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Dear Paul

**Review of Part J of the Network Code**

Thank you for the opportunity to respond to ORR's consultation as part of your review of Part J of the Network Code. This is the formal response of Freightliner Group Limited ('Freightliner') – representing Freightliner Limited ('FLL') and Freightliner Heavy Haul Limited ('FHH'). We are grateful for the extra couple of days afforded for our submission.

Since the questions raised by ORR are within the body of the consultation document, our comments follow the narrative of the document, referencing paragraph numbers as relevant.

**1.12** Freightliner has been an enthusiastic supporter of Strategic Capacity. However, in practice, since Network Rail has yet to designate any, and no practical challenge to strategic capacity has therefore yet been made, operators are naturally going to be reluctant to give up capacity in this fashion until its' integrity has been practically demonstrated, and until Network Rail begin to designate a strategically useful suite of strategic capacity.

With this in mind, Freightliner is unsure as to the necessity of a review at this juncture, but rather considers that Part J and its' application and terms might benefit from a review once Strategic Capacity is in settled, practical use.

**Q1. Why do consultees think that Condition J2 has not been used? (Paragraph 2.9)**

**Q2. Should Condition J2 be made more attractive to use and, if so, how? Or do consultees agree that, for the time being, Condition J2 should remain as it is? (Paragraph 2.10)**

**Q3. Are consultees aware of any issues regarding Condition J3 which need to be addressed? (Paragraph 2.11)**

Freightliner concurs that Condition J2 should be left for the time being. Freightliner is concerned that as finite network capacity runs out, it may be necessary for a review of the finer points of Part J if capacity is in practice being efficaciously managed by other means.

**Q4. Do consultees agree that the definition of Quantum Access Right is confusing and requires amendment? If so, do consultees agree with ORR's proposal for the definition in paragraph 2.15? (Paragraph 2.25)**

Freightliner Agrees.

**Q5. Do consultees agree that reference to Level Two Rights and Level Three Rights in Condition J4.2.2 should be deleted? (Paragraph 2.26)**

Freightliner agrees.

**Q6. Do consultees agree that the Use Period and Use Quota should be amended? (Paragraph 2.27)**

Conscious of the ability for the present arrangements to be abused, Freightliner cleaves to the proposal it made in its response to the previous ORR consultation (on 18/4/8) of 10 days in 90.

**Q7. What are consultees' views on the options for the Use Period and Use Quota set out in paragraph 2.21? (Paragraph 2.28)**

**1.44** Freightliner do not agree with any of the proposals; as above, Freightliner espouses the retention of the existing mechanism but with the use quota increased from a single event to a figure which represents genuine, worthwhile usage, although there is little practical difference between option (d) at a figure of circa 10% and simply amending the quota whilst keeping the existing system.

Specifically, options such as (b) would have a particularly grave detrimental effect upon customers whose demand fluctuates week by week, or where other commercial necessities require the ability to make up lost tonnage or augment regular volumes at short notice. Often, sites concerned are in city centre locations, necessarily with small stock-holding capability, and unable to 'smooth' delivery patterns by holding excess stock.

Options such as (f) would unduly increase the administrative burden of Part J and thereby increase the potential for conflict, as well as pushing up costs.

**Q8. Other than reviewing the Use Quota/Use Period and dispute resolution procedures, do consultees have any views how the Condition J4 process could be made quicker and more effective? (Paragraph 2.29)**

Freightliner is content with the operation of Condition J4 as it stands, beyond the suggestion to increase the Use Quota.

**Q9. What are consultees' experiences of using Condition J5? Do they consider it has worked well? (Paragraph 2.32)**

**Q10. What are consultees' views on combining Conditions J4 and J5? Would this be beneficial? (Paragraph 2.33)**

Freightliner considers that Conditions J4 and J5 may be merged, however J5 may be supplemented with a means for operators to conduct the J5 process between themselves without Network Rail's involvement, where there is no dispute – as per the proposals for Condition J7. If this were so, perhaps conditions J4 and J5 may usefully remain separate in the Network Code, despite being ostensibly the same in other respects.

**Q11. Are consultees aware of any issues with Condition J6 that need to be addressed? (Paragraph 2.36)**

No - it has barely been used.

**Q12. Do consultees agree that the drafting of Condition J7.1.2 requires clarification?**

**(Paragraph 2.44)**

**1.63** As ORR determined in ADP23, it is inherent in a commercially competitive environment that different operators will offer differentiated services to end customers in the process of seeking to offer an attractive package to potential customers. Freightliner therefore considers that drafting of J7.1.2 would benefit from clarification in this regard.

**Q13. Do consultees think that requiring the applicant to produce a letter from the third party customer confirming their arrangement as part of its application may reduce the scope for dispute? (Paragraph 2.45)**

Freightliner considers that the relevant customer(s) should be a party to any dispute under condition J7.

**Q14. Do consultees agree that it is not clear how Y-paths are dealt with under Condition J7? If so:**
**a) Do consultees have any comments on our proposal for dealing with this issue including the criteria proposed?**
**b) Do consultees have any other alternative proposals on how this issue could be addressed? (Paragraph 2.46)**

Freightliner concurs that it is not clear how Y-paths are dealt with, but notes that there is no such thing as a 'Y-right'. In practice, many Y-paths are held against quantum rights, which, subject to agreement on cordon caps, may conceivably continue to be satisfied in respect of both operators, depending on the specific circumstances, if the incumbent could demonstrate ROCN for the other variant of the Y-path which was not itself sterilised by the transfer of business.

**Q15. Do consultees agree that the Condition J7 process could be improved? (Paragraph 2.54)**

**Q16. Do consultees agree that Network Rail should not be substantially involved in the Condition J7 process until it is evident that the incumbent and applicant cannot agree? (Paragraph 2.55)**

Where there is no dispute, Freightliner agree that Network Rail need not be substantially involved, but consider that the involvement of the end customer would further aid the process, most likely by accounting for themselves for what business is to be transferred.

Where an application under condition J7 is uncontested, it should simply be enacted forthwith.

**Q17. Do consultees have any comments on our proposal for the Condition J7 process or any other views on how the process could be improved? (Paragraph 2.56)**

**1.73** Of the scenarios described, Freightliner wonders how access beneficiaries might be protected against vexatious applications, a role currently fulfilled by the means for Network Rail to reject the application.

Ten working days at each stage is potentially too fast-paced for operators to be able to deal with notices properly.

**1.75** Five days to attempt to resolve a dispute is unlikely ever to be practicable in terms of allowing time for the applicant to consider the respondent's counter notice or the incumbent to negotiate with the applicant. Either a longer period should be allowed, or perhaps accepting the inevitability of a dispute where the incumbent objects should be

accepted and this stage withdrawn in the interests of not lengthening the timescales for resolution where dispute exists.

Freightliner agrees that there is no need for position statements, the notice and counter notice serving this purpose. Where the applicant wishes to make broad, initial response to the counter-notice, they are at liberty to put this in writing at their discretion, if they believe this will expedite resolution. This might happen where the applicant wishes to contest a (possibly flimsy) claim by the incumbent that a notice is invalid, particularly where this concerns a technicality of the application of the Network Code, which can be remedied simply and has little or no association with the merits of the transfer itself.

**1.76** In practice, traffic often starts under STP with the new train operator before Part J processes have been formally concluded; this therefore may not be a serious issue. Whilst shortening of the timescales is positive, it must not be at the expense of a fair and considered process that affords reasonable means to all parties to deal with the matter properly.

**Q18. Are consultees aware of any issues regarding Condition J8 which need to be addressed? (Paragraph 2.59)**

No.

**Q19. What are consultees' views on Condition J9 as it is currently drafted? (Paragraph 2.65)**

Freightliner consider that condition J9 should remain – whilst Network Rail have not had cause to use it, finding more collaborative means to review rights outside the formal process, the formal process must remain to protect against the potential for an intransigent operator not to respond to such arrangements.

**Q20. Do consultees agree with our proposal to focus on output rather than process and ORR having the ability to force Network Rail to hold rights review meetings? (Paragraph 2.66)**

Freightliner is not aware of evidence which would suggest that this has been a perceived need to date, however the provision for this eventuality could be useful in the event that Network Rail and an operator together failed to review rights – especially where those rights concerned capacity which was not being properly used.

**Q21. What are consultees' views on what a rights review meeting should involve? (Paragraph 2.67)**

**Q22. How often should rights review meeting be held? (Paragraph 2.68)**

Six monthly rights review meetings are particularly impractical when the process of enacting the changes agreed with Network Rail usually takes more than six months to achieve! A contractual minimum of an annual review seems appropriate to Freightliner, with liberty to review more often by mutual consent.

It is the process of enacting the changes that needs to be expedited. Often, by the time consultation has taken place within Network Rail, the rights are once again out of date.

**Q23. Do consultees agree with the proposal to allow any timetable participant to force Network Rail to hold a rights review meeting? (Paragraph 2.69)**

Without adequate protection from vexatious applications, this idea probably would cause

more problems than it would solve. If ORR had the power to force a rights review, other timetable participants would be at liberty to lobby ORR to assess the situation, potentially approach Network Rail, and consider using *its* powers if necessary, thereby providing such protection.

**Q24. Do consultees agree that ORR's ability to consent to part only of the modifications submitted under condition J2 is no longer required? (Paragraph 2.74)**

Freightliner Agree.

**Q25. Do consultees agree that ORR should retain the ability to modify cordon cap adjustments submitted under Condition J8? If so, do consultees agree with the proposal to incorporate this power into Condition J8? (Paragraph 2.75)**

Freightliner Agree.

**Q26. What are consultees' views on our proposal to produce template notices and to amend Condition J11 to place an obligation on Network Rail to publish, review and keep the template notices up to date? (Paragraph 2.78)**

Template notices would hopefully reduce incidences of fundamentally solid applications being delayed or obstructed by the incumbent's assertion that the notice is for some reason invalid.

However, there would be an administrative burden on the whole industry to devise, agree and subsequently review the template notices, even if Network Rail had conduct of this.

Given that templates for other Network Code activities, such as Network Change, are only loosely used by the parties concerned in practice, and are relatively simple, the effort of creating and maintaining template notices may outweigh the benefits.

Further, given that in several historic cases, precedents have been set, or cases brought which do not conform to previous expectations of the process' ambit, template notices may well prove to be a constraint given that not all cases under Part J are of a homogenous nature.

**Q27. What are consultees' experiences of using ROCN? (Paragraph 2.89)**

**Q28. Do consultees agree that ROCN requires simplification? (Paragraph 2.90)**

**Q29. Do consultees agree with our approach of incorporating a simplified ROCN in Condition J12 or do they consider there are other approaches with more merit? (Paragraph 2.91)**

**1.104/5** The reasoning applied by ORR in these paragraphs is sound but holds good only to the extent that traffic is full train loads for a single customer.

Given the increasing prevalence of less than trainload traffic in the container sector, including trains run on a regular timetabled basis at the train operator's own risk, the situations envisaged in 1.105 will not always be demonstrable.

That said, where it is so, Freightliner agrees with the application of these principles, and with the incorporation of ROCN into the Network Code.

Freightliner further questions, in the context of the wider network, by what means ROCN (or another more suitable measurable) can be determined for passenger services,

particularly those which are under-patronised to the point of requiring specific public funding to maintain their viability. Cross-subsidy from other parts of the same passenger operation may apply. Freightliner considers that a regularly empty or near empty passenger train could be regarded similarly to empty freight trains which have allegedly been run in the past to defeat part J notices, sponsored by the rest of business conducted by the operator concerned.

As network capacity becomes ever more scarce, Freightliner consider that empty, or under-patronised passenger trains should become an equal focus for attention in the fashion that Part J is used for freight services. Whilst freight trains do not run when there is no traffic to convey, this is not true of passenger services – yet capacity is nevertheless consumed by such services every day. Opportunities should be sought to reduce frequency where patronage is demonstrably particularly poor; Freightliner has made representations to recent Route Utilisation Strategies on this principle.

Freightliner recognises that to effect this by means of ROCN would be very difficult indeed – but arguably the application of ROCN to multi-user and wagon-load freight is no less difficult.

**Q30. Do consultees agree that:**

**a) the rights required to fulfil a call-off contract should not typically operate under a firm right and should be applied for under a timetable variation, unless the applicant can demonstrate that the rights are being used on a regular ongoing basis; and**

**b) holding a call-off contract is insufficient justification for claiming ROCN and the associated path unless there is evidence that the call-off contract is being used regularly? (paragraph 2.92)**

Freightliner disagrees strongly. Freightliner's experience and that of its customers dictates that call-off contracts are essential to maintain the viability of many kinds of traffic, most particularly in sectors such as ESI coal, and construction materials. Please see also our answer to Q.7 in regard to 1.44 (b), above.

Such restrictions could conceivably impede ORR's duty to enable persons providing railway services <*and in turn their end customers*> to plan the future of their businesses with a reasonable degree of assurance.

Essentially such steps would preclude the existence of 'call-off' contracts, since an operator would otherwise only be able to contract with a customer in this way by re-selling vacant capacity, or making promises it might not be able to deliver when the trains were required to run. Such circumstances are likely to warrant careful individual consideration by ADP and ORR if they arise.

**1.107** Amendment of the UIOLI criteria to 10 in 90 days, as Freightliner suggest, would assist in providing a fair test of usage.

**Q32. Should Conditions J13 and J14 be amalgamated and simplified? If so, who should be able to refer a Part J dispute for determination in accordance with the ADRR and in what timescales? (Paragraph 2.104)**

Freightliner considers the amalgamation of conditions J13 and J14 to be appropriate.

**1.119/20** Permitting appeals by others would potentially give rise to third parties challenging decisions to which they were not a party in order to challenge a precedent being set by the decision. This may be perceived as a good or bad thing.

Making customers a party to a J7 application concerning their business would be helpful in this regard.

**Q33. Do consultees agree with our proposals for shortening the timescales of the ADA process for Part J disputes? If not, do consultees have any other views on how the process could be made quicker? (Paragraph 2.105)**

**Q34. Do consultees think including an express power within Part M enabling ORR to expedite its appeal procedure is a good idea?**

**a) If so, to what type of cases should the expedited procedure be applied?**

**b) If not, do consultees have any other views on how ORR's Part M appeal procedure could be made quicker? (Paragraph 2.106)**

**1.122** The appeal process *is* slow, but hastening the process must not leave it any less robust.

ORR would have to be content, for example, that an expedited decision would not be taken to judicial review and its' decision be found wanting in who or in part due to the deployment of an expedited process.

If ORR is content with the robustness of the decisions it reaches, then expedited outcomes are to the common good.

Freightliner is happy to elucidate further on any of the foregoing, should ORR deem this to be of assistance in considering this matter.

Yours sincerely

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Freightliner Group Limited