

From: Philip Whittingham
Sent: 04 June 2025 17:40
To: Rodgers, Jonathan
Cc: Clancy, Gareth HORLEY Darren
Subject: RE: [EXTERNAL] Reg 32 Appeal

Jonathan

Thanks for sharing the information. A few comments on the documents supplied:

1. 15/05/23 letter (pages 6-7): As early as this letter, AWC appear confused as to what constitutes a non-economic reason under J4.3.1 (a) and NR appear to have accepted (and continue to do so) this without correction
2. 11/10/23 email (page 9): AWC note that driver issues are the root cause and that it is unlikely that full rights will be used before Oct 2026 without changes to drivers terms and conditions (which remain unchanged today), significantly longer than the 2 year period noted in Jake Kellys letter in pages 3-5. This should have been clear to NR that a J2 process was the incorrect one to follow. Further confusion on what constitutes a non-economic reason prevails uncorrected by NR.
3. 11/10/23 email (page 8): Two days after ORR instructing NR/AWC to enter into the 2nd Supplemental on 09/10/23 (with a 30th October 2023 backstop date), NR note how little information is available on the Dec 24 timetable, noting AWC's "is not willing to relinquish rights even if on a temporary basis", and considering issuing a Part J notice (presumably under J4). This is despite knowing that a 2 year surrender would likely not be adequate. Knowing that AWC were unwilling to voluntarily surrender should have triggered a J4 process.
4. 18/10/23 (pages 10-12) meeting note (page 10): Notes NR will invoke Part J on 23/10/23 unless AWC temporarily relinquish unused rights. We note throughout the communications between NR and AWC that NR refer to Part J notices and it can only infer that these are likely to be under J4 given NR also notes that only operators can offer temporary relinquishment. There appears to remain a reluctance to relinquish rights unless NR guarantee the rights will come back to AWC, especially with NR noting Oct 26 as a potential end date and AWC merely offering to review points nearer the dates. NR note they would need to issue Part J (J4?) notice by end October 2023. It is unclear why this notice was not issued and seemingly remained the case in the 1/12/23 Access Right Review meeting notes, with AWC temporarily relinquishing on 12/01/24. It is also unclear why NR (Matt Allen) would consider "using strategic planning to protect additional Liverpool services as they are in the ESG" - the services would remain in the ESG timetable so this looks like it could only be protecting the services for AWC.
5. 12/01/24 email (page 16) – AWC acknowledge that following discussions with NR, a temporary relinquishment of right will be made. We cannot see notification of this event to ORR in the 2024 section on NR website (<https://www.networkrail.co.uk/industry-and-commercial/information-for-operators/network-code/>)
6. We note there seems to be no 13 week rights review following the 09/10/23 instruction to enter the 2nd Supplemental
7. 20/06/24 email (pages 33-36): AWC notes that train delays are causing delays to services and were known about prior to the access rights being granted. Along with the October 2023 emails above, this suggests AWC and NR were aware of the (economic) delivery issues yet were still awarded rights (via an ORR instruction). As these delivery issues were known by NR and AWC at the point of the 2nd Supplemental being put in

place, they are not issues that arose since the agreement was put in place and as such should not be issues capable of being relied on to temporarily relinquish rights.

8. 21/06/24 letter (pages 37 – 39): NR informed of a further temporary surrender despite noting prior discussions having taken place (see 01/07 comments below). AWC note that it (categorically) has “no current or foreseeable ongoing commercial need”. Furthermore, NR did not follow J2.1.3 by notifying ORR within 10 working days of the temporary relinquishment for whatever reason.
9. 01/07/24 letter (pages 40 – 44): AWC appear to accept that the use of J2.1.2 is incorrect, noting that “whilst we note that this normally occurs due to not having a current or foreseeable reasonable on-going commercial need, we highlight within our response that there are factors outside of AWC’s direct control that are preventing operation of these new services, with it being our intention to operate them as soon as resources allow”. The letter follows with the continuing misunderstanding of what non-economic reasons are. Despite this, NR continued to follow the J2.1.2 process when it was apparent that the rights would be required “as soon as resources allow” and the issues referred to being known prior to the contract date. There are also comments referring to discussions taking place on 3rd June 2024 (not included in the chronology) which again would suggest the J2.1.2 process was the wrong one to follow. Furthermore, NR did not follow J2.1.3 by notifying ORR within 10 working days of the temporary relinquishment, for whatever reason.
10. 22/07/24 letter (pages 51-57): Updated 01/07/24 letter which NR used (instead of the 01/07/24 letter) to comply with J2.1.3 – it is unclear how they would have known this letter was due and to inform ORR based on this letter rather than the 01/07 letter.
11. NR Commercial Manual – important in framing the mindset of NR given this guidance document. P112 – notes “Condition J2 sets out a process by which an access beneficiary can request information about the voluntary surrender or adjustment of its access rights and, if it wishes to take up that opportunity, can secure the surrender or adjustment, including compensation where applicable”. There is no suggestion here, as previously claimed in NR correspondence, that there are two processes within J2 and the table of key steps on P113 supports this. This support our view that a Relevant Enquiry must have been made under J2.2.

I think the additional information continues to support our position that NR followed the wrong process and that they should have followed the process under J4 (or at least J2.2) instead.

Regards

Phil