

1. The expression of access rights and the use of capacity

Introduction

- 1.1 In deciding whether to direct or approve new or amended access rights, a major part of our role is to ensure the fair and efficient allocation of network capacity. That entails making judgements about:
- (a) the realistic extent of spare capacity and the allocation of limited capacity between different requirements;
 - (b) the operational integrity of the services in a proposed contract and their wider implications for network performance; and
 - (c) the appropriate balance between certainty (for a train operator) and flexibility (for Network Rail to accommodate the needs of all other passenger and freight train operators).
- 1.2 This chapter discusses the issues we expect to address in making these judgements, and the criteria we expect to apply. It addresses in turn:
- (a) [capacity allocation and utilisation](#);
 - (b) [safety](#);
 - (c) [the expression of rights](#);
 - (d) [operational integrity](#);
 - (e) [consideration of alternative access rights](#);
 - (f) [capacity choices, criteria and competition](#) (including [Part J of the network code](#));
 - (g) [certainty and flexibility in the expression of rights for freight operators](#);
 - (h) [certainty and flexibility in the expression of rights for passenger operators](#);
 - (i) [protected rights](#);
 - (j) [duration and unilateral termination](#); and
 - (k) [enhancement](#).

Capacity allocation and utilisation: our role

- 1.3 Specifically, on the issue of capacity, our role is to oversee the fair and efficient allocation of network capacity by the infrastructure provider, and determine that allocation ourselves in certain circumstances (for example, where an operator has been unable to reach agreement with the infrastructure provider).
- 1.4 In making our decisions, we are obliged by statutory duties under section 4 of the Act to have regard to the funds available to the Secretary of State for the purposes of his functions relating to railways and railway services, and any general guidance from the Secretary of State or Scottish Ministers. DfT and Transport Scotland will also be interested in any application which has a potential impact on securing value for money, given their respective budgets. Therefore, we will ensure that DfT and, where applicable, Transport Scotland, have the opportunity to make representations on individual applications for track access contracts. The DfT's and Transport Scotland's view of network capacity should be informed by the work that Network Rail is undertaking on [RUSs](#). RUSs will also help to inform our decisions on the allocation of capacity for specific applications, particularly when we are considering likely changes to the pattern of services over time.

Route utilisation strategies

- 1.5 A RUS is a strategy that, for a particular part or the whole of the network, will promote the effective and efficient use of the capacity available, which is also consistent with the funding that is or is likely to be available during a particular timeframe. RUSs are based on information from industry stakeholders (including Network Rail, the DfT and Transport Scotland), and derived from regional planning assessments where available/applicable. They may cover a period of up to ten years. We have published [guidelines on RUSs](#), which are available on our website.
- 1.6 Condition 7 of Network Rail's [network licence](#) provides for it to establish and maintain RUSs, and sets out the process that Network Rail must follow in establishing or amending a RUS. We oversee this process. Network Rail undertakes extensive industry consultation (including with funders and providers of railway services, the Secretary of State and the Scottish Ministers, the PTEs and Passenger Focus). Once the consultation process is complete, Network Rail publishes the proposed RUS, following which we have 60 days in which to assess the RUS and decide whether to issue a notice of objection. In the absence of such a notice, the RUS becomes established.

Our involvement in the RUS development process ensures that our consideration of track access applications relating to a part of the network where a RUS is established is based upon an informed view of the likely capacity implications of the rights proposed. Network Rail has established a timetable for creating RUSs for various regions of the country, as well as a freight RUS and a network RUS. Completed RUSs will then be reviewed periodically. See [Network Rail's website](#) for further information.

- 1.7 Where a track access application relates to services in an area with an established RUS, we will expect to take into account the strategies described within that RUS when making our decision, and whether proposed new rights are consistent with the RUS. We do not however consider that a RUS can assume that existing rights will necessarily be overridden: indeed, it should reflect existing rights, including the exercise of any variation mechanisms within contracts. Neither would we expect to reject an application for proposed additional rights solely on the basis that those rights are not explicitly mentioned in relevant RUSs.
- 1.8 In their application form, applicants should state how the proposed access rights relate to relevant RUSs (including the freight RUS). If proposed access rights are not consistent with a RUS, the application form should explain the reasons for this, in particular describing any benefits that this divergence might have, as we would need to understand and agree the public interest reason for this.

Safety

- 1.9 We are unlikely to approve a track access contract or amendment to an existing contract if we believe it would give rise to safety issues that could not be properly addressed in time for the planned commencement of services.
- 1.10 Our approval of access rights does not in any way affect the responsibilities of the parties to ensure that the risks arising from their activities remain as low as is reasonably practicable. It is their responsibility to ensure that all appropriate risk control or mitigation measures have been taken and that they comply with relevant statutory regulations.
- 1.11 In general terms, we expect that the signalling system and operational rules for the network are designed so as to ensure that the timetable (which gives effect to access beneficiaries' access rights) can be operated safely and that changes to access contracts in respect of the pattern and quantum of services can be accommodated safely. However, we also recognise that changes to

pattern and quantum may have wider effects, for example on Network Rail's ability to obtain access to the network for inspection and maintenance activity, and increasing the number of trains that pass over level crossings. In addition, changes to the types of rolling stock which operators are permitted by their contracts to use on the network may affect the risks arising from the operation of trains. Where changes to an access contract may generate such material changes to risk, we expect that the parties will have assessed these risks, identified adequate control or mitigation measures and progressed any necessary actions, including reporting the matter to ORR if necessary.

The expression of access rights

- 1.12 The access rights set out in Schedule 5 of the track access contracts are the key description of what the train operator is buying from Network Rail. They are therefore a vital part of each contract. Access rights are given effect in the timetable through the timetabling process set out in Part D of the network code.
- 1.13 It is important that the expression of access rights is clear and accurate. ORR, the facility owner, other operators and consultees must be able to 'map' the access rights being sought onto the existing pattern of rights held in existing approved contracts, and against other operators' aspirations for changes and/or additions to the services that run. Before the introduction of the model contract there was great variation in how access rights were expressed. We recognised the importance of train operators being able to negotiate rights which met the needs of their businesses and their funders, but concluded that it was possible to standardise the *expression* of the key elements of the rights, and that this would have significant benefits in:
- (a) making the process of negotiation easier, because it would focus on the customisation of the rights to meet specific needs;
 - (b) reducing the potential for lack of clarity and disputes about the rights; and
 - (c) enabling other access beneficiaries and the facility owner to have a better understanding of the capacity that has been sold.

Therefore, following consultation and discussion with the railway industry, we developed Schedule 5 templates for the model passenger and freight contracts. The model freight customer access contract uses the template freight Schedule 5.

1.14 Both the passenger and freight templates for Schedule 5 cover the number of train slots that the access beneficiary has a right to secure in the compilation of the timetable. However, because of differing commercial needs between passenger and freight operators, the characteristics relating to these train slots are expressed differently.

(a) In the passenger contract these may include:

- (i) service intervals and clockface departures (Tables 3.1 & 3.2);
- (ii) timing of first and last trains (Table 3.3);
- (iii) calling patterns (Table 4.1);
- (iv) permitted specified equipment (rolling stock) (Table 5.1);
- (v) journey time protection (Tables 6.1-6.3); and
- (vi) any special rights (Tables 8.1-8.6).

(b) In the model freight and freight customer contracts these may include:

- (i) whether the rights are level 1, level 2 or level 3 (see [paragraphs 4.61-4.63](#))
- (ii) origin and departure times;
- (iii) turnaround times;
- (iv) intermediate points;
- (v) days of operation;
- (vi) permitted specified equipment expressed as timing loads;
- (vii) flexing allowances Network Rail may apply in compiling the timetable; and
- (viii) any additional required special terms (e.g. connections between services).

1.15 We generally require the adoption of the expression of rights as set out in the model Schedule 5s because of the benefits that flow from a standardised expression of rights in terms of clarity for the access beneficiary and Network Rail's future ability to model illustrative timetables and establish the extent of available capacity. It also helps in ensuring the asset register required by Condition 24 of Network Rail's [network licence](#) is sound in this respect. Applicants should ensure that the completed Schedule 5 to be submitted is both comprehensive and accurate.

1.16 Whilst the model contract, and Schedule 5 in particular, is designed to minimise the risk that Network Rail will oversell track capacity, it should be noted that the legal consequences of overselling capacity differ depending on whether the contract has been obtained on an agreed basis (sections 18 and 22) or a compulsory one (sections 17 and 22A). If capacity has been oversold in an agreed contract, the facility owner faces liability for breach of contract if it fails to deliver the access it has contracted to provide. However, because of the statutory prohibition in sections 17(1) (b) and 22A (4) (b) of the Act, any directions given by ORR which would necessarily involve the facility owner breaking a pre-existing access contract will be void. To avoid that happening, we developed model clauses concerning the defeasance of the contract only to the extent necessary to avoid such a clash. This is explained further in paragraphs 4.19-4.20.

Operational integrity

1.17 In considering the operational integrity of the access rights sought, we will want to be satisfied that:

- (a) the rights sought are capable of being exercised in a way that means that an access beneficiary's own services and those of any other access beneficiary using the same routes should be able to operate reliably, and that would not preclude Network Rail having adequate access to the infrastructure for efficient maintenance and renewal (i.e. that the combination of specified equipment and expression of rights will work in practice given such operating constraints as apply to the routes over which the services are to run under the Engineering Access Statement/Timetable Planning Rules);
- (b) the applicant intends and will be in a position to operate the services or have the services operated on its behalf; and
- (c) their operation would not necessarily conflict with the exercise of rights held under another access contract. We will not intentionally approve rights that cannot be met without Network Rail thereby failing to meet its obligations in track access contracts with other access beneficiaries. Indeed, in the case of applications made under sections 17 and 22A of the Act, the Act expressly states that we may not direct the facility owner to enter into such contracts.

1.18 It is possible that in certain circumstances Network Rail will not be able to predict with certainty whether access rights being sought would necessarily

conflict with rights held in other existing approved access contracts. This may be due to the flexibility built into the expression of rights, variations between contracts in the degree of flex that Network Rail may apply in compiling the timetable or uncertainty over infrastructure capacity. We wish to see such uncertainty eliminated as far as practicable, and believe the greater clarity achieved through the standardised expression of rights in the template Schedule 5 will help.

Defeasance

- 1.19 We are forbidden from directing new (under section 17(1) (b) of the Act) or revised (under section 22A (4) (b) of the Act.) access rights that, if exercised, will necessarily clash with the exercise of a right held under an existing access contract. Where there has been a risk that there might be such a clash, we have included a defeasance¹ clause in the contract. The defeasance clause defeases (i.e. nullifies) any right in the new contract that is found to necessarily conflict with the exercise of a right held in another predating contract to the extent and for the timetable development periods necessary to avoid the conflict. A defeasance provision can also provide for appropriate compensation to be payable to the access beneficiary.
- 1.20 We will only expect to consider directing the inclusion of a defeasance provision in an access contract where it has not been possible to be certain about the adequacy of capacity. We believe Network Rail should be in a position to know what capacity exists and what it has sold and that inclusion of such a provision should be exceptional. We would not expect a defeasance provision to be included in any access contract submitted to ORR under section 18 of the Act, as Network Rail should have agreed all aspects of the proposed access contract with the access beneficiary, including the extent of the access rights within it.

Access right modification provisions

- 1.21 Access right modification provisions have been used in the past to provide for the adjustment of access rights in one access beneficiary's contract in order to accommodate access rights that are likely to be approved in another access beneficiary's contract in the future. We are extremely reluctant to use such provisions and will only do so where we consider their use is justified, having regard to our statutory duties. Modification provisions have previously

¹ The rationale and application of defeasibility is set out in Chapter 2 of [*EWS-Railtrack, Rail Regulator's conclusions on application under section 17 of the Railways Act 1993*](#), Office of the Rail Regulator, May 2002.

been included in contracts containing access rights on the West Coast Main Line.

Capacity choices, criteria and competition

- 1.22 We consider that there are certain key choices which need to be made in the allocation of network capacity between:
- (a) alternative uses of scarce capacity (i.e. whether for passenger or freight);
 - (b) different passenger and freight train operators (and funders) wishing to use the same scarce capacity;
 - (c) running extra trains and network performance; and
 - (d) running trains on the network and the time required for safe, effective and adequate maintenance and renewal of the network.
- 1.23 These choices need to be well informed by analysis and quantification of the physical and economic trade-offs involved. We therefore consider that access beneficiaries' proposals for changes to access rights should be the subject of informal consultation by Network Rail and the applicant with affected access beneficiaries and funders *before* Network Rail conducts its formal consultation. In the case of proposals on which Network Rail and the access beneficiary have been unable to agree and are to be submitted to ORR as a section 17 or 22A application, we would expect the applicant to discuss its proposals with those potentially affected parties.
- 1.24 This initial consultation should enable obvious problems and trade-offs to be identified and addressed in the application which is then consulted on formally. This should reduce the likelihood of significant issues arising only in the course of formal consultation and, in turn, expedite our process of consideration.

Consideration of alternative access rights

- 1.25 In many cases, the access rights sought may require the timing of other access beneficiary's services to be changed (within their existing firm rights), or constrain the aspirations of other access beneficiaries to amend their access rights and/or seek new access rights in future. In these cases, we expect to have regard to the firmness of any other access beneficiaries' alternative plans for the capacity being sought (e.g. the extent to which they are backed up by availability of suitable rolling stock, the state of negotiations

with the facility owner etc.). In comparing alternatives to the rights sought, we will expect to consider:

- (a) the relative benefits to the users of railway services of the different service patterns, including the implications for performance and reliability (see below);
- (b) the extent to which the allocation of the rights would impact on the funds available to the Secretary of State for the purposes of his functions relating to railways and railway services, and the extent to which rights sought and the plans of other operators reflect a contractual commitment to the DfT, Transport Scotland or another funder (e.g. through a franchise agreement);
- (c) the likelihood of more efficient capacity utilisation resulting (e.g. where there are proposals to run longer trains or trains with improved specified equipment); and
- (d) the extent to which an increase in the capacity available might be involved, as a result of associated funding of network enhancement.

To encourage the right balance between accommodating additional services and Network Rail's requirements for network access for maintenance and renewal, the variable cost element of the access charge is designed to reflect additional maintenance and renewal costs arising from additional traffic. Furthermore, the arrangements for establishing the Engineering Access Statement under Part D of the network code should enable the facility owner to restrict access to permit efficient maintenance and renewal. Apart from Key Journey Times, all access rights, including firm rights, are subject to the Engineering Access Statement and Timetable Planning Rules. Where new or amended access rights materially increase the costs of efficient maintenance and renewal, there would need to be appropriate compensation for Network Rail. (Charging is discussed further in [Chapter 5](#)).

Capacity choices: capacity vs. performance

- 1.26 We recognise that as more trains run on the network, there comes a point where the disbenefits of extra services in terms of train service performance outweigh the benefits of the additional services to passengers or freight customers. Given this need to use track capacity efficiently, we examine very carefully any proposals for new services that would use already congested parts of the network.

- 1.27 The congestion charging arrangements in the current charging structure (explained in chapter 5) are designed to incentivise Network Rail to identify and pursue the most appropriate solution when considering the trade-off between accommodating additional services and sustaining operational performance. The capacity charge allows Network Rail to recover additional costs arising from the operational performance regime as the result of an increased number of services operating on the network. This is explained in more detail in [paragraphs 5.31-5.33](#).
- 1.28 In some circumstances it may be desirable to reserve some unused capacity (or 'white space') for reasons of maintaining or improving performance. We expect to take this requirement into account, and would not expect to approve or direct new rights where there is a material risk that performance disbenefits (both at the particular location and across the network) outweigh the benefits of the new service. In reaching such a conclusion we would take into account the available performance modelling, and also the views and information provided by affected operators and other interested parties. We may also make clear when approving or directing rights which potentially bring network usage close to this threshold, the extent to which we would be prepared to approve further rights (if at all).
- 1.29 In some cases, services may be discontinued because the adverse performance effect outweighs the benefits to users of passenger and freight rail services. The removal of such services could arise from a decision by an access beneficiary or from us not approving the continuation of some existing rights when an operator's track access contract is up for renewal. In circumstances where improving the network's robustness against disruption is the reason for a service being withdrawn, we would not expect to approve rights for another operator to use the capacity created, unless there had been a material change (e.g. an enhancement to the relevant part of the network that increased its capacity and its ability to recover from disruptions). In such circumstances, our usual procedures would give all relevant operators an opportunity to comment, including arguing that no new services should be approved or that other new services would offer greater benefits to railway users. In deciding the issue, we would also consider the needs of any affected freight customers.
- 1.30 In respect of new freight services, it should almost always be both practicable and a more efficient use of scarce capacity for a new service to be fitted around peak periods.

1.31 Nevertheless, in approving or directing new access rights which could affect performance, we expect to have regard to:

the impact on the overall resilience and integrity of the network or parts of it, particularly insofar as these may not be adequately reflected in the charging arrangements; and

the impact on delivery of specific national or route performance objectives.

1.32 We will require supporting performance information as part of an application where:

- (a) there is disagreement between the parties;
- (b) there are unresolved issues arising from Network Rail's consultation of potentially affected access beneficiaries regarding the likely operational performance impact; or
- (c) the application is complex and the associated changes to access rights may have a significant effect on performance.

However, we reserve the right to require further information from the parties in other circumstances where we consider this necessary in order to satisfy our statutory duties.

1.33 Supporting information might include:

- (a) specimen timetables, to demonstrate that the required capacity is available;
- (b) reports on performance modelling (for complex applications only);
- (c) a statement of any access rights that are being surrendered;
- (d) details of the anticipated impact that the rights will have on the industry's operational performance (including, where appropriate, the achievement of performance targets such as PPM (Public Performance Measure) and Passenger's Charter) and any specific actions being taken to mitigate this impact;
- (e) details of how the changes will affect the area contingency planning and traffic management arrangements in the relevant area once the new services are operating;
- (f) details of any specific actions being taken by the parties to ensure an effective implementation of the changes;

- (g) a statement of how the new rights will affect maintenance and renewal requirements on the route and the availability of access for safe, effective and adequate maintenance and renewal; and
- (h) a statement explaining the consistency of the rights sought with any relevant RUS.

We would normally expect Network Rail to carry out performance modelling or any performance analysis on behalf of the access beneficiary. For complex cases, we would expect Network Rail to carry out a cost benefit analysis. If the access beneficiary considers that its performance modelling requirements are not being met then it should contact us and we will look into this further.

- 1.34 With a clear understanding of the choices available, our focus can be on the criteria for making the choices. We are, of course, bound by our statutory duties, but the following paragraphs set out those factors to which, depending on the circumstances of the case, we will expect to have particular regard.
- 1.35 We will have regard to the benefits and costs of proposals for new or modified access rights, compared with alternative uses of the capacity. We may take into account cost-benefit analysis of the proposals and alternatives in order to facilitate this and, if such evidence is presented, any difference in assumptions compared with the appraisal criteria in [WebTAG](#) (Transport Analysis Guidance), [Scottish Transport Analysis Guidance](#) (STAG) or [Welsh transport planning and appraisal guidance](#) (WeITAG), as appropriate, should be highlighted.
- 1.36 We will also use the following approach to assess applications for their impact on network performance:
 - any performance modelling completed in support of a new access application for access rights over congested network should factor in any perturbation that may occur on associated routes and compliance with the Timetable Planning Rules;
 - the level of current performance before the rights to any additional capacity is approved;
 - use of an appropriate timetabling and performance modelling;
 - use of the JPIP process to develop robust mitigation for a decline in performance;
 - use and combination of rolling stock for any new services; and

where a proving period is included, the mechanism should include an obligation on the train operator to remedy any significant deterioration as soon as reasonably practicable rather than at the end of the proving period. In the case of minor deterioration, the provision obliges the parties to meet promptly to take remedial action.

The above criteria have been developed from previous decisions where the performance implications of a track access application has been a factor.

1.37 We recognise that in some cases it may be appropriate to give additional weighting to certain factors such as:

- (a) the benefits of providing completely new services as against an increase in the frequency of existing services. This is likely to be particularly important where certain passenger markets have particularly poor services;
- (b) specific requirements in competitive markets, such as availability of paths at short notice for freight;
- (c) the existence of direct funding support for a service or an associated network enhancement provided by a PTE or other public body; and
- (d) the efficient use of scarce or expensive resources.

1.38 As noted above, we will ensure that DfT has been consulted on all applications (or Transport Scotland for applications relating to Scotland), as it will be concerned with the implementation of:

- (a) its long-term plans for the development of the railway as set out in the High Level Output Specification ("HLOS"); and
- (b) any RUSs published by Network Rail.

We will also have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railway services and any constraints on his ability to fund enhancements as well as any general guidance from the Secretary of State or Scottish Ministers (and indeed our other statutory duties).

1.39 We will also consult and have regard to the views of other access beneficiaries and known potential access beneficiaries, Passenger Focus and, depending on where the services are to run, Transport Scotland, the Welsh Assembly Government, the Mayor of London, TfL, London TravelWatch and any PTE likely to have an interest.

Capacity choices: competing passenger services

- 1.40 Where a passenger operator is seeking to introduce a new service that competes with the existing services of one or more other such operators, we will wish to consider the extent to which such additional services would benefit passengers and not be primarily abstractive of the incumbents' revenues. The operator's application should therefore specify what benefits passengers are likely to gain and the extent to which service volume growth is expected to lead to passenger volume growth. Our conclusions on phase 1 of our [review of access policy](#) sets out our approach to assessing competing applications for capacity.
- 1.41 Where an access beneficiary is seeking to make a significant investment and seeks to protect this investment, we would not approve any moderation of competition provisions which would in effect restrict competition over that route. We consider that protection for such investment can be achieved through other contractual mechanisms that we have developed such as long term track access contracts and the rebate mechanism for investment in infrastructure.
- 1.42 ORR's policy on rebate mechanisms for network investments provides for train operators who invest significantly in on-network enhancements to be paid a rebate where a third party competing train operator benefits from that enhancement. At present, a competing third party operator would need ORR approval of specific access rights to run such services and a condition of this would be the inclusion of a rebate mechanism in their contract.
- 1.43 We would not expect to approve competing services that would be primarily abstractive of an incumbent's revenue without providing compensating economic benefits. To enable us to consider whether the proposed rights are primarily abstractive in nature we have established a five-stage test which we would apply when:
- a new open access service would compete with franchised services and so impact on the public sector funder's budget;
 - a new franchised service would compete with an existing franchised service where the competing services are supported by different funders or there are other concerns over the impact on a funder's budget; or
 - a new open access or franchised service would compete with an existing open access service, where that new service could force the existing

open access operator to withdraw from the market and reduce overall competition on the network.

1.44 The five stages of the 'not primarily abstractive' test are:

Stage 1: using standard industry models (such as MOIRA² and the passenger demand forecasting handbook) to make a broad estimate of the likely level of abstraction;

Stage 2: review the estimate established in Stage 1 with input from the applicant, potentially affected incumbent operators, funders and any other interested parties;

Stage 3: using benchmarking and survey information from other comparable situations to refine estimates produced by Stages 1 and 2;

Stage 4: assessing the likely impact of services one to two years after introduction to identify material impacts that would not occur immediately after introduction of the new services; and

Stage 5: will consider other relevant factors against quantitative assessment produced under Stages 1 – 4.

Capacity choices: competing passenger and freight services

1.45 Our phase 1 conclusions on the review of access policy also set out the process we would use when assessing competing passenger and freight applications for the same capacity. We will use transport appraisal methodology (such as WebTAG) to estimate freight user benefits in any cost benefit analysis where freight may be materially affected and in complex cases with alternative uses of capacity. We will calculate freight user benefits using generic values of time and reliability. We will also have regard to trade-off between passenger and freight where this has already been assessed and appraised in a RUS and any context-specific values of passenger or freight time.

Rights to be used

1.46 We would not normally expect to approve firm rights to train slots (or any other entitlement) unless the access beneficiary satisfies us as to its intention and ability to use the capacity in question. Otherwise, scarce capacity would be wasted by Network Rail's obligation to stand ready to accommodate the

² MOIRA is a computer model which models the effect of changes in rail timetables on passenger demand and passenger train operator revenue. It is consistent with the PDFH and may be used in tandem with that document

operator's access proposal to take up the unused rights. We would therefore want to see evidence supporting an operator's intention to use that capacity.

- 1.47 For a franchised or concession passenger operator, such information might include details of their franchise or concession requirements. Whereas for an open access passenger operator, we would look at business case information, including details of resourcing plans.
- 1.48 For a freight operator, this might include confirmation of a contract, or negotiation of a contract with the proposed customer, details of resourcing arrangements for the proposed services and evidence of any other relevant preparations. However, we would make allowance for prospective new freight flows, where the operator may need to have demonstrated that it had firm rights approved by ORR before the potential customers would enter into haulage contracts with it. In such cases we would want to see clear evidence of the operator's prospects of winning sufficient business before approving or directing the rights sought. For a freight customer this might include a commitment to use rail to transport its goods.
- 1.49 An access beneficiary may seek to increase the quantity of rights exercisable over time, for example where the availability of an increased number of train slots is dependent upon improvements to the infrastructure over a number of years. In such cases we will expect to see the step-up in rights expressed in separate entries (or perhaps, separate tables) within Schedule 5, indicating the dates from which each is to apply (or the stage of infrastructure improvements that have to be in place before the rights may apply), so that the actual extent of rights exercisable by operators at any one time is clear.

Consideration of a freight access beneficiary's past usage of access rights

- 1.50 When considering applications from freight access beneficiaries for new rights, especially over busy parts of the network, we may take into account the past usage of its access rights. We will do so if:
- (a) there is some doubt about whether the freight access beneficiary really needs the rights sought or whether it is likely to use the associated paths for a very high proportion of the time; or
 - (b) two or more freight access beneficiaries are seeking rights to the same limited capacity (either with applications being considered simultaneously or where we believe that one or more other applications for use of the same capacity are due to be made within a short time).

- 1.51 Past usage will be looked at by reference to the best available information on the use of paths for the traffic for which the applicant is seeking rights.

Special circumstances warranting approval of freight rights that may not be exercised

- 1.52 In the past, level 2 rights have been approved and directed in the knowledge that the freight operator would not (and physically could not) use all of the slots in the working timetable associated with such rights. This was done chiefly for electricity supply industry (“ESI”) coal traffic, in recognition of the flexibility that customers wanted in order for coal to be moved between a range of origins and destinations, often with the combinations to be used only being decided a few days, or even hours, in advance.
- 1.53 When we published our *Model freight track access contract: final conclusions*, we said we intended to consider whether such widespread use of long-term level 2 firm rights was desirable, or whether greater use should be made of the train operator variation process for such traffic.
- 1.54 It has become clear from our consideration and approval of several applications that freight operators employ different operational methods to transport coal. As such, we believe there can be no prescriptive level of access right; rather it is a question of certain levels of access rights being suitable for certain freight access beneficiaries over certain routes. In effect, we are prepared to consider each case on its own merits.

Cordon caps (freight access beneficiaries only)

- 1.55 Where new level 2 rights are approved, it may be necessary to provide for one or more cordon caps in the access contract. This is likely to be necessary where the total number of rights to paths, if exercised, would exceed the remaining capacity available at congested points on the network. This situation generally arises where there are rights to combinations of origins and destinations, all going through the same section of route (the cordon). A cordon cap therefore restricts Network Rail’s obligation so as to provide only a certain number of train paths through the cordon, even if the freight access beneficiary has rights that would otherwise exceed this limit. Clearly, the level of a cordon cap should reflect the access beneficiaries’ needs, not the overall capacity available through the cordon cap.
- 1.56 When considering an application for new level 2 rights on a route currently without a cordon cap, we would expect a cordon cap to be created at any location where the rights sought could require Network Rail to timetable train slots that were greater than the network’s capacity at that location. We would

also consider the case for a cordon cap if the approval of the rights sought would leave very little remaining capacity, taking account of the likely future needs of other access beneficiaries. These criteria would apply whether the application was for a new contract, or for an amendment to an existing contract.

- 1.57 Where a freight access beneficiary is seeking new level 2 rights and these rights pass through an existing cordon cap, it should explain what increases in cordon caps it is seeking, or why such an increase is considered unnecessary, in the application form. Where level 2 rights which pass through a cordon cap location are being 'converted' into level 1 rights, the application should explain what reductions to the cordon cap are considered necessary (or why they are considered unnecessary).
- 1.58 It should be noted that where access rights that are subject to a cordon cap are transferring from one freight access beneficiary to another, usually under the Part J freight transfer mechanism, it is likely that there will be an associated cordon cap reduction. There may also be a requirement to establish a new cordon cap for the recipient freight access beneficiary as part of the process of approving new access rights.

Part J of the network code

- 1.59 The purpose of Part J of the network code is to facilitate the relinquishing of access rights which are not being used, or are being significantly under-used. This enables Network Rail to sell access to other network users or to transfer access rights between freight operators where the commercial contract for the movement of goods also transfers from one freight operator to another. Part J applies to all track access contracts incorporating the network code and provides:
- (a) a requirement for six-monthly reviews of freight operators' access rights (including cordon caps);
 - (b) 'use it or lose it' ("UIOLI") arrangements;
 - (c) a freight transfer mechanism; and
 - (d) provisions for the voluntary adjustment or surrender of access rights.
- 1.60 Flow charts illustrating these processes are set out in appendices to Part J of the network code.

Certainty and flexibility in the expression of rights for freight access beneficiaries

Level 1, 2 and 3 rights

- 1.61 We recognise that freight train access beneficiaries will require track access rights that are sufficiently certain to enable them to plan their businesses with a reasonable degree of assurance. At the same time we recognise that, due to the nature of the rail freight market, access beneficiaries will generally require a good deal of flexibility. Equally, we need to ensure that there is sufficient flexibility to allow rail freight to compete effectively in what is often a fast-moving market. Schedule 5 of the model freight contract is intended to give freight access beneficiaries this combination of certainty and flexibility. Chapter 7 explains how Schedule 5 can be customised to an individual operator's needs.
- 1.62 The model freight contract distinguishes between level 1, level 2 and level 3 rights:
- (a) level 1 rights are firm rights in respect of quantum, origin and destination, equipment etc., and also timing (subject to Network Rail's flexing rights) and, in some cases, routing;
 - (b) level 2 rights are firm rights to quantum but do not specify the timing of a service, do not limit Network Rail's flexing rights or specify the specific route to be taken. They entitle the access beneficiary to a quantum of train paths, either per day, per week or both, with Network Rail otherwise having freedom (subject to the Decision Criteria) to flex the timing of the trains requested and the routes they must use; and
 - (c) level 3 rights are contingent rights i.e. contingent upon Network Rail being able first to satisfy access proposals for services made with firm rights, and subject to various conditions under Part D of the network code.
- 1.63 Level 2 rights, in themselves, may be less attractive for a freight access beneficiary than level 1 rights. This is because level 1 rights are more likely to result in services that match the timings and routes that the access beneficiary would prefer to use. However, level 1 rights lock up capacity where, in practice, a freight access beneficiary may only wish to operate a particular flow intermittently. Given the greater flexibility of level 2 rights for Network Rail, we have been prepared to approve or direct a quantum of level

2 rights above the level that the access beneficiary expects to use fully in practice. This issue is discussed in [paragraphs 4.52 - 4.54](#).

Train operator variation services

- 1.64 The model freight contract also allows beneficiaries to run Train Operator Variation Services without specific rights in Schedule 5 for up to 6 months. These are services for which the beneficiary has made a Train Operator Variation Request under Condition D3 of the network code. If a new freight operator is still negotiating with potential customers or a freight customer is not yet certain of the access rights it will require, it may wish to negotiate a track access contract which does not specify any level 1 level 2 or level 3 rights. Instead, it could rely on the right to run Train Operator Variation Services for up to six months, during which time an application under section 22 of the Act could be made for firm rights (level 1 or 2), or contingent rights (level 3), if the services were required for a longer period.
- 1.65 If the services are expected to run for less than the maximum six month period, it is entirely possible that a freight operator could rely on any number of short-term customer contracts and use the right to run Train Operator Variation Services without ever needing to request level 1, 2 or 3 rights. However, it is important to note that successive Train Operator Variation Services that have substantially the same characteristics are counted in together to determine whether the six months limitation period is exceeded.
- 1.66 If a prospective access beneficiary wishes to have access rights lasting longer than six months over the route(s) where a freight operator knows it is likely to win business or a freight customer expects to want services hauled on its behalf but where capacity constraints mean that it is not practicable for Network Rail to grant firm rights, its original application for approval of a track access contract could contain level 3 rights in the rights table in Schedule 5. We would be happy to discuss such proposed rights with the access beneficiary prior to submission of an application.
- 1.67 It should be borne in mind that, in the timetable development process, train operator variation requests are given the lowest priority by Network Rail (see Part D of the network code). So the access beneficiary's ability to secure a slot in the timetable would depend on there being sufficient spare capacity available after all competing firm rights and contingent rights (against which access proposals had been exercised by the Priority Date) have been satisfied. Train operator variation requests would of course also be subject to the Decision Criteria in Condition D4.6.

Certainty and flexibility in the expression of rights for passenger operators

- 1.68 Passenger operators (and funders) also require track access rights sufficiently certain to enable them to plan their businesses with a reasonable degree of assurance. We consider that the appropriate degree of certainty will depend on the importance to the operator's business plan of various aspects of the proposed contract and the expression of rights, both in the context of the operator's costs and revenues and of any franchise or similar commitments (e.g. a concession). Our analysis of the rights sought will take account of the justification for, and the cumulative impact of, those rights being exercised.
- 1.69 Guidance on the application of our policy on the expression of rights in passenger contracts is set out in the guide to completing the model contract in [Chapter 8](#).

Protected rights

- 1.70 Protected rights and protected obligations have very specific meanings defined in Part C of the network code. If a modification to the network code made by ORR under Condition C8 materially prevents an access beneficiary exercising or receiving the benefit of a protected right, or materially increases a protected obligation, the operator can prevent the modification from taking effect.
- 1.71 We recognise that there may be certain rights which are so vital to an access beneficiary's business, or to meeting a passenger operator's obligations under a franchise agreement, that the access beneficiary will wish to secure them as protected rights. However, we will wish to see a very clear justification for such rights, and will wish to be satisfied that any protected rights and obligations have been drawn as narrowly as possible. Furthermore, we will wish to ensure that the risk of such protected rights and obligations placing an undue constraint on the use of our change power under the network code is minimised.

Duration and unilateral termination

- 1.72 Regulation 18 of the [Access and Management Regulations](#) establishes the presumption that access contracts (referred to as 'framework agreements') should normally not exceed five years. This regulation also provides that agreements of between five and ten years must be justified by the existence of commercial contracts, specialised investments or risks. Agreements over fifteen years may only be made in exceptional cases, in particular where there

is large-scale and long-term investment, and particularly where such investment is covered by contractual commitments (i.e. a designated infrastructure framework agreement).

- 1.73 Our policy on [long-term access contracts](#) sets out the framework against which we will consider any application for a long-term access contract. The [Access and Management Regulations](#) were amended in 2009 and we are in the process of updating our policy on long-term access contracts in light of this.
- 1.74 Those intending to make an application for a long-term access contract should read the policy alongside these criteria and procedures. In addition to this policy, we will also take into account:
- (a) whether the duration sought would provide a reasonable degree of certainty for the access beneficiary and for the facility owner to plan their businesses, bearing in mind the lead times for the construction of the timetable, the planning of services, and investment;
 - (b) whether the facility owner is in a position, at the time an application is made, to confirm the availability of the capacity in question for the period sought (e.g. ensure that no conflicting rights have already been committed to another access beneficiary *from* some future date) or may only be able to warrant the provision of other rights from a date in the future (e.g. if conflicting rights are already committed to another access beneficiary *until* that future date); and
 - (c) the extent of flexibility within the proposed contract to allow for the adjustment of rights over time to respond to changing circumstances. It is our policy that track access contracts of greater than 15 years should contain a buy-back mechanism (operable from year 10 of the contract) to enable rights to be bought-back for alternative use. This is to help ensure that, in approving long-term access rights, network capacity is not unduly ossified.
- 1.75 We expect applicants to set out the rationale for the length of access contract sought, particularly having regard to our policy and the above factors. We would be willing to discuss with prospective applicants how these criteria might be interpreted in a particular case. We will also wish to understand the case for any in-built mechanisms to extend the life of a proposed access contract without further regulatory approval.

- 1.76 If we are not prepared to approve an agreement of more than five years, the access beneficiary may wish to consider applying for an extension to its contract well before the expiry date, so that the contract always had, say, a minimum of two years left to run. We would expect to treat such an application according to our criteria for deciding on the length of a new contract, so that we would be looking at the total remaining duration of the contract if the extension were approved. If Network Rail was unable to agree a joint application for an extension under section 22 of the Act, the access beneficiary could make an application under section 17 of the Act for a new track access contract, which would take effect on expiry of its existing contract.
- 1.77 We recognise that it has proven difficult to model available capacity and construct illustrative timetables, particularly for parts of the network where several access beneficiaries may have flexibility to exercise rights in multiple permutations. Where Network Rail is unable satisfactorily to confirm the availability of capacity for the full duration of a proposed contract, or the extension of an existing contract, we may be prepared either to approve an access contract or amendment which clearly specifies the shorter duration of certain rights, or to require that the contract contain an appropriate mechanism to test the availability of capacity at the time, with that test being passed (i.e. Network Rail confirming the capacity to be available having consulted with other operators) before the additional rights can be exercised.
- 1.78 We have stated previously that Network Rail should not plan on the basis of rail freight traffic falling away at the end of an access beneficiary's contract, but rather on the basis of catering for the carrying forward of freight traffic at its then existing levels at the end of the contract, unless it is clear that its freight customers are themselves planning such a reduction³. However, the access beneficiary should not assume that the quantum or expression of rights in a contract will automatically be available at its expiry for extension or 'rolling over' into a new contract. Even where access beneficiaries are seeking new access contracts (or extensions of existing contracts) to maintain existing service levels, we will require appropriate justification for the quantum, expression and term sought, so as to be satisfied that the continued use of that capacity is in the public interest.

³ Paragraph 2.7 of [*EWS – Railtrack, Rail Regulator's conclusions on application under section 17, Railways Act 1993*](#), Office of the Rail Regulator, May 2002.

Unilateral termination (freight and freight customer contracts)

- 1.79 The model freight and freight customers track access contracts contain a unilateral power for the freight operator or freight customer to terminate the contract by giving one year's notice. A passenger operator does not have the same right under the model passenger track access contract. This difference recognises the more changeable nature of the freight business and the absence of franchise agreements for freight access beneficiaries. We would consider arguments for a longer or shorter notice period within a particular access contract, but would need to be persuaded that one year was not a reasonable period for both parties.

Enhancement

- 1.80 This document is focused on the allocation of existing capacity and instances where provisions for enhancement have been agreed. When considering an application predicated on enhancement works, our key concern will therefore be to establish the certainty of those works proceeding, for example whether: the relevant processes for network and vehicle change have been completed; the facility owner or a third party is contractually committed to deliver the project; or full 'Railsys' modelling has been done to check that the capacity increase is viable and adequate etc. Where an enhancement project is covered by the terms of an access contract, we will also wish to be satisfied that it has been agreed in compliance with our [Policy Framework for Investments](#) (main page). [Paragraphs 5.11-5.16](#) below set our policy on access charging in relation to enhancements.

Congested infrastructure

- 1.81 The [Access and Management Regulations](#) require that where an infrastructure manager cannot adequately accommodate a request for capacity, it must declare the relevant section of infrastructure to be congested (see regulation 23). It must then undertake a capacity analysis, identifying the reasons for the congestion and the measures which might be taken in the short and medium term to ease the congestion. This must be followed by a capacity enhancement plan detailing, amongst other things, the constraints on infrastructure development, the options and costs for capacity enhancement, and the likely changes that would follow for access charges in line with regulations 23-25 of the [Access and Management Regulations](#). The infrastructure manager must provide interested parties (as specified in regulation 23(3)) with a copy of the capacity enhancement plan and a timetable for the completion of the measures identified within it to resolve the

congestion. However, the infrastructure manager is not required by the regulations to implement the plan. Network Rail's Network Statement (setting out current congested infrastructure) is available on its [website](#).

- 1.82 Applicants should note that where an application is made which relates to a part of the network that has been declared congested by Network Rail, this will not affect the process we undertake in considering that application. [Paragraphs 4.22 - 4.45](#) above set out the factors we will consider when allocating limited network capacity.