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Office of Rail Regulation  
One Kemble Street  
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Dear Paul,

**Review of Part J (changes to access rights) of the Network Code – Network Rail's response to ORR's consultation**

Network Rail welcomes the opportunity to comment on the Office of Rail Regulation consultation. We support much that is proposed in the document with respect to the scope to improve the effectiveness of Part J. We consider that ORR's regulatory proposals will assist in providing clarity to those operators wishing to transfer unused rights, thereby giving operators the opportunity to compete for traffic flows and to enable more efficient use of the network.

We can confirm that no part of our response is confidential and we are content for it to be published in full.

**Key points**

Although Part J has been subject to a number of changes and reviews since it was introduced in 2005, it has not been subject to significant reform. This background, the current McNulty study and industry value for money initiatives provide context for this consultation and help to focus the key issues to be addressed within Part J, i.e.:

- (a) Stakeholders have expressed concerns about timescales, costs and overall effectiveness of Part J; and
- (b) There is a propensity for Part J applications to become contractual disputes; access dispute determinations have indicated concern about the contractual effectiveness of some of the Part J processes.

In summary, we believe that costs and timescales could be significantly reduced and the effectiveness of Part J improved through:

- i. Resolving ambiguity within drafting, particularly as regards the meaning and application of the criteria comprising the "reasonable on-going commercial needs" and clarification of grounds for objection to surrender of rights.



- ii. Reducing the Use Period significantly, particularly where there is scarce capacity so that unused paths can be more quickly made available to operators for use and thereby improving utilisation.
- iii. Providing for rights surrender where there is only partial use so as to reduce the under-utilisation of capacity.
- iv. Simplifying the operation of the condition J7 transfer of rights process through a more direct engagement between incumbent and applicant which should reduce the number of interfaces, transactions and timescales.

In our response we have set out our comments to the questions using the title heading and paragraph numbers used within the consultation document.

## **Condition J2 – voluntary surrender and adjustment of access rights & Condition J3 – confidentiality**

### **1.32 Why do consultees think that condition J2 has not been used?**

Network Rail believes that there are factors that explain why TOCs and FOCs have not taken the opportunity to voluntarily surrender surplus rights:

- There is little obvious incentive on operators to surrender rights because they do not have a face value and the benefits arising are seen as small.
- Network Rail believes that if the criteria on how and when compensation would be payable had been established, as was envisaged when Part J came into effect in January of 2005, train operators may have been more likely to have been incentivised to use the mechanism and release unused rights rather than retain them.
- FOCs may fear that any capacity surrendered will be taken (for good) by passenger TOCs.

### **1.33 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?**

A key concern that some train operators have expressed is that if rights were surrendered during what might be a temporary reduction in requirement, there would be a risk that the related train paths could be permanently lost to that business sector and be taken up for use on other types of train services. The prospective introduction of new provisions in the Network Code for strategic capacity reservation could help to alleviate such concerns. Changes to condition J2, such as compensation criteria (1.32 above) and other incentives may best be considered following the introduction of strategic capacity arrangements.

### **1.34 Are consultees aware of any issues regarding Condition J3 which need to be addressed?**

Network Rail is not aware of any issues associated with condition J3.

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

**1.48 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?**

We believe that the reference “paragraph 2.15” should be “paragraph 1.38”. Network Rail supports the proposed change to make the definition of quantum access rights (QAR) clearer.

**1.49 Do consultees agree that reference to Level Two Rights and Level Three Rights in Condition J4.2.2 should be deleted?**

Network Rail agrees that this reference should be deleted.

**1.50 Do consultees agree that the Use Period and Use Quota should be amended?**

**1.51 What are consultees’ views on the options for the Use Period and Use Quota set out in paragraph 2.21?**

Network Rail believes that the paragraph reference “2.21” should read “1.45”. Network Rail supports the ORR view that the purpose of the Use Quota and Use Period is important for maximising capacity available for future use. Accordingly, these parameters should be set as low as reasonably possible and Network Rail believes that the current Use Period does not allow the industry to make the most efficient use of capacity.

Network Rail believes that a Use Period of 90 days is too long, especially where capacity is constrained and 30 days should be considered for routes such as WCML and ECML; there should be possibly even tighter Use Periods where there is little or no spare capacity.

We also believe that ‘partial surrender’ of rights has not been satisfactorily addressed within Part J or through outcome of disputes. The problem can arise where for example an Incumbent has an SX QAR but the associated Train Slots are split MO, TThO and WFO and only the WFO is used. In such circumstances a J4 notice may be served on the SX QAR but only for the days on which the Train Slot is unused (MO and TThO in this example). As described in paragraph 1.44 (b) of the consultation document Network Rail believes that in order to prevent a train slot for one day of the week (in respect of a SX right) blocking an access right for another operator for other days of the week, the Use Period and Use Quota should apply to each individual day of the week to which the access right applies.

**1.52 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?**

Network Rail believes that the proposed reduction to the Use Period and refinement of its application to specific days will materially help to improve the effectiveness of Condition J4. The grounds for objection under J4.10.2 (b) refer to a “reasonable on-going commercial need in respect of any or all of the Rights Subject to Surrender”. Network Rail has found that the effectiveness of Condition J4 has been inhibited by the

uncertainty around the definition of reasonable on-going commercial need. This can lead to disputes and add to the time required to reach an agreement.

In addition, J4.9.1 requires a Counter Notice to provide “evidence” but experience indicates that obtaining convincing “evidence” can be difficult and, therefore, it is suggested that what purports to be acceptable evidence should be clearly set out within Part J. It is also suggested that “any or all the Rights Subject to Surrender” within J4.10.2 (b) is redrafted as “Rights Subject to Surrender as specified in the Counter Notice” in order to place the requirement on the incumbent to clearly specify those rights where it is claimed there is a reasonable on-going commercial need.

### **Condition J5 – failure to use (third party application)**

#### **1.55 What are consultees’ experiences of using Condition J5? Do they consider it has worked well?**

The comments provided above in relation to Part J4 equally apply to Part J5.

#### **1.56 What are consultees’ views on combining Conditions J4 and J5? Would this be beneficial?**

Network Rail believes that a mechanism that enables a third party train operator to seek the surrender of another operators’ rights should be retained. If this separate mechanism is secured then Network Rail would support the combination of the J4 and J5 provisions to form one provision encompassing both mechanisms.

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

#### **1.59 Are consultees aware of any issues with Condition J6 that need to be addressed?**

Network Rail's has not identified specific issues.

### **Condition J7 – freight transfer mechanism**

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

Network Rail agrees that ADP 23 identified a number of issues (related to contract drafting) where greater clarity of the definitions would have helped to shorten a typically protracted process which more than often resulted in ADRR referrals. The delays in achieving rights transfers that have been experienced can risk the continued commitment by forwarders of traffic flows to the rail mode.

#### **1.68 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?**

Network Rail believes a letter from the third party customer detailing the nature and extent of their commitment would bring greater clarity and reduce the scope for disputes, thereby potentially reducing the timescales.

**1.69 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?**

Confusion as to how the parties dealt with Y paths has related to partial use of a right and the viability of the second “leg” of the right; and consequently this has led to disputes between the parties. Network Rail believes that there is a need to clarify the definition and supports the proposal to develop and include criteria to deal with Y paths.

**1.77 Do consultees agree that the Condition J7 process could be improved?**

**1.78 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?**

Network Rail believes that the process could be improved if the arrangements were more centred on engagement between applicant and incumbent which would be less time consuming and bureaucratic than the current approach where Network Rail largely “post-offices” exchanges between the parties. We would also welcome a change to J7 that would require the Applicant to provide evidence (for example by way of a letter from the Contracting Party) of the Transfer of Contracts from the Incumbent to the Applicant. Incorporating the requirement to provide evidence of a transfer is a key requirement for this mechanism to be effective.

**1.79 Do consultees have any comments on our proposal for the Condition J7 process or any other views on how the process could be improved?**

Where there is a dispute between the Applicant and the Incumbent, ORR’s proposal then envisages NR deciding the outcome. Although the proposal provides an improvement, in terms of direct engagement between applicant and incumbent when compared with the current process, the final stage may prove as difficult as now because:

- Where the parties disagree, the process would then require Network Rail to decide in favour of either the applicant or the incumbent. It would seem highly unlikely that the disputing parties would both accept the outcome, whatever it was, which would mean in practice that the ADDR process would most likely be engaged resulting in the same concerns and issues as now. The proposed approach may, therefore, be no quicker and could perhaps be even more protracted than the current situation.
- The applicant and incumbent if unable to agree may, anyway, try to save time by earlier engagement of the dispute process rather than referring in the first instance to Network Rail.

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

**1.82 Are consultees aware of any issues regarding Condition J8 which need to be addressed?**

We are not aware of any issues that need to be addressed.

## **Condition J9 – access rights review meetings**

### **1.88 What are consultees' views on Condition J9 as it is currently drafted?**

Condition J9 sets out the process for holding rights review meetings between Network Rail and a freight operator on a 6 monthly basis. The condition also enables the relevant operator or any other operator to request such reviews to be held in the event that Network Rail has not issued a Notice for such a meeting. In practice, there are contractual review meetings held between Network Rail and operators although since the introduction of Part J in 2005 none have been formally held as condition J9 meetings. To hold additional condition J9 meetings with each freight operator would mean at least a further 12 such meetings each year. This would potentially be a burden on the industry in terms of time and cost and is also over and above the level of industry engagement already occurring through the J4, J5, J6, J7 and J8 mechanisms - these conditions are actively used where there is an urgent priority to effect a change to access rights. Condition J9 reviews would supplement these processes but would require further time and resources from the engaging parties due to the:

- Large number of rights held in a many freight track access agreements.
- Timeframe within which data has to be collected, interpreted and communicated to the freight operators.
- Need to largely manually collate the information necessary due to the unavailability of a readily accessible rights utilisation reporting process.

As stated above, already there are regular meetings between Network Rail and operators, including reviews by commodity flow, service groups and contractual requirements, plus other matters such as engaging in performance issues and access requirements. Hence, it is unsurprising that additional “formal J9” meetings have not been convened or that there have not been any requests from operators to Network Rail to convene such meetings.

In addition to these issues, the J9 processes can be seen as being adversarial in that, the purpose of the Notices are only to seek a surrender of rights and, in fact, meetings would only take place where there is disagreement between Network Rail and the operator on whether rights should be surrendered. In view of this, plus the likelihood that there could then be protracted dispute processes, it is likely that any priority proposals for rights surrenders would not actually wait for a J9 meeting but be effected earlier by use of J4 and J5 mechanisms. It is difficult, therefore, to understand the circumstances in which J9 meetings, which are arranged either due to a third party request or as a result of direction by ORR, would be a more efficient use of time and resources than the alternative mechanisms within the other conditions.

As stated above there are other regular meetings held between Network Rail and operators to review contractual rights. For example, for operators with extensive schedule 5 rights, Network Rail and the relevant operator applies an approach for progressively reviewing individual Service Groups. This can typically result in a substantial number of supplemental applications, including where relevant rights for surrender. Therefore other than for urgent needs, where the other mechanisms (J4, 5,

6, 7 and 8) can be applied, Network Rail believes existing commercial arrangements provide sufficiently for contractual review requirements.

**1.89 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?**

Network Rail welcomes proposals to improve Part J but is unclear as to the benefits, in relation to additional industry costs, of redrafting Condition J9 as proposed. Network Rail welcomes other consultees views but experience to date shows that the J9 Condition is not a mechanism that industry parties wish to invest time in and prefer to rely on the other mechanisms within Part J. Network Rail believes that reform of Part J should focus on making the other conditions more effective which, if achieved, would further negate the need for additional meetings through Condition J9.

**1.9 What are consultees' views on what a rights review meeting should involve?**

**1.91 How often should rights review meetings be held?**

Network Rail believes that the existing commercial arrangements sufficiently provide for regular contractual review. Because of the differing size of operators, a standard frequency may not be appropriate. Network Rail sees the meetings as an ongoing process of assessment and review with the frequency reflecting the volume and nature of the rights held within individual TACs. In practice, this means meeting typically once per year, with the parties agreeing any intermediate reviews as necessary.

**1.92 Do consultees agree with the proposal to allow any Timetable Participant to force Network Rail to hold a rights review meeting?**

Network Rail does not believe that this is necessary but recognises that the same principle could be applied to Condition J5, but with better effect. To implement this proposal as consulted could risk J9 rights review meetings being requested very frequently, thereby potentially increasing costs but without necessarily accruing industry benefits.

**Condition J10 – ORR's consent and determination**

**1.97 Do consultees agree that ORR's ability to consent to part only of the modifications submitted under condition J2 is no longer required?**

**1.98 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?**

Experience has shown that the industry has not embraced J2 for reasons that we have explained earlier, therefore the proposed removal of consent will have limited impact.

Network Rail recognises that ORR has an interest in retaining the ability to modify cordon cap adjustments in certain circumstances.

## **Condition J11 – publication of documentation**

### **1.101 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?**

On occasions, negotiations have been held up whilst the parties discuss the intention and appropriateness of statements made in notices.

The formulation of industry approved templates would help to address these uncertainties.

## **Condition J12 – reasonable on-going commercial need**

### **1.112 What are consultees' experiences of using ROCN?**

Network Rail believes that the ROCN as currently defined, does not enable the parties to clearly understand the criteria and has led to disputes between the parties.

### **1.113 Do consultees agree that ROCN requires simplification?**

It is our view that the process of identifying whether an operator has a reasonable on-going commercial need would benefit from more clear and precise criteria.

### **1.114 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?**

Network Rail believes that the simplification of the ROCN will make it easier to use the process. The difficulties experienced with interpreting and agreeing ROCN application has been a key factor relating to delays in completing Part J processes and has been significant as regards the need to seek ADRR determination in many cases. Improvement to the ROCN criteria has the potential to significantly reduce timescales and industry costs.

### **1.115 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?**

Network Rail believes that the proposed changes in relation to call-off contracts will help parties to more consistently apply the ROCN rules and criteria.

### **1.116 Do consultees agree that the ROCN criteria applicable to cordon cap reduction could be simplified and incorporated into Conditions J6 and J8? Do consultees**



**have any other views on how the ROCN criteria applicable to cordon cap reductions could be improved?**

Network Rail supports the proposal to incorporate simplified ROCN criteria for cordon caps and their incorporation within Conditions J6 and J8.

**Condition J13 – dispute resolution and Condition J14 – appeal procedure**

**1.127 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?**

Network Rail believes that there is a degree of overlap between J13 and J14 which can lead to confusion. In this circumstance we propose that it is the Incumbent or the Third party that makes a referral.

**1.128 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?**

It is our view that whilst the existing rules specify timescales, there is scope for the parties to adopt a quicker process should they feel it is necessary.

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

Network Rail would welcome such a proposal provided it recognises the different level of urgency and importance of appeals.

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

We believe that this proposal should relate to issues of industry importance and be in the interest of justice. The process would benefit from ORR guidance on the criteria that should apply in these circumstances.

I trust these comments are useful and would be happy to facilitate a meeting with you to discuss in more detail any of the issues raised in this response.

**Yours sincerely,**

**John Boon**  
**Commercial Manager, Contracts & Network Code**