

Jonathan Rodgers  
Senior Executive, Access & Licencing  
Office of Rail and Road  
25 Cabot Square,  
London,  
E14 4QZ

**Date:** 11<sup>th</sup> April 2025

Dear Jonathan,

**FTWCRL Regulation 32 Interested Party Response in Respect of Virgin Management Limited**

**1. Section One: Introduction**

I am writing on behalf of First Trenitalia West Coast Rail Limited (FTWCRL) in respect of recent communications regarding Virgin Management Limited's (Virgin) regulation 32 with the Office of Rail and Road in respect of access right relinquishments made in 2024.

FTWCRL formally acknowledge the request to respond as an interested party in this matter [\[Link\]](#) and herewith provide our response. We are keen to support the Office of Rail and Road in reaching a decision on this concern, and as such have provided a significant amount of background in response to your request.

Our response references several letters sent by parties considered within this case, in addition to referencing several clauses within Part J of the Network Code. We believe that these provide additional context to this Regulation 32 process for the regulator to consider.

We note that this is a new application of the Regulation 32 process, for which there is no previous precedent in this regard to the specific allegation made in respect of an alleged Failure to Use. FTWCRL are therefore keen to understand the next steps & potential outcomes within this process under consideration by the ORR.



## 2. Section Two: Avanti West Coast (AWC)'s Timetable Step Up Strategy.

AWC is part of the West Coast Partnership, the trading name of FTWCRL; we have a mission to be the transport of choice, connecting customers and communities along the West Coast Mainline. This is with the vision of delivering a service that sets new standards for customer experience and operational excellence.

Delivery of additional services within the next two upcoming timetable change dates is an essential part of this mission and is a key part of what FTWCRL has worked towards over the course of the past two and a half years. FTWCRL have recently welcomed Network Rail's reassertion that these services were included within the December 2022 ESG timetable [[Link to NR Letter](#)], [[Link to FTWCRL Response](#)]. We note that our additional access applications made in advance of the ORR's 20<sup>th</sup> May 2024 deadline are all aligned with this timetable specification and are part of the originally intended operation within the December 2022 ESG.

FTWCRL has applied an effective readiness process which has enabled a more reliable delivery of our timetable, increasing provision at each change date in line with available traincrew resource. The importance for customers of a train service they can rely on, and which provides effective and reliable journey opportunities, is recognised by FTWCRL; this is evidenced in our latest positive net advocacy scores regarding our service – with Period 2513 providing the highest result since the pandemic.

Since the implementation of the December 2022 timetable, we have reliably increased our weekday service offering from 264 trains to 285 trains, an increase of 21 trains per day. At the same time, we have undertaken several upgrades to our fleet, including our multi-award winning Pendolino refurbishment, and the introduction of our new Evero fleets - a combination of bi-mode and electric Class 80x trains which have replaced the previous all-diesel Class 221 fleet.

FTWCRL trained over 200 drivers to operate the new Class 80x trains within in an initial twelve-month period and will complete the training of relevant colleagues by the start of the May 2025 timetable. These trains are already providing customers with an improved experience and greener journeys.

Our new Evero trains will also allow FTWCRL to increase our proposition on the Liverpool Route, with the first of our additional all-electric second hourly return services already operating from November 2024. This new service frequency has been welcomed by customers and stakeholders alike, and we look forward to increasing our provision over coming timetable changes in May and December this year.



FTWCRL has been clear & consistent that our current position regarding the relinquishment of access rights is temporary, and as more drivers become productive in line with our long-term five-year driver strategy, the majority of residual unused rights (minus a small number of exceptions) will be reinstated during the May 2025 timetable. We have continued to engage Network Rail and the ORR throughout this process.

During the December 2025 timetable, FTWCRL plans to introduce all remaining additional services on the Liverpool route, operating a total of 321 trains per weekday across the network. All these services were included within the December 2022 ESG agreed by the industry, and as such FTWCRL believe that there is sufficient capacity for the small number of services which have additional rights applied for – some of which have already been operating on a contingent basis since December 2024.

Our relentless focus on increasing our timetable offering with a stable and reliable approach has already driven growth, for which the whole industry is benefitting. FTWCRL is a net contributor to the public purse, as one of only two DfT operators not requiring a subsidy for its operation [\[Link\]](#). This is a clear result of the actions taken to stabilise operations and move forward with our new mission and vision.

FTWCRL strongly believes in the plans developed for the future; that they will deliver the most optimal outcome for customers and the wider economy, with more trains and better journey opportunities to be realised within the next 12 months. This cannot be matched by any aspirant Open-Access operation based on current timescales for both resource and rolling stock availability.

### **3. Section Three: West Coast Partnership Development (WCPD) – Future Service Development.**

Looking further to the future, we have recently welcomed Network Rail's acknowledgement of the strategic importance of HS2 [\[Link\]](#), and the future service specification which would be impacted by additional access to the network.

As you will be aware, West Coast Partnership Development, the other part of the FTWCRL business, is the Shadow Operator of High-Speed Services and is responsible for the development and recommendation of Train Service Specifications (TSSs) for all relevant services, including on the Conventional Rail Network, following the opening of the HS2 infrastructure. This work, on behalf of



the Secretary of State, is being undertaken in collaboration with Network Rail and is intended to optimise the economic benefits of the investment in the new HS2 network.

It is noted that the ORR has made clear the importance of HS2, issuing a letter in 2018 stating this and acknowledging that High Speed Services are a priority where access rights are considered [\[Link\]](#).

*Note: references to "Virgin" or "Virgin Trains" within the ORR's 2018 letter linked above refer to the previous West Coast operator, now FTWCRL, and not in respect of the current access proposal from Virgin Management Limited.*

FTWCRL remains clear that the applications being sought by other operators, including Virgin, are not consistent with the planned TSSs for High Speed and residual Intercity West Coast services therefore impacting the intended outcomes of the substantial investment in the rail network by the Secretary of State.

#### **4. Section Four: Background on the ORR's Process on Competing Access Applications – May 2025.**

Referring to the ORR's letter issued on the 24<sup>th</sup> April 2024, which focused on competing access rights, this resulted in a significant number of applications from prospective and existing operators submitted on the 20<sup>th</sup> May 2024 [\[Link\]](#). On the West Coast Mainline, this included applications from Virgin Management Limited (Virgin Trains), East Coast Trains Limited (Lumo), in addition to pre-existing requests from the Wrexham, Shropshire & Midlands Railway (WSMR) and Grand Union Trains (GUT) – now First Rail Stirling. This was in addition to newly proposed parcels operations and other freight uses.

At the time, FTWCRL provided opinion on the two new aspirant open access applications; namely both the Virgin and Lumo applications. At the time, FTWCRL was consistent and opposed both applications for access, with similar grounds surrounding capacity and future HS2 operations on the WCML. This position was also consistent with previous approaches taken by the West Coast operator. FTWCRL also opposed applications from parcels operators – conditional on their response for areas of clarification.

An additional layer of opposition was provided to the Virgin application on the basis it sought to take-over operations which FTWCRL is contracted to operate on behalf of the Secretary of State. We were



clear that the Virgin application represented a significant shift in the way in which open access proposals had previously been undertaken, seeking rights which were held, and in some cases are now operated, by FTWCRL. At the time, we stated that we were opposed in the strongest possible terms to this application; the strength of our position on this has not changed.

In the intervening period between our most recent engagement with Virgin, there has been further communication from the Department for Transport regarding their views, which Virgin responded to on the 7<sup>th</sup> February 2025. This letter contained multiple references to our AWC operation, in addition to alluding to the belief by Virgin that Network Rail had not followed the Network Code (Part J) in allowing FTWCRL to relinquish (temporarily) its access rights. We note that this later point is the subject of Virgin's Regulation 32 appeal. The above position is shared with openness as context in respect of this Regulation 32 process, and FTWCRL's position in respect of Virgin's application.

#### **5. Section Five: Letter by the Department for Transport on Live Open-Access applications, received during pre-election period; 4<sup>th</sup> February 2025.**

We welcome the intervention from the Department for Transport on the 4<sup>th</sup> February 2025 regarding live Open-Access applications on the West Coast Mainline [\[Link\]](#). Specifically, regarding the Virgin application, we support and echo the DfT's significant concerns.

We note the significant revenue abstraction which the DfT have forecast as £110.5m, failing the Not Primarily Abstractive (NPA) test at a ratio of 0.21. The response by Virgin suggests they believe that this is primarily driven by their-then proposed Glasgow service group. However, timings for this service group were not included within the original Section 17 application received in May 2024.

In reference to Virgin's response letter as of the 7<sup>th</sup> February 2025 [\[Link\]](#), we do not believe that there is credibility in Virgin's assertion nor agree with the principle that it would be a total of eight services (as opposed to the other sixty-two proposed), that would tip the balance of the NPA test in such a significant way. We therefore support and endorse the Department for Transport's assessment in this regard and would like to understand more regarding the methodology and assessment used in Virgin's own evaluation to verify claims made.

Given that FTWCRL is only one of two operators currently returning a premium to the taxpayer, the revenue abstraction that this application is likely to drive will result in a significant deterioration in



funds available to the Secretary of State – affecting all the whole public-passenger sector of the industry contracted by, or under the control of the DfT. This could be further exacerbated through an abstraction of operational resource, which in turn would require FTWCRL to reduce the timetable and therefore reducing the ability to raise revenue.

These specific points in relation to exacerbated impact through various forms of abstraction are relevant in respect of Virgin's Regulation 32 appeal due to their long-term consequence, and ability to unintentionally lead to a potential further utilisation of temporary relinquishments in the future.

Regarding other matters highlighted by the DfT in their letter, FTWCRL raised several of the same concerns with Virgin in our response dated 24<sup>th</sup> June 2024. Detailed analysis was provided on the implication for HS2 services, commercial business implications, demand & revenue forecasts, infrastructure, network capacity (by proposed route), performance, rolling stock, and station access.

FTWCRL concluded that:

*"Following this comprehensive assessment of VML's application, and whilst we recognise the importance of healthy competition on the network for the benefit of the passenger, we do not believe that this is a conventional Open Access request and as such requires further in-depth consideration by the Department for Transport, Office of Rail & Road and Network Rail in the context of the current WCP Contract, HS2 Train Service Specification and Network capacity.*

*Approving this application would represent a fundamental and profound change to the existing contract in place for the WCP Operator and Shadow Operator, in addition to the ability to deliver the full scope of High-Speed services on HS2 and the conventional network and national return on investment.*

*There are several unintended consequences that we believe have been identified with this application which therefore discredit the viability of delivering this proposal. It is our belief that this proposition would have the opposite effect when compared with its intention; customer journeys across the whole system would be negatively impacted, with potentially worse systemic performance & resilience due to the limited capacity available and use of congested infrastructure.*

*[Cont. on next page.]*



*Depending on the level of absolute abstraction, there may also be a negative impact on the funds available to the Secretary of State which would have an overall negative impact on value for money from public investment. We therefore cannot offer our support to this application and are opposed to this application in the strongest terms."*

***FTWCRL Response Letter to Virgin Track Access Application – Section 17 – 24.06.24.***

Whilst Virgin did respond to FTWCRL's letter of the 24<sup>th</sup> June 2024, the response did not address any of our significant concerns. FTWCRL provided a response back to Virgin highlighting this, without any further correspondence.

Given the additional information now held regarding the NPA test, in addition to the lack of credible plans to mitigate concerns raised, our position has been reinforced; we remain opposed in the strongest terms.

We note that Virgin have recently submitted a bid for the December 2025 timetable which includes a reduced quantum of trains. Upon understanding the reduced proposal, there is no change in our opposition or the significant concerns that remain in respect of network capacity, network performance & resilience, implications for future High-Speed Services originating from HS2 infrastructure, or the potential for significant revenue abstraction. We will be providing comment directly to Network Rail and Virgin Management Limited in due course regarding the reduced proposal.

## **6. Section Six: Part J of the Network Code**

FTWCRL are keen to provide effective context in relation to our interaction with Part J of the Network Code. We note that the claim made by Virgin Management Limited in their Regulation 32 appeal specifically references activities covered by Part J of the Network Code; the document which relates to Changes to Access Rights [\[Link\]](#).

- **Part J References throughout our Response**

In following sections of our response, we will address the following sections within Part J, the wording for which has been included in **Appendix A**.

A table with the relevant sections follows on the next page.



Table 1: Part J References

Part J Reference	In Reference To
J.2.1.1	Adjustment of rights in relation to access relinquishments.
J.2.1.2	Adjustment of rights in relation to access relinquishments.
J.2.6.1	Consultation by Network Rail
J.4.1.1	Failure to Use in relation to quantum access rights.
J.4.1.2	Failure to Use in relation to quantum access rights; conditions affecting the validity of J.4.1.1
J.4.1.3	Failure to Use in relation to quantum access rights.
J.4.3.1	Certain Periods to be disregarded in relation to Failure to Use, affecting the validity of J.4.1.1
J.4.4.1	Service of a Failure to Use.
J4.5.1	Cessation of a Failure to Use in relation to future timetables.

- *FTWCRL's Temporary Relinquishments under Part J of the Network Code*

We note that Virgin reference that FTWCRL have temporarily relinquished rights under condition J2.1.1 & J2.1.2 of Part J of the Network Code – believing that a different process should have been applied by Network Rail, known as Failure to Use, within J.4. They also state that alternatively, Network Rail should have consulted them under J.2.6.1.

Whilst we cannot speak on Network Rail's behalf, it is correct that FTWCRL have temporarily relinquished several rights in respect of its operations. This process commenced with initial relinquishments in January 2024, prior to our knowledge of Virgin's open-access aspirations on the West-Coast and continued throughout June and July 2024; the latter two being contracted in August 2024 [[Link 1](#)], [[Link 2](#)].

These relinquishments were duly completed in line with the agreed Part J relinquishment process, and these are now written into FTWCRL's track access contract. These later relinquishments were also subsequently published online by Network Rail, in line with other operators who have also temporarily surrendered rights. Links to other operators' temporary relinquishments can be found in the **Appendix B - References** at the end of this letter.

FTWCRL note that most rights temporarily relinquished have expiry dates prior to the proposed commencement of Virgin's Open Access proposal; only four rights that were temporarily relinquished last until May 2026. During the core period of the relinquishments, between June 2024 and December 2025, Virgin were not proposing to be and are not currently an access beneficiary.



Relinquishments made by FTWCRL have been made to align with our timetable step-up strategy as outlined in **Section Two** of our response above. In many cases, the relinquishments have been less than the maximum 24-month period for which Network Rail are able to consider “temporary”. Not only does this demonstrate the intent behind them to be to ensure alignment with AWC’s timetable recovery trajectory, but it also demonstrates that this position was always intended to be for a limited period.

FTWCRL have been clear and unambiguous that the intent behind our relinquishments is to act in good faith in accordance with the Network Code, and to temporarily release capacity not currently being used due to factors outside of our direct control. We are clear that regardless as to whether Virgin had submitted their aspirations in May 2024, the same course of action would have been taken – as evidenced by our established conversations with Network Rail from earlier in the same year.

- Utilisation of J.2.1. by FTWCRL

It is expedient of us to highlight the following aspects in respect of Part J.2., given its reference by Virgin within their Regulation 32 appeal.

In application of our temporary surrender, we used condition J2.1.1. This is a recognised fact by Virgin as listed within their Regulation 32 notice [\[Link\]](#):

*“...that NR subsequently accepted a notification from Avanti on 22nd July 2024 for the purported ‘temporary surrender’ of the paths under J2.1...”*

***Virgin Management Limited Regulation 32 Appeal to the ORR.***

FTWCRL notes that J.2.1.1. is stated as being “without prejudice to the rest of Part J”. This separates it and explicitly sits this clause apart from the other mechanisms within the Part J process, including J2.2. and J2.3.

It is therefore clearly applicable outside of processes under which other parties can make a relevant enquiry to Network Rail. As in our case, our temporary surrender was undertaken as an act in good faith as a good and efficient operator. J.2.1. was therefore the applicable clause for FTWCRL to utilise.



We also note that Network Rail's application of our utilisation of condition J.2.1. is consistent with approaches taken in respect of other operators. Other recently published temporary surrenders of access rights in 2024 from South Western Railway [\[Link\]](#), Merseyrail [\[Link\]](#), Northern [\[Link\]](#) & Transport for Wales [\[Link\]](#) also used the J.2.1 process. This demonstrates the consistency of FTWCRL's approach with established industry process.

For a long-established period, Network Rail has considered clause J.2.1. as allowing both permanent and temporary surrenders of rights.

FTWCRL notes that Network Rail has publicly made available Part J template notices on the Network Code section of their website [\[Link\]](#). We note that the relevant surrender template notice for J.2.1. is included within these templates. This notice explicitly asks the access beneficiary to select whether the surrender is intended to be permanent or temporary. This reflects a long-accepted position across the industry and was introduced following a Network Code-mandated consultation by Network Rail.

It is therefore our belief that J.2.1. was indeed the correct mechanism, that it has been applied consistently with the approach taken with other operators, and has an established process as demonstrated by Network Rail's documentation for operators to utilise.

- Failure to Use Rights (J.4.1.1) & Mitigating Factors (J.4.3.1.).

Virgin state that they believe that there has been a failure to use rights under condition J.4.1.1. FTWCRL strongly disagrees with this assertion.

J.4. covers the Topic of Failure to Use. Clause J.4.1.1, the mechanism by which a Failure to Use is applied by Network Rail, is subject to important conditions in both J.4.1.2 and J.4.3.1 which are relevant to the current issue subject to this appeal. As a reminder, J.4.3.1 states the following:

*"Any period of non-use shall be disregarded for the purpose of determining whether a Failure to Use has occurred under Condition J.4.1.1(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."*

***Part J of the Network Code.***



FTWCRL have been consistent in our position since Part J conversations commenced with Network Rail in 2023; there have clearly been non-economic factors beyond our control affecting our operation that have been temporary in nature. These are described further in the rest of this letter across **Sections Six, Seven and Eight** but in brief they consist of the impact of industrial action on our operations, the need to train drivers so they are to operate on the relevant paths and delays in the rolling stock to be used.

Despite seeking to mitigate these aspects as far as we reasonably could, these reasons were "non-economic" as per J4.3.1(a) because our non-use of our access rights was the result of external circumstances rendering this impossible rather than any commercial decision by FTWCRL. In the same way, all these reasons were beyond our control, again as per J4.3.1(a). In May 2023, we reinforced this position in a letter to Network Rail titled "Unused Access Rights – Network Rail's approach to post-pandemic recovery", stating:

*"Recognising FTWCRL is not using some of its access rights during this period, we do not deem a failure to use to be relevant under Part J 4.3.1 as the current Industrial Relations Climate and consequent reduction in Rest Day Working volunteers satisfied both J 4.3.1. (a) and (b) in being attributable to non-economic reasons beyond our control and temporary in nature".*

***FTWCRL Letter to Network Rail - Unused Access Rights – Network Rail's Approach to Post Pandemic Recovery.***

Following our decision to temporarily relinquish rights – acting reasonably and in good faith – we continued to make clear our belief that the reason for non-operation of services was due to factors outside of the direct control of AWC that were both non-economic in nature and temporary.

Please note the following excerpt from our intention of relinquishment letter to Network Rail, dated 1<sup>st</sup> July 2024:

*"FTWCRL is acting reasonably and in good faith by temporarily surrendering these rights. We wish to be clear that FTWCRL is currently not operating these services due to factors outside of its direct control which are non-economic in nature.*

*[Cont. on next page.]*



*This includes:*

- **Industrial Action** - FTWCRL's AWC operation is still recovering from a period of heightened challenging industrial relations between 2022 and 2024. Whilst local relations are improving, we note that the national dispute between ASLEF & Train Operators remains live, with no clear outcome.
- **Driver Training** – It has taken AWC 3 years to recover from a pause in Driver training during the pandemic. To deliver the new additional services on the Liverpool Route, further training is required. This includes both conventional new driver training as well as additional new traction training on Class 80x units, the agreement for which was also delayed.
- **Class 807 Delivery** – Deliveries of new units intended to operate the second AWC service between London Euston and Liverpool Lime Street have been subject to materials, manufacturing and testing delays.

*As a result, AWC does not currently have sufficient trains to increase service provision on this route without causing a detriment to other service groups.*

*Had these factors not been present, FTWCRL believes that there would be commercial viability in operating these new additional services during the current timetable period; it is our intention to introduce them as soon as conditions allow."*

#### ***FTWCRL Letter to Network Rail - Liverpool Access Relinquishments – 01.07.24.***

Of the factors laid out in the July 2024 letter, we are pleased that the national industrial dispute has been settled, allowing FTWCRL to re-build relationships with its Trade Union colleagues. We have spent the past two to three years focusing on our Driver recruitment, which is bearing fruit at the right time in line with our timetable strategy; additionally, we have recently renewed our rest day working agreement for 14-months to continue to support driver training. What is more, the entire Evero fleet will be delivered to support delivery of the May 2025 timetable.

FTWCRL are clear that we have a foreseeable on-going commercial need for these paths. FTWCRL are operating the temporarily relinquished rights within the correct timetable period as they return to us in line with our timetable step-up strategy as outlined in **Section Two**. We have been clear and unambiguous that had these external factors not existed, these services would have been operated at an earlier date than is currently possible.



We are steadfast in our position that that factors preventing operation were non-economic, temporary and outside of the control of FTWCRL. We have been consistent in our correspondence with Network Rail in this regard.

We therefore believe that application of Failure to Use would never have been appropriate; however we took action which we believed as a good and efficient operator would be in the best interests of network capacity.

Whilst the tail-end of some factors remain, our progress in mitigating this situation demonstrates that it is temporary in nature; we have both the available traincrew and rolling stock to match the bid train plan within the currency of each timetable change and are making fundamental progress surrounding the temporary factors which have led to our position. We do not believe that the rates of activity we have taken to deliver these improvements could be similarly matched by any aspirant Open Access operation in respect of rolling stock and traincrew with the remaining timeframe available.

- *Cessation of Failure to Use in Relation to Future Timetables (J.4.5.1).*

As outlined in **Section Two** of our response, FTWCRL have an explicit timetable trajectory. We are on-track to deliver the step up to 10tph, inclusive of the remaining second hourly Liverpool to London Euston service during the December 2025 timetable.

Services with relinquishments that are set to expire at the start of the May 2025 timetable have been bid to operate during the same timetable period. A consistent approach has been taken for December 2025's bid; the D40 (LTP Bid) was submitted to Network Rail in early March 2025.

Beyond being a clear intent of operation, and the demonstrable evidence that FTWCRL will hold sufficient traincrew and rolling stock to operate, a Failure to Use, in our view, would no-longer be applicable.

FTWCRL Notes J.4.5.1. which relates to a Cessation of Failure in relation to future timetables:

*"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:*

*[Cont. on next page.]*



- a) in relation to a Failure to Use under Condition J4.1.1(a), the Part J Access Beneficiary makes;*
- i. a Train Operator Variation Request for a Train Slot in respect of the relevant Quantum Access Right in the Working Timetable; or*
  - ii. an Access Proposal for a Train Slot in respect of the relevant Quantum Access Right in any subsequent New Working Timetable; or*
- b) 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."*

***Part J of the Network Code.***

As FTWCRL now has a clear & explicit access proposal for a train slot in respect of the relevant quantum of access rights in subsequent New Working Timetables for May 2025 and December 2025, in other words, confirming a cessation of a failure to use under J4.5.1(a)(ii), if it is held that one has occurred. In parallel to our approach to temporary relinquishments, we do not believe that a Failure to Use would be applicable for either the May 2025 or December 2025 timetable.

Given this, we are therefore keen to understand the implications of any decision by the ORR in this matter in relation to the above clause, and how it would likely affect the application of Part J in the future given the application of J4.5.1 to our situation.

**7. Section Seven: Virgin Management Limited's References to Driver Training in their 7<sup>th</sup> February 2025 letter to the ORR.**

Following receipt of the Department for Transport's letter on the 4<sup>th</sup> February 2025, we noted that Virgin provided a response which made references to our operation on the 7<sup>th</sup> February 2025 [\[Link\]](#).

This is relevant in respect of our response as an interested party to Virgin's Regulation 32 appeal and supports our firmly held belief that there were established, clear external non-economic factors present that prevented operation of an increased service provision. We believe it will assist ORR to explain further where Virgin has accepted the non-economic factors beyond our control that prevented us from using the relevant paths (thereby supporting our argument that J4.3.1 would disapply any failure to use under J4).



- *Driver Training at the West Coast Operator – Underlying Issues Exacerbated.*

We welcome Virgin's assertion that Driver Training was a longstanding issue, including during their tenure managing the West Coast operator. These issues were inherited by FTWCRL in December 2019. Virgin's letter [\[Link\]](#) states:

*"We note the DFT's comments on driver training. Indeed, Virgin Trains highlighted the issue of driver shortages to the DFT long before the West Coast franchise changed hands in 2019 and sought (unsuccessfully) at that time, permission from the DFT (due to being in the Last 12 Months provisions) to proactively recruit more drivers. Virgin's franchise bid in 2018/19 identified this issue and put forward robust plans to manage the situation. We cannot comment on the eventual winning bidder's plans...."*

***Virgin Letter to the ORR, 7<sup>th</sup> February 2025***

As a reminder, this inherited baseline position was further exacerbated by the lack of an ability to train driver colleagues during the COVID-19 pandemic which occurred within 4-months of FTWCRL's operational existence. Driver Training was impacted across a three-year period with varying restrictions across the three nations in which we operate – with this only further exacerbated by the national industrial relations climate experienced between 2022 and 2024.

Virgin's recent assertion in February 2025 regarding Driver Training also fundamentally demonstrates the validity of FTWCRL's Part J position as described by the letters shared by us in both May 2023 and July 2024 and referenced in **Section Six** above.

It is clear from statements made in their letter of 7<sup>th</sup> February 2025, issues regarding Driver Training had been longstanding spanning both Virgin & FTWCRL's tenure on the West Coast. It is therefore clear that even one significant event had the potential to create substantial disruption to delivery at the West Coast operator due to the fragility of this position.

In the space of three years, two non-economic issues occurred – including at the very start of the new franchise; a pause in training due to a variety of pandemic restrictions across the three nations served, and a national breakdown in industrial relations. Both external & once-in-a-generation factors were outside of FTWCRL's direct control.



We strongly believe that these issues did not lead to a Failure to Use under J.4.1.1, as these factors are explicitly non-economic, out of our control, and evidently would have been present for any operator who took over or continued operations from 2019. We have been clear throughout that we believe that this would satisfy both conditions J.4.3.1. (a) and J.4.3.1 (b).

FTWCRL's position is that we have acted reasonably and in good faith by temporarily releasing capacity back to the network while we were not able to use that capacity. Moreover, considering the non-economic factors present which were not in our control, we would not have been required to surrender access rights in any case because no failure to use occurred.

#### **8. Section Eight: Driver Training & Resource Abstraction Risk at the West Coast Operator – Mitigations to Resolve Inherited Underlying & Exacerbated Challenges.**

Following Virgin's confirmation of pre-existing underlying resource challenges in their letter as of the 7<sup>th</sup> February 2025, we also note references within the same letter to FTWCRL's underlying driver position by making direct reference to a Transport Select Committee Meeting in December 2022.

Since the implementation of the December 2022 timetable, FTWCRL has been diligently working towards increasing its service provision, driven by an increased driver establishment included within a 5-year driver recruitment strategy, and increasing productivity. We are on-track with progress to deliver against this with a view to introducing our full provision during the December 2025 timetable.

At the West Coast operator, it can take up to 24 months for a driver to become fully productive, depending on depot, route and traction requirements. To deliver a reliable service for customers, our increase in provision is at a responsible pace which prioritises sustainable growth.

Recognising the important role which our drivers play in delivering operational excellence, we have recently begun to see the real-terms benefits of two to three years of increased driver recruitment.

Using Period 12 as an example for comparison, in FY23, AWC driver responsible cancellations equated to an average of 8.7 trains per day – with overall TOC on Self (operator responsible) cancellations equating 4.2%. Two years later in Period 12 of FY25, AWC driver responsible related cancellations averaged 0.9 trains per day, with TOC on Self (operator responsible) Cancellations for the period equating 1.6%.



In Period 13 of FY25, this was again lower, with Driver Cancellations equating to 0.7 trains per day, and a period result of 1.0% for TOC on Self Cancellations overall. Year-end performance metrics for FY25 all demonstrate a measurable improvement against FY23. Again, the measure with the greatest improvement is in respect of TOC on Self Cancellations, where year-end MAA's (Moving Annual Averages) saw a 3.8% decrease (improvement) between FY 23 (6.8%) and FY25 (3.02%).

This is with the backdrop of an incremental increase over that same period of an additional 21 trains operated each day at a total of 285, during which the business undertook intensive Driver Training for the new Evero fleet.

- *Driver Resource & Abstraction Risk.*

We fully support the Department for Transport's recent assertion (in their letter from the 4<sup>th</sup> February 2025) [[Link](#)] that abstraction of Driver resource would have a significant impact on our ability to deliver the remaining uplifts required; uplifts which will deliver real journey benefits to customers within the next 12 months.

To reiterate this, we wish to be clear that operational resource abstraction to a Virgin operation at the service level proposed would both disadvantage customers and taxpayers, with fewer services in operation whilst Virgin provides training for its operational teams, and a further reduction in revenue for the Secretary of State due to fewer services operating.

It is highly likely that it would take a minimum of two to three years for FTWCRL to recover from this position when considering recruitment and training timescales. We evidence this assertion with our recent experience in mitigating the factors we have outlined in respect of J.4.3.1.

This is relevant to the Regulation 32 appeal; in an eventuality where a significant resource abstraction took place, it would likely lead to FTWCRL requiring further future temporary relinquishments in this regard to protect future service provision.

## **9. Section Nine: FTWCRL Response to Regulation 32 as an Interested Party**

We welcome the opportunity to contribute to the Regulation 32 process as an interested party, and are keen to provide our perspective to allow the Regulator to make an informed decision that confirms: (a) that Part J has been applied correctly to our temporary surrender of access rights, and (b) in parallel that there has been no failure to use by FTWCRL.



FTWCRL emphasises that its actions have been taken entirely in its approach as a good & efficient operator, acting in good faith to temporarily released unused capacity to the network.

- *Position on Virgin's Open Access Proposal*

FTWCRL have been clear and consistent in our views regarding Virgin's Open Access Proposal since we first became aware of it in May 2024.

For the grounds outlined in **Sections Two, Three, Four and Five**, we remain convinced that this access proposal represents a significant change from established Open Access applications, with the potential for real-terms impact for FTWCRL's operations, HS2, network capacity, significant abstraction of revenue and resource, and deterioration of systemic performance.

FTWCRL notes that the positive developments it has made over the past two years will be put at risk in the event of a significant resource abstraction to an Open Access operation, which itself would likely have further damaging performance affects for the West Coast Mainline. This may then result in a further reduction in timetabled operation, affecting a greater number of access rights.

- *Position on Utilisation of Temporary Relinquishments*

The same actions taken by FTWCRL would have been taken regardless as to Virgin's (or anyone else's) interest in Open Access Operations; we evidence this by the fact that relinquishment activities were already ongoing prior to Virgin's formal notification of intentions in the receipt of its Section 17 Form P on the 24<sup>th</sup> May 2024.

Our actions in respect of utilising J.2.1.1. & J.2.1.2 were intended to provide non-utilised capacity back to the network, working as a good and efficient operator in the best interests of the industry whilst our services were temporarily not operating. J2.1 has been used for temporary relinquishments by many operators (as noted above), and this reflects Network Rail's longterm application of this provision in Part J. The template notice for J2.1 asks operators to confirm whether a voluntary surrender is permanent or temporary. This template was agreed in consultation with the industry in accordance with J11.1.2. before being published.



- Position on Non-Utilisation of Access Rights & Failure to Use

We have remained clear regarding our perspective on Part J.4.1.1. throughout ongoing discussions with Network Rail; for clarity, we have always been consistent that our position has been driven by non-economic factors outside of our control which were always going to be temporary.

Indeed, information provided by Virgin in their letter dated 7<sup>th</sup> February 2025 demonstrates our position to be true alongside our own description of these factors. The inherited driver baseline in December 2019 produced a challenging position, only exacerbated by non-economic factors outside of our direct control.

This has included:

- A once in a century pandemic, which affected the ability to recruit and train drivers throughout our operation spread across three nations of the UK, across a three-year period between 2020 and 2022.
- A once in a generation national railway strike, which impacted industrial relations at all levels between 2022 and 2024.
- Delays in production of our Class 80x fleets, including to materials.

- Position on Temporary Nature of Challenges Outlined

On all fronts, we have been clear and consistent that actions taken by FTWCRL have ensured that these factors would have a temporary impact; but that nonetheless, would take time to remedy. We believe that we are now in the final stages of this, with the December 2025 timetable representing a key milestone, delivering our promised 10tph operation as envisaged within the December 2022 ESG.

It is clear that we have a credible timetable step-up plan outlined in **Section Two**, which is evidenced by the trajectory by which we have increased operations.

Our utilisation of temporary relinquishments in line with this strategy is unambiguous in demonstrating our intent. Our recent timetable delivery is also evidence of our intent to operate these services as they return to us. We have worked hard with industry partners to enable this.



Furthermore, with train services now bid for both the May 2025 and December 2025 timetables, it is our position that under J.4.5.1. FTWCRL now has a clear & explicit access proposal for a train slot in respect of the relevant quantum of access rights in subsequent New Working Timetables. We therefore believe that combined with the previous evidence of our credible step-up trajectory that a Failure to Use would no longer be applicable.

- Potential for Unintended Consequences – FTWCRL Impact.

Whilst we have been clear that for a variety of reasons, we do not believe that a Failure to Use would become applicable at this time, we note that the ORR can reach any decision on this matter, which will be binding.

As you will be aware, the May 2025 timetable will soon be in operation; as bid, this includes using most of our temporarily relinquished rights. In many cases, retailing against these services has now commenced and we are concerned of the potential commercial implication for outcomes under consideration.

Any decision which affects the May 2025 timetable is likely to have an impact on the funds available to the Secretary of State through a reduction in forecast revenue. As one of only two operators currently returning a premium to government, this is of significant concern.

What is more, FTWCRL is nearing completion of its timetable readiness process, which includes the final sign off-of train crew rostering. The process from initial diagram consultation through to the end of roster negotiations can take between 8 & 12 weeks in the shortest phasing. As a result, any decision made by the ORR must be cognisant of the fact that changes to access rights may fundamentally affect our operational delivery and performance for the full duration of the May 2025 timetable. This degradation may result from broken, inefficient or incomplete train crew diagrams - placed into rosters which do not reflect the intended operation.

The impact of inefficient and emergency diagrams and rostering were cited in the ORR's report [\[Link\]](#) into the May 2018 timetable which largely impacted Northern and GTR. It recognised that in Northern's case, emergency rostering had a sizeable impact:



*"4.25 As the May 2018 timetable was introduced, the failure to develop and implement train crew diagrams and rosters caused the introduction of emergency rostering at Manchester Piccadilly, Manchester Victoria and Leeds, affecting approximately 700 drivers and 2,300 trains per day.*

*4.26 Emergency rostering required Northern to revert to the last agreed roster and manage the allocation of work on the day, matching available resources to work requirements on an hourly-hour basis, resulting in services being at risk of cancellation until all options for cover (including overtime, cross-depot cover or alternative work times) had been exhausted...*

*4.31 Emergency rostering was adopted but a major displacement of staff and trains developed, resulting in the new timetable quickly falling over."*

***ORR Independent Inquiry into the Timetable Disruption of the May 2018.***

It is therefore essential that the ORR remain cognisant of this to avoid unintended consequences in respect of the May 2025 timetable and prevent an outcome which inadvertently causes significant disruption to customers.

- *Potential for Unintended Consequences – Part J*

FTWCRL's concern relates to the precedent set in respect of Part J, and its future interpretations.

FTWCRL firmly believes that conditions J.2.1.1 and J.2.1.2 were appropriate given they were applied in good faith, despite our belief that temporary non-economic factors have clearly been present. Any decision which suggests that application of these two conditions was incorrect may prevent operators coming forward to temporarily release capacity in good faith – when it could reasonably be used by other operators in the intervening period.

Furthermore, FTWCRL's strongly held belief is that conditions J.4.3.1. (in its entirety) and J.4.5.1. are demonstrably applicable in our case which mean there has been no failure to use. We would have significant concerns with any other outcome in light of the information that supports this position. An adverse decision would also set a challenging precedent for operators seeking to increase their service provision in the future.



- FTWCRL Requested Outcomes from the Regulation 32 Process.

We recognise that the ORR has a lot of detailed information to consider as part of making its decision; we are happy to meet with the Regulator to discuss any parts of our response in more detail.

As an interested party, potential outcomes of this process pose a significant risk to our current business, the future of GBR, and under existing arrangements, funds available to the Secretary of State.

In concluding this process, we ask that ORR provide the following outcomes to resolve this issue unambiguously:

- Reinforce the integrity of Part J and the processes followed by FTWCRL by upholding our temporary relinquishments as contractually agreed with Network Rail in 2024.
- Support the validity of FTWCRL's current position for future timetables under condition J.4.5.1.
- Endorse and provide definitive support to FTWCRL's position under condition J.4.3.1. on temporary & non-economic factors preventing operation of train services, with the following conditions; a) that ORR's support is applicable until the operation of the May 2026 timetable when the final remaining relinquished rights return to FTWCRL; & b) that new factors relevant under J4.1.2 or J4.3.1 will be considered in the future, if applicable.

We are firmly of the view that this outcome will provide the greatest clarity for the industry and operators on the West Coast regarding the capacity available, with the ability to effectively plan future proposals within the established industry timescales.

## **10. Section Ten: Concluding Remarks**

We thank the ORR for the opportunity to contribute to its Regulation 32 process as an interested party, and remain keen to understand the next steps, timeframes and potential outcomes within this process.



FTWCRL strongly believes it has acted reasonably and in good faith with Network Rail and other industry partners in respect of its utilisation of Part J of the Network Code, irrespective of non-economic factors being present for non-operation of services.

We remain opposed in absolute terms to Virgin's open access proposal and support and endorse views provided by the Secretary of State on the 4<sup>th</sup> February 2025 which sit in addition to our own previously provided in June 2024.

We remain available to discuss any of the detail provided in this letter regarding our timetable strategy at the ORR's convenience.

Yours sincerely,



Andy Doyle

**Head of Operational Readiness**

**Avanti West Coast**



## **Appendix A – Noted References in Part J of the Network Code**

Part J of the Network Code relates to Changes to Access Rights. FTWCRL note the following clauses as applicable for our response, which have been referenced throughout.

### ***J.2.1.1 – Adjustment of Access Rights in Relation to Relinquishments.***

*"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."*

### ***J. 2.1.2. – Adjustment of Access Rights in Relation to Relinquishments.***

*"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 and Road pursuant to Condition J2.1.3."*

### ***J.4.1.1 – Failure to Use in Relation to Quantum Access Rights.***

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

- a) after the Commencement Date, the Part J Access Beneficiary fails to secure the quantum of Train Slots which the Quantum Access Right permits in a New Working Timetable published by Network Rail at D-26 or in any subsequent variation of this published in accordance with D2.7.4; 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.*

### ***J.4.1.2 – Failure to Use in Relation to Quantum Access Rights; Conditions Affecting the Applicability of J4.1.1.***

*Condition J4.1.1(a) shall not apply:*

- a) where the Part J Access Beneficiary was unable to secure the necessary quantum of Train Slots permitted by the Quantum Access Right because of Restrictions of Use; or*



- b) to Level Two Rights or Contingent Rights where Network Rail has been unable to accommodate the Part J Access Beneficiary's Access Proposal into the New Working Timetable.*

***J.4.1.3 – Failure to Use in Relation to Quantum Access Rights.***

*"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."*

***J.4.3.1 – Certain Periods to be Disregarded in Relation to Failure to Use, Affecting the Applicability of J4.1.1.***

*"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 nonuse is:*

- a) attributable to non-economic reasons beyond the Part J Access Beneficiary's control; and*
- b) is temporary in nature."*

***J.4.4.1 – Service of a Failure to Use Notice.***

*"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"*

***J.4.5.1 – Cessation of Failure to Use in Relation to Future Timetables.***

*"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:*

- c) in relation to a Failure to Use under Condition J4.1.1(a), the Part J Access Beneficiary makes;
 
  - i. a Train Operator Variation Request for a Train Slot in respect of the relevant Quantum Access Right in the Working Timetable; or*
  - ii. an Access Proposal for a Train Slot in respect of the relevant Quantum Access Right in any subsequent New Working Timetable; or**
- d) 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."*



## Appendix B: Letters & Documents Referenced

*Documents Referenced in this section are arranged in date order.*

Reference FTXX	Document Name (& link if available)	Organisation	Date
FT01	Part J of the Network Code. <a href="#">The Network Code – Part J</a>	Network Rail Infrastructure Limited.	12/07/17
FT02	Track Access Issues Arising with High Speed 2 (HS2) <a href="#">ORR's Statement on Track access issues arising from High Speed 2</a>	Office of Rail & Road.	09/04/18
FT03	Office of Rail and Road: Independent Inquiry into the Timetable Disruption in May 2018. <a href="#">Office of Rail and Road: Independent Inquiry into the timetable disruption in May 2018</a>	Office of Rail & Road.	20/09/18
FT04	FTWCRL Response to Network Rail – Unused Access Rights – 150523	First Trenitalia West Coast Rail Limited.	15/05/23
FT05	Email Correspondence & Table of Rights from FTWCRL to Network Rail confirming willingness to Temporarily Relinquish Rights.	First Trenitalia West Coast Rail Limited.	12/01/24
FT06	Northern Trains Limited Part J Temporary Relinquishment of Rights. <a href="#">NTL Part J Temporary Surrender of Rights 050424.pdf</a>	Northern Trains Limited.	05/04/24
FT07	ORR Letter on Multiple Competing Track Access Applications <a href="#">Access application management, ORR letter to Network Rail and industry dated 24 April 2024</a>	Office of Rail and Road.	24/04/24
FT08	Part J Template Notices <a href="#">Part J Template Notices 26-04-24.docx</a>	Network Rail Infrastructure Limited.	26/04/24
FT09	Merseyrail J2.1.2. Notice – Temporary Surrender of Rights. <a href="#">Merseyrail J2.1.2 Notice - temporary surrender of rights.pdf</a>	Merseyrail Electrics 2002 Limited.	06/05/24
FT10	FTWCRL Letter to NR – Access Relinquishments – 21.06.24	First Trenitalia West Coast Rail Limited.	21/06/24
FT11	FTWCRL Response Letter to Virgin Track Access Application – Section 17 – 24.06.24 – Final V2.	First Trenitalia West Coast Rail Limited.	24/06/24
FT12	FTWCRL Letter to NR – Liverpool Access Relinquishments – 01.07.24 Final V2.	First Trenitalia West Coast Rail Limited.	01/07/24
FT13	FTWCRL Email Response to Virgin Management Limited's feedback on VML's access application.	First Trenitalia West Coast Rail Limited.	22/07/24
FT14	FTWCRL Part J Notification to the ORR – Temporary Surrender of Rights 1 <a href="#">Part J Notification to the ORR - temporary surrender of rights 1.pdf</a>	Network Rail Infrastructure Limited	05/08/24
FT15	FTWCRL Part J Notification to the ORR – Temporary Surrender of Rights 2 <a href="#">Part J Notification to the ORR - temporary surrender of rights 2.pdf</a>	Network Rail Infrastructure Limited	05/08/24
FT16	South Western Railway: Relevant Surrender of Rights signed. <a href="#">Notice of Relevant Surrender of Rights signed.pdf</a>	Network Rail Infrastructure Limited.	25/09/24
FT17	Transport for Wales: Part J Notification to the ORR – Temporary Surrender of Rights. <a href="#">Part J Notification to the ORR - temporary surrender of rights.docx.pdf</a>	Network Rail Infrastructure Limited.	25/10/24
FT18	DfT Letter to the ORR on 4th February 2025 in respect of Live Open Access Applications, Received during the Pre-Election Period. <a href="#">Live open access applications received during pre-election period: letter from DfT dated 4 February 2025</a>	Department for Transport.	04/02/25
FT19	Virgin Group Response to the DfT's letter of the 4 <sup>th</sup> February 2025. <a href="#">Live open access applications: Virgin Group response (dated 7 February 2025) to DfT's letter to ORR</a>	Virgin Management Limited.	07/02/25
FT20	Network Rail Representations for Applications Affecting West Coast Main Line South. <a href="#">Network Rail letter on West Coast Main Line (WCML) South applications dated 7 February 2025</a>	Network Rail Infrastructure Limited.	07/02/25
FT21	Rail Industry Finance April 2023 to March 2024 (Revised February 2025). <a href="#">Rail industry finance (UK) – April 2023 to March 2024</a>	Office of Rail and Road.	25/02/25
FT22	Regulation 32 Form – Virgin Management Limited. <a href="#">Appeal by Virgin Management Limited under Regulation 32 regarding the allocation process for infrastructure capacity</a>	Virgin Management Limited.	26/02/25
FT23	FTWCRL Response to NR's letter on West Coast South Track Access Applications. <a href="#">Response from First Trenitalia West Coast Rail Ltd (dated 28 February 2025) to Network Rail letter on West Coast Main Line (WCML) South applications of 7 February 2025</a>	First Trenitalia West Coast Rail Limited.	28/02/25



FT24	Letter from ORR to First Trenitalia West Coast Rail Limited Regarding Regulation 32 Appeal. <a href="#">Appeal by Virgin Management Limited under Regulation 32 regarding the allocation process for infrastructure capacity: letter from ORR to First Trenitalia West Coast Rail Limited dated 21 March 2025</a>	Office of Rail and Road.	21/03/25
FT25	NAS (Net Advocacy Score) vs CASL (Cancelled and Significantly Late) from 2019.	First Trenitalia West Coast Rail Limited.	07/04/25
FT26	Email Correspondence confirming AWC MAA TOC on Self Performance Results for FY's 23/24/25.	First Trenitalia West Coast Rail Limited.	07/04/25