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1.3.2 Non-receipt by an Appointed Operator of a copy notice or document pursuant to Condition J1.3.1(b) shall not affect the validity of a notice or document validly served on Network Rail or the relevant Freight Customer Access Option Holder (as the case may be).

1.4 **Transitional Provision**

1.4.1 Where, on the date of implementation of this revised Part J, any notice has already been served under the version of Part J which was in force immediately before this revised Part J took effect ("the previous Part J"), then the previous Part J shall apply in relation to the process, any consequential notice, decision or appeal related to that notice.

1.4.2 On the Principal Change Date in 2012, this Condition J1.4 shall cease to have effect and shall be removed from this Part J.

## **2 Adjustment of Access Rights**

### **2.1 Obligation of Part J Access Beneficiaries to surrender Access Rights**

2.1.1 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.

2.1.2 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 Regulation pursuant to Condition J2.1.3.

2.1.3 Network Rail shall notify the Office of Rail Regulation of the relevant modification to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary gives notice to Network Rail agreeing to the Relevant Surrender pursuant to Condition J2.1.2.

### **2.2 Obligation of Network Rail to answer Part J Access Beneficiary's Relevant Enquiries**

2.2.1 Network Rail shall provide the Part J Access Beneficiary with a Relevant Response within 30 Working Days of the making of a Relevant Enquiry.

### **2.3 Contents of Relevant Enquiries**

2.3.1 Each Relevant Enquiry shall contain:

- (a) a specification of the Access Rights (if any) which the Part J Access Beneficiary, at that time, is aware that it may be willing to surrender to Network Rail;
- (b) a specification of the Access Rights (if any) which the Part J Access Beneficiary, at that time, is aware that it may be willing to adjust;

- (c) a request that Network Rail provides the Part J Access Beneficiary with Relevant Information in relation to:
  - (i) any Specified Relevant Surrender; and
  - (ii) any Specified Relevant Adjustment;
- (d) a specification of the dates with effect from which the Specified Relevant Surrender or Specified Relevant Adjustment may be expected to take place;
- (e) a statement whether or not any Specified Relevant Surrender or Specified Relevant Adjustment is to be temporary; and
- (f) in the case of a temporary Specified Relevant Surrender or Specified Relevant Adjustment, a specification of the date on which the temporary Specified Relevant Surrender or Specified Relevant Adjustment shall cease to have effect, being no later than the second anniversary of the date when it is to take effect.

## 2.4 Information to be provided by Network Rail

2.4.1 Subject to Condition J3, the Relevant Information which Network Rail shall provide in each Relevant Response shall be a statement of:

- (a) the costs which Network Rail may reasonably expect to save or incur if any Specified Relevant Surrender or Specified Relevant Adjustment is made;
- (b) the times at which and the periods over which the Relevant Financial Consequences will have effect;
- (c) the steps which Network Rail would expect to take to achieve the Relevant Financial Consequences within the times referred to in Condition J2.4.1(b) and the opportunities which Network Rail has to accelerate or postpone the effect of the Relevant Financial Consequences;
- (d) the extent to which any Released Capacity may reasonably be expected to be used:
  - (i) by any other operator of trains or Freight Customer Access Option Holder; and
  - (ii) in relation to the maintenance, re-alignment, re-configuration, repair or renewal of any part

of the Network;

- (e) the reasonably foreseeable financial effects on Network Rail of the release of capacity;
- (f) Network Rail's proposals as to the amounts (if any) which should be payable by or to the Part J Access Beneficiary under the Access Agreement as a consequence of the making of any Specified Relevant Surrender or Specified Relevant Adjustment and its reasons for them, including in relation to the sharing between Network Rail and the Part J Access Beneficiary of the Relevant Financial Consequences; and
- (g) whether any other person has made an enquiry of Network Rail pursuant to an agreement between that person and Network Rail in relation to the surrender or adjustment of Access Rights under that agreement which, if made, might reasonably be expected to affect the interests of the Part J Access Beneficiary in relation to the Specified Relevant Surrender or Specified Relevant Adjustment in question,

together with such other information as the Part J Access Beneficiary reasonably requests, in each case in a form and amount of detail which is sufficient to enable the Part J Access Beneficiary to make a proper assessment of the effect of the making of the Specified Relevant Surrender or Specified Relevant Adjustment in question.

## 2.5 **Pre-existing obligations of confidence**

2.5.1 Nothing in this Condition J2 shall require Network Rail to break an obligation of confidence which arose before 1 April 1994.

## 2.6 **Consultation by Network Rail**

2.6.1 In preparing each Relevant Response, Network Rail shall:

- (a) except to the extent otherwise requested by the Part J Access Beneficiary and in accordance with such (if any) conditions as the Part J Access Beneficiary shall specify; and
- (b) subject to Condition J3,

carry out such consultation of:

- (i) other operators of trains, other Freight Customer Access Option Holders and other persons whom it has reason to believe intend

to become operators of trains or Freight Customer Access Option Holders; and

- (ii) any Funders which may be directly affected and of which Network Rail is aware, or ought reasonably to have been aware,

as shall be necessary or expedient so as to enable Network Rail properly to inform itself of the effects on the capacity of the track in question which the Specified Relevant Surrender or Specified Relevant Adjustment in question, if made, is likely to have.

## 2.7 **Obligation to co-operate**

### 2.7.1 If:

- (a) Network Rail has made any enquiry of a Part J Access Beneficiary in relation to a Relevant Enquiry made by that Part J Access Beneficiary or any other Part J Access Beneficiary under this Condition J2; and
- (b) the enquiry is one which the Part J Access Beneficiary may reasonably be expected to answer,

the Part J Access Beneficiary shall provide Network Rail with a response to the enquiry to the extent and in the amount of detail which is reasonable in the circumstances.

2.7.2 Information provided in any response under Condition J2.7.1 shall be treated as Qualifying Information and Condition J3 shall apply accordingly.

## 2.8 **Estimated costs of providing Relevant Response**

### 2.8.1 Network Rail:

- (a) shall provide the Part J Access Beneficiary, if so requested by it and as soon as reasonably practicable after the request, with:
  - (i) its best estimate of its costs of providing a Relevant Response; and
  - (ii) having provided such an estimate, its best estimate of the costs which it has incurred in preparing the Relevant Response in question up to the date of the request or any other date specified in the request; and

- (b) shall not, in preparing a Relevant Response, exceed the amount of the estimate without first notifying and obtaining the consent of the Part J Access Beneficiary.

## **2.9 Payments of costs of Relevant Responses**

2.9.1 The Part J Access Beneficiary shall:

- (a) be entitled to make any request of the kind referred to in Condition J2.8 at the time of making the Relevant Enquiry in question and at any time and from time to time thereafter, and the failure of the Part J Access Beneficiary to make any such request on any occasion shall not prejudice its right to make such a request on a later occasion;
- (b) pay to Network Rail an amount calculated pursuant to Condition J2.10; and
- (c) be entitled to receive from Network Rail, on request, a certificate from its auditors verifying that the costs referred to in Condition J2.10 have been incurred in providing the Relevant Response.

## **2.10 Division and payments of costs**

2.10.1 The amount referred to in Condition J2.9(b) shall be an amount equal to 75 per cent of the amount of Network Rail's reasonable costs of providing the Relevant Response which exceed £1,000 (excluding VAT). Such amount shall be payable not later than 20 Working Days after the later of:

- (a) the date upon which the Relevant Response shall be provided; and
- (b) the date upon which Network Rail requests payment of the amount in question in an invoice which is sufficient for the purposes of Value Added Tax.

2.10.2 For the purposes of this Condition J2, Network Rail's costs shall include a fair allocation of its administrative and other regional and national costs of carrying on its business.

## **2.11 Right to elect to surrender or adjust Access Rights**

2.11.1 If, following receipt of a Relevant Response, the Part J Access Beneficiary:

- (a) wishes to have a Specified Relevant Adjustment effected; and



- (b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,

it shall be entitled to do so after giving to Network Rail and the Office of Rail Regulation a notice to that effect within 15 Working Days after the date upon which it receives the Relevant Response in question. The Specified Relevant Adjustment shall have effect from the date the Office of Rail Regulation gives its consent to the making of the Relevant Adjustment in question in accordance with Condition J2.13.

2.11.2 If, following receipt of a Relevant Response, the Part J Access Beneficiary:

- (a) wishes to make a Specified Relevant Surrender; and
- (b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,

it shall give Network Rail notice to that effect within 15 Working Days after the date upon which it receives the Relevant Response in question. The Specified Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J2.11.3.

2.11.3 Network Rail shall notify the Office of Rail Regulation of the relevant modification to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary gives notice to Network Rail agreeing to the Specified Relevant Surrender pursuant to Condition J2.11.2.

## 2.12 **Right of Part J Access Beneficiary to have Access Rights adjusted**

2.12.1 If it is Determined that the Part J Access Beneficiary should be entitled to make any Relevant Surrender or have any Relevant Adjustment given effect, the Part J Access Beneficiary shall give notice to Network Rail as to whether it elects to exercise that entitlement. If the Part J Access Beneficiary does not give notice to Network Rail within 15 Working Days of the date of the Determination, the Part J Access Beneficiary shall lose the entitlement in question.

2.12.2 If the Part J Access Beneficiary gives notice pursuant to Condition J2.12.1 of an election to exercise an entitlement to make a Relevant Surrender, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J

Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of such notice. Network Rail shall include a copy of the relevant ADRR Determination, if applicable, with the notification.

2.12.3 Any Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J2.12.2.

2.13 **Office of Rail Regulation's consent to a Quality Adjustment of Access Rights**

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2.13.1 Subject to Condition J2.13.4, a Quality Adjustment shall have effect only with, and from the date specified in, in the Office of Rail Regulation's consent,

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2.13.2 Network Rail shall submit the relevant modifications to the Access Agreement or Access Agreements which have the effect of a Quality Adjustment to the Office of Rail Regulation for consent within 10 Working Days of:

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(a) The Part J Access Beneficiary's election to have a Specified Relevant Adjustment effected under Condition J2.11; or

(b) The Part J Access Beneficiary's election to have a Relevant Adjustment effected under Condition J2.12.

2.13.3 Network Rail and the Part J Access Beneficiary shall use all reasonable endeavours to procure that the Office of Rail Regulation is furnished with sufficient information and evidence as it requires to determine:

(a) whether or not to give its consent to the making of the Quality Adjustment in question or to part only of the modifications submitted to it; and

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(b) the date from which the Quality Adjustment, or part only, shall have effect.

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2.13.4 The Office of Rail Regulation's consent is not required in respect of a Quality Adjustment where the Quality Adjustment has been Determined by the Office of Rail Regulation in accordance with Condition J11.

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9 **Rights Review Meetings**

9.1 **The Rights Review Meeting**

- 9.1.1 Network Rail shall hold Rights Review Meetings as frequently as necessary in order for it to ensure that capacity on the network is shared in the most efficient and economical manner in the overall interest of users, providers, potential providers and funders of railway services.
- 9.1.2 Network Rail shall give a Part J Access Beneficiary at least 5 Working Days written notice of a Rights Review Meeting (“Rights Review Notice”). Network Rail shall, in the Rights Review Notice, list the Quantum Access Rights, related Train Slots or associated Ancillary Movements, Stabling or Y-Paths which are going to be the subject matter of the meeting (“Rights under Review”).
- 9.1.3 Where a Part J Access Beneficiary has received a Rights Review Notice in accordance with Condition J9.1.2, it shall attend the meeting and participate in it in a collaborative manner in order to assist Network Rail to meet its objectives set out in Condition J9.1.4 below.
- 9.1.4 In holding a Rights Review Meeting, Network Rail’s objectives shall include:
- (a) establishing why any Rights under Review are not being used;
  - (b) assessing whether it is appropriate for Network Rail to commence the Failure to Use procedure under Condition J4 in relation to any of the Rights under Review;
  - (c) assessing whether it is appropriate for any Relevant Adjustment to be made to the Part J Access Beneficiary’s Access Rights; and
  - (d) considering whether it is appropriate to agree any amendments or additions to the Part J Access Beneficiary’s Access Rights.
- 9.1.5 Further to a Rights Review Meeting, Network Rail shall, where it considers it appropriate, commence and pursue the Failure to Use procedure under Condition J4 to remove any of the Rights under Review from the Part J Access Beneficiary.

## 9.2 **ORR Power to Direct a Rights Review Meeting**

- 9.2.1 If the Office of Rail Regulation considers that a Part J Access Beneficiary is not using any of its Quantum Access Rights, related Train Slots or associated Ancillary Movements, Stabling or Y-Paths and Network Rail has not held a Rights Review Meeting related to this, then the Office of Rail Regulation may, in writing, direct Network Rail to hold a Rights Review Meeting (“J9 Direction”).
- 9.2.2 Network Rail shall comply with a J9 Direction within 10 Working Days of its receipt.
- 9.2.3 If any third party Part J Access Beneficiary reasonably believes that another Part J Access Beneficiary is not using any of its Quantum Access Rights, related Train Slots or associated Ancillary Movements, Stabling or Y-Paths and Network Rail has not held a Rights Review Meeting related to this, then it may report the matter to the Office of Rail Regulation. The Office of Rail Regulation will then consider whether it is appropriate for it to direct, pursuant to Condition J9.2.1, Network Rail to hold a Rights Review Meeting.
- 9.2.4 Where Network Rail has failed to comply with a J9 Direction in accordance with Condition J9.2.2, the Office of Rail Regulation may apply to the High Court (in Scotland, the Court of Session) for it to make such order as it thinks fit for requiring the failure to be made good.

## 9.3 **Notification**

- 9.3.1 If before, during or after the Rights Review Meeting, the Part J Access Beneficiary agrees a Relevant Surrender or Relevant Adjustment of any of the Rights under Review, then, within 10 Working Days, Network Rail shall give the Office of Rail Regulation notice of the relevant modifications to that Part J Access Beneficiary’s Access Agreement. The modifications shall be deemed to have effect on the date such notice is given to the Office of Rail Regulation.

## 10 **Obligation of Network Rail to publish documentation**

### 10.1 **Template Notices**

- 10.1.1 Network Rail shall publish promptly templates, and any revision to them, for any notices required under this Part J.
- 10.1.2 Before publishing templates or any revisions to them in accordance with Condition J10.1.1, Network Rail shall consult with relevant Part J Access Beneficiaries.

## 10.2 **Publication of Other Documentation**

10.2.1 Subject to Condition A3.1, Network Rail shall publish promptly an accurate and up-to-date copy or statement of every notice or notification given or received pursuant to this Part J, in order to inform persons holding or contemplating holding or surrendering Access Rights about how the allocation of capacity on any part of Network Rail's network may change over time.

## 10.3 **ORR Power to Direct Network Rail to Publish**

10.3.1 If Network Rail fails to comply with any of its obligations in Condition J10.1 or Condition J10.2, then ORR may, in writing, direct that Network Rail do so comply ("J10 Direction").

10.3.2 Network Rail shall start any process to comply with a J10 Direction within 10 Working Days of receipt of it and shall have complied with the J10 Direction within 30 Working Days of receipt of it.

10.3.3 Where Network Rail has failed to comply with a J10 Direction in accordance with Condition J10.3.2, the Office of Rail Regulation may apply to the High Court (in Scotland, the Court of Session) for it to make such order as it thinks fit for requiring the failure to be made good.

## 11 **Appeals**

### 11.1 **Appeal in accordance with the ADRR**

11.1.1 Any dispute arising under this Part may be referred by any Part J Access Beneficiary or Network Rail for determination in accordance with the ADRR.

11.1.2 A reference for determination brought under Condition J11.1.1 must be made:

- (a) within 5 Working Days of receipt of the decision to which objection is made; or
- (b) where the period referred to in Condition J11.1.2(a) includes Christmas Day, within 10 Working Days of such receipt.

### 11.2 **Appeal to the Office of Rail Regulation**

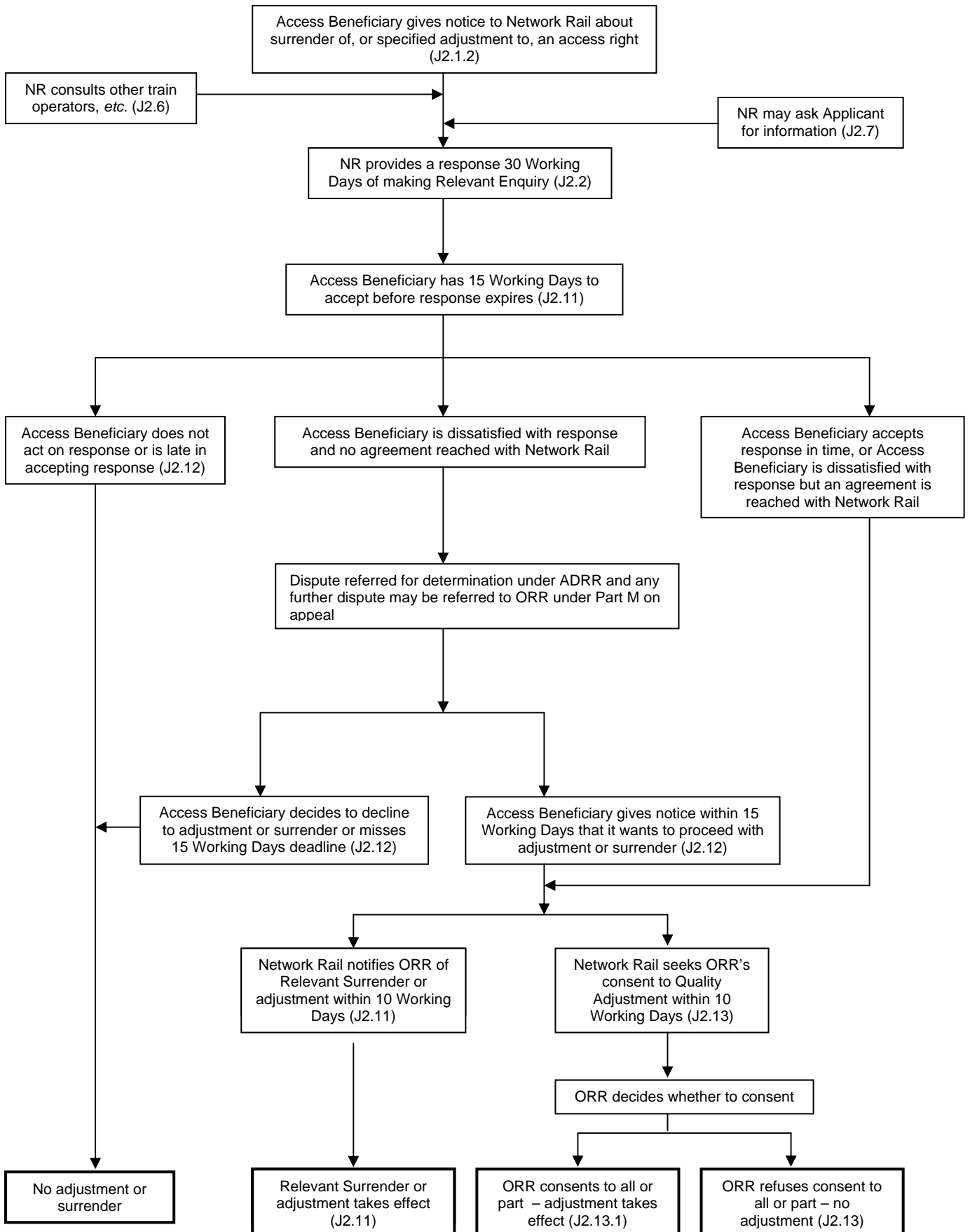
11.2.1 Where either Network Rail or any Part J Access Beneficiary is dissatisfied with the decision reached in accordance with the

ADRR under Condition J11.1, it may refer the matter to the Office of Rail Regulation for determination under Part M:

- (a) within 5 Working Days of receipt of the written determination reached in accordance with the ADRR to which objection is made; or
- (b) where the period referred to in Condition J11.2.1(a) above includes Christmas Day, within 10 Working Days of such receipt,

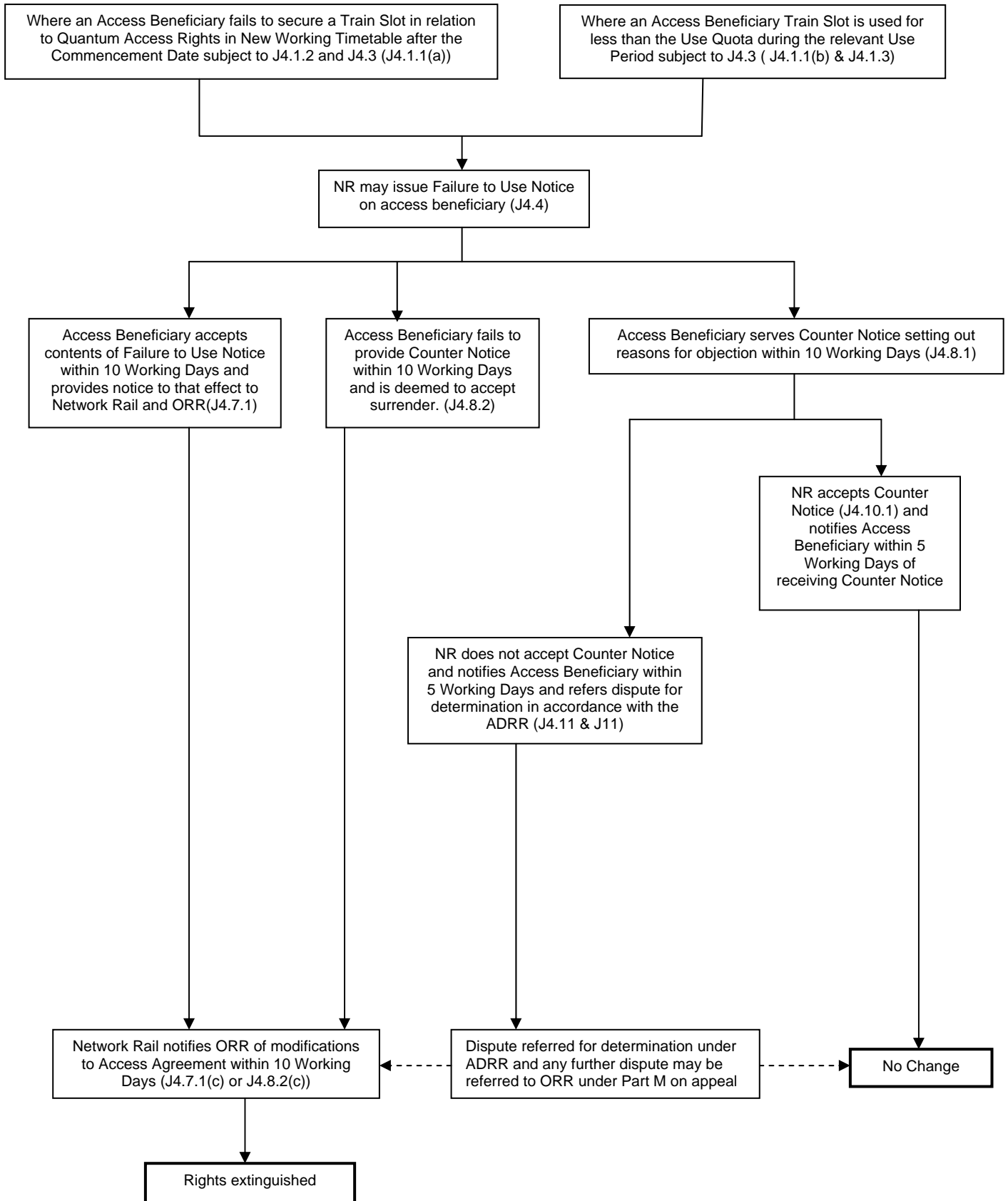
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**Appendix 1: Condition J2 process for voluntary surrender or adjustment of rights**

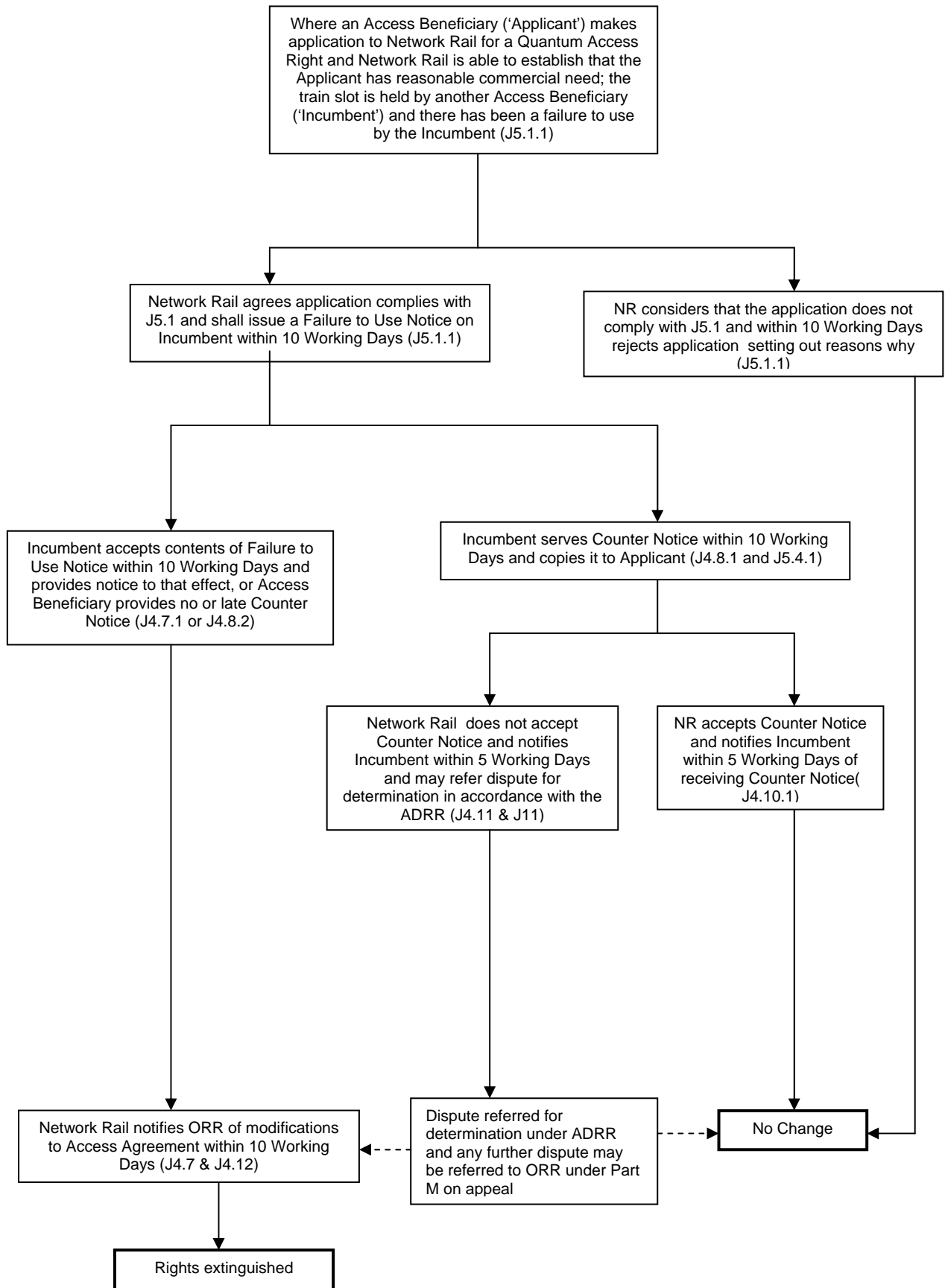




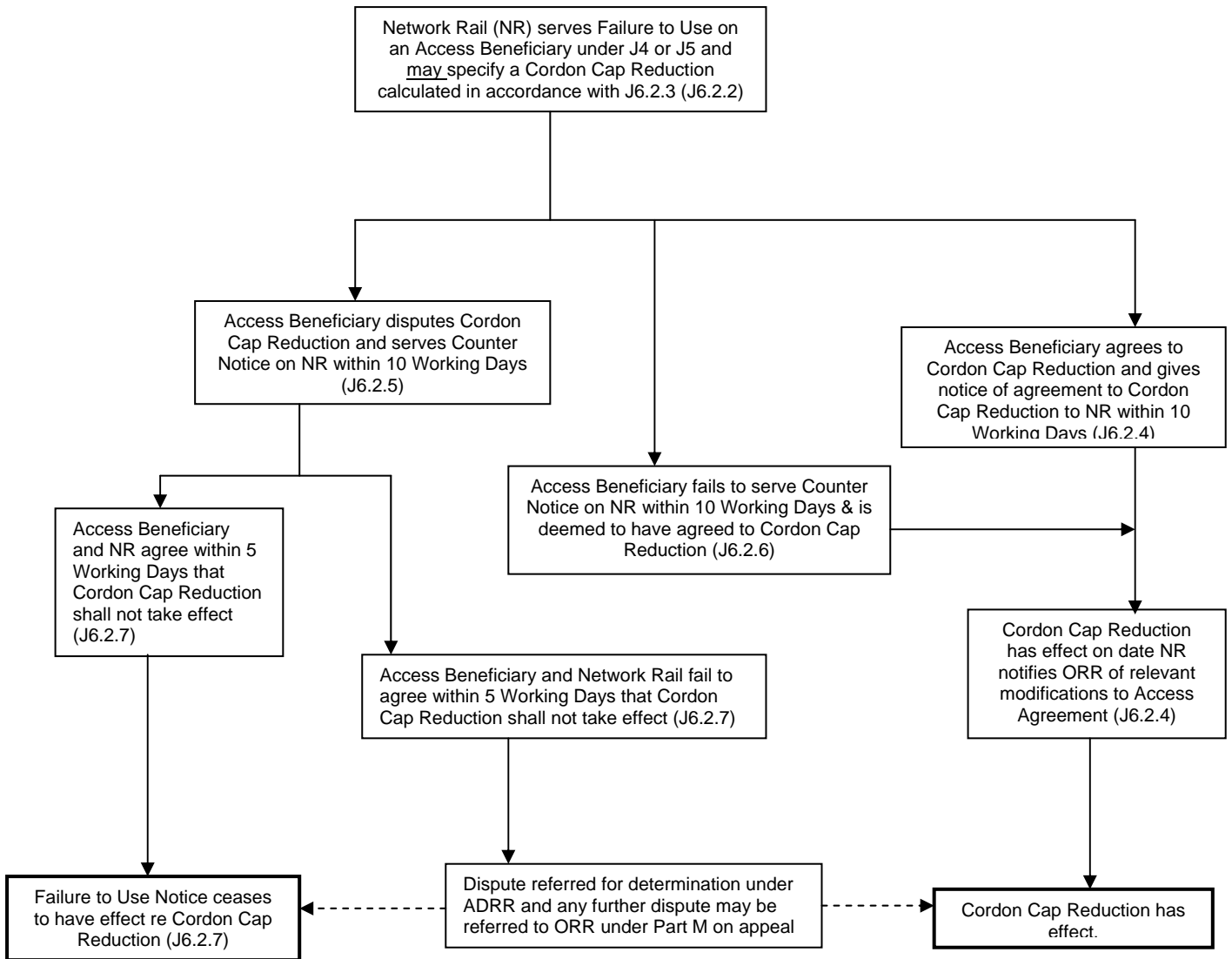
**Appendix 2: Condition J4 UIOLI process for unused rights or where slots are not sought by another access beneficiary**



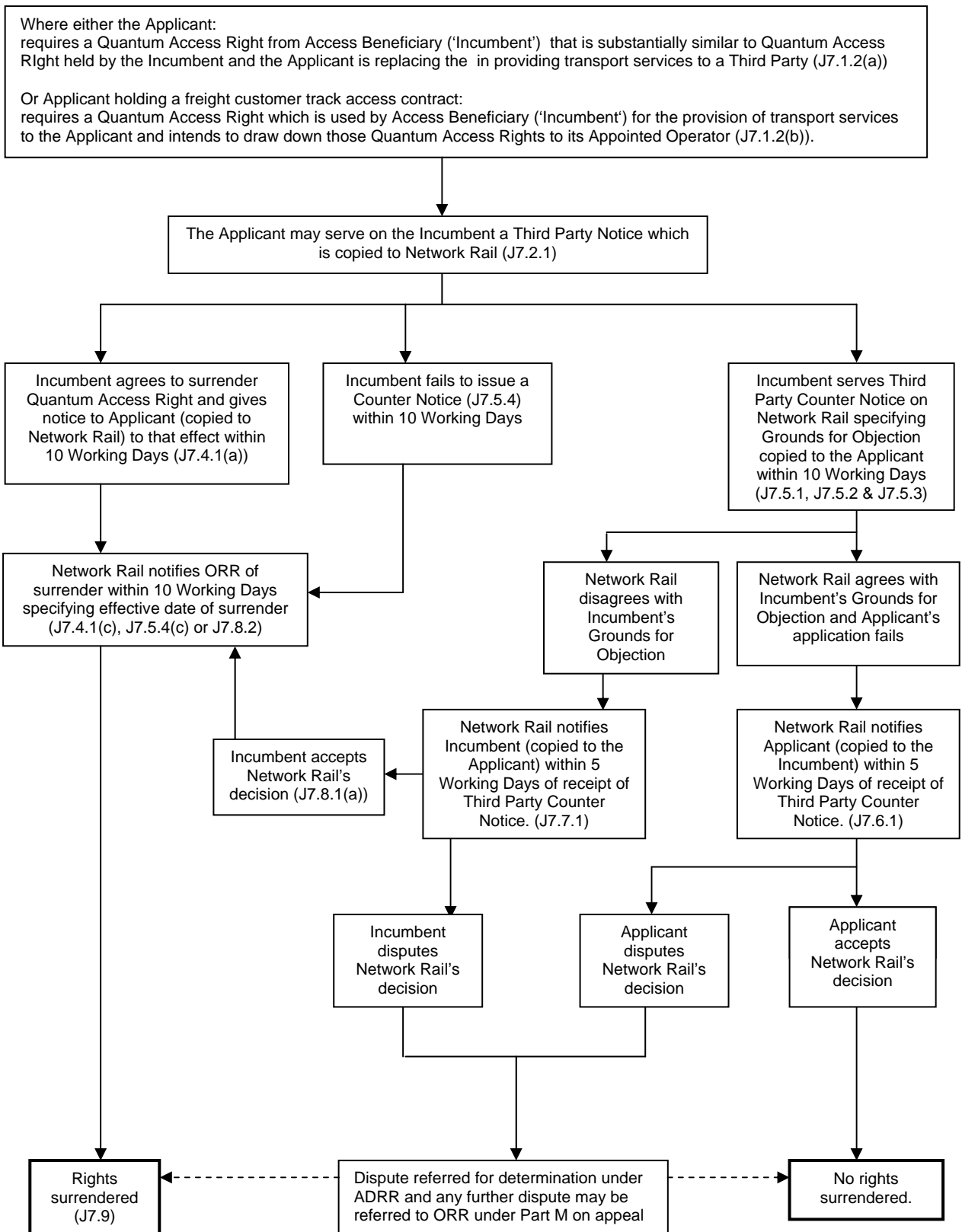
**Appendix 3: Condition J5 UIOLI process where slots are sought by another access beneficiary (Condition J5 uses Condition J4 for most of the process)**



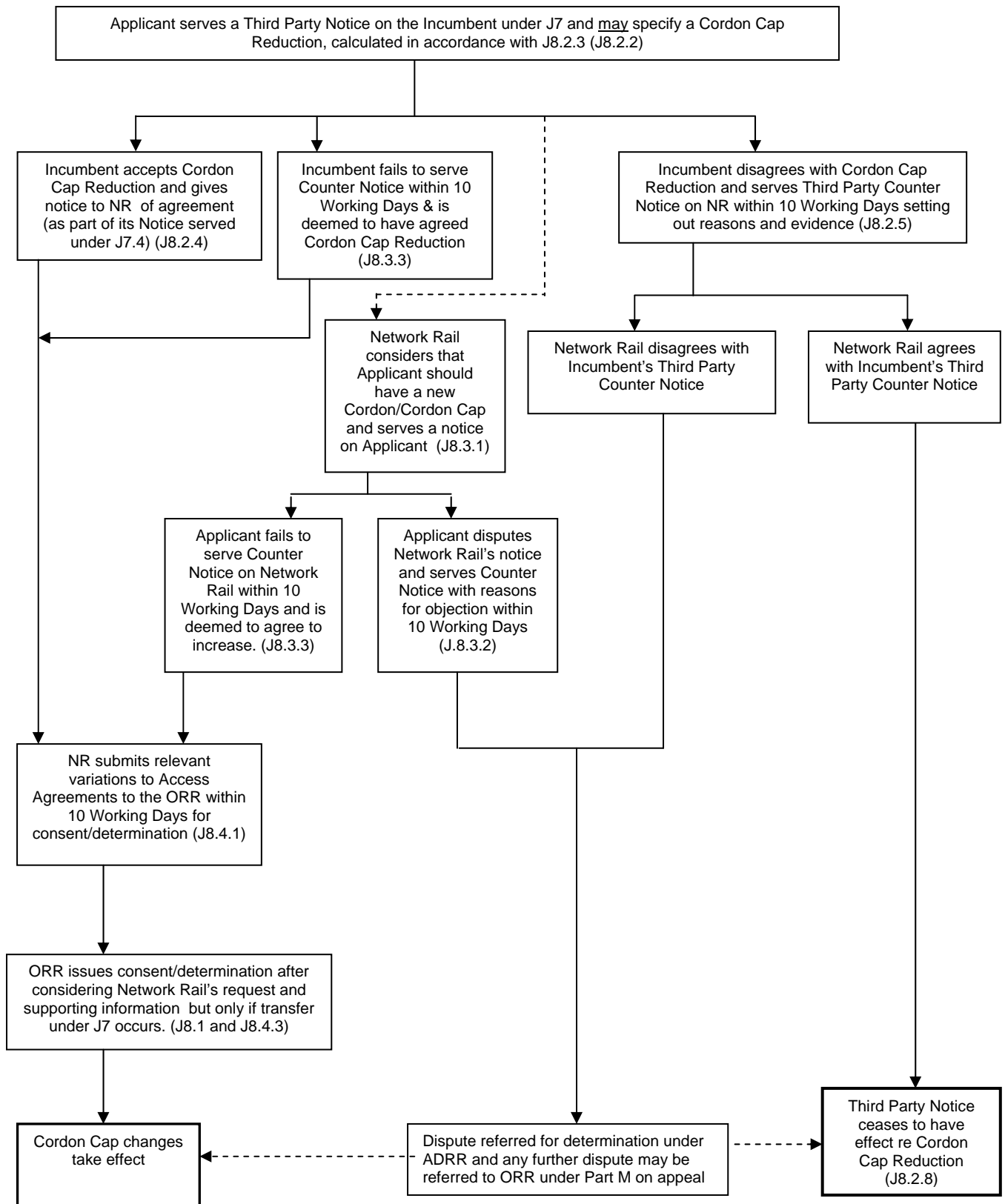
**Appendix 4: Condition J6 process for reducing cordon caps under UIOLI mechanism**



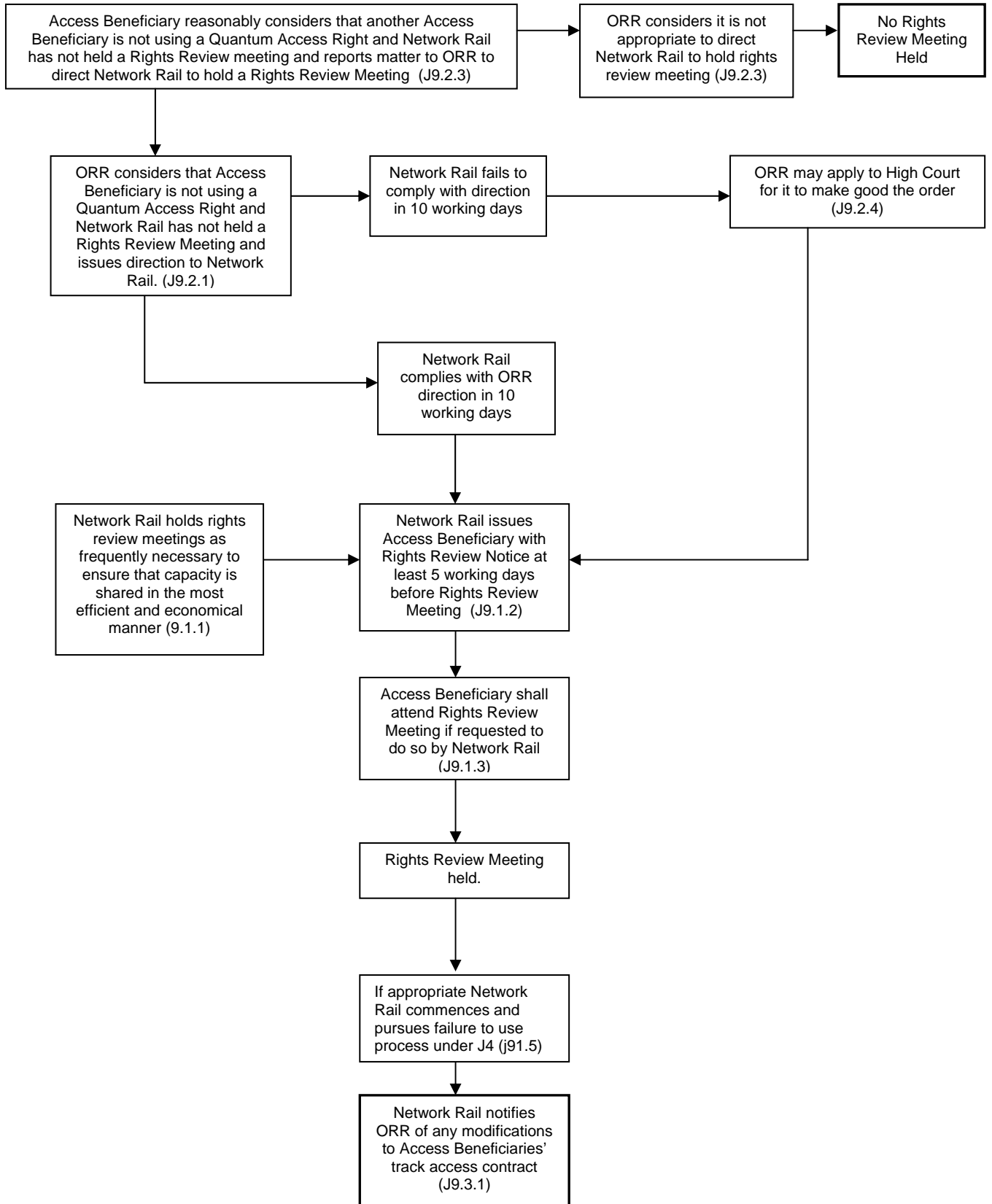
## Appendix 5: CONDITION J7 PROCESS- freight transfer mechanism



**Appendix 6: Condition J8 process for adjusting cordon caps under the freight transfer mechanism**



## Appendix 7: Condition J9 process for holding rights review meetings



## ***Annex C - Table listing and explaining all the changes to Part J***

## PROPOSED CHANGES TO PART J OF NETWORK CODE

	Location	Change	Reason
1	Explanatory Notes	delete	The status of the information contained in the Explanatory Notes has caused dispute in the past. In light of this, we are proposing that the Part begins with an overview which does form part of the Code. This also reflects the practice adopted in Part D.
2	Appendices 1-7	Moved to the back of the Part	We think it is neater for the appendices to be behind the text. This also reflects the practice adopted in Part D where timelines are annexed at the end of the Part.
3	New Condition 1.1	Condition 1.1- sets out an overview of the whole Part	See above
4	New Condition 1.2	“Definitions” heading is changed to “Interpretation” . Instead of saying “In this Part J, unless the context otherwise requires..” change to “In this Part J, capitalised words have the meanings shown below..”	For clarity. In addition, in the Part, defined terms are not used in any other context.
5	Definition – “ADRR Determination”	Add “in” after made in first line. Make consequential changes to references to other conditions	To correct typo. To make consequential changes
6	New definition – “Access Proposal”	To add new definition of Access Proposal and delete old definition of “Bid”	To reflect recent changes to Part D
7	Various Definitions	Change “has the meaning ascribed to it in” to “has the meaning shown in”	To express definitions in plainer English and make consistent with changes implemented in Part D
8	Definition “Grounds for Objection”	Change to singular “Ground of Objection” . Change reference of J4.10 to J4.9. Also add in reference to Condition J7.5.1.	Only proposing one ground in each of J4 and J7. To reflect changes to J4.10 and inclusion of grounds for objection on the face of Condition J7.
9	New Definition –	Add in new definition “J9 Direction - has the meaning shown in	Consequential to new Condition J9



## PROPOSED CHANGES TO PART J OF NETWORK CODE

	“J9 Direction”	Condition J9.2.1”	
10	New Definition – “J10 Direction”	Add in new definition “J10 Direction – has the meaning shown in Condition J10.3.1”	Consequential to new Condition J10
11	New Definition – “New Working Timetable”	Add in new definition “New Working Timetable – has the meaning shown in Part D of this code;”	To reflect recent changes to Part D
12	Definition - “Office of Rail Regulation Determination”	Delete the word “either” and change reference to Conditions J13.3 or J14.2 to “Condition J11.2	To reflect that proposed that there will only be one dispute resolution condition
13	Definition – “Quantum Access Right”	After “means a”, delete “Firm Right, any Contingent Right or any Level Three Right as such” and instead insert “any right”  After “part of such a”, delete “Firm Right, Contingent Right or Level Three Right” and instead insert “right”	We think the present definition is confusing because it specifically references any Level Three Right but not any Level One or Two Right. We presume that Level One and Level Two Rights were not specifically included in the definition because they are Firm Rights. However, a Level Three Right is a Contingent Right and therefore does not need to be referred to separately. We consider that what is actually intended to be covered is any right under an access agreement.
14	Definition – “Quantum Adjustment”	Delete “and the grant of it of any other Access Right”	We think that in the context of Condition J2, where this term is used, Quantum Adjustments should only be about the surrender of access rights and not about the grant of additional Access Rights to a Part J Access Beneficiary.
15	Definition – “reasonable ongoing	Delete this definition	Our proposed amendments to J4 and J7 remove this concept.

## PROPOSED CHANGES TO PART J OF NETWORK CODE

	commercial need”		
16	Definition – “Restrictive Provisions”	Change references to “access right” to “Access Right”	To correct typos
17	Definition – “Review Proposal”	Delete this provision	Our proposed new Condition J9 removes this concept
18	Definition – “Rights Review Meeting”	After “between”, delete “the Part J Access Beneficiary and Network Rail pursuant to Condition J9” and instead insert “Network Rail and a Part J Access Beneficiary for the purpose of reviewing the Quantum Access Rights held by that Part J Access Beneficiary and its use of them”	To explain what a Rights Review Meeting is in the context of our proposals for that condition
19	New Definition – “Rights Review Notice”	Add in new definition “Rights Review Notice – has the meaning shown in Condition J9.1.2”	Consequential to new Condition J9
20	Definition “Rights Subject to Surrender”	<p>Delete “(b) a Third Party Failure to Use Notice” and re-number following sub paragraph</p> <p>In (i) after “any Train Slot” insert “including any Y-Path”</p> <p>In (ii) after “Network Rail” add “(or the Applicant in relation to Condition J7.3) considers”</p> <p>In (iii) change “any Bid” to “any Access Proposal”</p>	<p>See paragraph 68 below</p> <p>To clarify that Y-Paths which relate to the Quantum Access Right can also be subject to surrender.</p> <p>To reflect the fact that under proposals to change Condition J7 the Applicant will serve a Third Party Notice directly on the Incumbent.</p> <p>To reflect the changes made recently to Part D</p>
21	New Definition “Rights Under	Add in new definition “Rights Under Review – shall have the meaning shown in Condition J9.1.2”	Consequential to new Condition J9

## PROPOSED CHANGES TO PART J OF NETWORK CODE

	Review”		
22	Definition “Third Party Failure to Use Notice”	Delete	See paragraph 68 below
23	Definition – “Use Period”	Delete present explanation and instead insert “has the meaning shown in Condition J4.2.3”	To reflect the changes proposed to Condition J4 and also the proposal to move away from the Use Quota/Period being set out in a document sitting outside the Code and instead put their definitions on the face of Part J
24	Definition – “Use Quota”	Delete present explanation and instead insert “has the meaning shown in Condition J4.2.2”	To reflect the changes proposed to Condition J4 and also the proposal to move away from the Use Quota/Period being set out in a document sitting outside the Code and instead put their definitions on the face of Part J
25	New Definition – “Y-Path”	Insert new definition “Y-Path – “means a Train Slot incorporated in the Working Timetable that is identified as such by the incorporation of the letter “Y” in the operating characteristics part of the Train Slot’s heading.	Because of the difficulties regarding the transfer of Y-paths in previous cases arising under Condition J7, we think it would be beneficial if the definition of ‘Rights Subject to Surrender’ specifically referred to Y-Paths and a definition of Y-Paths was included in Part J.
26	Present 1A	Becomes new Condition J1.3	Re-numbering
27	New Condition J1.4	Inserts a Transitional Provision	To deal with the fact that there could be outstanding notices/processes started under the present Part J when proposed revisions take effect. If this is the case then any notices/processes/appeals in relation to such notices will still be governed by the present Part J.  So that transitional

## PROPOSED CHANGES TO PART J OF NETWORK CODE

			drafting does not remain in Part J for evermore, longstop date provided for transitional drafting to be removed from the code.
28	J2.13, heading,	After “a” add “Quality”	So that ORR’s consent is only required in relation to modifications which are Quality Adjustments
29	J2.13.1	In first line after “a”, delete “Relevant” and insert “Quality”  Delete “in accordance with Condition J10”	To reflect that ORR’s consent is only required in relation to modifications which are Quality Adjustments.  To reflect the fact that power for ORR to consent to part only of the modification presented to it is being moved from Condition J10 to J2
30	J2.13.2	After “Access Agreements” in the second line insert “which have the effect of a Quality Adjustment”	To clarify that ORR’s consent is only required in relation to modifications which are Quality Adjustments
31	J2.13.3(a)	Delete “relevant” and insert “Quality”  After “question” insert “or to part only of the modifications submitted to it”	To ensure ORR’s consent is only required in relation to modifications which are Quality Adjustments  To reflect the fact that power for ORR to consent to part only of the modification presented to it is being moved from Condition J10 to J2
32	J2.13.3(b)	Delete “relevant” and insert “Quality”  After “Adjustment,” insert “or to part only”	To ensure ORR’s consent is only required in relation to modifications which are Quality Adjustments  To reflect the fact that power for ORR to consent to part only of the modification presented to it is being moved from

## PROPOSED CHANGES TO PART J OF NETWORK CODE

			Condition J10 to J2
33	J2.13.4	Delete “relevant” and insert “Quality”  Change reference to “J13” to “J11”	To ensure ORR’s consent is only required in relation to modifications which are Quality Adjustments  Consequential change arising from new dispute resolution condition J11
34	J3.13 – Appeal against Disputes Chairman’s determination	Delete this sub condition and make consequential changes to numbering	At the moment any dispute arising from the Allocation Chair’s decision about confidentiality of information provided under the J2 process comes to ORR on appeal. We propose that such disputes should be dealt with in the same way as any other dispute under the Network Code – determined in accordance with the ADRR. We think this is consistent with the approach taken elsewhere in the Network Code and with the industry’s wish to see disputes dealt with the industry.
35	J3.13 - heading	Change heading to “Immunity of the Allocation Chair”	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.
36	J3.13.1	In first line, before “Allocation” delete “Neither”.  In first line after “Chair” delete “the Office of Rail Regulation”  In first line after “shall” insert “not”	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.
37	J3.14.1	In the second line after “the remit of the Allocation Chair”, delete “and the Office of Rail Regulation”	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.
38	J3.14.2	Delete this sub-condition and re-number the rest of the sub-conditions	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.

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39	J3.15	Delete wording arising from old sub-condition J3.16.1(c) – “the Office of Rail Regulation has determined that a determination of the Allocation Chair of the kind referred to in Condition J3.16.1(b) shall be confirmed in whole or in part; or”	To reflect that we are proposing that ORR no longer hears disputes under the J2 process.
40	J4.1	Delete and re-number the rest of the sub-conditions	This was old transitional drafting and is no longer relevant.
41	J4.1.1	Delete reference to “J4.2.2”  Change reference to “J.4.2.3” to “J.1.2”  Change reference to “J4.4” to “J4.3”	Old J4.2.2 is being deleted – see para 43 below.  Consequential change  Consequential change
42	J4.1.1(a)	Change “First” to “New”  After “secure”, delete “one or more” and instead insert “the quantum of”  After “Train Slots”, delete “in respect of that Quantum Access Right” and insert “which the Quantum Access Right permits”	To reflect recent changes to Part D  To reflect that the quantum of Train Slots which the Access Right permits have to be obtained. Present wording means that where 1 Train Slot is obtained – even if Access Right permits more – then this criterion is satisfied.
43	J4.1.2	Delete sub-condition  Insert as a new sub condition: “Condition J4.1.1(a) shall not apply where the Part J Access Beneficiary was unable to secure the necessary quantum of Train Slots permitted by the Quantum	We do not think rights, whatever their status, which have not been accommodated in the timetable and are therefore not being used should be protected from the Failure to Use process.  This is to address a point made by Freightliner that sometimes it cannot secure the necessary quantum of Train Slots permitted by the Quantum Access Right because of

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		Access Right because of Restrictions of Use that are set out in the relevant Engineering Access Statement.”	Restrictions of Use.
44	J4.1.3	change reference to “J4.2.1(b)” to “J4.1.1(b)”  change reference to “J4.2.1(b)” to “J4.1.1(b)”  change reference to “J4.2.3” to “J4.1.3”	consequential re-numbering
45	J4.2	Delete and insert as a new J4.2 “Use Quota and Use Period 4.2.1 The Use Quota and Use Period shall apply to services for the carriage of goods by railway and passengers. 4.2.2 The Use Quota shall be one. 4.2.3 The Use Period shall be thirteen consecutive weeks for which the Train Slot is included in the Working Timetable. Where a Train Slot is derived from a Quantum Access Right which permits a Train Slot to be obtained on more than one day of the week, the use of the Train Slot on each relevant day of the week shall be assessed separately. 4.2.4 A train movement shall not count towards the Use Quota if it is made with the primary purpose of achieving the Use Quota for that Train Slot.”	To reflect the fact that the Use Quota and Use Period should appear on the face of Condition J4.  Also to reflect proposals to amend the Use Period so that it applies to each individual day of the week to which the Access Right relates. For example, where an operator has rights to use the same path on each day of the week then it will need to have used at least one path in a period of thirteen consecutive weeks on each day for which it has rights.
46	J4.3	Change reference to Condition “J4.2.1(a) or (b)” to Condition “J4.1.1(a) or (b)”  After “such non-use” make text that follows a new sub (a) and then insert a new sub(b) to read “is temporary in nature”.	consequential re-numbering  To make clear that non-use shall be disregarded only if it is of a temporary nature.
47	J4.4	Change “considers there is” to “considers there has been”	Correction of tense

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		Delete sub para (b) and make text of sub para (a) run into main paragraph	ORR doesn't require copies of these documents
48	J4.5	Delete wording arising from old Condition J4.6 and instead insert: "4.5.1 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, 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."	To clarify difficulties experienced with present wording as evidenced in appeals by GB Railfreight and DB Schenker under Part J heard by ORR in relation to determination ADA05. To clarify that a cessation of a Failure to Use can only occur before a Failure to Use Notice has been served.
49	J4.6.1	Insert a new sub-paragraph (c) "the date on which the Surrender is intended to take effect"	To make consistent with what is presently required in a Third Party Failure to Use notice issued under J5
50	J4.7.1	In sub paragraph (a) delete "give notice to that effect to" and insert "notify"  In sub paragraphs (b) and (c) to change reference to "J4.8.1" to "J4.7.1"	To make consistent with other such references in Part J.  Consequential re-numbering
51	J4.8.1(a)	Add "and/or" at the end of sub paragraph (a)	To be consistent with other sub -paragraphs
52	J4.8.1(b)	After "or", delete "that the Failure to Use was not continuing at the date of the service of the Failure to Use Notice; and/or" and instead insert "there has been a cessation of a Failure to Use in accordance with Condition J4.5; and/or"	See reasoning under paragraph 48 above
53	J4.8(d)	Change "there are" Grounds of Objection to "there is a". Make "Grounds" singular. Change Reference to "J4.10" to "J4.9"	To reflect the fact that we are proposing that there is only one ground for objection
54	J4.8	In final paragraph delete "The Part J Access Beneficiary shall send a copy of any Counter Notice and such evidence to the Office of Rail Regulation."	To reflect the fact that ORR does not require to be sent copies of these documents.
55	J4.8.2	Change reference to "Condition J4.9" to "Condition J4.8"	Consequential re-numbering
56	J4.9 -	Change heading to "Ground for	To reflect that only one



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	heading	Objection”	ground for objection is proposed
57	J4.9	Delete present text and replace with “A Train Operator may object to a surrender specified in a Failure to Use Notice on the grounds that the Rights Subject to Surrender relate to an enhancement of the Network for which the Train Operator is contracted to pay through access charges (“Ground for Objection”)”.	To reflect that we think that the ROCN defence should be removed as it enables ‘evergreen’ call off contracts to be relied on which leaves Part J open to manipulation.  This proposal also reflects our response to DBS’ concerns that removal of ROCN would mean that franchised passenger operators would have a defence under Condition present J4.9.1(a) but freight operators wouldn’t have a similar defence. We consider that there isn’t sufficient justification for passenger and freight operators to be treated differently and therefore propose removing the passenger operator defence. This means that the only remaining defence is that open to a Train Operator if the rights subject to surrender relate to an enhancement for which they are contracted to pay for.
58	J4.10 - heading	Delete existing heading “Cessation of Notice” and replace with “Network Rail agrees with the Part J Access Beneficiary	We think this heading is more suitable as it describes one of the two options Network Rail has, rather than focusing on the outcome of that option
59	J4.10.1	In Condition J4.10.1 change “If the Part J Access Beneficiary and Network Rail agree or it is determined..” to “If Network Rail agrees with the Part J Access Beneficiary..”	To emphasise that it is Network Rail’s decision whether the Counter Notice has been substantiated or not
60	J4.10.1	Change reference to “J4.9” to “J4.8”	Consequential re-numbering

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		<p>Change “Grounds” of Objection to “Ground” of objection</p> <p>At the end of the paragraph delete the wording after “shall” and instead replace with “have failed and Network Rail shall notify the Part J Access Beneficiary in writing that this is the case within 5 Working Days of receipt of the Counter Notice”</p>	<p>To reflect that only one ground of objection is proposed</p> <p>To add a 5 working day time period for Network Rail to notify the Part J Access Beneficiary</p>
61	J4.11	<p>Add a new Condition J4.11 “Network Rail does not agree with the Part J Access Beneficiary 4.11.1 If Network Rail considers that:</p> <p>(a) the matters set out in Condition J4.8.1(a), (b) or (c) have not been substantiated; and</p> <p>(b) the Part J Access Beneficiary’s Ground for Objection has not been substantiated in respect of any or all of the Rights Subject to Surrender,</p> <p>then it shall notify the Part J Access Beneficiary in writing that this is the case within 5 Working Days of receipt of the Counter Notice.”</p>	<p>To explain the alternative route, to that set out in Condition J4.10, and new timeframe of 5 Working Days which Network Rail has to notify Part J Access Beneficiary</p>
62	J4.12	<p>Condition J4.12 – Delete first paragraph and instead insert “The surrender of the Rights Subject to Surrender will occur:”</p>	<p>To simplify pre-amble to dates</p>
63	J4.12.1(a)	<p>At the start of the sub paragraph add “where either the Part J Access Beneficiary accepts Network Rail’s decision made pursuant to Condition J4.11 or there is an ADRR Determination, on the date....”</p> <p>After reference to “Condition J4.12.2” delete “, in the event of an ADRR Determination”</p>	<p>To deal with the scenarios that either the Part J Access Beneficiary accepts Network Rail’s decision or takes Network Rail to dispute under the ADRR</p> <p>Not now necessary as explained in earlier re-draft of sub-paragraph</p>
64	J4.12.1(b)	<p>Before the word “specified” insert “on the date”</p>	<p>Consequential drafting change to changes explained in paragraph 62 above</p>
65	J4.12.2	<p>After “in the event of” insert “the</p>	<p>To reflect that J4.12 now</p>

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		<p>Part J Access Beneficiary accepting Network Rail’s decision or there is an..”</p> <p>After “...no more than 10 Working Days after the date of..” insert “the acceptance or of the relevant...”</p> <p>After “ADRR Determination” in the penultimate line insert “, as applicable, “</p> <p>After “ADRR Determination” in the last line insert “, if applicable,”</p>	<p>explains what happens when either the Part J Access Beneficiary accepts Network Rail’s decision or it takes the decision to dispute</p>
66	J4.13	<p>Amend heading to “ Access Proposals”</p> <p>Amend reference to “D7.1” to “D2.4”</p> <p>Replace “bid” with “Access Proposal”</p>	<p>To reflect recent changes to Part D</p>
67	J5.1 - heading	<p>Delete “Third Party” from heading “Third Party Failure to Use Notices”</p>	<p>See paragraph 68 below</p>
68	J5.1.1(b)(iii)	<p>Delete the word “continuing”</p> <p>After sub paragraph (b), after “Network Rail shall serve a”, delete “Third Party” and after “Failure to Use” add “under Condition J4.4. In addition, delete “Incumbent” delete “and send a copy of the notice to the Office of Rail Regulation”</p>	<p>See changes proposed to Condition J4.5. There is no such thing as a “continuing” Failure to Use – there is either a “ Failure to Use” or not, in that it ceased to be so before the Failure to Use Notice was served.</p> <p>Rather than having a Third Party Failure to Use Notice we think it is much neater if J5 interlinks into J4 at this point and what Network Rail serves is a Failure to Use Notice under J4.4. This means that all references to Third Party Failure to Use Notice should be amended to Failure to Use Notice. ORR does not require copies of these notices.</p>
69	J5.2	<p>Delete “whether a Failure to Use has ceased to be continuing shall</p>	<p>For consistency with change proposed in</p>

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		be determined in accordance with Condition J4.6” and instead insert “there will have been a cessation of a Failure to Use if the test in Condition J4.5 has been met.”	paragraph 48 above
70	J5.3	Delete this sub-condition and re-number remaining sub-conditions	See paragraph 68 above.
71	J5.3.1	After “Incumbent of a” delete “Third Party”	See paragraph 68 above.
72	J5.4	Various consequential changes marked up in attached drafting	Various consequential changes including re-numbering, changes to headings and changes reflecting the recent changes to Part D.
73	J5.5	Amend reference “Condition J5.4(b)” to “J5.4.1(b)”  Amend “Incumbent” to “Network Rail”  Amend reference to “J5.4.1(b)” to “J5.3.1(b)”	Consequential change  As Network Rail serves the Failure to Use Notice and will receive any counter notice, it makes sense for it to send a copy of the counter notice to the Applicant.  Consequential change
75	J6.2.1	After “Failure to Use Notice” delete “or a Third Party Failure to Use Notice, as applicable”	See paragraph 68 above
76	J6.2.2	Amend reference to Condition “J4.7” to “J4.6”  After “may specify” insert “the amount by which Network Rail considers, in accordance with Condition J6.2.3,”  After “an Existing Cordon Cap” delete “that Network Rail considers should be made” and insert “should be reduced”  After “Failure to Use Notice” delete “or the Third Party Failure to Use Notice”	Consequential change  To make clear that calculation is carried out in accordance with 6.2.3 and also that Cordon Cap Reduction is the amount by which an Existing Cordon Cap should be reduced.  See paragraph 68 above.
77	6.2.3	Delete present wording and instead insert: “The Cordon Cap Reduction shall	To incorporate on the face of J6 the formula to calculate a cordon cap

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		<p>be calculated in accordance with the following formula:  Cordon Cap Reduction = <math>(Rr/R) \times C</math>  (a) where "Rr" means the number of Level 2 Rights being transferred, "R" means the total number of Level 2 Rights related the cordon cap held by the Part J Access Beneficiary before transfer and "C" means the Part J Access Beneficiary's cordon cap before transfer; and  (b) where application of the formula does not result in a whole number, the result shall be rounded down to the nearest whole number."</p>	<p>reduction in relation to J6 from the "Criteria for Interpreting the expression "Reasonable On-going Commercial Need".</p> <p>In addition, we propose to amend the formula so that it changes the cordon cap in proportion with the rights being transferred. If the resulting reduction figure is not a whole figure then we think it should be rounded down – so that there is no risk that the resulting cordon cap is too low.</p>
78	J6.2.4	<p>Amend references to Condition "J4.8(a)" to read "J4.7.1(a)"  Amend references to Condition "J5.4" to "J5.3.1(a)"</p>	Consequential changes
79	J6.2.5	<p>Amend reference to Condition "J4.9" to read "J4.8"  Amend reference to Condition "J5.4" to "J5.3.1(a)"</p> <p>In (a) after "Cordon Cap Reduction" delete "because it has a reasonable on-going commercial need for its Existing Cordon Cap" and, instead, insert "and setting out its reasons why"</p>	<p>Consequential changes</p> <p>To reflect that we are proposing to remove the reasonable on-going commercial need test</p>
80	J6.2.6	Amend reference to "J4.9.2" to "J4.8.2"	Consequential change
81	J6.2.7	After "Failure to Use Notice" delete "or the Third Party Failure to Use Notice, as applicable"	See paragraph 68 above
82	J7.1.2	In the first line after "Train Operator" insert "who is replacing the Incumbent in the provision of transport services to a third party,"	To clarify in light of uncertainty in appeal of ADP23 as to what was being replaced. The current wording led the ADP to conclude that the applicant had to replace the incumbent with an identical or nearly identical

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			use of the quantum firm rights; rather than it being the applicant who is replacing the incumbent as the provider of transport of goods by railway and it was not necessary that applicant's services are identical to the incumbent's.
83	J7.1.3	Delete	We do not think this wording is necessary. It will be obvious whether Part J is being used or not by the fact of reference to it and by the process which is being followed.
84	J7.2	<p>Delete "If Network Rail receives an application from a Part J Access Beneficiary ("the Applicant") requesting" and, instead, insert "Where a Part J Access Beneficiary want to hold"</p> <p>After "(the "Incumbent") then", delete "within 10 Working Days following receipt of the Applicant's application, Network Rail..." and insert "it"</p> <p>After "it shall serve a Third Party Notice on the Incumbent and send a copy of that notice to", delete "Office of Rail Regulation" and, instead, insert "Network Rail"</p> <p>Delete last sentence.</p>	<p>To reflect the fact that process will now be triggered by applicant who will service a notice on incumbent directly without having to go through Network Rail.</p> <p>To reflect the fact that applicant will be serving notice directly on the incumbent.</p> <p>ORR does not require copies of these notices. As the process is now instigated directly between applicant and incumbent, a copy of the notice should be sent to Network Rail.</p>
85	J7.3	<p>Delete present Condition J7.3 and instead insert:</p> <p>"7.3.1 When making an application to the Incumbent of the type described in Condition J7.2, the Applicant shall specify in the application:</p> <p>(a) the Quantum Access Right sought by the Applicant;</p> <p>(b) the Rights Subject to Surrender which the Applicant requires the</p>	<p>This condition merges the old J7.3 and J7.4. (a) and (b) both come from old J7.4. (c) comes from old J7.3 (d) is new and was proposed by a consultee as part of the consultation already carried out in relation to these proposed changes to Part J. As</p>

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		<p>Incumbent to Surrender in order to accommodate the Applicant's request;</p> <p>(c) the date on which the Applicant requests that the Quantum Access Right takes effect in its Access Agreement;</p> <p>(d) that it has suitable access to and from the freight customer's relevant facility in accordance with paragraph 6.4 of its Access Agreement; and</p> <p>(e) that the Quantum Access Right sought has the characteristics described in either Condition J7.1.2(a) or Condition J7.1.2(b)(as the case may be). Where Condition J7.1.2(a) is being relied on, the Applicant must attach a letter from the relevant freight customer confirming the circumstances which mean Condition J7.1.2(a) applies."</p>	<p>suitable access is a requirement in the Access Contract then we think it is sensible to require a statement at this stage that suitable access has been secured.</p> <p>(e) reflects old J7.3 but also requires the applicant to provide a letter from the third party customer confirming the commercial arrangement so as to reduce the scope for dispute.</p>
86	J7.4	Delete re-number remaining sub-conditions	Old condition J7.4 has now been merged into new condition J7.3
87	J7.4	<p>In Condition J7.4.1(a) after "to that effect to" insert "the Applicant and copy this to"</p> <p>In (b) and (c) amend reference to "J7.5(c)" to "J7.4.1(c)" and "J7.5(a)" to J7.4.1(a)"</p>	<p>To reflect that process is now between applicant and incumbent.</p> <p>Consequential re-numbering</p>
88	J7.5	Delete sub paragraphs (a) and (b) and, instead, insert "specifying that it objects to the surrender because the incumbent requires the Rights Subject to Surrender to continue to convey traffic for another customer and this currently is the primary purpose for which the Rights Subject to Surrender are used ("Ground for Objection"). The Incumbent shall provide evidence in support of any Ground for Objection."	<p>To reflect the fact that</p> <ol style="list-style-type: none"> <li>1) old objection that Third Party Notice invalid is not necessary because, if this was the case, then the process has not been initiated properly and so no counter notice should be served.</li> <li>2) reasonable ongoing commercial need is no longer going to be set out in separate criteria.</li> </ol>

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		<p>After “The Incumbent shall send a copy of any Counter Notice and such evidence”, delete “to both the Office of Rail Regulation and, “</p> <p>After “information,” insert “to”</p>	<p>Therefore puts the defence of the incumbent requiring the Rights Subject to Surrender to continue to convey traffic for another customer onto the face of J7. Also adds a “primary purpose” test into the defence to avoid disputes arising when Rights are used for two different customers.</p> <p>ORR does not require a copy of this document.</p>
89	J7.5	<p>Delete Condition J7.5.2 and instead insert “</p> <p>If the Incumbent disagrees with:</p> <ul style="list-style-type: none"> <li>(a) any Train Slots shown in the Third Party Notice as relating to the Quantum Access Right; or</li> <li>(b) any Ancillary Movements or Stabling the Applicant included in the Third Party Notice as being directly related to the Quantum Access Right and no longer required by the Incumbent following the surrender of the Quantum Access Right; or</li> <li>(c) any Access Proposal shown in the Third Party Notice as relating to the Quantum Access Right,</li> </ul> <p>it shall include in the Third Party Counter Notice details of why it disagrees with the Applicant.”</p>	<p>Expanded so that Incumbent can disagree with Ancillary Movements or Stabling or any Access Proposal included in the Third Party Notice. Present drafting doesn’t allow this which we do not agree with.</p>



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90	J7.5.3	<p>Swap order so old J7.5.4 becomes J7.5.3 and vice-versa</p> <p>Change reference to “Condition J7.6” to “Condition J7.5.4”</p>	<p>Change order so consequence of no counter notice is last in Condition</p> <p>Consequential change</p>
91	J7.5.4	<p>(a) after “Third Party Notice” insert “and the Applicant will notify Network Rail, copied to the Incumbent, that this is the case”</p> <p>(b) change reference to “Condition J7.6.3(c)” to “Condition J7.5.4(c)”</p> <p>(c) change reference to “Condition J7.6.3(a)” to “Condition J7.5.4(a)”</p>	<p>To ensure that Network Rail is notified after the deemed surrender.</p> <p>Consequential change</p> <p>Consequential change</p>
92	J7.6	<p>Delete present text and instead insert new heading and text: <b>“Network Rail agrees with Incumbent</b></p> <p>If Network Rail considers that the Grounds for Objection in the Third Party Counter Notice have been substantiated then, subject to any appeal under Condition J11, the Applicant’s application will have failed. Network Rail shall notify the Applicant in writing that this is the case, copied to the Incumbent, within 5 Working Days of receipt of the Third Party Counter Notice and shall set out the reasons for such failure.”</p>	<p>To emphasise that it is Network Rail’s decision whether the Counter Notice has been substantiated or not</p>
93	J7.7	<p>Delete present text and instead insert new heading and text: <b>“Network Rail agrees with Applicant</b></p> <p>7.7.1 If Network Rail considers that the Incumbent’s Grounds for Objection in the Third Party Counter Notice have not been substantiated, then Network Rail shall notify the Incumbent in writing that this is the case, copied to the Applicant, within 5 Working Days</p>	<p>To explain the alternative route, to that set out in Condition J4.10, and new timeframe of 5 Working Days which Network Rail has to notify Part J Access Beneficiary</p>

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		<p>of receipt of the Third Party Counter Notice.</p> <p>7.7.2 Where the Incumbent has disagreed with the Applicant in accordance with Condition J7.5.2, then Network Rail shall, in the notification referred to in Condition J7.7.1, set out what it determines the Rights Subject to Surrender to be.”</p>	
94	J7.8	<p>Delete present 7.8.1 and 7.8.2 and instead insert new heading and text:</p> <p><b>“Surrender of Access Rights</b></p> <p>7.8.1 The surrender of the Rights Subject to Surrender will be deemed to have occurred:</p> <p>(a) where either the Incumbent accepts Network Rail’s decision made pursuant to Condition J7.7 or there is an ADRR Determination, on the date on which such notice is given to the Office of Rail Regulation pursuant to Condition J7.8.2; or</p> <p>(b) on the date specified in the Office of Rail Regulation Determination, if applicable.</p> <p>7.8.2 In the event of the Incumbent accepting Network Rail’s decision or there is an ADRR Determination in accordance with Condition J7.8.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary’s (and, if applicable, Appointed Operator’s) Access Agreement no more than 10 Working Days after the date of the acceptance or of the relevant ADRR Determination, as applicable, and shall include a copy of the relevant ADRR Determination, if applicable, with such notice.”</p>	<p>To follow on from the new drafting in J7.6 and J7.7 to deal with the scenarios that either the Part J Access Beneficiary accepts Network Rail’s decision or takes Network Rail to dispute under the ADRR</p>
95	J7.9	<p>J7.9.1(a)(i) – amend reference to “J7.6.4(c)” to “J7.4.1(c)” and amend reference to “J7.5.(c)” to “J7.5.4(c)”</p>	<p>Consequential amendments</p>

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		<p>Add in a new J7.9.1(a)(ii) - “the date on which the Applicant requested that the Quantum Access Right take effect in its Access Agreement pursuant to Condition J7.3.1(a); or” and make consequential numbering changes to remaining sub paragraphs</p>	<p>The proposed drafting is aimed at providing a link to the handover of rights to the date from which the applicant specified in its Third Party Notice that it required the rights.</p>
96	J7.10	<p>Amend heading and any reference to “Bid” to “Access Proposal”</p> <p>Amend reference to Condition “D4.7.1” to “D2.4”</p> <p>Amend reference to “J7.9” to “J7.10”</p>	<p>To reflect recent changes to Part D of the Network Code.</p> <p>Consequential changes</p>
97	J8.2.2	<p>After “specify”, delete “any reduction to” and instead insert “the amount by which the Applicant considers, in accordance with Condition J8.2.3,”</p> <p>After “an Existing Cordon Cap” delete “that Network Rail considers should be made” and insert “should be reduced”</p>	<p>To make clear that calculation is carried out in accordance with 8.2.3 and also that Cordon Cap Reduction is the amount by which an Existing Cordon Cap should be reduced.</p>
98	J8.2.3	<p>Delete present wording and instead insert:          “The Cordon Cap Reduction shall be calculated in accordance with the following formula:          Cordon Cap Reduction = <math>(R_r/R) \times C</math>          (c) where “R<sub>r</sub>” means the number of Level 2 Rights being transferred, “R” means the total number of Level 2 Rights related the cordon cap held by the Part J Access Beneficiary before transfer and “C” means the Part J Access Beneficiary’s cordon cap before transfer;          and          where application of the formula does not result in a whole number, the result shall be rounded down to the nearest whole number.”</p>	<p>To incorporate on the face of J8 the formula to calculate a cordon cap reduction in relation to J6 from the “Criteria for Interpreting the expression “Reasonable On-going Commercial Need”.</p> <p>In addition, we propose to amend the formula so that it changes the cordon cap in proportion with the rights being transferred. If the resulting reduction figure is not a whole figure then we think it should be rounded down – so that there is no risk that the resulting cordon cap is too low.</p>
99	J8.2.4	<p>Amend reference to “Condition J7.5” to “Condition J7.4”</p>	<p>Consequential change</p>

## PROPOSED CHANGES TO PART J OF NETWORK CODE

100	J8.2.5	<p>Amend reference to “Condition J7.6” to “Condition J7.5”</p> <p>In (a) after “Cordon Cap Reduction” delete “because it has a reasonable on-going commercial need for its Existing Cordon Cap” and, instead, insert “and setting out its reasons why”</p>	<p>Consequential change</p> <p>To reflect that we are proposing to remove the reasonable on-going commercial need test</p>
101	J8.2.6	Amend reference to “Condition J7.6.3” to “Condition J7.5.4”	Consequential Change
102	J8.2.7	Amend reference to “Condition J7.6.4” to “Condition J7.5.3”	Consequential Change
103	J8.3	Decapitalise “Cordon Caps”	Not a defined term
104	J8.4	Heading – Amend this to read: “Office of Rail Regulation’s consent to or Determination of a Cordon Cap Reduction or Cordon Cap Increase”	To reflect that this condition is dealing with both Cordon Cap Decreases and Cordon Cap Increases
105	J8.4.1	Change “a” in first line to “any” and delete the “and” in between Cordon Cap Reduction and Cordon Cap Increase in the first line and, instead, insert “or”	
106	J8.4.3	After “Cordon Cap Reduction” in the first line delete the “and” and instead insert “or”	To reflect the fact that it might be one or the other
107	J8.4.3	<p>After “If the Office of Rail Regulation does not consent to the reduction or increase, it shall” delete the remainder of the text and, instead, insert:</p> <p>“(a) issue a notice to the parties setting out why consent has been refused; or</p> <p>(b) issue a notice requiring the parties to the relevant Access Agreement to modify the Cordon Cap Reduction and/or Cordon Cap Increase as specified in the notice, to take effect on the date stated in the notice. No such notice shall have effect unless the Office of Rail Regulation has:</p> <p>(i) consulted the parties to the relevant Access Agreement on a draft of the notice it proposes to issue;</p> <p>(ii) taken into account any representations made by the</p>	<p>This drafting reflects that we are proposing to move ORR’s ability for ORR to modify a cordon cap increase or reduction reached under J8, which is presently in Condition J10, to J8 itself.</p>

## PROPOSED CHANGES TO PART J OF NETWORK CODE

		parties in response to the consultation under Condition J8.4.3(b)(i); and (iii) notified the parties as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions.”	
108	J9	New Condition as set out in attached drafting	The new condition: (a) rather than focusing on the process of J9, specifies the objectives which Network Rail has to achieve in holding the meetings; (b) places an obligation on the relevant Part J Access Beneficiary attendee to participate in the meetings in a collaborative manner to assist Network Rail to meet its objective; (c) provides ORR with the ability to direct Network Rail to hold a Rights Review Meeting and, where Network Rail does not comply, gives ORR the power to seek an order from the High Court securing compliance; and (d) means that Rights Review Meetings should be considered in relation to any Part J Access Beneficiary. This would be an extension of the present system which only applies in relation to freight operators.
109	J10	Deleted and re-number following conditions	We are proposing incorporating ORR’s ability to modify cordon cap increases or decreases under J8 directly into J8 (see paragraph 98 above) and we propose incorporating ORR’s ability to agree part only of the modifications submitted to it under J2.13

## PROPOSED CHANGES TO PART J OF NETWORK CODE

			directly into J2 (see paragraph 29 above)
110	J10	New Condition (based on old Condition J11) as set out in attached drafting	Old Condition J11 has been revised to place an obligation on Network Rail to publish, review and keep the template notices up to date. In addition, we have also given ORR a power to order Network Rail to comply with this obligation and where Network Rail does not so comply for ORR to seek an order from the High Court securing compliance.
111	J11	Delete old conditions 12, 13 and 14 and insert a new Condition 11 as in the attached drafting	Reasons for deleting J12 as set out in ORR's Emerging Conclusions on Part J dated August 2011 and its Final Conclusions on Part J dated December 2011. We have amalgamated old Conditions J13 and J14 and produced a simplified dispute resolution condition which mirrors that in the new Part D.

## ***Annex D: Proposal for change to Part D of the Network Code***

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Insert as a new Condition 8.5 in Part D:

**“8.5 Removal of Train Slots obtained by a freight Train Operator that are not underpinned by access rights in the Rights Table in Schedule 5 of the freight Train Operator’s Access Agreement**

8.5.1 Where:

- (a) a freight Train Operator has obtained Train Slots in the Working Timetable by making a Train Operator Variation Request; and
- (b) the Train Slots are not underpinned by access rights in the Rights Table in Schedule 5 of the freight Train Operator’s Access Agreement; and
- (c) Network Rail, after consulting the relevant freight Train Operator and acting reasonably, considers that the Train Slots are not being used;

then Network Rail shall remove the Train Slots from the Working Timetable.

8.5.2 Where a Timetable Participant reasonably believes that sub Conditions 8.5.1 (a) and (b) apply, then it may report this to Network Rail who shall consult with the relevant freight Train Operator and consider whether to remove the Train Slots from the Working Timetable in accordance with Condition D8.5.1.”

Present Condition D8.5 would become Condition D8.6.

## ***Annex D: Proposal for change to Part M of the Network Code***

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## Network Code - Part M — Appeals

### **Explanatory Note**

~~A. Provision is made for parties who are dissatisfied with the outcome of Timetabling Disputes made under Part D of and with ADRR Determinations of disputes under Part J to appeal decisions to the Office of Rail Regulation. Part M sets out general provisions regarding appeals to the Office of Rail Regulation.~~

~~B. If the Office of Rail Regulation refuses to hear the appeal, and the Appellant wishes to pursue the appeal, he must, unless agreed otherwise by the parties, do so before the High Court (in Scotland, the Court of Session).~~

~~C. This Explanatory Note does not form part of the Network Code.~~

### **DEFINITIONS**

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In this Part M, except where the context otherwise requires:

~~“Appellant” means any dispute party seeking to challenge a determination made in accordance with the ADRR by appeal to the Office of Rail Regulation;~~

~~“dispute party” means any person who fulfilled the definition of “Dispute party” set out in the ADRR;~~

~~“Respondent” means, in relation to any determination which is challenged under this Part M, any other dispute party which is affected by such determination.~~

~~CONDITION M1 – APPLICATION OF PART M~~

~~The rules in this Part M apply to any appeal to the Office of Rail Regulation under:~~

~~(a) any relevant Condition of this code; or~~

## 1      Introduction

### 1.1     Overview

1.1.1   Part M provides the process by which a party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D or a decision reached by Access Disputes Adjudication in relation to a dispute arising under Part J, can appeal the matter to the Office of Rail Regulation for determination.

### 1.2     Interpretation

1.2.1   In this Part M:

- (a)     the singular shall include the plural and vice versa;
- (b)     the headings are for convenience only and shall not affect interpretation; and
- (c)     capitalised words have the meanings shown below:

1.2.2   In this Part M, capitalised word have the meanings shown below:

<u>“Appellant”</u>	<u>means any Dispute Party seeking to challenge a determination made in accordance with the ADRR by appeal to the Office of Rail Regulation;</u>
<u>“Dispute Party”</u>	<u>means any person who fulfilled the definition of “Dispute party” set out in the ADRR;</u>
<u>“Respondent”</u>	<u>means, in relation to any determination which is challenged under this Part M, any other dispute party which is affected by such determination.</u>

~~(b) — the ADRR.~~

## **CONDITION M2 - TIME LIMIT FOR APPEALS**

## 2 Notice of Appeal

### 2.1 Requirements

2.1.1 Any appeal made under this Part M must ~~be made by written notice served in accordance with Condition M3:~~

- (a) comply with the requirements of Condition M3; and
- (b) be served on the Office of Rail Regulation and the Respondent(s):
  - (i) ~~(a) — in the case of an appeal under Condition D5,~~ within five Working Days of receipt of the ~~determination to be challenged. If Christmas Day occurs within this period then an appeal should be submitted within 10 Working Days~~decision to which objection is made;

~~(b) — in the case of an appeal under Condition J13 or J3.13, within 10 Working Days of a relevant ADRR Determination;~~

~~(c) — in any other case, within 30 Working Days of receipt of the determination to be challenged,~~

- (ii) where the period referred to in Condition M2.1(b)(i) includes Christmas Day, within ten Working Days of that decision.

2.1.2 ~~or such longer period as the~~The Office of Rail Regulation may ~~allow~~extend the timeframe referred to in Condition M2.1(b) if it considers it appropriate to do so.

## ~~CONDITION M3 – NOTICE OF APPEAL~~

### ~~3.1 – Contents~~

#### 3 Content of a Notice of Appeal

#### 3.1 Content of a Notice of Appeal

3.1.1 ~~In a~~ notice of appeal ~~the Appellant~~ must:

- (a) ~~(a)~~ identify the determination which the Appellant wishes to challenge;
- (b) ~~(b)~~ detail why the Appellant believes that the determination is:
  - (i) ~~(i)~~ wrong; or
  - (ii) ~~(ii)~~ unjust because of a serious procedural or other irregularity; and
- (c) ~~(c)~~ insofar as reasonably practicable, attach any evidence on which the Appellant wishes to rely in support of the appeal.

### ~~3.2 – Service~~

#### 4 Right of The Appellant must serve the notice of appeal on the Office of Rail Regulation and the Respondent(s) to Refuse to Hear an Appeal

## ~~CONDITION M4 – RIGHT OF THE OFFICE OF RAIL REGULATION TO REFUSE TO HEAR APPEAL~~

### 4.1 ~~4.1~~ **Grounds of decision**

4.1.1 Within ~~15~~10 Working Days of service of a notice of appeal pursuant to Condition M~~3,2~~2, the Office of Rail Regulation may decide that the appeal should not proceed to it, including on the grounds that:

- (a) ~~(a)~~ — the matter in question is not of sufficient importance to the industry;

- (b) ~~(b)~~ the reference is frivolous or vexatious;
- (c) ~~(c)~~ the conduct of the party making the reference ought properly to preclude its being proceeded with; or
- (d) ~~(d)~~ it is appropriate or convenient for the matter instead to be disposed of by the High Court (in Scotland, by the Court of Session).

## 4.2 ~~4.2~~ Consequences of decision

4.2.1 If the Office of Rail Regulation decides that the reference to appeal should not proceed, it shall immediately notify the Appellant and each Respondent of its decision, and:

- (a) ~~(a)~~ in the case of decision on any of the grounds specified in Condition M4.1(a), (b) or (c), the decision in accordance with the ADRR shall stand; and
- (b) ~~(b)~~ in the case of a decision on the ground specified in Condition M4.1(d), either party to the appeal shall be entitled to apply to the High Court (in Scotland, the Court of Session) for any appropriate relief.

## **CONDITION M5 - RESPONDENT'S NOTICE**

### 5 Respondent's Notice

#### 5.1 Requirements

5.1.1 ~~5.1~~ Within ~~30~~10 Working Days of service of a notice of appeal a Respondent may serve on the Appellant, any other Respondent and the Office of Rail Regulation a notice:

- (a) ~~(a)~~ stating that he opposes the appeal; and
- (b) ~~(b)~~ insofar as reasonably practicable, attaching any evidence on which the Respondent wishes to rely in opposing the appeal.

~~5.2~~ In the event that:

- ~~(a) a Respondent seeks more time to serve such a notice; or~~

~~(b) the Appellant seeks the appeal to be dealt with more expeditiously than the timescales in Condition M5.1 would allow;~~

5.1.2 In the event that a Respondent seeks more time to serve such a notice the Office of Rail Regulation may, upon the ~~relevant party~~ Respondent providing the Office of Rail Regulation with evidence which satisfies it that an extension ~~or expedition~~ of the timeframe for service of the notice is appropriate, grant such ~~shorter or~~ longer period for service of the notice as it considers necessary.

## **CONDITION M6 – MATTERS TO BE CONSIDERED ON APPEAL**

### 6 **Expedited Process**

#### 6.1 **Appellant or Respondent Request to Expedite**

6.1.1 Where a party to the appeal believes that the appeal should be dealt with on an expedited basis, it should make representations to the Office of Rail Regulation, copied to the other party, explaining why it believes this to be the case and its proposed timetable for the appeal. Where the Appellant makes such representations, it should do so as part of its Notice of Appeal. Where the Respondent makes such representations, it should do so within two Working Days of receipt of the Notice of Appeal.

6.1.2 On receipt of representations in accordance with Condition M6.1.1, the Office of Rail Regulation shall give the other party to the appeal an opportunity to make any representations in response.

6.1.3 Having received any representations in accordance with Conditions M6.1.1 and 6.1.2, where the Office of Rail Regulation believes it is in the interests of justice to do so, it shall order that the appeal is heard on whatever expedited timeframe it considers appropriate.

#### 6.2 **Power of ORR to order expedited Process**

6.2.1 Even where a party to the appeal does not request that the appeal be dealt with on an expedited basis in accordance with Condition M6.1, the Office of Rail Regulation may, where it believes it is in the interest of justice to do so, order that an appeal is heard on whatever expedited timeframe it considers appropriate.



## 7      [Matters to be Considered on Appeal](#)

### 7.1      ~~6.1~~ **Scope**

7.1.1 Every appeal will be limited to a review of the decision of the lower tribunal unless the Office of Rail Regulation considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

### 7.2      ~~6.2~~ **Grounds**

7.2.1 At any hearing of the appeal, a party may not rely on a matter not contained in the appeal notice or Respondent's notice unless the Office of Rail Regulation gives permission.

## **CONDITION M7 – POWERS OF OFFICE OF RAIL REGULATION**

## 8      [Powers of the Office of Rail Regulation](#)

### 8.1      [ORR's Powers](#)

8.1.1 The Office of Rail Regulation shall, in determining the matter in question, have the power:

- (a)      ~~(a)~~ to give directions as to the procedure to be followed in the appeal, including in relation to the time limits within which anything must be done, the making of any written and oral submissions, and the extent to which any evidence or other submissions made by one party to the appeal shall be disclosed to any other;
- (b)      ~~(b)~~ to appoint any person to act as a legal or technical assessor who it considers has suitable knowledge and experience to assist the Office of Rail Regulation;
- (c)      ~~(c)~~ to make any interim order as to the conduct or the positions of the parties pending final determination of the matter by the Office of Rail Regulation; and
- (d)      ~~(d)~~ to make such orders as it shall think fit in relation to the proportions of the costs of the proceedings in question (assessed in such manner as the Office of Rail Regulation shall determine) which shall be borne by each party.

## ~~CONDITION M8 – IMMUNITY OF OFFICE OF RAIL REGULATION~~

### 9 Immunity of the Office of Rail Regulation

#### 9.1 Immunity of Office of Rail Regulation

9.1.1 The Office of Rail Regulation shall not be liable in damages or otherwise for any act or omission to act on its part (including negligence) in relation to the conduct of any reference to appeal.

## ~~CONDITION M9 – OBLIGATION TO COMPLY WITH DETERMINATION OF APPEAL~~

### 10 Obligation to Comply with Determination of Appeal

#### 10.1 Obligation to Comply with Determination of Appeal

10.1.1 All Appellants and Respondents shall:

- (a) ~~(a)~~ subject to and pending the final determination of any reference to the Office of Rail Regulation, comply with:
  - (i) ~~(i)~~ any determination made in accordance with the ADRR in relation to any dispute referred ; and/or
  - (ii) ~~(ii)~~ any interim order of the Office of Rail Regulation; ~~and~~ an
- (b) ~~(b)~~ comply with any final determination of the Office of Rail Regulation.

## ~~CONDITION M10 – EFFECTIVE DATE OF OFFICE OF RAIL REGULATION'S DECISION~~

11      **Effective Date of Office of Rail Regulation's Decision**

11.1    **Effective Date of Office of Rail Regulation's Decision**

11.1.1 If, in relation to any particular dispute, any interim order or final determination of the Office of Rail Regulation is made during any period of operation of the Working Timetable to which the dispute relates, the Office of Rail Regulation may, if it is of the opinion that in the circumstances of the case the balance of material convenience to all affected persons (taking into account any material prejudice that may thereby result) favours such a course, stipulate that such order or determination shall take effect at a specified time during such period of operation.

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Deletions	74
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Moved to	1
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Format changed	0
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## ***Annex E: Proposal for change to ADRR***

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### **Proposed Amendments to Chapter G of ADRR – to speed up the ADA process for Part J disputes**

1. Insert at the end of Rule G14:

“In relation to disputes referred under Part J of the Network Code, the oral hearing shall be fixed by the Hearing Chair as soon as practicable after his/her appointment and shall take place, unless exceptional circumstances apply, within 14 days of completion of service of the statements of case referred to in Rules G17(a)-(c) below.”

2. Insert at the beginning of Rule G17(a) and Rule G17 (b)

“subject to Rule 17 (h),”

3. Insert at the beginning of Rule G17 (e):

“except in relation to a dispute arising under Part J of the Network Code, “

4. Insert a new Rule G17 (h)

“17 (h) for disputes referred under Part J of the Network Code the timeframes set out in Rules G17(a) and G17(b) shall be reduced to 7 days.”

### **Proposed Amendments to Chapter B of ADRR to remove the requirement of a Procedural Agreement for Timetabling Disputes and disputes arising under Condition B2.4.4 and Part J of the Network Code**

1. Delete Rule B5 and instead replace it with the following text:

“5 All Timetabling Disputes shall be referred to a Timetabling Panel in accordance with Chapter H. Following service of a Notice of Dispute relating to such a dispute the process under Chapter H shall commence and the Secretary shall appoint a Timetabling Panel in accordance with Rule H11. If either party raises any objection then the Hearing Chair of the Timetabling Panel shall consider the best way to proceed.”

2. Delete Rule B6 and instead replace it with the following text:

“6 All disputes referred to resolution in accordance with these Rules under Condition B2.4.4 of the Network Code shall be referred to an ADA in accordance with Chapter G as a single stage dispute resolution process with no appeal. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the Secretary shall appoint a Hearing Chair for

the dispute in accordance with Rule G9. If either party raises any objection then the Hearing Chair shall consider the best way to proceed.”

3. Delete Rule B7 and instead replace it with the following text:

“7 All disputes referred for resolution in accordance with these Rules under Part J of the Network Code shall be referred to an ADA in accordance with Chapter G with a right of appeal to the ORR for determination in accordance with Part M of the Network Code. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the Secretary shall appoint a Hearing Chair for the dispute in accordance with Rule G9. If either party raises any objection then the Hearing Chair shall consider the best way to proceed.”

## ***Annex F: Impact assessment***

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### **Section 1: The issue**

#### **What is the issue?**

- 1.1. Part J of the Network Code provides a number of mechanisms for transfer, adjustment and surrender of access rights. Since its introduction in 2005 there have been partial reviews of Part J but no complete review has been carried out. We have a number of concerns about the usage and functionality of Part J and as a consequence are proposing a number of substantial changes to certain Part J Conditions.

#### **Why are we intervening?**

- 1.2. Following a review of Part J we consulted the industry on a number of specific changes we had identified that could be made to Part J to improve its overall effectiveness and clarity. In addition to identifying a number of drafting changes that could be made to improve clarity and understanding, we identified two main issues that we felt needed particular review, namely the “*use quota and use period*” and the “*Reasonable on-going Commercial Need*” criteria (ROCN). Our proposals for dealing with these two issues will result in a change of approach and consequently have an impact for the industry.

#### **What is the desired outcome?**

- 1.3. That our proposals will provide more clarity to users of Part J and will meet Fs and customers’ needs for simpler processes and shorter timescales for the transfer and surrender of access rights and train slots.

#### **When will we review the success of the intervention?**

- 1.4. We will review the success of any changes 3 years after the changes have been introduced. This should provide sufficient time for the amended Part J mechanisms to bed down and any adverse impacts to become apparent – although under Part C of the Network Code either ORR or an access beneficiary can propose a change earlier if it is thought necessary.

### **Section 2a: The options – use period/quota**

In our consultation document, we proposed a number of options for dealing with this issue. For ease of reference these are discussed below.

#### **Option 1: Do nothing**

- 2.1. We could make no proposals to amend Condition J4. The other options are assessed relative to this option.

**Option 2: have a requirement that the use period/quota would apply to each day of the week**

2.2. The second option is to have a requirement that the use quota/period would apply to each individual day of the week to which the access right relates. For example, for a SX right the use quota/period would be assessed separately for Monday, Tuesday, Wednesday, Thursday and Friday. In comparison with option 1 this would prevent a train slot that is obtained for one day of the week for a SX right, blocking the access right being used by another train operator for the other days of the week. This would also provide for more efficient use of capacity and promote transfers or access rights between FOCs for the benefit of freight customers. In our consultation most support was shown for this option.

**Option 3: assessing future requirements on previous usage**

2.3. A variation on option 2 would be to assess future requirements of rights on the basis of the preceding year's use so that it would not be possible to retain rights to a path for more days per week than its average use over the 365 days immediately prior to the failure to use. For example, if across a year a SX right is only used to obtain a path once per week on average, the right should not be retained as a SX right and the FOC would need to nominate a single day rather than continue to hold the right in respect of 5 days per week. This would be an improvement on the existing mechanism however there was little support from consultees for this option.

**Option 4: Set a minimum percentage for rights usage**

2.4. A minimum percentage threshold could be set for use of the rights across the Use Period and a certain percentage use of the rights would be required, for example, 60%. This option is an improvement on option 1 but again there was little support from consultees for this approach.

**Option 5: Minimum percentage of rights usage based on commodity**

2.5. A variation on option 4 is minimum percentage thresholds for different commodities e.g., the percentage use for coal might be less than percentage attributed to inter-modal. Again there was little support for this option and we consider that it would be too complex to administer. This complexity makes it less attractive than option 1.

**Option 6: Tiered use quota depending on constrained capacity**

2.6. The last option is to have a tiered use quota/period depending on how constrained is believe to be. The use period would remain at 90 days where there are no known capacity constraints but it could reduce to 30 days where capacity scarcity is evident and 14 days where there is little or spare capacity. Although this option appears attractive compared to the other options, there would be difficulty in establishing the levels of capacity and administering such a system. There was also little support from FOCs.

**Section 2b: The options – ROCN criteria and cordon cap  
ROCN formula**



We did not put forward specific options in our consultation document, but in view of the conflicting views received on how to deal with this issue and against the background of the industry's desire to see more straightforward and clear processes we reviewed our thinking and considered other ways of dealing with the issues.

### **Option 1 – Do nothing**

2.7. We could make no proposals to amend ROCN or move the ROCN cordon cap formula. The other options are assessed relative to this option.

### **Option 2 – Simplify and include the ROCN criteria in the Network Code and move ROCN formula relating to cordon caps to other conditions in Part J**

2.8. Option 2 is to simplify the existing ROCN to provide clear outputs, obligations and requirements for freight customers, FOCs and Network Rail. The ROCN criteria relating to cordon caps would be moved to Conditions 6 and 8 which deal with cordon caps and be formula based. Simplification of the ROCN criteria and moving the cordon cap ROCN formula to Conditions J6 and J8 would improve clarity. Most consultees supported simplification of the ROCN criteria and its inclusion directly in the Network Code. Most consultees were supportive the changes to the cordon cap ROCN criteria.

### **Option 3 – Remove ROCN criteria and move ROCN formula relating to cordon caps to other conditions in Part J**

2.9. Option 3 is to remove entirely the existing ROCN criteria from Part J impacting upon J4 and J7. This would mean that in most circumstances the incumbent would automatically lose the access right which it had failed to use. The ROCN criteria relating to cordon caps would be moved to Conditions 6 and 8 which deal with cordon caps and be formula based. The removal of the ROCN criteria will significantly improve the clarity of the operation of J4 for Network Rail, FOCs and rail freight customers. Moving the formula to the relevant Conditions will also aid in this. There was support from most consultees to simplify the ROCN criteria and move the cordon caps formulae.

## **Section 3: The preferred options**

3.1. We recognise that it is not always possible to quantify the financial impacts of policy decisions. However our preferred options make a number of assumptions on the reduction of administrative burdens for FOCs, the benefits of increased certainty of ability of freight customers to move between freight customers and the more efficient use of capacity.

**use quota/period**

3.2. We have decided that the preferred option amending the use quota/period is option 2 which would apply the use period/quota to each day of the week. We have decided that this option is the most appropriate because it provides the simplest method to ensure that capacity is being used in comparison with other that are listed. This option also had the most support from consultees and would have the most positive impacts on stakeholders. The grid below shows the relative merits of the different options.

	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6
Easy to implement	✓	✓	✓	✓		
Wide support from consultees		✓				
Improvement on option 1		✓	✓	✓	✓	✓

**ROCN**

3.3. We have decided that the preferred option for simplifying the ROCN criteria is option 3 which removes completely any criteria for retaining an access right. This option is the most radical. However we consider that it provides the necessary clarity for Part J of which most consultees were supportive, and will also benefit freight customers in the long term. [ROCN for Condition J7]. Option 3 would also introduce a simple formula for the calculation of a reduction in cordon caps following a surrender or transfer under Conditions J4 or J7 and improve it clarity over the existing provision. Given the removal of any ROCN criteria from Part J, we also consider that it is desirable to move the cordon cap formulae to the relevant Conditions to improve the overall clarity of Part J.

**Impact on stakeholders/duty holder**

3.4. **Network Rail** – We do not consider that our changes to Part J will have a significant impact on Network Rail but it should reduce the amount of administrative involvement of Network Rail in an undisputed transfer or surrender of access rights. The introduction of cordon cap formulae will also ease the administrative burden on Network Rail when dealing with cordon cap adjustments

3.5. **Government** – We do not consider that the proposed changes will have any significant impact on government.

3.6. **FOCs** – We consider that the changes will have a beneficial on FOCs because they will provide more clarity on the Part J mechanisms and the

changes to the use quota/period will ensure unused capacity can transfer more readily between FOCs.

- 3.7. **Franchise and open access operators** - We consider that the proposed changes will not have a significant impact on train operators.
- 3.8. **Consumers** - We expect that freight customers will benefit from our proposals because the removal ROCN criteria will provide greater clarity and should reduce the number of surrenders or transfers resulting in disputes. We also expect the changes to the use quota/period will ensure unused capacity can transfer more readily between FOCs. We do not expect that the proposals will have any significant impact on passenger customers.

#### **Impact on specific consumer groups**

- 3.9. **Disability** – This policy involves the allocation and utilisation of track access capacity and is disability neutral.
- 3.10. **Gender** – This policy involves the allocation and utilisation of track access capacity and is gender neutral.
- 3.11. **Race** – This policy involves the allocation and utilisation of track access capacity and is race neutral.
- 3.12. **Other** – We do not consider that the impact of this policy would vary across consumer groups, for example low income households.

#### **Impact on health and safety**

- 3.13. We do not consider that there will be an impact on health and safety, as Network Rail and train operators are licensed and have already obtained the necessary safety certifications, and will be planning and running services.

#### **Impact on sustainable development**

- 3.14. We consider that there may be a positive impact on sustainable development from encouraging the industry to better utilise capacity to the benefit of its customers (both passenger and freight).

#### **Impact on competition**

- 3.15. We expect that the proposed changes will have result in greater competition between FOCs as freight customers will have more certainty that they can change their rail haulier.

#### **Geographic impacts**

- 3.16. In implementing our access policy we take account of general guidance provided by the Secretary of State or Scottish Ministers and / or notified strategies and policies of the National Assembly of Wales, depending on the geography of the services concerned, in accordance with our statutory duties. Our application of the access policy may vary by geography as a result.

3.17. The specific policy changes set out in this document do not, however, have a distinct geographic impact.

### **Statutory duties**

3.18. We think the following statutory duties under section 4 of the Railway Act 1993 (as amended) are particularly relevant to this policy proposal:

- otherwise to protect the interests of users of railway services;
- to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [it] considers economically practicable;
- to contribute to the development of an integrated system of transport of passengers and goods;
  - to promote efficiency and economy on the part of persons providing railway services;
  - to promote competition in the provision of railway services for the benefit of users of railway services; to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;
  - to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions under this Part or the Railways Act 2005 that are not safety functions; and
  - to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

### **Overall impact**

3.19. We consider that the overall impact will be to improve clarity and transparency when access rights and train slots are being transferred or surrendered to best meet the needs of freight customers.

### **Conclusion**

3.20. From the impacts described above, we believe that that implementation of this policy will have a net benefit for society.