, after consulting the relevant Train Operator, Network Rail may remove any of the Train Slots from the Working Timetable.”

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

## ***Annex D: Draft proposal for change to Part M of the Network Code***

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## Network Code - Part M — Appeals

### **Explanatory Note**

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

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

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

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

~~“Appellant” means any dispute party seeking to challenge a determination made in accordance with the ADRR by appeal to the Office of Rail Regulation;~~

~~“dispute party” means any person who fulfilled the definition of “Dispute party” set out in the ADRR;~~

~~“Respondent” means, in relation to any determination which is challenged under this Part M, any other dispute party which is affected by such determination.~~

## ~~CONDITION M1 -- APPLICATION OF PART M~~

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

~~(a) any relevant Condition of this code; or~~

## 1      Introduction

### 1.1      Overview

1.1.1    Part M provides the process by which a party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D or a decision reached by Access Disputes Adjudication in relation to a dispute arising under Part J, can appeal the matter to the Office of Rail Regulation for determination.

### 1.2      Interpretation

1.2.1    In this Part M:

- (a)      the singular shall include the plural and vice versa;
- (b)      the headings are for convenience only and shall not affect interpretation; and
- (c)      capitalised words have the meanings shown below:

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

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

~~(b) — the ADRR.~~

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

## 2      Notice of Appeal

### 2.1      Requirements

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

- (a)      comply with the requirements of Condition M3; and
- (b)      be served on the Office of Rail Regulation and the Respondent(s):
  - (i)      ~~(a) — in the case of an appeal under Condition D5, within five Working Days of receipt of the determination to be challenged. If Christmas Day occurs within this period then an appeal should be submitted within 10 Working Days~~ decision to which objection is made;

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

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

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

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

## ~~CONDITION M3 – NOTICE OF APPEAL~~

### ~~3.1 – Contents~~

#### 3      Content of a Notice of Appeal

#### 3.1      Content of a Notice of Appeal

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

- (a)      ~~(a)~~ identify the determination which the Appellant wishes to challenge;
- (b)      ~~(b)~~ detail why the Appellant believes that the determination is:
  - (i)      ~~(i)~~      wrong; or
  - (ii)     ~~(ii)~~     unjust because of a serious procedural or other irregularity; and
- (c)      ~~(c)~~ insofar as reasonably practicable, attach any evidence on which the Appellant wishes to rely in support of the appeal.

### ~~3.2 – Service~~

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

## ~~CONDITION M4 – RIGHT OF THE OFFICE OF RAIL REGULATION TO REFUSE TO HEAR APPEAL~~

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

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

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

- (b) ~~(b)~~ the reference is frivolous or vexatious;
- (c) ~~(c)~~ the conduct of the party making the reference ought properly to preclude its being proceeded with; or
- (d) ~~(d)~~ it is appropriate or convenient for the matter instead to be disposed of by the High Court (in Scotland, by the Court of Session).

## 4.2 ~~4.2~~ Consequences of decision

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

- (a) ~~(a)~~ in the case of decision on any of the grounds specified in Condition M4.1(a), (b) or (c), the decision in accordance with the ADRR shall stand; and
- (b) ~~(b)~~ in the case of a decision on the ground specified in Condition M4.1(d), either party to the appeal shall be entitled to apply to the High Court (in Scotland, the Court of Session) for any appropriate relief.

## ~~CONDITION M5 - RESPONDENT'S NOTICE~~

## 5 Respondent's Notice

### 5.1 Requirements

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

- (a) ~~(a)~~ stating that he opposes the appeal; and
- (b) ~~(b)~~ insofar as reasonably practicable, attaching any evidence on which the Respondent wishes to rely in opposing the appeal.

~~5.2 In the event that:~~

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

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

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

## **CONDITION M6 – MATTERS TO BE CONSIDERED ON APPEAL**

### 6 **Expedited Process**

#### 6.1 **Appellant or Respondent Request to Expedite**

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

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

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

#### 6.2 **Power of ORR to order expedited Process**

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

## 7      Matters to be Considered on Appeal

### 7.1      ~~6.1~~ **Scope**

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

### 7.2      ~~6.2~~ **Grounds**

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

## **~~CONDITION M7 – POWERS OF OFFICE OF RAIL REGULATION~~**

## 8      Powers of the Office of Rail Regulation

### 8.1      ORR's Powers

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

- (a)      ~~(a)~~ to give directions as to the procedure to be followed in the appeal, including in relation to the time limits within which anything must be done, the making of any written and oral submissions, and the extent to which any evidence or other submissions made by one party to the appeal shall be disclosed to any other;
- (b)      ~~(b)~~ to appoint any person to act as a legal or technical assessor who it considers has suitable knowledge and experience to assist the Office of Rail Regulation;
- (c)      ~~(c)~~ to make any interim order as to the conduct or the positions of the parties pending final determination of the matter by the Office of Rail Regulation; and
- (d)      ~~(d)~~ to make such orders as it shall think fit in relation to the proportions of the costs of the proceedings in question (assessed in such manner as the Office of Rail Regulation shall determine) which shall be borne by each party.

## ~~CONDITION M8 – IMMUNITY OF OFFICE OF RAIL REGULATION~~

### 9      Immunity of the Office of Rail Regulation

#### 9.1      Immunity of Office of Rail Regulation

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

## ~~CONDITION M9 – OBLIGATION TO COMPLY WITH DETERMINATION OF APPEAL~~

### 10      Obligation to Comply with Determination of Appeal

#### 10.1      Obligation to Comply with Determination of Appeal

10.1.1 All Appellants and Respondents shall:

- (a)      ~~(a)~~ subject to and pending the final determination of any reference to the Office of Rail Regulation, comply with:
  - (i)      ~~(i)~~ —any determination made in accordance with the ADRR in relation to any dispute referred ; and/or
  - (ii)      ~~(ii)~~ —any interim order of the Office of Rail Regulation; ~~and~~ an
- (b)      ~~(b)~~ comply with any final determination of the Office of Rail Regulation.

## ~~CONDITION M10 – EFFECTIVE DATE OF OFFICE OF RAIL REGULATION'S DECISION~~

11      Effective Date of Office of Rail Regulation's Decision

11.1    Effective Date of Office of Rail Regulation's Decision

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

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Document 2	PowerDocs://ORR/422032/5
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Split/Merged cell	
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Deletions	74
Moved from	1
Moved to	1
Style change	0
Format changed	0
Total changes	191

## ***Annex E: Draft proposal for change to ADDR***

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

1. Insert at the end of Rule G14:

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

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

“subject to Rule 17 (h),”

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

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

4. Insert a new Rule G17 (h)

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

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

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

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

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

“6 All disputes referred to resolution in accordance with these Rules under Condition B2.4.4 of the Network Code shall be referred to an ADA in accordance with Chapter G as a single stage dispute resolution process with

no appeal. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the Secretary shall appoint a Hearing Chair for the dispute in accordance with Rule G9. If either party raises any objection then the Hearing Chair shall consider the best way to proceed.”

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

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

## ***Annex F: summary of consultation questions***

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	Paragraph	Question
1	2.10	Do consultees agree that ORR's role should be reduced as outlined in paragraph 2.9 above? If not please say why.
2	2.15	Do consultees agree the removal of J3.13? If not please say why.
3	2.32	We welcome any alternative suggestions from consultees that would achieve the aims set out in paragraph 2.30 above for improving the UIOLI process.
4	2.36	Do consultees have any comments on our proposal to delete J4.2.2?
5	2.40	Do consultees agree that Part D is the appropriate place for this provision? If not please say why.
6	2.42	Consultees are invited to comment on the proposed drafting changes to J4 at <b>Annex B</b> and to Part D at <b>Annex C</b> .
7	2.56	Consultees' comments are invited on our proposal to include the formula at J6.2.3 (drafting at <b>Annex B</b> ).
8	2.72	We would welcome comments on our proposed definition of "Y-paths".
9	2.77	Consultees are invited to let us know if they consider J7.10.1 (ii) should be retained and if so why?
10	2.80	Consultees are invited to comment on the proposed drafting changes to J7 at Annex B.
11	2.86	Consultees are invited to comment on the proposed drafting changes to J8 at Annex B.
12	2.100	Consultees are invited to comment on the proposed drafting changes to J9 at Annex B.
13	2.105	Consultees are invited to comment on the proposal to delete J10.
14	2.128	Do consultees agree the removal of J12? If not please say why.
15	2.144	Consultees are invited to comment on our proposals for amalgamating J13 and J14 and the proposed drafting changes which are at Annexes B, D and E.
16	2.148	Do consultees agree that we should retain the flow diagrams?

## ***Annex G: Draft impact assessment***

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### **Section 1: The issue**

#### **What is the issue?**

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

#### **Why are we intervening?**

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

#### **What is the desired outcome?**

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

#### **When will we review the success of the intervention?**

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

### **Section 2a: The options – use period/quota**

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

#### **Option 1: Do nothing**

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

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

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

**Option 3: assessing future requirements on previous usage**

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

**Option 4: Set a minimum percentage for rights usage**

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

**Option 5: Minimum percentage of rights usage based on commodity**

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

**Option 6: Tiered use quota depending on constrained capacity**

- 2.6. The last option is to have a tiered use quota/period depending on how constrained is believe to be. The use period would remain at 90 days where there are no known capacity constraints but it could reduce to 30 days where

capacity scarcity is evident and 14 days where there is little or spare capacity. Although this option appears attractive compared to the other options, there would be difficulty in establishing the levels of capacity and administering such a system. There was also little support from freight operators.

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

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

### **Option 1 – Do nothing**

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

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

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

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

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

## **Section 3: The preferred options**

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

#### use quota/period

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

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

#### ROCN

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

#### Impact on stakeholders/duty holder

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

ease the administrative burden on Network Rail when dealing with cordon cap adjustments

- 3.5. **Government** – We do not consider that the proposed changes will have any significant impact on government.
- 3.6. **FOCs** – We consider that the changes will have a beneficial on FOCs because they will provide more clarity on the Part J mechanisms and the changes to the use quota/period will ensure unused capacity can transfer more readily between FOCs.
- 3.7. **Franchise and open access operators** - We consider that the proposed changes will not have a significant impact on train operators.
- 3.8. **Consumers** - We expect that freight customers will benefit from our proposals because the removal ROCN criteria will provide greater clarity and should reduce the number of surrenders or transfers resulting in disputes. We also expect the changes to the use quota/period will ensure unused capacity can transfer more readily between FOCs. We do not expect that the proposals will have any significant impact on passenger customers.

#### **Impact on specific consumer groups**

- 3.9. **Disability** – This policy involves the allocation and utilisation of track access capacity and is disability neutral.
- 3.10. **Gender** – This policy involves the allocation and utilisation of track access capacity and is gender neutral.
- 3.11. **Race** – This policy involves the allocation and utilisation of track access capacity and is race neutral.
- 3.12. **Other** – We do not consider that the impact of this policy would vary across consumer groups, for example low income households.

#### **Impact on health and safety**

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

#### **Impact on sustainable development**

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

#### **Impact on competition**

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

### **Geographic impacts**

- 3.16. In implementing our access policy we take account of general guidance provided by the Secretary of State or Scottish Ministers and / or notified strategies and policies of the National Assembly of Wales, depending on the geography of the services concerned, in accordance with our statutory duties. Our application of the access policy may vary by geography as a result.
- 3.17. The specific policy changes set out in this document do not, however, have a distinct geographic impact.

### **Statutory duties**

- 3.18. We think the following statutory duties under section 4 of the Railway Act 1993 (as amended) are particularly relevant to this policy proposal:
- otherwise to protect the interests of users of railway services;
  - to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [it] considers economically practicable;
  - to contribute to the development of an integrated system of transport of passengers and goods;
  - to promote efficiency and economy on the part of persons providing railway services;
  - to promote competition in the provision of railway services for the benefit of users of railway services; to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;
  - to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions under this Part or the Railways Act 2005 that are not safety functions; and
  - to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

### **Overall impact**

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

### **Conclusion**

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

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