

## Part J – Changes to Access Rights

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<b>1</b>	<b>Introduction</b>	<b>4</b>
1.1	Overview	4
1.2	Interpretation	5
1.4	Freight Customer Access Option Holders	12
1.5	<del>Response Timescales</del> <del>transitional Provision</del>	13
<b>2</b>	<b>Adjustment of Access Rights</b>	<b>14</b>
2.1	Obligation of Part J Access Beneficiaries to surrender Access Rights	14
2.2	Obligation of Network Rail to answer Part J Access Beneficiary's Relevant Enquiries	14
2.3	Contents of Relevant Enquiries	14
2.4	Information to be provided by Network Rail	15
2.5	Pre-existing obligations of confidence	16
2.6	Consultation by Network Rail	16
2.7	Obligation to co-operate	17
2.8	Estimated costs of providing Relevant Response	17
2.9	Payments of costs of Relevant Responses	18
2.10	Division and payments of costs	18
2.11	Right to elect to surrender or adjust Access Rights	18
2.12	Right of Part J Access Beneficiary to have Access Rights adjusted	19
2.13	<del>Office of Rail Regulation</del> <del>Office of Rail and Road</del> 's consent to a Quality Adjustment of Access Rights	20
<b>3</b>	<b>Confidentiality</b>	<b>21</b>
3.1	Affected Persons and their interests	21
3.2	Part J Access Beneficiary's right to elect for Relevant Response without Qualifying Information	21
3.3	Relevant Response without Qualifying Information	21
3.4	Relevant Response with Qualifying Information	22
3.5	Contents of notice to Affected Person	22
3.6	Entitlement of Network Rail to include Qualifying Information if no Notice of Objection	22
3.7	Discretion of the Allocation Chair to order confidentiality	23
3.8	Allocation Chair's directions as to preservation of confidentiality of Qualifying Information	23
3.9	Grounds on which the Allocation Chair may order confidentiality	23
3.10	Opportunity to make representations to the Allocation Chair	24
3.11	Hearing on confidentiality representations	24
3.12	Written reasons for decision	25
3.13	Immunity of the Allocation Chair	25
3.14	Preservation of confidentiality of Qualifying Information pending determination	25
3.15	Obligation to provide Confidentiality Undertaking	26
<b>4</b>	<b>Failure to Use</b>	<b>27</b>
4.1	Failure to Use	27
4.2	Use Quota and Use Period	28
4.3	Certain periods to be disregarded	28
4.4	Service of Failure to Use Notice	28
4.5	Cessation of Failure to Use	29

4.6	Contents of a Failure to Use Notice .....	29
4.7	Acceptance of surrender.....	29
4.8	Counter Notice .....	30
4.9	Grounds for Objection .....	31
4.10	Network Rail agrees with the Part J Access Beneficiary .....	31
4.11	Network Rail does not agree with the Part J Access Beneficiary.....	31
4.12	Surrender of Access Rights .....	31
4.13	Access Proposals .....	32
<b>5</b>	<b>Failure to Use: third party application .....</b>	<b>32</b>
5.1	Failure to Use Notices .....	32
5.2	Cessation of Failure to Use .....	33
5.3	Application of Conditions.....	33
5.4	Counter Notice.....	34
<b>6</b>	<del><b>Not used</b></del> <b>Cordon Cap Reduction (Failure to Use) .....</b>	<del><b>34</b></del>
<del>6.1</del>	<del>Application of this Condition J6 .....</del>	<del>34</del>
<del>6.2</del>	<del>Cordon Cap Reduction procedure .....</del>	<del>34</del>
<del>6.3</del>	<del>Effective Date of Cordon Cap Reduction .....</del>	<del>35</del>
<b>7</b>	<b>Freight transfer mechanism.....</b>	<b>36</b>
7.1	Application of this Condition J7.....	36
7.2	Third Party Notice .....	37
7.3	Applicant's responsibilities.....	37
7.4	Acceptance of surrender.....	37
7.5	Third Party Counter Notice .....	38
7.6	Network Rail agrees with Incumbent.....	39
7.7	Network Rail agrees with Applicant .....	39
7.8	Surrender of Access Rights .....	40
7.9	Grant to Applicant .....	40
7.10	Access Proposals .....	41
<b>8</b>	<del><b>Not used</b></del> <b>Cordon Cap Reduction (transfer).....</b>	<del><b>42</b></del>
<del>8.1</del>	<del>Application of this Condition J8 .....</del>	<del>42</del>
<del>8.2</del>	<del>Existing Cordon Cap adjustments procedure .....</del>	<del>42</del>
<del>8.3</del>	<del>Cordon Cap Increase .....</del>	<del>43</del>
<del>8.4</del>	<del>Office of Rail Regulation/Office of Rail and Road's consent to or Determination of a Cordon Cap Reduction or Cordon Cap Increase .....</del>	<del>44</del>
<b>9</b>	<b>Rights Review Meetings .....</b>	<b>46</b>
9.1	The Rights Review Meeting .....	46
9.2	ORR Power to Direct a Rights Review Meeting .....	47
9.3	Notification.....	47
<b>10</b>	<b>Right of Network Rail to make an Access Right Change .....</b>	<b>47</b>
10.1	Obligation to facilitate a proposed Access Right Change .....	47
10.2	Notice by Network Rail of a proposed Access Right Change .....	48
10.3	Content of notice of a proposed Access Right Change .....	49
10.4	Negotiation following notice of a proposed Access Right Change.....	50
10.5	Response of Incumbent to notice of a proposed Access Right Change .....	51
10.6	Offer of compensation .....	52
10.7	Amount of compensation .....	52
10.8	Acceptance of offer of compensation .....	53
10.9	Payment of compensation .....	53

10.10	Reimbursement of assessment costs.....	54
10.11	Obligation to incur no further costs.....	54
10.12	Confidentiality of the Incumbent.....	54
10.13	Application of Part J confidentiality mechanism.....	55
10.14	Right of appeal to relevant ADRR Forum.....	56
10.15	Right to withdraw.....	56
10.16	<del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> power to direct an Access Right Change.....	57
10.17	Exclusion.....	58
<b>11</b>	<b>Obligation of Network Rail to publish documentation.....</b>	<b>58</b>
11.1	Template Notices.....	58
11.2	Publication of Other Documentation.....	59
11.3	ORR Power to Direct Network Rail to Publish.....	59
<b>12</b>	<b>Appeals.....</b>	<b>59</b>
12.1	Appeal in accordance with the ADRR.....	59
12.2	Appeal to the <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> .....	59

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## 1 Introduction

### 1.1 Overview

1.1.1 Part J provides mechanisms where, if a Train Operator or a Freight Customer Access Option Holder, together referred to as “Part J Access Beneficiaries”, is not using Access Rights they can be removed from the Part J Access Beneficiary’s contract. The mechanisms can be instigated by:

- (a) the Part J Access Beneficiary itself as set out in Condition J2;
- (b) Network Rail as set out in Condition J4; or
- (c) by a third party Part J Access Beneficiary who wishes to use the rights in question. Condition J5 sets out a process where a Part J Access Beneficiary can apply for rights held by another Part J Access Beneficiary where that Part J Access Beneficiary has not used them and the applicant has a commercial need for them. Condition J7 sets out a process whereby a freight operator can apply for rights held by another freight operator if it wins the existing freight traffic. In addition, Condition J7 provides that a Freight Customer Access Option Holder can apply for the rights held by a freight operator provided those rights are used for the provision of transport services on behalf of that Freight Customer Access Option Holder who wishes to draw down those rights to another freight operator of its choice.

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1.1.2 Condition J9 provides that Network Rail should hold regular meetings with each Part J Access Beneficiary for the purpose of reviewing the Access Rights held by that Part J Access Beneficiary and its use of them. Where Network Rail does not do this, the ~~Office of Rail Regulation~~Office of Rail and Road can direct Network Rail to hold such a meeting.

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

1.1.4 Condition J11 obliges Network Rail to publish templates for any notice required under Part J and a copy of any notice served. Where Network Rail does not do this, the ~~Office of Rail Regulation~~Office of Rail and Road can direct Network Rail to do so.

1.1.5 Condition J12 sets out a dispute resolution process whereby any dispute arising under Part J is first of all referred for determination in accordance with the ADRR and any appeal is

referred to the ~~Office of Rail Regulation~~Office of Rail and Road.

## 1.2 Interpretation

1.2.1 Where the following definitions are used in this Part J, they shall have the meanings shown below:

“ADRR”	means the Access Dispute Resolution Rules described in Part A of this Code;
“ADRR Determination”	means a determination made in accordance with the ADRR following a reference made under Condition J11.1, where such determination has not been referred to the <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> under either Condition J11.2 within the time limit for such referral;
“Access Proposal”	has the meaning shown in Part D of this code;
“Access Right”	means, in relation to an Access Agreement, permission to use track for the purpose of the operation of trains on that track by a beneficiary and rights ancillary thereto which are provided or charged for in the Access Agreement in question;
“Access Right Change”	amendment or limitation of a Part J Access Beneficiary’s Firm Right in order to achieve Better Use;
“Affected Person”	means, in relation to Qualifying Information, the person to whose affairs the information relates;
“Allocation Chair”	has the meaning shown in the ADRR;
“Ancillary Movements”	has the meaning shown in Part D of this code;
“Applicant”	has the meaning shown in: (a) Condition J5.1(a); or  (b) Condition J7.2, as applicable;
“Appointed Operator”	means a Train Operator into whose Access Agreement a Freight Customer Access Option Holder has drawn down some or all of its Access Rights in accordance with that

Freight Customer Access Option Holder's Access Agreement;

"beneficiary" has the meaning shown in section 17(7) of the Act;

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

"Commencement Date" means the date on which the relevant Quantum Access Right takes effect in accordance with the Part J Access Beneficiary's Access Agreement;

"Confidentiality Direction" has the meaning shown in Condition J3.8.1;

"Confidentiality Undertaking" has the meaning shown in Condition J3.15.1;

“Contingent Right” has the meaning shown, , in the relevant Access Agreement;

~~“Gordon Cap Increase” has the meaning shown in Condition J8.3.1;~~

~~“Gordon Cap Reduction” has the meaning shown in:  
(a) Condition J6.2.2; or  
(b) Condition J8.2.2, as applicable;~~

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“Counter Notice” means a notice given by the Part J Access Beneficiary to Network Rail under Condition J4.8 ~~or~~, J5.3.1(b), ~~J6.2.5 or J8.3.2~~;

“Determination” means an ADRR Determination or an Office of Rail Regulation Determination, as the case may be and “Determined” (and cognate expressions) shall be construed accordingly;

“Disputes Chairman” has the meaning shown in the ADRR;

~~“Existing Gordon Cap” means, in relation to an Access Agreement, a gordon cap specified in that Access Agreement concerning a location to which any Rights Subject to Surrender which are Level Two Rights under that Access Agreement relate;~~

“Failure to Use” has the meaning shown in Condition J4.1.1;

“Failure to Use Notice” means a notice given by Network Rail to a Part J Access Beneficiary under Condition J4.4;

“Funder” means the appropriate franchising authority, each Passenger Transport Executive and any local, national or supra-national authority or agency (whether of the United Kingdom or the European Union) or other person which provides money by way of grant or loan with the primary purpose of securing the provision of services relating to railways;

“Grounds for Objection” means the grounds set out in Condition J4.9 or Condition J7.5.1, as applicable;

“Incumbent” has the meaning shown in:  
(a) Condition J5.1.1(b)(ii);  
(b) Condition J7.2; or

	(c) Condition J10.1.2(b);
“J9 Direction”	has the meaning shown in Condition J9.2.1;
“J11 Direction”	has the meaning shown in Condition J11.3.1;
“Level Two Right”	has the meaning shown, , in the relevant Access Agreement;
“network statement”	has the meaning shown in regulation 134 of the Railways <del>Infrastructure</del> (Access, and Management <del>and Licensing or Railway Undertakings</del> ) Regulations 2016 <del>05</del> , as amended from time to time and/or other such other legislation taking effect in Great Britain in respect of the same subject matter as those Regulations;
“New Working Timetable”	has the meaning shown in Part D of this code;
“Notice of Objection”	means a notice given by an Affected Person to Network Rail of the kind referred to in Condition J3.5.1(b);
“ <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> Determination”	means a determination made by the <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> following a reference made under Condition J11.2;
“ <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> ’s Model Passenger Track Access Contract”	means the model passenger track access contract published by the <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> under section 21 of the Act, as amended from time to time;
“ <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> ’s Model Freight Track Access Contract”	means the model freight track access contract published by the <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> under section 21 of the Act, as amended from time to time;
“ <del>Office of Rail Regulation</del> <u>Office of Rail and Road</u> ’s Model Track Access Contract (Freight Customer Access)”	Objections”
“Part J Access Beneficiary”	



means the model track access contract for freight customer access published by the ~~Office of Rail Regulation~~Office of Rail and Road under

“Primary Purpose”

section 21 of the Act, as amended from time to time;

means a Train Operator or a Freight Customer Access Option Holder;

means the period specified in Condition J3.5.1(b)

“Primary Purpose”

means conveying 50% or more of the gross tonnage transported using the Rights Subject to Surrender, over the 12 month period immediately preceding the date of service of the Third Party Notice, for a Primary Purpose Customer

“Primary Purpose Customer”	means a customer or customers other than the third party referred to in Condition J7.1.2(a);
“Principal Change Date”	has the meaning shown in Part D of this Code;
“protected right”	has the meaning shown in Condition C8.3.3;
“Qualifying Information”	means information which Network Rail has acquired in relation to the affairs of: <ul style="list-style-type: none"> <li>(a) any Affected Person; or</li> <li>(b) an Incumbent</li> </ul> under an Access Agreement between Network Rail and that person;
“Quality Adjustment”	means the alteration of any aspect of the Access Rights of the Part J Access Beneficiary (whether in relation to performance, the quality or condition of the Network, the liability of any person to any other person, or in any other respect) other than a Quantum Adjustment in a manner which is not inconsistent with this code;
“Quantum Access Right”	means any right under an Access Agreement in respect of a number (or quantum) of Train Slots in any specified period (including rights to Train Slots in respect of additional trains or relief services), and includes part of such a right;
“Quantum Adjustment”	means the surrender of any Access Right of the Part J Access Beneficiary in question;
“relate” and “in respect of”	in relation to a Train Slot and a Quantum Access Right where these terms are used together, means that the Train Slot in question has been secured by the Part J Access Beneficiary in accordance with Part D in the exercise of that Quantum Access Right;
“Released Capacity”	means track capacity made available to Network Rail as a consequence of the making of a Specified Relevant Surrender or a Specified Relevant Adjustment, and “release of capacity” shall be construed accordingly;
“Relevant Adjustment”	means a Quality Adjustment or a Quantum

	Adjustment, and “adjust” shall be construed accordingly;
“Relevant Consultation”	means a consultation carried out by Network Rail with a Third Party during negotiation under Condition J10.4 or before an offer of compensation is made under J10.6;
“Relevant Enquiry”	means an enquiry made of Network Rail by the Part J Access Beneficiary under Condition J2;
“Relevant Financial Consequences”	means the cost savings or costs incurred referred to in Condition J2.4.1(a);
“Relevant Information”	means information which complies with the provisions of Condition J2.4;
“Relevant Response”	means Network Rail’s answer to a Relevant Enquiry under Condition J2;
“Relevant Surrender”	means the surrender to Network Rail of Access Rights possessed by the Part J Access Beneficiary;
“Relevant Undertaking”	means a deed of undertaking from the Third Party to pay the Incumbent: (a) the agreed reasonable costs of providing an estimate of compensation, in advance of those costs being incurred, pursuant to Condition J10.10; and (b) compensation under Condition J10.7, where the Third Party has requested that Network Rail withdraw the notice of a proposed Access Right Change under Condition J10.15 but the Incumbent has nonetheless suffered costs, direct losses and expenses (including loss of revenue).
“Restrictive Provisions”	means any provisions in the Incumbent’s Access Agreement that restrict the operation of the transferring Access Right, and specific timings relating to the transferring Access Right;
“Rights Review Meeting”	means a meeting held between 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;

“Rights Review Notice”	has the meaning shown in Condition J9.1.2;
“Rights Subject to Surrender”	<p>means, in relation to:</p> <p>(a) a Failure to Use Notice; or</p> <p>(b) a Third Party Notice,</p> <p>as applicable, the Quantum Access Right to which such notice refers and:</p> <p>(i) any Train Slot, including any Y-Path, or part of it in the Working Timetable which relates to that Quantum Access Right;</p> <p>(ii) any Ancillary Movements or Stabling that Network Rail (or the Applicant in relation to Condition J7.3) considers:</p> <p>(A) are directly associated with the relevant Quantum Access Right; and</p> <p>(B) will no longer be required by the relevant Part J Access Beneficiary following the surrender or reduction of the Quantum Access Right, as applicable; and</p> <p>(iii) any Access Proposal relating to any such Quantum Access Right;</p>
“Rights under Review”	shall have the meaning shown in Condition J9.1.2;
“Service Characteristics”	for the purposes of a right surrendered under Condition J7.8, has the meaning shown in the Incumbent’s Access Agreement;
“Specified Relevant Adjustment”	means a Relevant Adjustment specified in a Relevant Enquiry;
“Specified Relevant Surrender”	means a Relevant Surrender specified in a Relevant Enquiry;
“Stabling”	has the meaning shown in the relevant Access Agreement;
“Third Party”	means an Access Beneficiary or a Potential Access Party who has submitted an Access Right Change proposal to Network Rail;
“Third Party Counter Notice”	means a notice given by the Incumbent to Network Rail under Condition J7.5.1 <del>or Condition J8.2.5</del> ;

“Third Party Notice ”	means a notice given under Condition J7.2;
Train Operator Variation Request	has the meaning shown in Part D of this code;
“Train Slot”	has the meaning shown in Part D of this code;
“Use Period”	has the meaning shown in Condition J4.2.3;
“Use Quota”	has the meaning shown in Condition J4.2.2; and

“Y Path” means, a Train Slot incorporated in the Working Timetable which:  
 (a) departs from one or more Origins to the same Destination; and/or  
 (b) arrives at one or more Destinations from the same Origin,  
 that is identified as such by the incorporation of the letter “Y” in the operating characteristics of the Train Slot’s heading.

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~~“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.~~

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#### 1.4 Freight Customer Access Option Holders

##### 1.4.1 Where there is any reference in this Part J:

- (a) to any Access Right of a Part J Access Beneficiary (including any reference to any Access Right of an Incumbent in Condition J5 ~~or~~; J7 ~~and/or J8~~) which is an Access Right of a Freight Customer Access Option Holder that has been drawn down by that Freight Customer Access Option Holder into an Access Agreement of an Appointed Operator, then any alteration, adjustment, surrender, agreement, determination or other decision to be made pursuant to this Part J in respect of that Access Right shall be made with reference to and, where required by this Part J, in consultation with, that Freight Customer Access Option Holder, and not that Appointed Operator; and
- (b) to any notice or other document being served on a Part J

| Access Beneficiary (including any notice to be served on an Incumbent pursuant to Condition J5 ~~or~~, J7 ~~and/or~~ ~~J8~~), or a Part J Access Beneficiary being required to serve any notice or other document on any other party, and the notice or other document in question relates to, or otherwise affects, any Access Right of a Freight Customer Access Option Holder that has been drawn down into an Access Agreement of an Appointed Operator, then (save in respect of Condition J3):

- (i) any notice or other document to be served on that Part J Access Beneficiary (including any notice to be served on an Incumbent pursuant to Condition J5 ~~or~~, J7 ~~and/or~~ J8) shall be served on that Freight Customer Access Option Holder (with a copy to the Appointed Operator for information purposes only); and
- (ii) any notice or other document to be served by that Part J Access Beneficiary shall be served by that Freight Customer Access Option Holder (with a copy to the Appointed Operator for information purposes only).

1.4.2 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).

## 1.5 ~~Response timescales~~ **Transitional Provision**

1.5.1 ~~Unless otherwise stated in this Part J, where one party is required to respond to another, the timescale for such response is 10 Working Days. 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.~~

1.5.2 ~~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~~Office of Rail and Road pursuant to Condition J2.1.3.

2.1.3 Network Rail shall notify the ~~Office of Rail Regulation~~Office of Rail and Road 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~~Office of Rail and Road 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~~Office of Rail and Road 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~~Office of Rail and Road pursuant to Condition J2.11.3.

2.11.3 Network Rail shall notify the ~~Office of Rail Regulation~~Office of Rail and Road 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~~Office of Rail and Road pursuant to Condition J2.12.2.

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

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~~Office of Rail and Road's consent.

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~~Office of Rail and Road for consent within 10 Working Days of:

- (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~~Office of Rail and Road 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
- (b) the date from which the Quality Adjustment, or part only, shall have effect.

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

### 3 **Confidentiality**

#### 3.1 **Affected Persons and their interests**

3.1.1 If, having received a Relevant Enquiry, Network Rail has reasonable grounds for believing that, in order to provide the Relevant Response:

- (a) it is necessary for it to disclose to the Part J Access Beneficiary any Qualifying Information; and
- (b) such disclosure would or might, in Network Rail's reasonable opinion, seriously and prejudicially affect the interests of the Affected Person,

Network Rail shall give notice to that effect to the Part J Access Beneficiary.

#### 3.2 **Part J Access Beneficiary's right to elect for Relevant Response without Qualifying Information**

3.2.1 Having received a notice from Network Rail pursuant to Condition J3.1, the Part J Access Beneficiary shall be entitled, by notice given to Network Rail, to elect either:

- (a) that the Relevant Response be provided to it without the Qualifying Information; or
- (b) that Network Rail should give notice to the Affected Person in question pursuant to Condition J3.4 and thereafter comply with the procedures established in this Condition J3.

3.2.2 Network Rail shall not proceed with its preparation of the Relevant Response until the Part J Access Beneficiary has made its election.

#### 3.3 **Relevant Response without Qualifying Information**

3.3.1 If the Part J Access Beneficiary makes an election pursuant to Condition J3.2.1(a):

- (a) Network Rail shall proceed to prepare and provide the Relevant Response so as to omit the Qualifying Information; and
- (b) if, having received a Relevant Response of the kind referred to in Condition J3.3.1(a), the Part J Access Beneficiary wishes Network Rail to revise it so as to



include any Qualifying Information, it shall be entitled to do so by notice to Network Rail.

3.3.2 If the Part J Access Beneficiary gives notice to Network Rail pursuant to Condition J3.3.1(b), Network Rail shall proceed to give notice to the Affected Person in question pursuant to Condition J3.4 and thereafter comply with the procedures established in this Condition J3.

#### 3.4 **Relevant Response with Qualifying Information**

3.4.1 If the Part J Access Beneficiary makes an election pursuant to Condition J3.2.1(b), Network Rail shall give notice to the Affected Person that it has grounds for a belief of the kind referred to in Condition J3.1.

#### 3.5 **Contents of notice to Affected Person**

3.5.1 The notice given to the Affected Person pursuant to Condition J3.4 shall be accompanied by:

- (a) a statement of the information which Network Rail considers it necessary to disclose; and
- (b) a statement to the effect that, unless the Affected Person gives notice to Network Rail within 15 Working Days of his receipt of the notice that he objects to the disclosure in question, that person shall have lost the right to object to its disclosure.

#### 3.6 **Entitlement of Network Rail to include Qualifying Information if no Notice of Objection**

3.6.1 Subject to Condition J2.5, if no Notice of Objection has been given to Network Rail within the Period for Objections, Network Rail shall be entitled to include the Qualifying Information in the Relevant Response.

### **3.7 Discretion of the Allocation Chair to order confidentiality**

3.7.1 If Network Rail has received a Notice of Objection within the Period for Objections, it shall immediately give notice of that fact to the Part J Access Beneficiary and the Secretary who shall pass that notice to the Allocation Chair.

3.7.2 The notice given to the Part J Access Beneficiary pursuant to Condition J3.7.1 shall not contain any indication as to the identity of the Affected Person, whether by stating its name, the nature of its business or any information which may enable the Part J Access Beneficiary to determine its identity.

3.7.3 The notice given to the Secretary shall be accompanied by:

- (a) a copy of the Notice of Objection;
- (b) an explanation by Network Rail as to its reasons for the belief referred to in Condition J3.1; and
- (c) a request for directions of the kind referred to in Condition J3.7.4.

3.7.4 The parties shall comply with such directions which the Allocation Chair gives them in relation to the preservation of the positions of the parties (including the Affected Person) and the confidentiality of the Qualifying Information pending the determination of the matter. No such directions shall have effect for a period which is longer than 90 days without being renewed by the Allocation Chair.

### **3.8 Allocation Chair's directions as to preservation of confidentiality of Qualifying Information**

3.8.1 In a case to which Condition J3.7 applies, and subject to Condition J2.5, Network Rail shall be entitled to include Qualifying Information in a Relevant Response except where directed not to do so by the Allocation Chair, to the extent stated and subject to such conditions (if any) as shall be specified in the direction (a "Confidentiality Direction").

3.8.2 No Relevant Response containing Qualifying Information shall be given until after the expiry of the period specified by the Allocation Chair in any directions of the kind referred to in Condition J3.7.4.

### **3.9 Grounds on which the Allocation Chair may order confidentiality**

3.9.1 A Confidentiality Direction shall only have effect if:

- (a) it is stated by the Allocation Chair to have been given on the grounds that:

- (i) the disclosure to the Part J Access Beneficiary of the Qualifying Information in question would or might seriously and prejudicially affect the interests of the Affected Person; and
  - (ii) such prejudice outweighs or is likely to outweigh the interests of Freight Customer Access Option Holders, potential Freight Customer Access Option Holders, operators and potential operators of railway assets, in each case on the part of the Network in question in its disclosure to the Part J Access Beneficiary, having due regard to the matters about which duties are imposed on the ~~Office of Rail Regulation~~Office of Rail and Road by section 4 of the Act; and
- (b) the Allocation Chair has complied with the requirements specified in Conditions J3.11 and J3.12.

### 3.10 Opportunity to make representations to the Allocation Chair

3.10.1 Within 20 Working Days of the Allocation Chair's receipt of a notice pursuant to Condition J3.7.1 (or such longer period as the ~~Office of Rail Regulation~~Office of Rail and Road may allow), each of Network Rail, the Part J Access Beneficiary and the Affected Person shall be entitled to make representations to the Allocation Chair:

- (a) as to whether it considers that the Allocation Chair should exercise his discretion to give a Confidentiality Direction; and, if so
- (b) the extent and conditions of the Confidentiality Direction.

3.10.2 Any such representations shall be accompanied by the reasons why the person in question believes the Allocation Chair should or should not (as the case may be) give a Confidentiality Direction.

### 3.11 Hearing on confidentiality representations

3.11.1 If he has received any representations of the kind contemplated by Condition J3.10, the Allocation Chair shall be entitled to hear the parties on the matter. The Allocation Chair has an absolute discretion as to the procedure to be followed in any such hearing, and may at any time amend it if he considers it necessary to do so for the fair resolution of the matter.

**3.12 Written reasons for decision**

3.12.1 If any representations have been made to him pursuant to Condition J3.10, unless the parties concerned otherwise agree, the Allocation Chair shall provide them with his reasons for his determination. Such reasons shall be given in writing.

**3.13 Immunity of the Allocation Chair**

3.13.1 The Allocation Chair shall not be liable in damages or otherwise for any act or omission to act on their part (including negligence) in relation to any reference to them under this Condition J3.

3.13.2 Each of the Part J Access Beneficiary and Network Rail shall:

- (a) indemnify and hold harmless the Allocation Chair, against every claim which may be made against any of them in relation to any of the matters referred to in Condition J3.13.1; and
- (b) to the extent that it is the creditor in the indemnity in Condition J3.13.2(a), hold the benefit of that indemnity upon trust as bare trustee for the benefit of the Allocation Chair.

3.13.3 No provision of the Access Agreement which operates so as to exclude or restrict the liability of either party shall apply to the obligations of the parties under this Condition J3.13.

**3.14 Preservation of confidentiality of Qualifying Information pending determination**

3.14.1 In making any determination of the kind contemplated by this Condition J3, the remit of the Allocation Chair shall include a requirement that:

- (a) any hearing of the kind contemplated by Condition J3.11 shall be conducted in such a way as not to disclose any part of the Qualifying Information; and
- (b) the reasons for the Allocation Chair's determination shall, if given to the parties, not disclose to the Part J Access Beneficiary any part of the Qualifying Information.

### 3.15 Obligation to provide Confidentiality Undertaking

#### 3.15.1 If:

- (a) an Affected Person has given notice to Network Rail that it does not propose to give a Notice of Objection within the Period for Objections; or
- (b) the Allocation Chair has determined that no Confidentiality Direction shall be given in relation to Qualifying Information; or
- (c) the Affected Person requires Network Rail to procure that the Part J Access Beneficiary gives a Confidentiality Undertaking for the benefit of the Affected Person,

the Part J Access Beneficiary shall deliver to Network Rail an undertaking of strict confidentiality in relation to the Qualifying Information (a "Confidentiality Undertaking").

#### 3.15.2 A Confidentiality Undertaking shall:

- (a) contain an undertaking that the person giving it will hold the Qualifying Information disclosed to it strictly confidential and will not, without the consent of the Affected Person, disclose it to any person except in any of the circumstances referred to in Clause 14.2(a)-(k) (entitlement to divulge) of the ~~Office of Rail Regulation~~ Office of Rail and Road's Model Passenger and Model Freight Track Access Contracts and clause 14.2(a)-(l) of the ~~Office of Rail Regulation~~ Office of Rail and Road's Model Track Access Contract (Freight Customer Access)), in each case subject to the conditions which apply to such disclosures under that Clause;
- (b) contain no limitations on the liability of the person who gives it in the case of its breach; and
- (c) in every other respect, be unqualified.

#### 3.15.3 A Confidentiality Undertaking shall be:

- (a) given to Network Rail by the Part J Access Beneficiary as soon as reasonably practicable after Network Rail has requested the Part J Access Beneficiary to provide it; and
- (b) held by Network Rail upon trust for the Affected Person.

3.15.4 If the Part J Access Beneficiary fails to comply with its obligations under this Condition J3.15, Network Rail shall not include the Qualifying Information in its Relevant Response.

#### 4 **Failure to Use**

##### 4.1 **Failure to Use**

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

- (a) after the Commencement Date, the Part J Access Beneficiary fails to secure the quantum of Train Slots which the Quantum Access Right permits in a New Working Timetable published by Network Rail at D-26 or in any subsequent variation of this published in accordance with D2.7.4; or
- (b) the Part J Access Beneficiary fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right.

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

- (a) where the Part J Access Beneficiary was unable to secure the necessary quantum of Train Slots permitted by the Quantum Access Right because of Restrictions of Use; or
- (b) to Level Two Rights or Contingent Rights where Network Rail has been unable to accommodate the Part J Access Beneficiary's Access Proposal into the New Working Timetable.

4.1.3 For the purposes of Condition J4.1.1(b), the Part J Access Beneficiary fails to make use of a Train Slot if it uses the Train Slot for less than the Use Quota during the relevant Use Period.

4.1.4 For the purposes of Condition J4.1.1(b) and J4.1.3, a Freight Customer Access Option Holder fails to make use of a Train Slot if either:

- (a) it fails to draw down the Access Rights to use such Train Slot into the Access Agreement of an Appointed Operator resulting in such Train Slot not being used by an Appointed Operator; or

- (b) it draws down the Access Rights to use such Train Slot into the Access Agreement of an Appointed Operator and that Appointed Operator fails to make use of that Train Slot within the meaning of Condition J4.1.3.

#### 4.2 **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 a 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.

#### 4.3 **Certain periods to be disregarded**

4.3.1 Any period of non-use shall be disregarded for the purpose of determining whether a Failure to Use has occurred under Condition J4.1.1(a) or (b) if, and to the extent that, such non-use is:

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

#### 4.4 **Service of Failure to Use Notice**

4.4.1 If Network Rail considers there has been a Failure to Use by a Part J Access Beneficiary and that Failure to Use is continuing it may serve a Failure to Use Notice on the Part J Access Beneficiary requiring the Part J Access Beneficiary to surrender Rights Subject to Surrender.

#### 4.5 Cessation of Failure to Use

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:

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

#### 4.6 Contents of a Failure to Use Notice

4.6.1 A Failure to Use Notice shall specify:

- (a) the Failure to Use which Network Rail considers has occurred;
- (b) the Rights Subject to Surrender which Network Rail requires the Part J Access Beneficiary to surrender; and
- (c) the date on which the Relevant Surrender is intended to take effect.

#### 4.7 Acceptance of surrender

4.7.1 If the Part J Access Beneficiary agrees to the surrender specified in the Failure to Use Notice then:

- (a) it shall, within 10 Working Days, notify Network Rail and the ~~Office of Rail Regulation~~Office of Rail and Road;
- (b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the ~~Office of Rail Regulation~~Office of Rail and Road pursuant to Condition J4.7.1(c); and
- (c) Network Rail shall notify the ~~Office of Rail Regulation~~Office of Rail and Road 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 on which the Part J Access Beneficiary agrees to the surrender pursuant to Condition J4.7.1(a).

#### 4.8 Counter Notice

4.8.1 The Part J Access Beneficiary may, within 10 Working Days of receipt of a Failure to Use Notice, serve a Counter Notice on Network Rail stating that:

- (a) it considers the Failure to Use Notice to be invalid;
- (b) there has been no Failure to Use or there has been a cessation of a Failure to Use in accordance with Condition J4.5; and/or
- (c) any Ancillary Movements and/or Stabling specified in the Failure to Use Notice as being Rights Subject to Surrender:
  - (i) are not directly associated with the relevant Quantum Access Right; and/or
  - (ii) would still be required by the Part J Access Beneficiary following the surrender of the relevant Quantum Access Right; and/or
- (d) there is a Ground for Objection to the proposed surrender within Condition J4.9, detailing the Ground for Objection on which it relies,

and must provide evidence with the Counter Notice in support of its contentions.

4.8.2 If no Counter Notice is served within 10 Working Days of receipt of a Failure to Use Notice:

- (a) the Part J Access Beneficiary will be deemed to have agreed to the surrender specified in the Failure to Use Notice;
- (b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the ~~Office of Rail Regulation~~Office of Rail and Road pursuant to Condition J4.8.2(c); and
- (c) Network Rail shall notify the ~~Office of Rail Regulation~~Office of Rail and Road of the relevant modifications to the Part J Access Beneficiary's Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary is deemed to have agreed to the surrender pursuant to Condition J4.8.2(a).

## 4.9 Grounds for Objection

4.9.1 An Access Beneficiary may object to a surrender specified in a Failure to Use Notice on the grounds (“Grounds for Objection”) that:

~~the Rights Subject to Surrender relate to an enhancement of the Network for which the Access Beneficiary is contracted to pay through access charges (“Grounds for Objection”).~~

- (a) ~~the Rights Subject to Surrender relate to an enhancement of the Network for which the Part J Access Beneficiary is contracted to pay through access charges; or~~
- (b) ~~the Rights Subject to Surrender have been partially used by the Part J Access Beneficiary to the extent that:~~
- (i) ~~either the Origin has been operated from or the Destination has been operated to during the Use Period through the partial use of the associated Train Slot in the Working Timetable; and~~
  - (ii) ~~the partial use is supported by a relevant contract between the Part J Access Beneficiary and an end customer; and,~~
  - (iii) ~~prior to the receipt of the Failure to Use Notice, the Part J Access Beneficiary has advised Network Rail in writing that it wishes to amend the relevant Quantum Access Right(s) to reflect the partial use and specifies the particular amendments it is seeking to be made; or~~
- (c) ~~the Rights Subject to Surrender are required to be retained by the Part J Access Beneficiary for reasons of national security or for the transit of nuclear materials. In such cases, it will be necessary for the Part J Access Beneficiary to provide with its Counter Notice a written statement from the relevant Government Department supporting the reasons for the retention of the Rights Subject to Surrender.~~

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## 4.10 Network Rail agrees with the Part J Access Beneficiary

4.10.1 If Network Rail agrees with the Part J Access Beneficiary:

- (a) that the matters set out in Condition J4.8.1(a), (b) or (c) have been substantiated, the Failure to Use Notice

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shall have failed and Network Rail shall notify the Part J Access Beneficiary in writing that this is the case within 10 Working Days of receipt of the Counter Notice; or

- (b) that the Part J Access Beneficiary's Grounds for Objection has been substantiated in respect of any or all of the Rights Subject to Surrender (or parts thereof in the case of the Ground for Objection specified in Condition J4.9.1(b)) then, subject to Condition J4.10.2 below, the Failure to Use Notice shall have failed and Network Rail shall notify the Part J Access Beneficiary in writing that this is the case within 10 Working Days of receipt of the Counter Notice.

~~the Failure to Use Notice shall 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.~~

- 4.10.2 In the case of the Ground of Objection specified in Condition J4.9.1(b), the Failure to Use Notice shall have failed only in respect of those parts of the Rights Subject to Surrender that have been partially used.

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#### 4.11 Network Rail does not agree with the Part J Access Beneficiary

4.11.1 If Network Rail considers that:

- (a) the matters set out in Condition J4.8.1(a), (b) or (c) have not been substantiated; and
- (b) the Part J Access Beneficiary's Grounds for Objection have not been substantiated in respect of any or all of the Rights Subject to Surrender (or parts thereof in the case of the Ground for Objection specified in Condition J4.9.1(b)),

then it shall notify the Part J Access Beneficiary in writing that this is the case within ~~10~~ Working Days of receipt of the Counter Notice.

#### 4.12 Part J Access Beneficiary response to Network Rail's notification under Condition J4.11

- 4.12.1 Upon receipt of a notice under Condition J4.11, the Part J Access Beneficiary shall respond to Network Rail in writing within 10 Working Days stating that it either accepts or disagrees with Network Rail's decision.

- 4.12.2 If the Part J Beneficiary disagrees with Network Rail's decision under Condition J4.11, then in addition to its response under Condition J4.12.1, it shall also at the same time refer the matter for determination in accordance with the ADRR.

- 4.12.3 If the Part J Access Beneficiary fails to respond to Network Rail in

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accordance with Condition J4.12.1, it will be deemed to have accepted Network Rail's decision.

4.12.13 **Surrender of Access Rights**

4.12.14.13.4 The surrender of the Rights Subject to Surrender will occur:

- (a) 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 on which such notice is given to the ~~Office of Rail Regulation~~Office of Rail and Road pursuant to Condition J4.12.2; or

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- (b) on the date specified in the ~~Office of Rail Regulation~~Office of Rail and Road Determination, if applicable.

~~4.12.24.13.2~~ In the event of the Part J Access Beneficiary accepting Network Rail's decision or there is an ADRR Determination in accordance with Condition J4.12.1, Network Rail shall notify the ~~Office of Rail Regulation~~Office of Rail and Road 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.

#### ~~4.13.14~~ **Access Proposals**

~~4.13.14.14.1~~ Where any Rights Subject to Surrender surrendered under this Condition J4 include the surrender of an Access Proposal, Network Rail's obligations under Condition D2.4 shall cease to have effect in respect of that Access Proposal as from the date the surrender takes effect in accordance with this Condition J4.

## **5 Failure to Use: third party application**

### **5.1 Failure to Use Notices**

#### **5.1.1 If:**

- (a) Network Rail receives an application from a Part J Access Beneficiary (the "Applicant") for a Quantum Access Right to a Train Slot; and
- (b) the Train Slot:
  - (i) is one in respect of which the Applicant can demonstrate a reasonable commercial need; and
  - (ii) was secured in exercise of a Quantum Access Right of another Part J Access Beneficiary (the "Incumbent"); and
  - (iii) is one in respect of which there is a Failure to Use by the Incumbent,

then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a Failure to Use Notice under Condition J4.4 on the Incumbent. If the Applicant's

application does not comply with this Condition J5.1, then within

10 Working Days following receipt of the Applicant's application Network Rail shall serve a notice on the Applicant rejecting its application and setting out its reasons for rejecting the application.

## 5.2 Cessation of Failure to Use

5.2.1 For the purposes of Condition J5.1(b)(iii), there will have been a cessation of a Failure to Use if the Train Slot has been used in the thirteen consecutive weeks that it has been included in the Working Timetable before the date that the Applicant's Failure to Use Notice was received by Network Rail. ~~test in Condition J4.5 has been met.~~

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## 5.3 Application of Conditions

5.3.1 The following Conditions shall apply following service on the Incumbent of a Failure to Use Notice as they apply to a Failure to Use Notice:

- (a) J4.7 (Acceptance of surrender);
- (b) J4.8 (Counter Notice);
- (c) J4.9 (Grounds for Objection)
- (d) J4.10 (Network Rail agrees with the Part J Access Beneficiary);
- (e) J4.11 (Network Rail does not agree with the Part J Access Beneficiary);
- (f) J4.12 (Surrender of Access Rights), where in respect of this Condition J5, any relevant Determination is between Network Rail and the Incumbent, then the Applicant shall accept that the Determination will also dispose of the matter as between the Applicant and Network Rail; and
- (g) J4.13 (Access Proposals), as if that Condition referred to a surrender under this Condition J5.



## 5.4 Counter Notice

5.4.1 Subject to the redaction of any commercially sensitive information, the Incumbent shall send a copy of any Counter Notice issued under Condition J5.3.1(b) to the Applicant.

## 6 ~~Not Used~~ Cordon Cap Reduction (Failure to Use)

### 6.1 ~~Application of this Condition J6~~

6.1.1 ~~This Condition J6 shall not apply if, in accordance with Conditions J4 or J5, the Part J Access Beneficiary and Network Rail agree or it is Determined that in relation to the relevant Failure to Use there are no Rights Subject to Surrender.~~

### 6.2 ~~Cordon Cap Reduction procedure~~

6.2.1 ~~Where any Rights Subject to Surrender specified by Network Rail in a Failure to Use Notice relate to Level Two Rights and concern a location where the Part J Access Beneficiary on whom the notice has been served has an Existing Cordon Cap, the provisions of this Condition J6 will apply in addition to Conditions J4 or J5.~~

6.2.2 ~~The Failure to Use Notice, in addition to the matters set out in Condition J4.6 or J5.3, as applicable, may specify the amount by which Network Rail considers, in accordance with Condition J6.2.3, an Existing Cordon Cap should be reduced (the "Cordon Cap Reduction") if Rights Subject to Surrender were surrendered by the Part J Access Beneficiary under Conditions J4 or J5, as applicable.~~

6.2.3 ~~The Cordon Cap Reduction shall be calculated in accordance with the following formula:~~

$$\text{Cordon Cap Reduction} = (R_r/R) \times C$$

(a) ~~where "R<sub>r</sub>" means the number of Level 2 Rights being transferred, "R" means the total number of Level 2 Rights related to 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.~~

- 6.2.4 ~~If the Part J Access Beneficiary agrees to the Cordon Cap Reduction:~~
- ~~(a) it shall give notice to that effect to Network Rail, served in accordance with Condition J4.7.1(a) or J5.4.1(a), as applicable;~~
  - ~~(b) Network Rail shall give notice to the Office of Rail Regulation Office of Rail and Road, served in accordance with Condition J4.7.1(c) or J5.3.1(a), as applicable; and~~
  - ~~(c) the Cordon Cap Reduction shall have effect from the date on which notice is given to the Office of Rail Regulation Office of Rail and Road by Network Rail pursuant to Condition J6.2.4(b).~~
- 6.2.5 ~~If the Part J Access Beneficiary does not agree to the Cordon Cap Reduction, it shall serve a Counter Notice, in accordance with Condition J4.8 or J5.3.1(b), as applicable:~~
- ~~(a) specifying that it objects to the Cordon Cap Reduction and setting out its reasons why; and~~
  - ~~(b) providing evidence in support of its objection.~~
- 6.2.6 ~~Condition J4.8.2 shall apply as if that Condition referred to a Cordon Cap Reduction rather than a surrender.~~
- 6.2.7 ~~If the Part J Access Beneficiary and Network Rail agree or it is Determined that the Cordon Cap Reduction shall not take effect, the Failure to Use Notice shall cease to have effect to the extent that it relates to a Cordon Cap Reduction.~~

### 6.3 **Effective Date of Cordon Cap Reduction**

- 6.3.1 ~~If it is Determined that the Cordon Cap Reduction shall have effect, then the Cordon Cap Reduction shall have effect from the date:~~
- ~~(a) on which notice is given to the Office of Rail Regulation Office of Rail and Road pursuant to Condition J6.3.2, in the event of an ADRR Determination; or~~
  - ~~(b) specified in the Office of Rail Regulation Office of Rail and Road Determination, if applicable.~~
- 6.3.2 ~~In the event of an ADRR Determination in accordance with Condition J6.3.1, Network Rail shall notify the Office of Rail Regulation Office of Rail and Road 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 ADRR Determination and shall include a copy of the relevant ADRR Determination with such notice.~~

~~6.3.3 Where the Cordon Cap Reduction is specified in a Failure to Use Notice, any relevant Determination will be between Network Rail and the Incumbent, and, where applicable, the Applicant shall accept that the Determination will dispose of the matter as between the Applicant and Network Rail.~~

## 7 Freight transfer mechanism

### 7.1 Application of this Condition J7

7.1.1 This Condition J7 applies only to services for the carriage of goods by railway.

7.1.2 This Condition J7 applies only to an application for a Quantum Access Right from an Applicant which is either:

- (a) a Train Operator, who is replacing the Incumbent in the provision of transport services to a third party, where the Quantum Access Right relates to the provision of those transport services (subject, where applicable, to any competitive tendering process amongst other parties); or
- (b) a Freight Customer Access Option Holder, where the Quantum Access Right sought is:
  - (i) currently held by an Incumbent which is a Train Operator for the provision of transport services to or on behalf of that Freight Customer Access Option Holder; and
  - (ii) one which that Freight Customer Access Option Holder intends (subject, where applicable, to any competitive tendering process amongst other parties, including, if applicable, the Incumbent) to draw down into the Access Agreement of a Train Operator (whether or not the Incumbent) so that such Train Operator can become an Appointed Operator to provide those transport services to or on behalf of the Freight Customer Access Option Holder.

## 7.2 Third Party Notice

7.2.1 Where a Part J Access Beneficiary wants to hold a Quantum Access Right (“the Applicant”) that is substantially similar to an existing Quantum Access Right of another Part J Access Beneficiary (the “Incumbent”) then it shall serve a Third Party Notice on the Incumbent and send a copy of that notice to Network Rail.

## 7.3 Applicant’s responsibilities

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:

- (a) the Quantum Access Right sought by the Applicant;
- (b) the Rights Subject to Surrender which the Applicant requires the Incumbent to Surrender in order to accommodate the Applicant’s request;
- (c) the date on which the Applicant requests that the Quantum Access Right takes effect in its Access Agreement;
- (d) that it has suitable access to and from any relevant facility to meet its obligations under clause 6.4 of its Access Agreement; and
- (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.

## 7.4 Acceptance of surrender

7.4.1 If the Incumbent agrees to the surrender specified in the Third Party Notice, then:

- (a) it shall, within 10 Working Days, give notice to that effect to the Applicant and copy this to Network Rail;
- (b) the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent’s (and, if applicable, Appointed Operator’s) Access Agreement on the date specified in the ~~en-~~ ~~which~~ notice is

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given to the ~~Office of Rail Regulation~~Office of Rail and Road pursuant to Condition J7.4.1(c); and

- (c) Network Rail shall notify the ~~Office of Rail Regulation~~Office of Rail and Road of the relevant modifications to the Part J Beneficiary's — (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Beneficiary agrees to the surrender pursuant to Condition J7.4.1(a).

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## 7.5 Third Party Counter Notice

7.5.1 The Incumbent may, within 10 Working Days of receipt of a Third Party Notice, serve a Third Party Counter Notice on Network Rail specifying that it objects to the surrender because the Incumbent:

- (a) has used the Rights Subject to Surrender for a Primary Purpose; and
- (b) requires to continue to use the Rights Subject to Surrender to convey traffic for the Primary Purpose Customer ("Grounds for Objection").

7.5.2 The Incumbent shall provide evidence in support of its Grounds for Objection. The Incumbent shall send a copy of any Counter Notice, subject to the redaction of any commercially sensitive information, to the Applicant.

7.5.3 If the Incumbent disagrees with:

- (a) any Train Slots shown in the Third Party Notice as relating to the Quantum Access Right; or
- (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
- (c) any Access Proposal shown in the Third Party Notice as relating to the Quantum Access Right,

it shall include in the Third Party Counter Notice details of why it disagrees with the Applicant.

7.5.4 If the Quantum Access Right sought by the Applicant is the subject of a competitive tendering process amongst other parties including the Incumbent, then the Incumbent:

- (a) may notify Network Rail of this process; and
- (b) if it has done so, the period of 10 Working Days

referred to in Condition J7.5.4 shall be deemed to commence on the date that the third party or Freight Customer Access Option Holder (as the case may be) indicates, at the end of the relevant tendering process, its intention to contract.

7.5.5 If no Third Party Counter Notice is served within 10 Working Days of receipt of a Third Party Notice:

- (a) the Incumbent will be deemed to have agreed to the surrender of the Rights Subject to Surrender specified in the Third Party Notice and the Applicant will notify Network Rail, copied to the Incumbent, that this is the case;
- (b) the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's (and, if applicable, Appointed Operator's) Access Agreement with effect from the date on which notice is given to the ~~Office of Rail Regulation~~Office of Rail and Road pursuant to Condition J7.5.54(c); and
- (c) Network Rail shall notify the ~~Office of Rail Regulation~~Office of Rail and Road of the relevant modifications to the Incumbent's, Applicant's and, if applicable, Appointed Operator's Access Agreements no more than 10 Working Days after the date on which the Part J Access Beneficiary is deemed to have agreed the surrender pursuant to Condition J7.5.54(a).

## 7.6 Network Rail agrees with Incumbent

7.6.1 If Network Rail considers that the Grounds of Objection in the Third Party Counter Notice have been substantiated then, subject to any appeal under Condition J12, 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.

## 7.7 Network Rail agrees with Applicant

7.7.1 If Network Rail considers that the Incumbent's Grounds of 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 of receipt of the Third Party Counter Notice.

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.

**7.8 ~~Incumbent response to Network Rail's notification under Condition J7.7~~**

**7.8.1 Upon receipt of a notice under Condition J7.7.1, the Incumbent shall respond to Network Rail in writing within 10 Working Days stating that it either accepts or disagrees with Network Rail's decision.**

**7.8.2 If the Incumbent disagrees with Network Rail's decision under Condition J7.7, then in addition to its response under Condition J7.8.1, it shall also at the same time refer the matter for determination in accordance with the ADRR.**

**7.8.3 If the Part J Access Beneficiary fails to respond to Network Rail in accordance with Condition J7.8.1, it will be deemed to have accepted Network Rail's decision.**

**7.8.7.9 Surrender of Access Rights**

**7.8.17.9.4** The surrender of the Rights Subject to Surrender will be deemed to have occurred:

- (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~~Office of Rail and Road pursuant to Condition J7.8.2; or
- (b) on the date specified in the ~~Office of Rail Regulation~~Office of Rail and Road Determination, if applicable.

**7.8.27.9.2** 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~~Office of Rail and Road 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.

**7.8.37.9.3** In respect of this Condition J7.8, any relevant Determination will be between Network Rail and the Incumbent, and the Applicant shall accept that the Determination will dispose of the matter as between the Applicant and Network Rail.



| 7.97.10 **Grant to Applicant**

| ~~7.9.17.10.4~~ Network Rail shall, through the issue of a notice  
| to both the Applicant and the Incumbent, grant to the  
| Applicant the rights surrendered by the Incumbent under this  
| Condition J7. Such rights shall be granted to the Applicant :

| (a) as from the latest of the following dates ~~on which:~~

| (i) ~~the date stated in a notice is~~ given to the  
| ~~Office of Rail Regulation~~Office of Rail  
| ~~and Road~~ pursuant to Condition  
| J7.5.54(c), J7.4.1(c) or  
| J7.8.2 or the date specified in the ~~Office~~  
| ~~of Rail Regulation~~Office of Rail and Road  
| Determination (as applicable); or

| (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~~

(iii)(ii) the **date the** Applicant's Access Agreement is modified to include, where applicable, any relevant Restrictive Provisions associated with such rights contained in the Incumbent's Access Agreement; ~~or~~

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~~(iv) the relevant Cordon Cap Increase, if any, has effect pursuant to Condition J8;~~

- (b) with Service Characteristics in substantially the same form as the Rights Subject to Surrender; and
- (c) for a period of time:
  - (i) equal to that which the Incumbent would have enjoyed had the rights remained with the Incumbent; or
  - (ii) until expiry of the Applicant's Access Agreement,

whichever is the shorter.

#### 7.107.11 Access Proposals

~~7.10.17.11.4~~ Where any Rights Subject to Surrender surrendered under this Condition J7 include the surrender of an Access Proposal, Network Rail's obligations under Condition D2.4 shall, in respect of that Access Proposal:

- (a) cease to have effect in relation to the Incumbent as from the date the surrender takes effect in accordance with this Condition J7; and
- (b) be deemed to have effect in relation to the Applicant as from the date the Access Proposal is granted to the Applicant in accordance with Condition J7.10.

8 ~~Not used~~ **Cordon Cap Reduction (transfer)**

8.1 ~~Application of this Condition J8~~

~~8.1.1 This Condition J8 shall not apply if, in accordance with Condition J7, the Incumbent and Network Rail agree or it is Determined that in relation to any Quantum Access Right sought by the Applicant there are no Rights Subject to Surrender.~~

8.2 ~~Existing Cordon Cap adjustments procedure~~

~~8.2.1 Where any Rights Subject to Surrender specified by Network Rail in a Third Party Notice relate to Level Two Rights and concern a location where either the Incumbent has an Existing Cordon Cap or Network Rail considers that a new cordon and/or cordon Cap should be incorporated into the Applicant's Access Agreement the provisions of Condition J8 will apply in addition to Condition J7.~~

~~8.2.2 The Third Party Notice, in addition to the matters set out in Condition J7.4, may specify the amount by which the Applicant considers, in accordance with Condition J8.2.3, an Existing Cordon Cap (the "Cordon Cap Reduction") should be reduced if Rights Subject to Surrender were surrendered by the Incumbent under Condition J7.~~

~~8.2.3 The Cordon Cap Reduction shall be calculated in accordance with the following formula:~~

$$\text{Cordon Cap Reduction} = (R_r/R) \times C$$

~~(a) where "R<sub>r</sub>" means the number of Level 2 Rights being transferred, "R" means the total number of Level 2 Rights related to 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.~~

- ~~8.2.4 If the Incumbent agrees to the Cordon Cap Reduction it shall give notice to that effect to Network Rail, as part of its notice served in accordance with Condition J7.4.~~
- ~~8.2.5 If the Incumbent does not agree to the Cordon Cap Reduction, it shall serve a Third Party Counter Notice, as part of its notice served in accordance with Condition J7.5:~~
- ~~(a) specifying that it objects to the Cordon Cap Reduction and setting out its reasons why; and~~
  - ~~(b) providing evidence in support of its objection.~~
- ~~8.2.6 Condition J7.5.4 shall apply as if that Condition referred to a Cordon Cap Reduction rather than a surrender.~~
- ~~8.2.7 Condition J7.5.3 shall apply.~~
- ~~8.2.8 If the Incumbent and Network Rail agree or it is Determined that the Incumbent has a reasonable on-going commercial need for its Existing Cordon Cap, the Third Party Notice shall cease to have effect to the extent it relates to a Cordon Cap Reduction.~~
- ~~8.2.9 Where the Cordon Cap Reduction is specified in a Third Party Notice, any relevant Determination will be between Network Rail and the Incumbent, and the Applicant shall accept that the Determination will dispose of the matter as between the Applicant and Network Rail.~~

### ~~8.3~~ **Cordon Cap Increase**

- ~~8.3.1 If Network Rail considers that a new cordon and/or cordon cap should be incorporated into the Applicant's Access Agreement, it shall serve a notice on the Applicant specifying the increase that Network Rail considers should be made to the Applicant's Existing Cordon Cap or, where no cordon or cordon cap exists in the Applicant's Access Agreement, provide to the Applicant a new cordon and/or cordon cap (in either case a "Cordon Cap Increase") to take effect at the same time as the corresponding Relevant Surrender.~~
- ~~8.3.2 The Applicant may, within 10 Working Days of receipt of a notice from Network Rail under Condition J8.3.1, serve a Counter Notice on Network Rail:~~
- ~~(a) specifying that it objects to the Cordon Cap Increase; and~~

~~(b) providing reasons for its objection.~~

~~8.3.3 If no Counter Notice is served within 10 Working Days of receipt of a notice from Network Rail under Condition J8.3.1 the Applicant will be deemed to have agreed to the Cordon Cap Increase specified in the notice.~~

~~8.3.4 Subject to Condition J8.4, a Cordon Cap Increase shall be granted to the Applicant:~~

~~(a) as from the date of the corresponding Relevant Surrender; and~~

~~(b) for a period of time:~~

~~(i) equal to that which the Incumbent would have enjoyed had its Existing Cordon Cap remained unchanged; or~~

~~(ii) until the expiry of the Applicant's Access Agreement,~~

~~whichever is the shorter.~~

~~8.4 **Office of Rail Regulation Office of Rail and Road's consent to or Determination of a Cordon Cap Reduction or Cordon Cap Increase**~~

~~8.4.1 Subject to Condition J8.4.2, any Cordon Cap Reduction or Cordon Cap Increase shall have effect only with the Office of Rail Regulation's consent in accordance with Condition J11. Such consent shall be sought by Network Rail submitting the relevant modifications to the Incumbent's, Applicant's and, if applicable, Appointed Operator's Access Agreements to the Office of Rail Regulation for consent within 10 Working Days after the later of:~~

~~(a) the Incumbent's acceptance of the Cordon Cap Reduction under Condition J8.2.6;~~

~~(b) the Incumbent's deemed acceptance of the Cordon Cap Reduction under Condition J8.2.7; or~~

~~(c) the relevant ADRR Determination.~~

~~8.4.2 Network Rail, the Incumbent and the Applicant 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 modifications in question; and~~

~~(b) the date from which those modifications shall have effect.~~

~~8.4.3 The Gordon Cap Reduction or Gordon Cap Increase shall have effect from the date the Office of Rail RegulationOffice of Rail and Road issues a notice to the parties giving its consent to the reduction or increase. If the Office of Rail RegulationOffice of Rail and Road does not consent to the reduction or increase, it shall:~~

~~(a) issue a notice to the parties setting out why consent has been refused; or~~

~~(b) issue a notice requiring the parties to the relevant Access Agreement to modify the Gordon Cap Reduction and/or Gordon 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 RegulationOffice of Rail and Road has:~~

~~(i) consulted the parties to the relevant Access Agreement on a draft of the notice it proposes to issue;~~

~~(ii) taken into account any representations made by the 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.~~

## 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 10 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~~Office of Rail and Road 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~~Office of Rail and Road 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~~Office of Rail and Road. 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~~Office of Rail and Road 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~~Office of Rail and Road.

## 10 Right of Network Rail to make an Access Right Change

### 10.1 Obligation to facilitate a proposed Access Right Change

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



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

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

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

## 10.2 **Notice by Network Rail of a proposed Access Right Change**

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

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

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

10.2.2 Network Rail must reasonably believe that:

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

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

- (a) any Incumbent;
- (b) the ~~Office of Rail Regulation~~ Office of Rail and Road; and
- (c) any relevant funder.

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

### 10.3 Content of notice of a proposed Access Right Change

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

- (a) identify the Firm Right of any Incumbent which is subject to the Access Right Change;
- (b) set out the Access Right Change;
- (c) explain, referencing evidence where possible, why Network Rail believes that each of the criteria in Condition J10.2.2 is met;
- (d) state the date on which the Access Right Change will take effect, that date falling no later than the Priority Date for the relevant Working Timetable during which the Access Right Change is proposed to take effect;

- (e) request from the Incumbent an estimate of compensation with evidence where possible, payable under Condition J10.7 and, subject to Condition J10.5.3, to be provided to Network Rail within 60 Working Days of the date on which notice is given by Network Rail under Condition J10.2.1;
- (f) request from the Incumbent an estimate of the Incumbent's reasonable costs of providing an estimate of compensation, to be provided within 10 Working Days of the date on which notice is given by Network Rail under Condition J10.2.1; and
- (g) where the proposed Access Right Change was submitted to Network Rail by a Third Party, contain a Relevant Undertaking.

#### 10.4 **Negotiation following notice of a proposed Access Right Change**

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

- (a) after giving notice under Condition J10.2, the proposed Access Right Change, if applicable;
- (b) after receiving an estimate of reasonable costs under Condition J10.5.2, the reasonable costs payable in advance under Condition J10.10.2; or
- (c) after receiving an estimate of compensation under Condition J10.5.1, the compensation payable under Condition J10.7.

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

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

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

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

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

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

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

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

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

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

- (a) agrees to the proposed Access Right Change;
- (b) considers that one or more of the criteria in Condition J10.2.2 is not met; or
- (c) considers that any other aspect of the notice was deficient.

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

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

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

## 10.6 **Offer of compensation**

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

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

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

## 10.7 **Amount of compensation**

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

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

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

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

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

#### 10.8 **Acceptance of offer of compensation**

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

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

#### 10.9 **Payment of compensation**

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

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

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

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

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

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

#### **10.10 Reimbursement of assessment costs**

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

10.10.2 If the proposed access right change was submitted to Network Rail by a Third Party, that Third Party shall reimburse Network Rail for:

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

#### **10.11 Obligation to incur no further costs**

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

#### **10.12 Confidentiality of the Incumbent**

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

- (a) it is necessary for it to disclose to the Third Party any Qualifying Information; and

- (b) such disclosure would or might, in Network Rail's reasonable opinion, seriously and prejudicially affect the interests of the Incumbent,

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

#### 10.13 **Application of Part J confidentiality mechanism**

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

- (a) Notice served under Condition J10.12.1 was served under Condition J3.1;
- (b) "Relevant Response" means "Relevant Consultation";
- (c) "Part J Access beneficiary" means "Third Party"; and
- (d) "Affected Person" means "Incumbent".



#### 10.14 Right of appeal to relevant ADRR Forum

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

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

#### 10.15 Right to withdraw

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

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

10.15.3 If Network Rail receives a request to withdraw the notice of a proposed Access Right change and wishes to pursue the proposed Access Right Change on its own initiative, it may do so without serving another notice under Condition J10.23 but must notify the Incumbent and the ~~Office of Rail Regulation~~Office of Rail and Road of its decision as soon as reasonably possible.

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

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

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

- (a) the date on which notice is withdrawn; or
- (b) the date on which Network Rail notifies the Incumbent and the ~~Office of Rail Regulation~~Office of Rail and Road under Condition J10.15.3 as applicable.

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

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

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

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

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

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

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

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

## 10.17 Exclusion

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

## 11 Obligation of Network Rail to publish documentation

### 11.1 Template Notices

11.1.1 Network Rail shall publish promptly templates, and any revision to them, for any notices required under this Part J.

11.1.2 Before publishing templates or any revisions to them in accordance with Condition J11.1.1, Network Rail shall consult with relevant Part J Access Beneficiaries.

### 11.2 Publication of Other Documentation

11.2.1 Subject to Condition A3, 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.

### 11.3 ORR Power to Direct Network Rail to Publish

11.3.1 If Network Rail fails to comply with any of its obligations in Condition J11.1 or Condition J11.2, then ORR may, in writing, direct that Network Rail do so comply ("J11 Direction").

11.3.2 Network Rail shall start any process to comply with a J11 Direction within 10 Working Days of receipt of it and shall have complied with the J11 Direction within 30 Working Days of receipt of it.

11.3.3 Where Network Rail has failed to comply with a J11 Direction in accordance with Condition J11.3.2, the ~~Office of Rail Regulation~~ Office of Rail and Road 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.

## 12 Appeals

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12.1 **Appeal in accordance with the ADRR**

12.1.1 Except in relation to Conditions J10.1 – J10.17, 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.

12.1.2 A reference for determination brought under Condition J12.1.1 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 J12.1.2(a) includes Christmas Day, within 10 Working Days of such receipt.

12.2 **Appeal to the ~~Office of Rail Regulation~~ Office of Rail and Road**

Except in relation to Conditions J10.1 – J10.17, 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~~ Office of Rail and Road 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.