

Proposed changes to Part J

DRAFT ACCESS RIGHTS REOPENER – PART J EXTRACT

Insert at existing J1.1.4: Condition J10 allows Network Rail to amend access rights in order to achieve ‘Better Use’ and subject to certain criteria. An Access Right Change is subject to ORR approval.

At existing J1.1.4: Renumber current J1.1.4 to J1.1.5 and update the reference to J10 to J11.

At existing J1.1.5: Renumber current J1.1.5 to J1.1.6 and update the reference to J11 to J12.

Insert at J1.2 Interpretation:

“Access Right Change” amendment or limitation of a Part J Access Beneficiary’s Firm Right in order to achieve Better Use;

“Better Use” means a positive significant impact on the ability of Network Rail to achieve the objective set out in Condition D4.6.1, that is, to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services;

“Relevant Consultation” means a consultation carried out by Network Rail with a Third Party during negotiation under Condition J10.4 or before an offer of compensation is made under J10.6;

“Relevant Undertaking” means a deed of undertaking from the Third Party to pay the Incumbent:

- (a) the agreed reasonable costs of providing an estimate of compensation, in advance of those costs being incurred, pursuant to Condition J10.10; and
- (b) compensation under Condition J10.7, where the Third Party has requested that Network Rail withdraw the notice of a proposed Access Right Change under Condition J10.15 but the Incumbent has nonetheless suffered costs, direct losses and expenses (including loss of revenue).

Final proposed changes to Part J and to ADRR

“Third Party” means an Access Beneficiary or a Potential Access Party who has submitted an Access Right Change proposal to Network Rail;

Amend the following definitions in existing Condition J1.2 as follows:

“Incumbent” has the meaning shown in:

- (a) Condition J5.1.1(b)(ii);
- (b) Condition J7.2; or
- (c) Condition J10.1.2(b)

“Qualifying Information” means information which Network Rail has acquired in relation to the affairs of:

- (a) any Affected Person; or
- (b) an Incumbent

under an Access Agreement between Network Rail and that person.

Insert at J10 (and renumber existing J10 and J11 to J11 and J12 respectively):

Right of Network Rail to make an Access Right Change

10.1 Obligation to facilitate a proposed Access Right Change

10.1.1 Network Rail shall take all reasonable steps to facilitate the development of a proposed Access Right Change, except where the proposed Access Right Change has been submitted by a Third Party who:

- (a) has not set out, in as much detail as reasonably possible, the reasons why it believes that:
 - (i) the proposed Access Right Change will achieve Better Use;
 - (ii) the positive impact of the Access Right Change was not reasonably foreseeable when the relevant Firm Right took effect; and
 - (iii) Better Use cannot reasonably be achieved using:
 - A. Parts D, G or Conditions J2.1 – 9.3 of Part J of this Network Code;
 - B. Relevant provisions of the Act; or
 - C. Increased investment in the network;
- or
- (b) has not provided a Relevant Undertaking.

Final proposed changes to Part J and to ADRR

10.1.2 Where applicable, the obligation of Network Rail under Condition J10.1.1 includes but is not limited to:

- (a) evaluation of a submission for a proposed Access Right Change proposal submitted to Network Rail by a Third Party;
- (b) consultation as may reasonably be expected to enable any Part J Access Beneficiary who holds a Firm Right subject to the proposed Access Right Change (the “Incumbent”) to make representations, before notice of a proposed Access Right Change is given;
- (c) consultation before a notice of a proposed Access Right Change is given with relevant parties including any relevant funder; and
- (d) the preparation of a notice given under Condition J10.2.1

10.2 Notice by Network Rail of a proposed Access Right Change

10.2.1 Network Rail shall give notice of a proposed Access Right Change:

- (a) submitted to Network Rail by a Third Party; or
- (b) identified by Network Rail on its own initiative

if it considers that the criteria in Condition J10.2.2 have been satisfied.

10.2.2 Network Rail must reasonably believe that:

- (a) the proposed Access Right Change will achieve Better Use;
- (b) the positive impact of the Access Right Change was not reasonably foreseeable when the relevant Firm Right took effect; and
- (c) Better Use cannot reasonably be achieved using:
 - (i) Parts D, G or Conditions J2.1 – 9.3 of Part J of this Network Code;
 - (ii) Relevant provisions of the Act; or
 - (iii) Increased investment in the network.

10.2.3 Network Rail shall give notice of a proposed Access Right Change to:

- (a) any Incumbent;

Final proposed changes to Part J and to ADRR

(b) the Office of Rail Regulation; and

(c) any relevant funder.

10.2.4 Network Rail shall give notice of a proposed Access Right Change no less than 18 months before the commencement of the relevant Working Timetable during which the Access Right Change is proposed to take effect.

10.3 Content of notice of a proposed Access Right Change

10.3.1 Notice of a proposed Access Right Change given by Network Rail under Condition J10.2.1 shall:

(a) identify the Firm Right of any Incumbent which is subject to the Access Right Change;

(b) set out the Access Right Change;

(c) explain, referencing evidence where possible, why Network Rail believes that each of the criteria in Condition J10.2.2 is met;

(d) state the date on which the Access Right Change will take effect, that date falling no later than the Priority Date for the relevant Working Timetable during which the Access Right Change is proposed to take effect;

(e) request from the Incumbent an estimate of compensation with evidence where possible, payable under Condition J10.7 and, subject to Condition J10.5.3, to be provided to Network Rail within 60 Working Days of the date on which notice is given by Network Rail under Condition J10.2.1;

(f) request from the Incumbent an estimate of the Incumbent's reasonable costs of providing an estimate of compensation, to be provided within 10 Working Days of the date on which notice is given by Network Rail under Condition J10.2.1; and

(g) where the proposed Access Right Change was submitted to Network Rail by a Third Party, contain a Relevant Undertaking.

10.4 Negotiation following notice of a proposed Access Right Change

10.4.1 Network Rail shall use reasonable endeavours to negotiate with the Incumbent so as to agree:

(a) after giving notice under Condition J10.2, the proposed Access Right Change, if applicable;

Final proposed changes to Part J and to ADRR

(b) after receiving an estimate of reasonable costs under Condition J10.5.2, the reasonable costs payable in advance under Condition J10.10.2; or

(c) after receiving an estimate of compensation under Condition J10.5.1, the compensation payable under Condition J10.7.

10.4.2 In any negotiation carried out under Condition J10.4.1, the Incumbent shall use reasonable endeavours to negotiate with Network Rail the matters set out at ~~ef~~ Condition J10.4.1(a)-(c).

10.4.3 If the proposed Access Right Change was submitted to Network Rail by a Third Party, Network Rail shall carry out a Relevant Consultation as appropriate during the negotiation.

10.4.4 Subject to Condition J10.4.5, Network Rail and the Incumbent may agree a proposed Access Right Change at any time before the date on which the Office of Rail Regulation makes a direction under Condition J10.16, where applicable.

10.4.5 If the proposed Access Right Change was submitted to Network Rail by a Third Party, Network Rail and the Incumbent may not agree a proposed Access Right Change until Network Rail has obtained the agreement of the Third Party.

10.4.6 If an agreement is reached under Condition J10.4.4, Network Rail and the Incumbent shall submit the relevant Access Agreement, amended to reflect the proposed Access Right Change, to the Office of Rail Regulation for approval under section 22 of the Act.

10.5 Response of Incumbent to notice of a proposed Access Right Change

10.5.1 The Incumbent shall provide an estimate of compensation in accordance with Condition J10.3.1(e).

10.5.2 The Incumbent shall provide to Network Rail an estimate of the reasonable costs of providing an estimate of compensation in accordance with Condition J10.3.1(f).

10.5.3 An Incumbent who provides an estimate of reasonable costs in accordance with Condition J10.3.1(f) has 40 Working Days from receipt of payment of the agreed reasonable costs to provide the estimate of compensation.

10.5.4 The Incumbent shall give notice to Network Rail and the Office of Rail Regulation if it:

(a) agrees to the proposed Access Right Change;

(b) considers that one or more of the criteria in Condition J10.2.2 is not met; or

Final proposed changes to Part J and to ADRR

(c) considers that any other aspect of the notice was deficient.

10.5.5 If the Incumbent gives notice under Condition J10.5.2 (b) or (c), it shall provide reasons, referencing evidence where possible,

10.5.6 Notice shall be provided to Network Rail and ORR under this Condition J10.5 within 60 Working Days of the date on which notice is given by Network Rail under Condition J10.2.

10.5.7 A failure to give notice under Condition J10.5.4 shall constitute agreement to the proposed Access Right Change, as if notice had been given under Condition J10.5.4(a).

10.6 Offer of compensation

10.6.1 Subject to Conditions J10.4.1 and J10.6.3, Network Rail shall, no later than 30 Working Days after receiving an estimate of compensation provided by the Incumbent pursuant to Condition J10.3.1(e), make a written offer of compensation in confidence to the Incumbent.

10.6.2 Subject to Condition J10.6.3, if the Incumbent fails to provide an estimate of compensation pursuant to Condition J10.3.1(e), Network Rail shall, no later than 90 Working Days after the date on which notice is given by Network Rail under Condition J10.2.1, make a written offer of compensation in confidence to the Incumbent.

10.6.3 If the proposed Access Right Change was submitted to Network Rail by a Third Party, Network Rail shall not make a written offer of compensation under Conditions J10.6.1 or J10.6.2 until it has carried out a Relevant Consultation and obtained agreement of the Third Party to fund the offer of compensation.

10.7 Amount of compensation

10.7.1 Subject to Condition J10.9.2, Network Rail shall pay compensation to the Incumbent in respect of an Access Right Change.

10.7.2 The amount of the compensation referred to in Condition J10.7.1 shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Incumbent as a consequence of the implementation of the proposed change.

10.7.3 There shall be taken into account in determining the amount of compensation:

- (a) the benefit (if any) to be obtained or likely in the future to be obtained by the Incumbent as a consequence of the Access Right Change; and

Final proposed changes to Part J and to ADRR

- (b) the ability or likely future ability of the Incumbent to recoup any costs, losses and expenses from third parties including passengers and customers or to otherwise mitigate the costs, direct losses and expenses (including loss of revenue).

10.8 Acceptance of offer of compensation

10.8.1 If the Incumbent wishes to accept the compensation offered under Condition J10.6, it shall, within 30 Working Days of receiving the offer, indicate its acceptance in writing.

10.8.2 A failure to indicate acceptance in writing in accordance with Condition J10.8.1 or to refer the matter for determination in accordance with Condition J10.14, shall constitute acceptance of the offer.

10.9 Payment of compensation

10.9.1 Subject to Condition J10.9.2, the compensation payable under Condition J10.7 shall be paid to the Incumbent by Network Rail on or before the date on which the proposed Access Right Change is due to take effect.

10.9.2 If the proposed Access Right Change was submitted to Network Rail by a Third Party, the Third Party shall pay Network Rail an amount equal to the compensation payable under Condition J10.7 on a date agreed with Network Rail but no later than-

- (a) the Working Day before the date on which the Access Right Change is due to take effect, or
- (b) where a matter has been referred for determination under Condition J10.14.1 and the date on which the Access Right Change is due to take effect has been missed or is likely to be missed, a revised date notified to the Incumbent and the Third Party by Network Rail, or
- (c) where notice has been given under Condition J10.5.4(b) or (c), the date specified by the Office of Rail Regulation pursuant to Condition J10.16.1(b) or (c), where relevant.

10.9.3 Network Rail shall not pay compensation to the Incumbent until an amount equal to the compensation owed has been received by Network Rail from the Third Party.

10.9.4 The Access Right Change shall not take effect until the compensation payable under Condition J10.7 has been received by the Incumbent.

10.9.5 Compensation is not payable under this Condition if it has already been paid pursuant to a Relevant Undertaking because the Third Party has requested that Network Rail withdraw the notice of a proposed Access Right Change.

Final proposed changes to Part J and to ADRR

10.10 Reimbursement of assessment costs

10.10.1 Subject to Condition J10.10.2, the Incumbent shall be entitled to reimbursement by Network Rail of all reasonable costs incurred by the Incumbent in assessing any Access Right Change.

10.10.2 If the proposed Access Right Change was submitted to Network Rail by a Third Party, that Third Party shall reimburse Network Rail for:

- (a) the reasonable costs incurred by Network Rail in giving notice of a proposed Access Right Change;
- (b) the Incumbent's reasonable costs of providing an estimate of compensation, to be paid by the Third Party in advance of those costs being incurred; and
- (c) the reasonable costs incurred by an Incumbent and reimbursed by Network Rail pursuant to Condition J10.10.1.

10.11 Obligation to incur no further costs

10.11.1 The Incumbent shall, if requested by Network Rail at any time, incur no further costs (except any costs which cannot reasonably be avoided) in respect of any Access Right Change.

10.12 Confidentiality of the Incumbent

10.12.1 If Network Rail has reasonable grounds for believing that, in order to carry out a Relevant Consultation:

- (a) it is necessary for it to disclose to the Third Party any Qualifying Information; and
- (b) such disclosure would or might, in Network Rail's reasonable opinion, seriously and prejudicially affect the interests of the Incumbent,

Network Rail shall give notice to that effect to the Third Party and such Qualifying Information shall not be disclosed.

10.13 Application of Part J confidentiality mechanism

10.13.1 The provisions of Conditions J3.2 to J3.15 apply to the conduct of a Relevant Consultation as if:

- (a) Notice served under Condition J10.12.1 was served under Condition J3.1;

Final proposed changes to Part J and to ADRR

(b) “Relevant Response” means “Relevant Consultation”;

(c) “Part J Access beneficiary” means “Third Party”; and

(d) “Affected Person” means “Incumbent”.

10.14 Right of appeal to relevant ADRR Forum

10.14.1 If the Incumbent is dissatisfied as to the compensation offered under Condition J10.7, it may, within 30 Working Days of receiving the offer refer the matter for determination in accordance with ADRR.

10.14.2 If the Incumbent or Third Party is dissatisfied as to any matter concerning the reimbursement of costs, it may refer the matter for determination in accordance with ADRR.

10.15 Right to withdraw

10.15.1 Network Rail may withdraw the notice of a proposed Access Right Change identified by Network Rail on its own initiative if it believes that the criteria in Condition J10.2.2 are no longer met.

10.15.2 Subject to Condition J10.15.3, Network Rail shall withdraw the notice of a proposed Access Right Change as soon as possible if it is requested to do so by the Third Party.

10.15.3 If Network Rail receives a request to withdraw the notice of a proposed Access Right change and wishes to pursue the proposed Access Right Change on its own initiative, it may do so without serving another notice under Condition J10.2 but must notify the Incumbent and the Office of Rail Regulation of its decision as soon as reasonably possible.

10.15.4 If Network Rail withdraws the notice of a proposed Access Right Change identified by Network Rail on its own initiative, Condition J10.10 applies to costs incurred up to and including the date on which notice is withdrawn.

10.15.5 Where Network Rail withdraws the notice of a proposed Access Right Change under Condition J10.15.1 or Condition J10.15.2, Condition J10.7 applies to costs, direct losses and expenses (including loss of revenue) accrued by the Incumbent as a consequence of the proposed Access Right Change.

10.15.6 If the Third Party requests Network Rail to withdraw the notice of a proposed Access Right Change, Condition J10.10 applies to costs incurred up to and including:

(a) the date on which notice is withdrawn; or

Final proposed changes to Part J and to ADRR

- (b) the date on which Network Rail notifies the Incumbent and the Office of Rail Regulation under Condition J10.15.3

as applicable.

10.15.7 Where Network Rail withdraws the notice of a proposed Access Right Change under Condition J10.15.1 or Condition J10.15.2:

- a) the Incumbent shall provide to Network Rail an estimate of compensation within 40 Working Days of notification of that withdrawal;
- b) negotiation in accordance with Conditions J10.4.1(b), J10.4.2 and J10.4.3 shall take place;
- c) Condition J10.6 shall apply; and
- d) Condition J10.14 shall apply.

10.16 Office of Rail Regulation power to direct an Access Right Change

10.16.1 If the Office of Rail Regulation receives a notice under Condition J10.5.4(b) or (c) it shall, after assessing objectively the merits of that notice, the notice provided by Network Rail under Condition J10.2.1, and any other material it considers relevant, whilst having regard to the duties set out at section 4 of the Act:

- (a) direct Network Rail to withdraw notice of the proposed Access Right Change;
- (b) approve the proposed Access Right Change and direct that it should take effect on a date specified by the Office of Rail Regulation; or
- (c) after consultation with Network Rail, the Incumbent, and the Third Party, approve the proposed Access Right Change with modifications and direct that it should take effect on a date specified by the Office of Rail Regulation.

10.16.2 The Office of Rail Regulation may also take into consideration the determination of the relevant ADRR Forum made under Condition J10.14, where applicable.

10.16.3 The Office of Rail Regulation shall not make a direction in respect of a notice received under of Condition J10.5.4(b) until:

- (a) a matter referred for determination under Condition J10.14.1 has been so determined; and
- (b) the determination has been disclosed to the Office of Rail Regulation in confidence.

Final proposed changes to Part J and to ADRR

10.17 Exclusion

10.17.1 Conditions J10.1 – J10.16 have no application to an Access Agreement that already contains provision for compensating an amendment or limitation of Firm Rights, other than a provision contained in this Network Code.

Other amendments to existing Part J:

At Condition J11.1.1, before ‘Any dispute arising..’ insert, ‘Except in relation to Conditions J10.1 – J.10.17,’

At Condition J11.2.1, before ‘Where either Network Rail...’ insert ‘Except in relation to Conditions J10.1 – J.10.17’.

Proposed changes to the ADRR

Proposed amendments to ADR Rules

1. Rule B7:

Amend opening sentence:-

Except as stipulated in Rule B8, all disputes referred

1. Insert new Rule B8:

All disputes referred for resolution in accordance with these Rules under Condition J10.14 of the Network Code shall:

- (a) if concerning Condition J10.14.1, be referred to an ADA in accordance with Chapter G or referred for expert determination in accordance with Chapter I.
- (b) if concerning Condition J10.14.2, be referred for expert determination in accordance with Chapter I.

2. Renumber existing Rules B8 to B21 to become B9 to B22.

3. Newly numbered Rule B14:

Insert new clause (k):

(k) in the event that no agreement is reached between the parties under Rule B8(a), shall determine that, unless the parties reach a contrary agreement within seven days of the allocation hearing, the matter shall be referred to final determination by expert determination subject to Chapter I and shall draw up the Procedure Agreement accordingly and shall sign it as Allocation Chair.

4. 5. Rule G50:

Add second sentence:

Where a dispute has arisen in connection with Condition J10.14.1 of the Network Code, the Hearing Chair shall deliver his reasoned written determination within ten working days of final submission to the ADA of all relevant information.

Final proposed changes to Part J and to ADRR

5. Insert new Rule G63:

Documents including the determination produced or disclosed in the course of an ADA in connection with Condition J10.14.1 of the Network Code shall be kept confidential and such Documents shall not be published on the access disputes website.

6. Renumber existing Rules G63 to G69 to become G64 to G70.