

# The Network Code

*(with Explanatory Notes)*

**23 May 2018**

*Note:*

*This document is available on the Network Rail website at <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/>*

*Two complimentary copies, in loose-leaf format, are supplied to each Access Party. Amendments to the Network Code are also on the Network Rail website at the “Completed Proposal for Change” web-page and include identification of the specific changes to the text. Amended pages will be dated in the bottom right hand corner and the “contents/amendments” page provides the reference (PfC number) to the “Proposal for Change” page of the website.*

*If further copies of this document are required they may be obtained from the website or copied locally, although such copies should be subject to appropriate control arrangements. Additional copies may also be obtained from Network Rail although a charge may be raised to cover costs of production.*

*The Secretary of the Class Representative Committee can be contacted on 07515 619692.*

### **History of updates since 1 January 2009**

<b>Proposal for Change</b>	<b>Parts of the code updated</b>	<b>Effective date of changes</b>
PfC 48	Part C, Part J, Part M and ADRR	1 February 2009
PfC 49	Part B	1 February 2009
ORR C8 Notice	Part G	1 April 2009
PfC 50	Part G	28 May 2009
PfC 51	Part C and Part K	23 September 2009
PfC 52	Part D	26 November 2009
PfC 54	All Parts	01 August 2010
PfC 55	Part B	01 October 2010
PfC 56	Part A, Part D	01 October 2010
PfC 58	Part D	07 April 2011
PfC 57	Part A, Part C, Part H and Part J	11 April 2011
PfC 59	Part D	19 July 2011
PfC 60	Part D	16 March 2012
PfC 61	Part D, Part J, Part M and ADRR	29 June 2012
PfC 62	ADRR	29 June 2012
PfC 63	Part A	29 June 2012
PfC 64	Part D	23 April 2014
PfC 65	Part J and ADRR	01 April 2015
PfC 68	Part D	13 July 2015
PfC 67	Part B	21 July 2015
PfC 66	ADRR	23 September 2015
PfC 69	Part B	25 December 2015
PfC 70	Part B	01 June 2017
PfC 71	All Parts	12 July 2017
PfC 72	ADRR	12 July 2017
PfC 75	Part B	23 May 2018

## ARRANGEMENT OF PARTS AND CONDITIONS

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## Preface

- A. *The Network Code is a set of rules which is incorporated by reference into, and therefore forms part of, each bilateral access contract between Network Rail and a holder of access rights. It does not create any contractual relationship between operators of trains.*
- B. *The purpose of the Network Code is:-*
- (i) to regulate change, including change to the working timetable, change to railway vehicles specified in an access contract, change to the network, change to computer systems and change to the Network Code itself;*
  - (ii) to establish procedures relating to environmental damage;*
  - (iii) to establish a performance monitoring system; and*
  - (iv) to establish procedures in the event of operational disruption.*
- C. *This Preface does not form part of the Network Code*

# Part A - General Provisions

## Explanatory Note

- A. *Part A sets out certain definitions, general provisions and rules of interpretation which apply generally to this code. Definitions which are specific to individual parts of this code are contained in the relevant part.*
- B. *This Explanatory Note does not form part of the Network Code.*

## CONDITION A1 - GENERAL

### 1.1 *General interpretation*

The paramount objective in the railway industry is to operate a safe and secure railway on which the elements of risk to safety and security are reduced to a level as low as reasonably practicable. Nothing in this code shall be interpreted or construed as compromising that objective.

In this code, unless the context otherwise requires:

- (a) *This code*

References to this code means this code as modified from time to time. References to The Railtrack Track Access Conditions shall be treated as references to this code.

- (b) *Parts, Conditions and paragraphs*

References to Parts, Conditions and paragraphs are to Parts, Conditions and paragraphs of this code.

- (c) *Definitions in the Act*

Terms and expressions defined in the Act shall, unless the contrary intention appears, have the same meaning in this code.

(d) *Statutory provisions*

References to statutory provisions shall be construed as references to those provisions as amended or re-enacted or as their application is modified by other statutory provisions from time to time and shall include references to any statutory provisions of which they are re-enactments (whether with or without modification).

(e) *Interpretation Act*

Words and expressions defined in the Interpretation Act 1978 shall have the same meaning in this code and the rules of interpretation contained in that Act shall apply to the interpretation of this code.

(f) *Include*

The words “include” and “including” are to be construed without limitation.

(g) *Other documents etc.*

Any agreement, instrument, licence, standard, timetable, code or other document referred to in this code or entered into, approved, authorised, accepted or issued by a person pursuant to this code shall be construed, at the particular time, as a reference to that agreement, instrument, licence, standard, timetable, code or other document, as it may then have been amended, varied, supplemented or novated.

(h) *Conflict*

In the event of any conflict of interpretation between this code and an Access Agreement (not including this code) the following order of precedence shall apply:

- (1) this code; and
- (2) the Access Agreement.

(i) *Time limits*

Where in this code any obligation of an Access Party is required to be performed within a specified time limit that obligation shall continue after

that time limit if the Access Party fails to comply with that obligation within the time limit.

(j) *Headings*

The headings and references to headings shall be disregarded in construing this code.

(k) *Ruling language*

All notices served under this code shall be in the English language.

## **1.2 Definitions**

In this code, unless the context otherwise requires:

“Act”	means the Railways Act 1993 as amended;
“Access Agreement”	means any particular access contract, whether or not entered into pursuant to any directions of the Office of Rail and Road under the Act, incorporating this code;
“Access Beneficiary”	means, in respect of an Access Agreement, the Train Operator or Access Option Holder who is party to that Access Agreement;
“Access Dispute Resolution Rules”	means the set of rules regulating the resolution of disputes, entitled “Access Dispute Resolution Rules” and annexed to this code;
“access option”	has the meaning ascribed to it in section 17(6) of the Act;
“Access Option Holder”	means any person who may exercise an access option in respect of a railway facility:  (a) which is not a station or a light maintenance depot; and  (b) in respect of which the facility owner is Network Rail;

“Access Parties”	means, in respect of an Access Agreement, Network Rail and the Access Beneficiary who are party to that Access Agreement;
“Affiliate”	means, in relation to any company: <ul style="list-style-type: none"> <li>(a) a company which is either a holding company or a subsidiary of such company; or</li> <li>(b) a company which is a subsidiary of a holding company of which such company is also a subsidiary,</li> </ul> and for these purposes, “holding company” and “subsidiary” have the meanings ascribed to them in section 736 of the Companies Act 1985;
“Change of Law”	means the application to any person of any Legal Requirement which did not previously so apply or the change of any Legal Requirement applying to that person (including any such Legal Requirement ceasing to apply, being withdrawn or not being renewed) other than in relation to: <ul style="list-style-type: none"> <li>(a) corporation tax (or any other tax of a similar nature replacing corporation tax on profits or gains); or</li> <li>(b) value added tax;</li> </ul>
“Class Member”	has the meaning given to that term in Part C of this code;
“Competent Authority”	means any local, national or supra-national agency, authority, department, inspectorate, minister, ministry, official, court, tribunal, or public or statutory person (whether autonomous or not and including the Office of Rail and Road) whether of the United Kingdom or of the European Union, which has, in respect of an Access Agreement, jurisdiction over either or both of the Access Parties to, or the subject matter of, that agreement provided that “Competent Authority” shall not include Her Majesty’s



	Government (or any department, minister, official or nominee of it) where acting as shareholder of the Access Party in question or other than pursuant to the Crown prerogative or a statutory function or power;
“Direction”	means, in respect of an Access Agreement, any direction, requirement, instruction or rule binding on either or both of the Access Parties, and includes any modification, extension or replacement of any such direction, requirement, instruction or rule for the time being in force;
“Franchised Services”	has the meaning given to that term in Condition A1.6;
“Freight Customer Access Option Holder”	means an Access Option Holder whose access option is an Access Agreement with Network Rail pursuant to which that Access Option Holder can draw down rights to a Train Operator to enable it to operate services for the carriage of goods by railway for or on behalf of that Access Option Holder;
“hard copy information”	means any relevant item which it is not reasonably practicable for Network Rail to publish on its website, having regard, in particular, to whether such relevant item is, or is likely to be: <ul style="list-style-type: none"> <li>(a) Unavailable in electronic form; or</li> <li>(b) Incapable of being downloaded and/or printed by any class of persons accessing Network Rail’s website; or</li> <li>(c) Exceptionally costly to publish on its website;</li> </ul>
“Legal Requirement”	means (for the purpose of the definition of Change of Law), in relation to any person, any of the following: <ul style="list-style-type: none"> <li>(a) Any enactment to the extent that it applies to that person;</li> </ul>

- (b) any regulation made by the Council or the Commission of the European Union to the extent that it applies to that person or a decision taken by the said Commission which is binding on that person to the extent that it is so binding; and
- (c) any interpretation of law, or finding, contained in any judgment given by a court or tribunal of competent jurisdiction in respect of which the period for making an appeal has expired which

Requires any legal requirement falling within paragraphs (a) or (b) above to have effect in a way which is different to that in which it previously had effect;

“Network”	means the network in respect of which Network Rail is the facility owner and which is situated in England, Wales and Scotland;
“Network Change”	has the meaning ascribed to it in Part G of this code;
“Network Code”	means the document entitled “Network Code”;
“Network Rail”	means Network Rail Infrastructure Limited, incorporated in England and Wales under registered number 2904587;
“non-sensitive version”	means a version of a relevant item: <ul style="list-style-type: none"> <li>(a) from which sensitive information has been excised; and/or</li> <li>(b) in which sensitive information has been replaced by a summary containing no sensitive information;</li> </ul>
“Passenger Transport Executive”	has the meaning ascribed to it in section 9 of the Transport Act 1968;
“Potential Access Party”	means any person who proposes in good faith to enter into an Access Agreement or become an

Access Option Holder provided that such person has first undertaken to Network Rail to be bound by the relevant provisions of the Network Code and the ADRR;

“publish on a website” means, in relation to any specified information to be published on a website, placing such specified information on the relevant website in a prominent position and with links which enable visitors to that site to locate it quickly and without difficulty;

“railway funding authority” has the meaning as defined in section 45 of the Railways Act 2005;

“Railway Group Standards” means technical standards and operating procedures authorised pursuant to the Railway Group Standards Code issued by Rail Safety and Standards Board Limited and approved by the Office of Rail and Road;

“relevant ADRR Panel” means the Panel established under Part E of the Access Dispute Resolution Rules which is to determine a relevant dispute in accordance with the principles and procedures set out in Part A of the Access Dispute Resolution Rules;

“relevant item” means, in respect of any specified information, the whole or part of any information, statement, proposal, draft, instrument or other document which constitutes or forms part of that specified information;

“Restriction of Use” means, for the purposes of the Network Code, a restriction of use of all or any part of the Network;

“Routes” means, in respect of an Access Agreement, those parts of the Network which a Train Operator has permission to use pursuant to that agreement;

“Secretary”	has that meaning given to it in the ADRR;
“secure information”	means a relevant item, the publication of which may, in the reasonable opinion of Network Rail, create any risk to the safety or security of the Network.;
“sensitive information”	<p>means a relevant item, the publication of which by Network Rail:</p> <p>(a) is likely materially to compromise or otherwise prejudice the commercial interests of any Access Party or any of its Affiliates; or</p> <p>(b) may reasonably be expected seriously and prejudicially to affect the interests of any person;</p>
“Services”	<p>means, in respect of an Access Agreement:</p> <p>(a) the services for the carriage of passengers by railway;</p> <p>(b) the services for the carriage of goods by railway; and</p> <p>(c) any other train movement for the purpose of testing the physical or operational characteristics or capabilities of any railway asset,</p> <p>in each case as provided for in that agreement;</p>
“specified information”	means any information, statement, proposal, draft, instrument or other document;
“Track Access Contract Parties” or “TAC Parties”	<p>means, in respect of any Access Agreement other than</p> <p>an access option, Network Rail and the Train Operator who are party to that Access Agreement;</p>
“Train Crew”	means those persons on a train responsible for the operation of that train;
“Train Operator”	means (without prejudice to Condition A1.3), in respect of an Access Agreement, a person (whether

or not an operator of trains) who has permission to use track pursuant to that agreement;

“Working Day” means each of Monday to Friday (inclusive) excluding common law and statutory public holidays; and

“Working Timetable” means as set out in Condition D2.1 and 2.1.6.

### **1.3 References to Train Operator**

Each reference in Parts E, F, G, H, J, K, L and M to a Train Operator, or to any obligation of a Train Operator, shall, insofar as the Train Operator is not an operator of a train, be construed as a reference to the person whose operation of trains on the Network derives from that Train Operator’s Access Agreement or (as the case may be) to that person’s obligation and, in the latter case, the Train Operator shall procure that the person concerned performs the relevant obligation.

### **1.4 Notices**

1.4.1 Any notice, consent or approval to be given under this code by any person may be given by:

- (a) personal delivery, express postal delivery or prepaid first class post to the intended recipient’s registered address or principal business address within the UK; or
- (b) facsimile to the intended recipient’s advertised facsimile number; or
- (c) e-mail to the e-mail address of the intended recipient most recently provided by the intended recipient to the sender.

1.4.2 Where any notice, consent or approval is given by e-mail in accordance with Condition A1.4.1 (c), the recipient shall be entitled, within 5 Working Days of receipt of the e-mail, to request that a hard copy of the notice, consent or approval be provided. Where such a request is made, the sender shall provide the recipient with the hard copy within 5 Working Days of the request being received.

1.4.3 Any notice, consent or approval given in accordance with Condition A1.4.1 shall be deemed to have been received in accordance with Condition A4.2.

## **1.5 Good faith**

The Access Parties shall, in exercising their respective rights and complying with their respective obligations under this code (including when conducting any discussions or negotiations arising out of the application of this code or exercising any discretion under it) at all times act in good faith.

## **1.6 Franchised services**

References to Franchised Services include:

- (a) railway passenger services which the appropriate designating authority has designated as eligible for provision under franchise agreements pursuant to section 23 of the Act;
  - (b) railway passenger services provided by a person appointed as a concessionaire or concession operator by a railway funding authority;
- and
- (c) railway passenger services provided by the relevant franchising authority, or another person on behalf of the relevant franchising authority, under section 30 of the Act.

## **CONDITION A2 - STANDARDS OF DOCUMENTATION**

Where in this code any person is required to prepare, produce or publish any specified information, that obligation is an obligation to ensure that the specified information:

- (a) is in terms which are, to the greatest extent reasonably practicable, precise, clear and unambiguous; and
- (b) contains the information specified for its contents by the provision of this code which requires its preparation, production or publication, and this Condition A2 is without prejudice to any further or other requirements specified in this code in relation to the specified information (including in Part K).

## **CONDITION A3 - PUBLICATIONS**

### **3.1 General Obligation**

- 3.1.1 Where in this code Network Rail is required to publish any specified information, that obligation is an obligation to ensure that the specified information:

- (a) is, subject to Condition A3.1.3, brought to the notice of every Train Operator, every Access Option Holder, every Passenger Transport Executive, Transport for London, the Scottish Ministers and the Welsh Assembly Government, the Office of Rail and Road and the Secretary of State.
- (b) is published on its website.

3.1.2 The obligation of Network Rail under Condition A3.1.1 shall have full effect on and from the date on which Condition A3 comes into effect unless the Office of Rail and Road has given a notice stating:

- (a) a later date on which Condition A3.1.1 shall have effect; and
- (b) its reasons,

in which event Condition A3.1.1 shall have effect on and from the date stated in the notice.

- 3.1.3
- (a) Any person to whom Network Rail owes an obligation under Condition A3.1.1(a) may give notice to Network Rail at any time stating that it does not wish to have information of any type or class brought to its notice under Condition A3.1.1(a).
  - (b) If a person gives notice under Condition A3.1.3(a) Network Rail's obligation under Condition A3.1.1(a) to such person shall not apply to the extent stated in the notice.
  - (c) A person who has given notice under Condition A3.1.3(a) may revoke or modify its notice at any time by further notice to Network Rail.

### **3.2 Sensitive information**

Where in this code Network Rail is required to publish any specified information which includes relevant items which are sensitive information on its website, that obligation shall be satisfied in respect of any relevant item if it publishes a non-sensitive version of that relevant item.

### **3.3 Secure Information**

Where in this code Network Rail is required to publish on its website any specified information which includes relevant items which are secure information, that obligation shall be satisfied if it:

- (a) indicates on its website:
  - (i) in general terms, the nature of the relevant item; and
  - (ii) that it will comply with all reasonable requests to supply any person to whom Network Rail owes an obligation under Condition A3.1.1(a), subject to Condition A3.1.3, with a paper copy of the relevant item; and
- (b) complies with requests of the kind specified in Condition A3.3(a)(ii).

### **3.4 *Hard copy information***

Where in this code Network Rail is required to publish on its website any specified information which includes relevant items which are hard copy information, but are not sensitive information, that obligation shall be satisfied if it:

- (a) indicates on its website:
  - (i) the nature of the relevant item; and
  - (ii) that it will comply with all reasonable requests to supply any person with a paper copy of the relevant item; and
- (b) complies with requests of the kind specified in Condition A3.4(a)(ii).

### **3.5 *Hard copy sensitive information***

Where in this code Network Rail is required to publish on its website any specified information which includes relevant items which are hard copy information and are sensitive information, that obligation shall be satisfied if it:

- (a) indicates on its website:
  - (i) the nature of the relevant item; and
  - (ii) that it will comply with all reasonable requests to supply any person with a paper copy of the non-sensitive version of the relevant item; and
- (b) complies with requests of the kind specified in Condition A3.5(a)(ii).



### **3.6 Determination**

3.6.1 A determination as to whether any relevant item is sensitive information may be made:

- (a) in relation to a relevant item submitted to Network Rail by another person, by the person submitting the relevant item, in the exercise of his rights under Condition A3.7.1; and
- (b) in relation to any other relevant item, by Network Rail.

3.6.2 A determination as to whether any relevant item is secure information or hard copy information may be made by Network Rail.

### **3.7 Non-sensitive versions**

3.7.1 Any person who is obliged to submit specified information to Network Rail may submit a non-sensitive version of particular relevant items, provided that he also submits such relevant items in their entirety and Network Rail shall publish the non-sensitive version of those relevant items.

3.7.2 If no non-sensitive version of a particular relevant item is submitted to Network Rail, Network Rail shall be entitled to assume that the relevant item does not contain any sensitive information and shall publish that relevant item in its entirety.

### **3.8 Appeals**

3.8.1 If any Access Party is dissatisfied with a determination made by:

- (a) Network Rail under Condition A3.6.1(b) or A3.6.2; or
- (b) any other person under Condition A3.6.1(a),

it may refer the matter for determination in accordance with the ADRR.

3.8.2 If any Access Party or Potential Access Party is dissatisfied with any decision of the relevant ADRR Panel in relation to any matter referred to it under Condition A3.8.1, that Access Party may refer the matter to the Office of Rail and Road for determination under Part M.

## **CONDITION A4 - NOTICE BY THE OFFICE OF RAIL AND ROAD**

#### **4.1 Giving of Notice**

Where in this code there is provision for a notice to be given by the Office of Rail and Road for any purpose, such notice:

- (a) may be given from time to time; and
- (b) shall only have effect if it has been:
  - (i) given to every Access Party, every Passenger Transport Executive, Transport for London, the Scottish Ministers and the Welsh Assembly Government, the Secretary of State, and every other person who has notified the Office of Rail and Road that it wishes to receive any such notice; and
  - (ii) published on its website and placed on the register maintained under section 72 of the Act (as a document issued or made by it under an access agreement).

#### **4.2 Deemed Receipt**

A notice given under this code shall be deemed to have been received:

- (a) if sent by hand or express postal delivery, at the time of delivery;
- (b) if sent by prepaid first class post from and to any place within the United Kingdom, 3 Working Days after posting unless otherwise proven;
- (c) if sent by facsimile (subject to confirmation of uninterrupted transmission by a transmission report) before 17.00 hours on a Working Day, on the day of transmission and, in any other case, at 09.00 hours on the first Working Day following the day of transmission; and
- (d) if sent by e-mail;
  - (i) upon sending if sent before 17:00 hours on a Working Day; or
  - (ii) in any other case, at 09:00 hours on the first Working Day following the day of transmission.

### **4.3    *Reasons for decisions***

An express provision of this code which requires or contemplates that the Office of Rail and Road should give reasons for its decision in any case does not affect the right of any person to be given reasons for any other decision of the Office of Rail and Road in any other case.

## **CONDITION A5 - LIMITATION ON LIABILITY**

### **5.1    *General***

If an Access Party fails to perform an obligation under this code, the provisions of its Access Agreement limiting the liability of such Access Party under that contract shall have effect in relation to such failure unless and to the extent that:

- (a)    an express provision states otherwise in any Part of this code; or
- (b)    an express provision states otherwise in the relevant Access Agreement.

### **5.2    *Saving***

Condition A5.1 does not apply to an obligation to pay compensation under Condition F3, G2 or G4.

## **CONDITION A6 - CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

### **6.1    *Application to third parties***

Except as provided in this Condition A6, no person who is not an Access Party shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any provision of this code.

### **6.2    *Application to Network Code***

Where in this code a right is given to any person who is not an Access Party, that person shall be entitled to enforce directly any such right under the Contracts (Rights of Third Parties) Act 1999 but only by way of injunction or other performance order of a court or competent tribunal and not by way of damages or other compensatory award.

## **CONDITION A7 - CONSULTATION**

### **7.1    *Consultation by a meeting***

Where in this code a person is required to consult with other persons on any matter, such consultation may take place at a meeting to which such persons are invited.

## Part B - Performance Monitoring

### Explanatory Note

- A. *Part B provides for the establishment by Network Rail of a Performance Monitoring System, designed to record whether trains pass specified monitoring points, the times at which they do so and the difference between those times and the corresponding scheduled times. The system is also designed to enable Network Rail to determine and record the cause of any delay or cancellation. Provision is made for Network Rail to notify and seek agreement from affected Train Operators regarding the cause of any such delay or cancellation, and there are procedures specified for resolving cases where Network Rail and a Train Operator disagree regarding the cause.*
- B. *Train Operators are given the right to notify Network Rail if the Performance Monitoring System is not fit for purpose and require Network Rail to investigate the grounds for such notification and report on its findings.*
- C. *Both Network Rail and Train Operators are given the right to audit and inspect the records and monitoring equipment of the relevant Performance Monitoring System and to require tests of the Performance Monitoring System to be carried out in the presence of an independent expert.*
- D. *Condition B5.3 also makes it clear that the TAC Parties can, however, agree a more onerous Performance Monitoring System than that contemplated by Part B. The model set out in Part B is therefore a minimum standard.*
- E. *Part B also incorporates the Delay Attribution Principles and Rules which is a document providing guidance on the attribution of delay.*
- F. *Part B also incorporates the Performance Data Accuracy Code which encompasses defined standards of accuracy of performance data.*
- G. *Provision is made for the setting up of a Delay Attribution Board whose purpose, constitution and procedures are set out in Conditions B6 and B7.*
- H. *This Explanatory Note does not form part of the Network Code.*

## DEFINITIONS

In this Part B, unless the context otherwise requires:

“Alternate”	means an alternate Member appointed pursuant to Condition B6.2.6;
“Band”	has the meaning defined in Part C;
“Board”	means the Delay Attribution Board constituted in accordance with Condition B6.2;
“Board Meeting”	means a meeting of the Board;
“Board Secretary”	means the secretary of the Board;
“Chair”	means the chair of the Board appointed pursuant to Condition B6.3.1 and, where he or she is acting as Chair, the Deputy Chair;
“Class”	has the meaning defined in Part C;
“Class Member”	has the meaning defined in Part C;
“Class Representative Committee”	has the meaning defined in Part C;
“costs”	includes expenses;
“Delay Attribution Principles and Rules”	means, subject to Condition A1.1(g), the document which provides guidance on the attribution of delay across the Network, entitled “Delay Attribution Principles and Rules” as issued by the Board;
“Deputy Chair”	means the Deputy Chair of the Board appointed pursuant to Condition B6.3.1;
“Franchised Passenger Class”	has the meaning defined in Part C;
“Member”	means a member of the Board and “Board Member” shall be construed accordingly;
“Network Rail Member”	means a Member who has been appointed by Network Rail;
“Non-Franchised Passenger Class”	has the meaning defined in Part C;
“Non-Network Rail Members”	means a member who has not been appointed by Network Rail;

“Non-Passenger Class”	has the meaning defined in Part C;
“Performance Data Accuracy Code”	means, subject to Condition A1.1(g), the code relating to the standards of performance data accuracy entitled “Performance Data Accuracy Code” as issued by the Board;
“Performance Monitoring System”	means the system for monitoring train performance described in Condition B1;
“Proposal for Amendment”	means any proposal to amend the Delay Attribution Principles and Rules or the Performance Data Accuracy Code; and
“railway safety levy”	has the meaning ascribed to it in regulation 2 of The Railway Safety Levy Regulations 2006.

## **CONDITION B1 - PROCEDURES FOR MONITORING PERFORMANCE**

### **1.1 *Performance Monitoring System***

Network Rail shall operate a system for monitoring train performance which accurately records:

- (a) the times at which trains arrive at, depart from and pass specified points;
- (b) the difference between the time at which a train arrives at, departs from or passes a specified point and the time published for such arrival, departure or passing in the Working Timetable;
- (c) all cancelled trains and trains failing to pass any specified point; and
- (d) the cause of train delays and cancellations.

### **1.2 *The Performance Data Accuracy Code***

#### **1.2.1 *Incorporation***

The Performance Data Accuracy Code is incorporated into and shall form part of this Network Code. Condition C8 shall apply, but Conditions C1, C2, C3, C4, C5, C6, C7 and C9 shall not apply, to the Performance Data Accuracy Code.

#### **1.2.2 *Obligations and Rights***

Each TAC Party shall observe and perform its obligations, and shall have the benefit of its rights, under the Performance Data Accuracy Code. For the purpose of Condition B1.1 “accurately” shall be construed in accordance with the Performance Data Accuracy Code.

### **1.3 *The Delay Attribution Principles and Rules***

The Delay Attribution Principles and Rules is incorporated into and shall form a part of this Network Code. Condition C8 shall apply, but Conditions C1, C2, C3, C4, C5, C6, C7 and C9 shall not apply, to the Delay Attribution Principles and Rules.

## **CONDITION B2 - DIAGNOSIS OF DELAYS OR CANCELLATIONS**

### **2.1 *Determination of causes of delays or cancellations***

Network Rail shall, in relation to any train delay or cancellation (subject to any thresholds agreed between Network Rail and each Train Operator), determine and record the persons and causes which are responsible for the delay or cancellation and where more than one, so far as practicable, the extent to which each person or cause is so responsible.



## **2.2 *Information relating to causes of delays or cancellations***

Network Rail shall, when determining and recording the persons and causes which are responsible for train delays and cancellations, have due regard to all information which is relevant in the circumstances, including the following:

- (a) information from any computerised or other recording system which Network Rail may, for the time being, be permitted to use for the purposes of a particular Access Agreement;
- (b) information supplied by signallers and other persons duly authorised to participate in the signalling of trains;
- (c) information supplied by any operator of trains, whether such information is within its knowledge or based on information supplied by other operators of railway assets;
- (d) information supplied by Network Rail, whether such information is within Network Rail's knowledge or based on information supplied by persons engaged or acting on behalf of, or otherwise in accordance with or subject to the instructions of, Network Rail or other operators of railway assets; and
- (e) information and guidance set out in the Delay Attribution Principles and Rules.

## **2.3 *Notification and agreement of delays or cancellations***

### **2.3.1 *Notification of delays or cancellations***

Network Rail shall, as soon as reasonably practicable following the occurrence of any train delay or cancellation affecting a Train Operator's train, notify that operator of the occurrence of that delay or cancellation and the responsibility, if any, for that delay or cancellation attributed by Network Rail to that operator. Any such notification shall be sent using the Performance Monitoring System (and/or any such others means of notification that has been agreed for this purpose between that Train Operator and Network Rail) and at the same time provide its reasons for doing so.

### **2.3.2 *Consideration by a Train Operator***

A Train Operator shall consider each delay or cancellation attributed by to it Network Rail and, if that Train Operator wishes to refer the attribution for further investigation it shall do so within two Working Days of receipt of that notice utilising the Performance Monitoring System (or any other means of notification that has been agreed for this purpose

between that Train Operator and Network Rail), and at the same time provide its reasons for doing so.

#### **2.3.3 *Agreement of delay attribution***

Any attribution shall, unless referred for further investigation by that Train Operator within two Working Days of receipt of that notice in accordance with Condition B2.3.2, be deemed to be agreed by that Train Operator.

### **2.4 *Matters referred for further investigation***

#### **2.4.1 *Procedure for conducting further investigation***

Within the next two Working Days after receipt of a notification from a Train Operator in accordance with Condition B2.3.2, Network Rail and that Train Operator shall attempt to resolve the matter referred for further investigation. Such further investigation shall take into account all relevant circumstances of the case and any relevant information set out in the Delay Attribution Principles and Rules.

#### **2.4.2 *Referral for review***

If agreement has not been reached within the two Working Days referred to in Condition B2.4.1, the matter shall be referred for review by the designated senior manager appointed by the Train Operator and the designated senior manager appointed by Network Rail for the purposes of this Condition B2.4.2.

#### **2.4.3 *Referral for further guidance or resolution***

If, within 20 Working Days, or such other period as may be agreed by Network Rail and the Train Operator, of the matter being referred for review pursuant to Condition B2.4.2, Network Rail and the Train Operator are unable to agree on the attribution, they shall seek guidance from the Board, or from any sub-committee that the Board has designated for this purpose, on the appropriate application of the Delay Attribution Principles and Rules or on any other relevant matter.

#### **2.4.4 *Guidance from the Board***

If, within 10 working days of guidance being received from the Board or any designated sub-committee pursuant to Condition B2.4.3, Network Rail and the Train Operator are unable to agree on the attribution, they shall refer the matter for determination in accordance with the ADRR.

#### 2.4.5 *Precedence*

For the purposes of operating the procedures set out in this Condition B2.4, in any Access Agreement Network Rail and the Train Operator may substitute for any timescale prescribed in this Condition B2.4 a corresponding timescale in Schedule 8 or its equivalent (Performance Regime) of that Access Agreement.

### **2.5 *Amendments to the Delay Attribution Principles and Rules or the Performance Data Accuracy Code***

#### 2.5.1 *Entitlement to make a Proposal for Amendment to the Delay Attribution Principles and Rules or the Performance Data Accuracy Code*

- (a) Any Access Party shall be entitled to sponsor a Proposal for Amendment.
- (b) The Board shall be entitled to sponsor a Proposal for Amendment provided that any such proposal is approved by the Board as a resolution in accordance with Condition B7.2.1.
- (c) Any Proposal for Amendment shall:
  - (i) be in writing and sent to the Board Secretary;
  - (ii) contain reasonable particulars of the amendment proposed;
  - (iii) be supported by an explanation in reasonable detail of the reasons for the proposed amendment; and
  - (iv) include, to the extent that it is able to do so, for the benefit of any Access Party to whom a notice is given under Condition B2.5.2(a), an assessment of any wider impact (including commercial impact) that the proposal is likely to have on another Access Party, and a proposed solution to mitigate such impact.

#### 2.5.2 *Notice of Proposal for Amendment*

The Board Secretary shall, within five working days following receipt of a Proposal for Amendment pursuant to Condition B2.5.1(a), or, if later, within five working days following receipt of any clarification that the Board may reasonably request from the sponsor of that proposal, or within five working days of receipt of a Proposal for Amendment pursuant to Condition B2.5.1(b):

- (a) give notice of that proposal (including any associated impact assessment and proposed solution provided in accordance with Condition B2.5.1(c)(iv)) to each Access Party; and

- (b) invite the submission to the Board of written representations in respect of that proposal within such period as is reasonable in all the circumstances (the “Consultation Period”), being a period of not less than 20 working days from the date of notification under paragraph (a) above. In making representations, an Access Party should:
  - (i) specify whether or not it accepts the proposed change and provide an explanation for its position;
  - (ii) indicate any wider impact (including commercial impact) that the proposed change is likely to have on its business; and
  - (iii) confirm whether it is content with any solution proposed by the sponsor; or
  - (iv) provide details of any alternative solution it considers appropriate to address the wider impact (including commercial impact); and
  - (v) indicate whether such an alternative has been discussed and agreed with Network Rail and/or a potentially affected Train Operator.

#### *2.5.3 Calling of Board Meeting to consider a Proposal for Amendment*

The Board Secretary shall, at the end of the Consultation Period:

- (a) identify the Board Meeting at which the Proposal for Amendment will be considered; and
- (b) supply the Proposal for Amendment to each Member together with:
  - (i) copies of all representations received pursuant to Condition B2.5.2(b); and
  - (ii) if the sponsor of the proposal consents, any modification to that proposal.

#### *2.5.4 Modification of Proposal for Amendment*

2.5.4.1 A modification of any Proposal for Amendment may be proposed:

(a) by any Access Party during the Consultation Period described in Condition B2.5.2(b); or

(b) by any of the Members at the Board Meeting called in respect of such Proposal for Amendment.

- 2.5.4.2 The Board shall consider any modifications, whether material or otherwise, which are proposed to a Proposal for Amendment.
- 2.5.4.3 If the proposed modification to any Proposal for Amendment is:
- (a) a material modification; and
  - (b) if seven or more Members (including at least two Network Rail Members and at least two Non-Network Members) present, and entitled to vote, at the Board Meeting called in respect of such Proposal for Amendment, shall have voted in favour of the proposed modification, the Board shall treat the proposal as a new Proposal for Amendment and the provisions of Conditions B2.5.2 and B2.5.3 shall apply
- then the Board shall request the Board Secretary to carry out further consultation in respect of such Proposal for Amendment incorporating the proposed modification.
- 2.5.4.4 If the proposed modification to any Proposal for Amendment is:
- (a) a non-material modification; and
  - (b) if all the Members present, and entitled to vote, at the Board Meeting called in respect of such Proposal for Amendment, shall have voted in favour of the proposed modification
- then no further consultation shall be carried out in respect of such Proposal for Amendment and the Board shall consider the Proposal for Amendment, as modified, pursuant to Condition B2.6.1.
- 2.5.4.5 For the purposes of Condition B2.5.4.4, the failure of a Member to cast its vote or intimate its abstention shall be treated as a vote in favour of the proposed modification.
- 2.5.4.6 If Condition B2.5.4.4(a) is satisfied and Condition B2.5.4.4(b) is not satisfied, the proposed modification shall be disregarded and the Proposal for Amendment to which it relates shall be considered without taking the modification into account.

2.5.4.7 If the Board cannot agree unanimously whether or not a proposed modification is material; then, for the purposes of this Condition B2.5.4, the modification shall be treated as though it is a material modification.

#### 2.5.5 *Clarification*

The sponsor of a Proposal for Amendment shall promptly comply with all reasonable written requests of the Board for further clarification of the proposal.

### 2.6 ***Consideration by the Delay Attribution Board***

#### 2.6.1 *Voting passmark*

The Board shall consider and may approve each Proposal for Amendment. A Proposal for Amendment shall have been approved only if seven or more Members (including at least two Network Rail Members and at least two Non-Network Rail Members) present, and entitled to vote, at the relevant Board Meeting shall have voted in favour of that Proposal for Amendment, provided that the failure of a Member to cast their vote or to intimate their abstention shall be treated as a vote in favour of the Proposal for Amendment.

#### 2.6.2 *Rights of attendance*

A sponsor of a Proposal for Amendment shall be entitled to attend the relevant part of any Board Meeting at which the Proposal for Amendment is to be considered.

### 2.7 ***Consequences of a Board decision***

#### 2.7.1 *Decision to Approve*

Any decision by the Board to approve a Proposal for Amendment shall state the date from which it is proposed that such approved amendment is to take effect being a date no earlier than the date on which the Board reached its decision. The Board Secretary shall, as soon as reasonably practicable following such decision, submit the approved Proposal for Amendment (and any associated impact assessment and proposed solution) to the Office of Rail and Road, together with a written memorandum:

- (a) explaining in reasonable detail the reasons for the proposed amendment, why the Board considers that the proposed changes are necessary, and how they will improve the industry delay attribution process;

- (b) containing details of the results of the consultation process (including copies of any representations made pursuant to Condition B2.5.2(b));
- (c) detailing what, if any, changes were made to the original Proposal for Amendment in the light of representations received, and why these changes have been accepted;
- (d) stating the reasons behind the rejection of any representations in respect of the Proposal for Amendment;
- (e) providing details of where a number of Proposals for Amendment put forward to the Board have been merged; and
- (f) stating the reasons for any dissent from the Board's decision by any Board Member.

#### *2.7.2 Requirement for Office of Rail and Road's approval*

No Proposal for Amendment shall have effect unless the Office of Rail and Road gives notice to the Board in writing that it approves the proposal and confirms the date of introduction.

#### *2.7.3 Notification of approval*

If the Office of Rail and Road gives its approval of the Proposal for Amendment, the Board Secretary shall, as soon as reasonably practicable:

- (a) notify details of the approved amendment and when it will take effect to all Access Parties;
- (b) arrange for the approved amendment to be incorporated into a revised version of the Delay Attribution Principles and Rules or Performance Data Accuracy Code; and
- (c) publish and circulate the revised version of the Delay Attribution Principles and Rules or Performance Data Accuracy Code to all Access Parties and to the Office of Rail and Road.

#### *2.7.4 Decision to Reject*

The Board Secretary shall, as soon as reasonably practicable following a decision of the Board, or following receipt of notification of a decision of the Office of Rail and Road, to reject a Proposal for Amendment, notify the sponsor of that decision.

### **2.8 Power of the Board to make non-material modifications to the Delay Attribution Principles and Rules and the Performance Data Accuracy Code**

2.8.1 Without prejudice to Condition B2.5.1(b), the Board is entitled to make modifications to the Delay Attribution Principles and Rules and the Performance Data Accuracy Code provided that such modifications are:

(a) proposed at a Board Meeting;

(b) non-material; and

(c) all the Members present, and entitled to vote, at the Board Meeting called in respect of such non-material amendment, shall have voted in favour of the proposed modification.

2.8.2 For the purposes of Condition B2.8.1, the failure of a Member to cast its vote or intimate its abstention shall be treated as a vote in favour of the modification.

2.8.3 If the Board cannot agree unanimously whether or not a proposed modification is non-material; then, for the purposes of this Condition B2.8, the modification shall not be made.

2.8.4 Following any modifications made by the Board pursuant to Condition B2.8, the Board Secretary shall, as soon as reasonably practicable following such decision, submit the approved modification to the Office of Rail and Road explaining in reasonable detail the reasons for the proposed modification.

2.8.5 No modification made pursuant to Condition B2.8 shall have effect unless the Office of Rail and Road gives notice to the Board in writing that it approves the modification and confirms the date of introduction.

### **CONDITION B3 - SYSTEM INVESTIGATION**

#### **3.1 *Notification of unsatisfactory system***



A Train Operator may, when it has reasonable grounds for considering that the Performance Monitoring System is not satisfying the requirements set out in Condition B1, notify Network Rail of the manner in which the Performance Monitoring System is alleged not to satisfy such requirements.

### **3.2 *Investigation of system***

As soon as practicable following receipt of a notice from a Train Operator under Condition B3.1, Network Rail shall investigate the matters complained of and shall, within the period of 20 working days following the date of receipt of that notice, prepare and deliver to that Train Operator a report of its investigations which shall include:

- (a) details of all relevant tests and checks carried out by Network Rail;
- (b) the results of Network Rail's investigations;
- (c) Network Rail's conclusion as to whether the Performance Monitoring System failed to satisfy the requirements set out in Condition B1 in the manner alleged by that Train Operator or in any other respect;
- (d) Network Rail's reasons for its conclusions and copies of all relevant data and documentation in respect thereof; and
- (e) any steps which Network Rail is taking or proposes to take in respect of any failure to satisfy the said requirements.

### **3.3 *Adjustment to prior results***

If it is established in accordance with Condition B3.2 or Condition B4.2 that the Performance Monitoring System is not satisfying the requirements set out in Condition B1, the relevant results obtained from the Performance Monitoring System for the period of two months preceding the date of the investigation or, if later, since the date of the last investigation under Condition B3.1 (but not in respect of earlier periods), shall be adjusted in a manner which is fair and reasonable to correct those results.

## **CONDITION B4 - RECORDS, AUDIT AND TESTING**

### **4.1 *Obligation to keep information***

The TAC Parties shall, for a period of not less than six years, keep summaries of all material information relating to the monitoring of train performance.

### **4.2 *Right to audit and inspect***

Either TAC Party may, without prejudice to Condition B3.2 and on giving at least five working days' prior notice to the other TAC Party:

- (a) audit and inspect at any reasonable time all processes, systems and records of the Performance Monitoring System for any particular period and in relation to the Train Operator's Services;
- (b) inspect at any reasonable time all such premises and equipment as are used in connection with the Performance Monitoring System to monitor train performance in respect of the Train Operator's Services; and
- (c) require the other TAC Party to carry out analysis, investigations and tests of the Performance Monitoring System including the processes, systems and equipment used in connection with the Performance Monitoring System in the presence of an independent expert nominated by the first TAC Party, such tests to be as reasonably required by the first TAC Party to determine its accuracy and suitability to monitor train performance in respect of the Train Operator's Services.

#### **4.3 *Costs to be borne by investigating party***

Subject to Condition B4.4, any audit, inspection, analysis, investigation or testing carried out in accordance with Condition B4.2 shall be at the requesting TAC Party's own cost.

#### **4.4 *Costs to be borne by party subject to investigation***

Where the overall results of the Performance Monitoring System for that period are shown as a result of any audit, inspection, analysis, investigation or testing to be inaccurate in any material respect due to any act or omission by the TAC Party which is the subject of the audit, inspection, analysis, investigation or testing, that TAC Party shall bear the reasonable cost of both TAC Parties of that audit, inspection, analysis, investigation or testing.

### **CONDITION B5 - CO-OPERATION**

#### **5.1 *Review of operations***

The TAC Parties shall, not less than once every six months, meet, review performance and discuss alterations to their operations which will improve train performance and reduce train delays and cancellations.

#### **5.2 *Implementation of alterations***

The TAC Parties agree to use all reasonable endeavours to implement any alterations agreed under Condition B5.1.

#### **5.3 *Obligations in Access Agreement***

Nothing in this Part B shall restrict the TAC Parties from agreeing, in an Access Agreement, obligations in relation to performance monitoring which are more onerous than those contained in this Part B.

## **CONDITION B6 - DELAY ATTRIBUTION BOARD**

### **6.1 Purpose of the Board**

#### **6.1.1 Delay Attribution Principles and Rules and Performance Data Accuracy Code**

The purpose of the Board is to lead, monitor and advise on the effectiveness and accuracy of the delay attribution process and use of the Delay Attribution Principles and Rules and the Performance Data Accuracy Code.

#### **6.1.2 Proposal for Amendment**

The Board may receive, or sponsor, Proposals for Amendment, pursuant to Condition B2.5.1, and has responsibility for considering whether or not the Delay Attribution Principles and Rules or the Performance Data Accuracy Code as appropriate should be amended in accordance with any such proposal, after taking account of information supplied by the Board Secretary pursuant to Condition B2.5.3(b).

#### **6.1.3 Guidance**

The Board will also provide guidance to TAC Parties on request to assist in the resolution of disagreements concerning delay attribution.

### **6.2 Establishment and composition of the Board**

#### **6.2.1 General**

The Board is hereby established and shall consist of the Chair, the Board Secretary and 12 Members of whom one shall be appointed Deputy Chair pursuant to Condition B6.3.1(b). The Members shall consist of the following:

- (a) six Network Rail Members;
- (b) one Non-Network Rail Member from each of the three Bands of the Franchised Passenger Class;
- (c) one Non-Network Rail Member from each of the two Bands of the Non-Passenger Class; and
- (d) one Non-Network Rail Member from the Non-Franchised Passenger Class.

Neither the Chair nor the Board Secretary shall be a Member.

### 6.2.2 *Appointment of Members*

Non-Network Rail Members shall be appointed by election. Elections shall be carried out in the same way as elections of members of the Class Representative Committee are carried out pursuant to Part C.

Network Rail Members can be appointed at any time provided that Network Rail has given at least ten working day' notice of such appointment to the Board Secretary.

The Board Secretary shall, as soon as reasonably practicable following the election or appointment of a new Member, notify the Chair, all Members and Class Members of that election or appointment.

### 6.2.3 *Duration of appointment*

Subject to Condition B6.2.4:

- (a) unless re-elected, a Non-Network Rail Member shall be treated as having ceased to hold office on the 1 April which is nearest to the date which is two years after the date of their appointment; and
- (b) a Network Rail Member shall cease to hold office when removed by Network Rail in accordance with Condition B6.2.4.1.

### 6.2.4 *Loss of office*

#### 6.2.4.1

A Non-Network Rail Member may be removed from office and a replacement elected in his or her place by a majority in number of members of the relevant Class or Band (as the case may be) present (whether in person or by proxy) and voting at the relevant meeting called for the purpose of such removal and substitute appointment;

A Network Rail Member may be removed from office and a replacement appointed in his or her place provided Network Rail has given at least ten working days' notice of such reappointment to the Board Secretary.

#### 6.2.4.2

A Member:

- (a) shall be treated as having resigned from office if he or she dies or becomes of unsound mind;
- (b) shall, if he or she ceases to be an employee of a company which is a member of the Class or Band which elected or appointed him or her but continues to be an employee of an Access Party, as soon

as is reasonably practicable notify the Board Secretary, and may continue as a Non-Network Rail Member or Network Rail Members (as the case maybe) until such time as that Class or Band has elected or appointed his or her successor pursuant to Condition B6.2.4.1; and

- (c) shall, if he or she ceases to be an employee of an Access Party, resign from office; or, if he or she fails to resign, shall be treated as having resigned.

#### 6.2.5 *Alternates*

Each Member (other than an Alternate) shall:

- (a) appoint any other Member or any other person from the same Class or Band who is willing to act to be their Alternate; and
- (b) remove that Alternate from office as their Alternate.

The appointment or removal of an Alternate shall be by notice given to the Board Secretary the Member making or revoking the appointment not later than two working days before a Board Meeting.

#### 6.2.6 *Rights of Alternates*

- (a) An Alternate shall be entitled:
  - (i) to receive notice of all Board Meetings which their appointer is entitled to attend;
  - (ii) to attend and vote at any such Board Meeting at which the Member which appointed him or her is not personally present; and
  - (iii) generally to perform all the functions of the Member which appointed him or her to act in their absence.
- (b) Save as otherwise provided in Conditions B6.2.5 and B6.2.6, an Alternate shall be deemed for all purposes to be a Member.
- (c) An Alternate shall cease to be an Alternate if the Member which appointed him or her ceases to be a Member or revokes their appointment pursuant to Condition B6.2.5.

### **6.3 *The Chair, Deputy Chair and Board Secretary***

#### 6.3.1 *Appointment of Chair and Deputy Chair*

The Board shall appoint:

- (a) its Chair, who shall:
  - (i) not be a Member;
  - (ii) have suitable experience of the railway industry; and
  - (iii) not, during their term of office, be employed by or otherwise connected with any Access Party or receive any benefit from any Access Party in return for services provided to it, in either case in a way which may compromise their impartiality; and
- (b) one of its Members to act as Deputy Chair.

Each such appointment and any re-appointment shall be made by unanimous resolution.

#### 6.3.2 *Declaration of connections*

The Chair shall on appointment declare to the Board Secretary any relevant connection which he or she has or has had with the railway industry, and shall during their term of office promptly disclose any new connection of that kind. The Board Secretary shall provide a copy of any disclosure made under this Condition B6.3.2 to each Member and to every Access Party which requests it.

#### 6.3.3 *Fees, expenses and allowances of Chair*

Subject to Condition B6.3.4, the Chair shall hold office on such terms as the Board shall determine. Where the terms on which the Chair holds office include provision for the payment to him or her of any allowances or expenses, the rate at which those allowances and expenses are paid shall be determined by the Board.

The terms on which the Chair holds office may, in addition to providing for their remuneration, include provision for the payment of such pensions, allowances or gratuities to or in respect of him or her, or such contributions or payments towards provision for such pensions, allowances or gratuities, as may be determined by the Board.

#### 6.3.4 *Duration of appointment of Chair*

The Chair shall be appointed for a term of two years, and may be reappointed. The Board may remove him or her from office on the motion of any Member, provided that at least ten working days' written notice of the intention to table such a motion has been given to all Members and the Chair. A motion to remove the Chair shall:

- (a) in the case of removal on the ground of the incapacity or misbehaviour of the Chair, be passed on the positive resolution of

at least seven Members (including at least two Network Rail Members and at least two Non-Network Rail Members); and

- (b) in any other case, be passed only by unanimous resolution.

#### 6.3.5 *Appointment of successor Chair*

If, within two months of the termination (for whatever reason) of the period of office of a Chair, the Board shall have failed to appoint a new Chairman pursuant to Condition B6.3.1, the Board shall:

- (a) by unanimous resolution, determine a list of three candidates for the office of Chair;
- (b) send the list to the Office of Rail and Road, together with such information in relation to the candidates and the preferences of the Board Members as the Office of Rail and Road may request; and
- (c) be deemed to have appointed as Chair the candidate selected by the Office of Rail and Road.

#### 6.3.6 *Deputy Chair - appointment and removal*

The Deputy Chair shall be appointed by the Board for a term of one year, and may be reappointed. The Board may remove him or her from office on the motion of any Member, provided that at least ten working days' written notice of the intention to table such a motion has been given to all Members and the Chair and, unless the Chair and all Members otherwise consent, a Board Meeting shall have been held at which the motion shall have been debated and, if thought fit, passed.

#### 6.3.7 *Voting by Deputy Chair*

The Deputy Chair shall be entitled to cast their vote as a Member notwithstanding that, at the relevant time, he or she may be acting as Chair of the Board or the sub-committee in question.

#### 6.3.8 *Network Rail as secretariat*

Network Rail shall be the secretariat of, and shall provide all administrative and other services reasonably necessary for, Board Meetings, including in relation to the convening of meetings, the service of notices of meetings and preparing and circulating minutes of all meetings. After consulting the Board and after taking accounts of its comment (if any) made in response, Network Rail shall appoint the Board Secretary and, as soon as reasonably practicable thereafter, notify all Members and the Chair of the appointment.

#### 6.3.9 *Terms of appointment of Deputy Chair, Board Secretary etc.*

The Deputy Chair (subject to Condition B6.3.6) and the Board Secretary shall hold office on such terms as the Board shall determine. Where the terms on which each of them holds office include provision for the payment to them of any allowances or expenses, the rate at which those allowances and expenses are paid shall be determined by the Board.

The terms on which each of the Deputy Chair and the Board Secretary holds office may include provision for their remuneration, the payment of such pensions, allowances or gratuities to or in respect of then, or such contributions or payments towards provision for such pensions, allowances or gratuities, as may be determined by the Board.

#### 6.3.10 *Chair etc. not employees*

None of the Chair, the Deputy Chair or the Board Secretary shall by virtue of their office be an employee of the Board or any person.

### 6.4 Funding of the Board etc.

#### 6.4.1 *Payments by TAC Parties*

Each TAC Party shall, within 20 working days of being requested to do so by the Board Secretary, pay to the Board Secretary an amount of the estimated costs and expenses of the Board equal to the proportion which the amount of railway safety levy most recently determined as payable by it bears to the aggregate railway safety levy payable by all TAC Parties. The amount payable by any TAC Party which is not required to pay any amount of railway safety levy shall be assessed by the Board and shall be fair and reasonable. The Board Secretary shall receive and hold amounts paid pursuant to this Condition B6.4.1 on behalf of the Board.

#### 6.4.2 *Board to estimate costs*

The estimated costs and expenses of the Board referred to in Condition B6.4.1 shall be the amount which the Board reasonably expects will be its costs of operation in the year (beginning 1 April) in respect of which the activities of the Board are required to be funded, taking into account any receipt, including any sums which it reasonably expects to receive in or for that period pursuant to Condition B6.4.1.

#### 6.4.3 *Adjustments of estimates*

To the extent that the actual costs and expenses of the Board shall have been underestimated or overestimated by the Board in respect of any period, the amount of the difference shall be carried over to the following



year and shall be added to or deducted from the amounts payable by TAC Parties in that following year.

Any credit due to an TAC Party may be withheld, in whole or in part, at the sole discretion of the Board if that TAC Party has failed in the previous year to pay the required amount for that year within 20 working days of being requested to do so by the Board Secretary pursuant to Condition B6.4.1.

#### **6.4.4 *Accountants' certificate***

Any TAC Party shall be entitled to require the Board Secretary to provide it with a certificate from a firm of chartered accountants of national standing in relation to the costs and expenses of the Board in respect of any year. The Board Secretary shall promptly comply with any such request.

### **6.5 *Capacity of Board to enter into Contracts with Officers***

In making any appointment or otherwise exercising its powers under this Condition B6, the Board is authorised to act on behalf of the TAC Parties.

### **6.6 *Indemnities by new, and to retiring, Access Parties***

#### **6.6.1 *New Access Parties***

An Access Party, on becoming such, shall indemnify those who are already Access Parties (the “existing Access Parties”) against its share of any liability which arises:

- (a) while it is an Access Party; and
- (b) under a contract of appointment entered into by the Board on behalf of the existing Access Parties (or some of them, and whether or not with others) before it became an Access Party.

Its share shall be the appropriate proportion of the liability calculated in accordance with Condition B6.4.1, applied to the Access Parties at the time the liability arises.

#### **6.6.2 *Retiring Access Parties***

An Access Party which ceases to be such shall be indemnified by the Access Parties which remain as such against any liability which arises:

- (a) after it ceases to be an Access Party; and
- (b) under a contract of appointment entered into by the Board on behalf of it (with other Access Parties) while it was an Access Party,

such that the Access Parties as at the date the liability arises shall bear it in the proportion set out in Condition B6.4.1, applied to them.

## **6.7 Sub-committees**

### **6.7.1 *Setting up sub-committees***

The Board shall be entitled to set up sub-committees to consider particular topics related to the activities of the Board. The Board shall have the power, by unanimous vote, to determine the constitution of any sub-committee. If it shall fail to reach such a decision, the Chair shall make a ruling determining the matter which shall be binding on the Board.

### **6.7.2 *Membership***

The Board shall have the power, by unanimous vote, to determine the membership of each sub-committee. If it shall fail to reach such a decision, the Chairman shall make a ruling determining the matter which shall be binding on the Board. The same person may be a Board Member and a member of any sub-committee.

### **6.7.3 *Chair of sub-committees***

The chair of any sub-committee shall be either the Chair or any other person elected by the sub-committee in question and approved by the Chair.

### **6.7.4 *Procedural rules***

Condition B7.3 shall apply in relation to the rules of procedure of sub-committees, except that the Board shall have the power to modify the timescales specified in Condition B7.1.1 in their application to a meeting of a sub-committee.

## **CONDITION B7 - PROCEEDINGS OF THE BOARD**

### **7.1 *Board Meetings***

The Board shall meet on average every 20 working days in accordance with the provisions of this Condition B7.1

#### **7.1.1 *Board Secretary to arrange meetings***

The Board Secretary shall:

- (i) no later than 1 December in each calendar year provide the Board with the date, venue and time of each Board Meeting for the forthcoming calendar year; and

(ii) at least three working days prior to each Board Meeting notify the Board the:

(a) date, venue and time of that Board Meeting; and

(b) business of that Board Meeting.

#### **7.1.2 Board Secretary to cancel or reschedule meetings previously arranged**

The Board Secretary shall either cancel or reschedule any Board Meeting if the Board has decided at a previous Board Meeting that there is likely at the prospective Board Meeting to be either insufficient business to transact or insufficient Members available to achieve a quorum in accordance with Condition B7.2.27.1.3 *Business previously advised*

In addition to the business of a Board Meeting that has been notified to the Board in accordance with Condition B7.1.1(ii)(b), other business arising subsequently may be placed on the agenda of that Board Meeting only at the discretion of the Board Secretary or Chair.

## **7.2 Conduct of Delay Attribution Board Meetings**

### **7.2.1 Regulation of business**

Save as otherwise provided in this Part B, Members shall meet at Board Meetings for the despatch of business provided that:

(a) any resolution in respect of such business shall only be approved if at least seven Members (including at least two Network Rail Members and at least two Non-Network Rail Members ) present, and entitled to vote, at a Board Meeting shall have voted in favour of that resolution; and

(b) the failure of a Member to cast their vote or to intimate their abstention in respect of a resolution shall be treated as a vote in favour of that resolution.

### 7.2.2 *Quorum*

No business shall be transacted at any Board Meeting unless a quorum of Members is present at that Board Meeting.

The quorum for each Board Meeting shall be the Chair and seven Members, of which at least three shall be Network Rail Members and at least three shall be Non-Network Rail Members.

With the consent of the Chair, or in accordance with such directions as the Chair shall have given, the Deputy Chair may attend in the place of the Chair and shall be counted both as Chair and as a Board Member for the purposes of assessing the quorum.

If, due to unforeseen circumstances (including travel delay or ill health), neither the Chair nor the Deputy Chair are able to attend a Board Meeting, and that Board Meeting has a quorum of seven members, of which at least three shall be Network Rail Members and at least three shall be Non-Network Rail Members, then those Members in attendance may elect, for that Board Meeting only, a temporary Chair from amongst the Members in attendance to enable the Board to carry out its business. The person elected as temporary Chair shall be counted both as Chair and as a Board Member for the purposes of assessing the quorum.

### 7.2.3 *Adjournment without a quorum*

If a quorum is not present at a Board Meeting, that Board Meeting shall be adjourned and any business carried over to the next Board Meeting.

### **7.3 Rules of procedure of the Board and sub-committees**

#### **7.3.1 Board to make rules**

Unless otherwise provided in this Condition B7.3, the Board shall be entitled to make and from time to time revise the rules of procedure to be followed by the Board and any sub-committee. If no rules of procedure shall have been made for any sub-committee, the rules of procedure of the Board shall apply *mutatis mutandis* to the proceedings of the sub-committee as if it were the Board.

#### **7.3.2 Power to delegate power to make rules**

The Board may delegate the power to make and revise rules of procedure for any sub-committee to the sub-committee in question, subject to such (if any) conditions as the Board shall specify in the delegation. Any such delegation may be revoked at any time by notice in writing given by the Board to the chair of the sub-committee in question. Notice of any such delegation or revocation shall be promptly given to each member of the sub-committee in question. This Condition B7.3 shall apply *mutatis mutandis* to rules made pursuant to a delegation, except that Condition B7.3.3 shall apply as if references in that Condition to “the Chair” were references to both the Chair of the Board and the chair of the sub-committee in question.

#### **7.3.3 Consultation with Chair**

No rules of procedure may be made or revised pursuant to this Condition B7.3 unless the Board shall have:

- (a) consulted the Chair as to the proposed rules or revisions; and
- (b) taken into account any representations or objections he or she shall have made within such time as the Board shall have specified for the purpose.

In so consulting, the Board shall provide a copy of the proposed rules or revisions to the Chair.

#### **7.3.4 Part B to prevail**

Where Part B provides for the procedure to be followed in the determination of any matter referred to the Board or any sub-committee, those provisions shall prevail and the Board shall have no power to make inconsistent rules of procedure.

#### **7.4    *Minutes***

The Board Secretary shall prepare full and accurate minutes of every Board Meeting. The minutes shall be considered and approved (with or without modification) at the next Board Meeting. An Access Party may request the Board Secretary to provide it with a copy of the approved minutes of any Board Meeting. The Board Secretary will comply with any such request as soon as reasonably practicable.

The Board Secretary will also compile and publish a summary of the minutes of each Board Meeting on the Board's website not later than five working days after their approval.

#### **7.5    *Liability of Officers***

Neither the Chair, the Deputy Chair or the Board Secretary shall be liable to any Access Party for any act or omission (including negligence) in connection with any Board proceedings under this Part B unless the act or omission is established to have been in bad faith.

#### **7.6    *Website***

The Board Secretary shall, on behalf of the Board, procure the establishment of a website upon which he or she shall publish from time to time relevant documents agreed by the Board as being relevant to its business and which are suitable for general publication.

# Part C - Modifications to the Network Code

## Explanatory Note

- A. *Part C provides for a democratic process by which the Network Code and the ADRR may be changed. Class protection is provided for each of four interest groups (or Classes), namely Network Rail, franchised passenger Train Operators, non-franchised passenger Train Operators and non-passenger Train Operators (collectively referred to as "Train Operators"). The latter three classes may include Access Option Holders. The second and last of these groups are subdivided into Bands reflecting the relative size and nature of those groups and their respective members.*
- B. *An Access Beneficiary can only be a member of one class, which is determined by the type of railway services in respect of which it pays the greatest part of its Track Charges.*
- C. *Each of the Classes (and, where appropriate, Bands) is given the right, annually, to elect Class Representatives to a Class Representative Committee. The Committee is charged with responsibility for considering and, if it thinks fit, approving proposals for changing the Network Code.*
- D. *The Class Representative Committee is to establish rules of procedure which are to be followed for all Committee Meetings. Objections to any of the rules of procedure may be made by the Office of Rail and Road and, in specific circumstances, by any Class Member or any person who proposes in good faith to enter into an Access Agreement or become the holder of an access option.*
- E. *Any Class Member, any person who proposes in good faith to enter into an Access Agreement or become the holder of an access option or the Office of Rail and Road is entitled to make a Proposal for Change for consideration by the Class Representative Committee. Proposals must be made in writing to Network Rail.*
- F. *There are eight members of the Committee. Each of these may, as part of the democratic process, vote on proposals for changing the Network Code. Normally six must vote in favour for a Proposal for Change to the Network Code to be carried.*

- G. *On the satisfaction of certain criteria, Network Rail and any two of the Class Representatives of the Franchised Passenger Class have an ability to veto a proposal to change the Network Code. This right of veto is subject to an additional appeal procedure.*
- H. *Any Class Member, any person who proposes in good faith to enter into an Access Agreement or become the holder of an access option, the Office of Rail and Road, the Secretary of State or any Class Representative is entitled to propose a modification to any Proposal for Change for consideration by the Class Representative Committee. The number of votes required for any such modification to be incorporated into the relevant Proposal for Change depends on whether or not the modification is a material modification.*
- I. *Network Rail is to provide the secretariat function for the convening and holding of Class Meetings, election of Class Representatives, the convening and holding of Committee Meetings and the consideration of proposals to change the Network Code. As part of this function, Network Rail will maintain and update, as appropriate, a website containing various information relating to Committee Meetings and Proposals for Change.*
- J. *The Office of Rail and Road is given certain rights to determine complaints made regarding a failure to comply with any part of the procedure relating to a Proposal for Change.*
- K. *In addition to the democratic process described above, the Office of Rail and Road is given certain rights to require changes to the Network Code. Any such changes are to be made only after due consultation with all affected parties and with other relevant statutory bodies.*
- L. *The ADRR may be changed in accordance with the same procedures.*
- M. *This Explanatory Note does not form part of the Network Code.*



## DEFINITIONS

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

“Alternate Representative” means an alternate of a Class Representative as described in Condition C3.2.5;

“Annual Class Meeting” means, in respect of any Class, an annual meeting of members of that Class called by Network Rail at any time during the final quarter of each calendar year;

“Band” means:

- (a) in relation to the Non-Passenger Class, either one of the two bands of members of that Class who are Train Operators consisting respectively of those Train Operators whose annual Track Charges relating to the provision of services for the carriage of goods by railway amount as nearly as practicable to the first 75% and the final 25% of the aggregate relevant annual Track Charges payable by all of the members, listed at the relevant time on the basis of descending value of the relevant annual Track Charges payable by them at that time; and
- (b) in relation to the Franchised Passenger Class, any one of the three bands of members of that Class who are Train Operators consisting respectively of those Train Operators whose annual Track Charges relating to the provision of Franchised Services amount as nearly as practicable to the first 40%, the next 40% and the final 20% of the aggregate relevant annual Track Charges payable by all of the members, listed at the relevant time on the basis of descending value of the relevant annual Track Charges payable by them at that time,

provided that in relation to [3](#):

- (i) an Access Option Holder (other than a Freight Customer Access Option Holder) who is not also a

Train Operator already falling within paragraph (a) or (b) above, they will be assigned, as a member of either the Non-Passenger Class or Franchised Passenger Class, to the respective Non-Passenger Class band or Franchised Passenger Class band in accordance with paragraph (a) or (b) above based on their forecast annual Track Charges for the rights in the Access Option that have not been exercised within a track Access Agreement; and

- (ii) a Freight Customer Access Option Holder who is not also a Train Operator already falling within paragraph (a) or (b) above, will be assigned, as a member of the Non-Passenger Class, to the Non-Passenger Class band representing the final 25% of the relevant annual Track Charges referred to in paragraph (a) above.

The allocation of an Access Option Holder to a band will not displace any Train Operator already assigned to that band or who would otherwise be assigned to that band;

“Band Meeting”	means, in respect of any Band, a meeting of members of that Band called in accordance with Condition C1.4.1;
“Class”	means any one of Network Rail, the Franchised Passenger Class, the Non-Franchised Passenger Class and the Non-Passenger Class;
“Class Meeting”	means an Annual Class Meeting or an Extraordinary Class Meeting;
“Class Member”	means a member of a Class;
“Class Representative”	means a person who is appointed by a Class or Band to serve on the Class Representative Committee;
“Class Representative Committee”	means the committee of Class Representatives constituted in accordance with Condition C2;
“Committee Meeting”	means a meeting of the Class Representative Committee;

“Consultation Period”	means the period for consultation described in Condition C5.2(b);
“Extraordinary Class Meeting”	means, in respect of any Class, a meeting of that Class other than an Annual Class Meeting;
“Franchised Passenger Class”	means all Access Beneficiaries whose Access Agreements are, at least in part, in respect of the provision or proposed provision of Franchised Services, as a class;
“Non-Franchised Passenger Class”	means all Access Beneficiaries whose Access Agreements are, at least in part, in respect of the provision or proposed provision of railway passenger services (other than Franchised Services), as a class;
“Non-Passenger Class”	means all Access Beneficiaries whose Access Agreements are, at least in part, in respect of the provision or proposed provision of services for the carriage of goods by railway, as a class;
“Proposal for Change”	means any proposal (other than a notice issued by the Office of Rail and Road under Condition C8) to change this code (including this Part C) or the Access Dispute Resolution Rules, together with any modification of that proposal as referred to in Condition C5.4;
“Representation Period”	means, in respect of any Class Representative, the period for which that representative has been or is to be appointed, being the period commencing on the date on which the appointment is made and ending on the date of the next following Annual Class Meeting of that Class; and
“Track Charges”	means, in respect of an Access Agreement, the charges which it is reasonably foreseeable will be levied by Network Rail for and in connection with the permission to use the Network pursuant to that agreement for the period in question.

## **CONDITION C1 - CLASS MEETINGS**

### **1.1 *Annual Class Meetings***

#### **1.1.1 *Timing***

Members of a particular Class may, at any Class Meeting, fix the date, time or venue of the next succeeding Annual Class Meeting of that Class. If the members fail so to fix such date, time or venue, Network Rail shall do so having consulted with each member prior to convening that Annual Class Meeting as to its date, time and venue and having had due regard to its views.

#### **1.1.2 *Notices of meetings***

Network Rail shall, in respect of each Class (other than Network Rail), call an Annual Class Meeting by giving to all members of that Class not less than 42 days' notice:

- (a) specifying the date, venue and time of the meeting (which shall be those, if any, which have been fixed pursuant to Condition C1.1.1);
- (b) setting out the names and addresses of all members of the Class and the Bands within which they fall, as determined at the date of the notice; and
- (c) calling for nominations for the posts of Class Representatives of that Class, such nominations to be notified to Network Rail no later than 35 days prior to the meeting.

#### **1.1.3 *Notification of business of meeting***

Network Rail shall, in respect of an Annual Class Meeting called in accordance with Condition C1.1.2, notify to each Class Member at least 28 days before the date fixed for that meeting, the details of:

- (a) all nominations received by it for the posts of Class Representative of that Class specifying, if relevant, the Band to which each nomination relates; and
- (b) the business of the meeting, being:
  - (i) the appointment of Class Representatives; and

- (ii) any matters notified to Network Rail by any member of that Class for discussion at that meeting.

## **1.2 *Extraordinary Class Meetings of Franchised Passenger Class and Non-Passenger Class***

### **1.2.1 *Notices of requisitioned meetings***

Network Rail shall, in respect of any Class (other than Network Rail and the Non-Franchised Passenger Class), within a period of 14 days following receipt of notice in writing from:

- (a) members of that Class (the identity of such members being determined as at the date of the notice) representing more than 10% in number of members of that Class;
- (b) members of a Band of that Class (the identity of such members being determined as at the date of the notice) representing more than 20% in number of members of that Band; or
- (c) a Class Representative of that Class

requisitioning an Extraordinary Class Meeting and specifying the matters to be discussed at that meeting, call an Extraordinary Class Meeting by giving not less than 28 days, and not more than 42 days, notice:

- (d) specifying the date, venue and time of the meeting (Network Rail having first consulted with each Class Member as to such date, venue and time);
- (e) specifying the matters notified to Network Rail by any member of that Class or Class Representative for discussion at that meeting; and
- (f) giving the names and addresses of the members of that Class.

### **1.2.2 *Waiver of notice periods***

The periods of notice referred to in Condition C1.2.1 may be waived either prospectively or retrospectively with the consent in writing of all members of the Class for which the Extraordinary Class Meeting has been called.

### **1.3    *Extraordinary Class Meetings of Non-Franchised Passenger Class***

#### **1.3.1    *Notices of requisitioned meetings***

Network Rail shall, in respect of the Non-Franchised Passenger Class, within the period of 14 days following receipt of notice in writing from:

- (a)    members of that Class (the identity of such members being determined as at the date of the notice) representing more than 10% in number of members of that Class; or
- (b)    the Class Representative appointed by that Class

requisitioning a Class Meeting, for the purpose of either:

- (i)    appointing a Class Representative of that Class to fill a casual vacancy or of removing the Class Representative and appointing a replacement; or
- (ii)   discussing such other matters as shall be specified in the notice

call a Class Meeting by giving notice of not less than 28 days, and not more than 42 days,

- (c)    specifying the date, venue and time of the meeting (Network Rail having first consulted with each Class Member as to such date, venue and time);
- (d)    specifying the business of the meeting being:
  - (i)    the proposed appointment of the Class Representative of that Class to fill a casual vacancy or the proposed removal of that Class Representative and the proposed appointment of a replacement; and
  - (ii)   any matters notified to Network Rail by any member of that Class or Class Representative for discussion at that meeting;
- (e)    in the case of the business specified in Condition C1.3.1(d)(i), calling for nominations for the post of Class Representative of that Class no later than 21 days prior to the meeting; and
- (f)    giving the names and addresses of the members of that Class.

### 1.3.2 *Notification of nominations*

Network Rail shall, in respect of a Class Meeting called in accordance with Condition C1.3.1 for the purpose of the business specified in Condition C1.3.1(d)(i), on giving a further notice at least 14 days before the date fixed for that meeting, notify to each member details of all nominations received by it for the post of Class Representative of that Class.

### 1.3.3 *Waiver of notice periods*

The periods of notice referred to in Conditions C1.3.1 and C1.3.2 may be waived either prospectively or retrospectively with the consent in writing of all members of the Class for which the Class Meeting has been called.

## 1.4 ***Band Meetings***

### 1.4.1 *Notices of requisitioned meetings*

Network Rail shall, in respect of any Band of any Class, within the period of 14 days following receipt of notice in writing from:

- (a) members of that Band (the identity of such members being determined as at the date of the notice) representing more than 20% in number of members of that Band; or
- (b) the Class Representative appointed by that Band

requisitioning a Band Meeting for the purpose either of appointing a Class Representative of that Band to fill a casual vacancy or of removing that Class Representative and appointing a replacement, call a Band Meeting by giving notice of not less than 28 days, and not more than 42 days:

- (c) specifying the date, venue and time of the meeting;
- (d) specifying the business of the meeting (being the proposed appointment of the Class Representative of that Band to fill a casual vacancy or the proposed removal of that Class Representative and the proposed appointment of a replacement);
- (e) calling for nominations for the post of Class Representative of that Band no later than 21 days prior to the meeting; and
- (f) giving the names and addresses of the members of that Band.

#### 1.4.2 *Notification of nominations*

Network Rail shall, in respect of a Band Meeting called in accordance with Condition C1.4.1, on giving a further notice at least 14 days before the date fixed for that meeting, notify each member of the Band of details of all nominations received by it for the post of Class Representative of that Band.

#### 1.4.3 *Waiver of notice periods*

The periods of notice referred to in Conditions C1.4.1 and C1.4.2 may be waived either prospectively or retrospectively with the consent in writing of all members of the relevant Band.

### 1.5 ***Conduct of Class and Band Meetings***

#### 1.5.1 *Business*

No Class Meeting shall take a vote on any matters other than the appointment or removal of a Class Representative.

#### 1.5.2 *Quorum*

No business shall be transacted at any Class Meeting unless a quorum of members of that Class is present (whether in person or by proxy) at the Class Meeting. The quorum for any Class Meeting shall be one third in number of the members of that Class present (whether in person or by proxy).

#### 1.5.3 *Adjournment without a quorum*

If, within half an hour from the time appointed for the beginning of a Class Meeting, a quorum is not present, that meeting shall be adjourned to the same day in the next week at the same time and place (or such other time and place as the chairman of the meeting may determine) and if, at the adjourned meeting, a quorum is not present within half an hour from the time appointed for the meeting, the members of the Class present (whether in person or by proxy) shall constitute a quorum.

#### 1.5.4 *Chairman*

Those members of the Class present at the Class Meeting shall elect the chairman of that meeting. The chairman shall have no casting vote.



#### 1.5.5 *Proxies*

A Class Member, where it is entitled to attend and vote at a Class Meeting, shall be entitled to appoint another person (whether a member of that Class or not) as its proxy to attend, speak and vote in its place. The instrument appointing the proxy shall be in writing, executed by or on behalf of the Class Member and shall be available for inspection at the relevant meeting.

#### 1.5.6 *Votes*

Each Class Member shall have one vote at any Class Meeting at which it is entitled to vote.

#### 1.5.7 *Secretariat and minutes*

Network Rail shall attend each Class Meeting, take accurate minutes of each meeting and distribute such minutes to members of the relevant Class within the period of 14 days following that Class Meeting. Such minutes shall be discussed and, if thought fit, approved (with or without modification) at the next Class Meeting.

#### 1.5.8 *Application*

The provisions of this Condition C1.5 shall apply mutatis mutandis to Bands and Band Meetings as they apply to Classes and Class Meetings.

#### 1.5.9 *Affiliates*

Affiliates of one another within a single Band (and, if there is only one Band in a Class, within a single Class) shall be treated as the same person for the purpose of any election.

### **1.6 *Membership of a Class where eligible to be a member of more than one***

- 1.6.1 If any Train Operator shall be eligible to be a member of more than one Class, it shall be a member of the Class corresponding to the type of railway services in respect of which the greatest part of its Track Charges will be payable for the period in question or, in respect of an Access Option Holder, it shall be a member of the Class corresponding to the type of railway services that will be operated when the option is exercised. No Access Beneficiary shall be a member of more than one Class.

- 1.6.2 Where an Access Option Holder other than a Freight Customer Access Option Holder exercises its rights under its access option, it shall only be eligible to be a Class Member in respect of any unexercised rights that remain within its access option.
- 1.6.3 Where a Freight Customer Access Option Holder exercises its rights under its access option, it shall be and remain eligible to be a Class Member of the relevant Class notwithstanding the exercise of such rights.

### **1.7 Election of Class/Band Representatives**

- 1.7.1 Nominations in accordance with Condition C1.1.2(c), C1.3.1(e) or C1.4.1(e) for each Class, or each Band of a Class, may be made only by members of that Class, or that Band, respectively.
- 1.7.2 Nominees for election as a representative of a Class or Band shall, at the time of the election, be employees or officers of a company that is a member of that Class or Band respectively.
- 1.7.3 A Class Member may vote only in the election for a representative of a Class, or of a Band, of which he is a member.
- 1.7.4 If no nominations are received in accordance with the timescales specified in Condition C1.1.2(c), C1.3.1(e) or C1.4.1(e), a written nomination signed by an officer or employee of a Class Member may be presented in writing to the chairman of the relevant Class Meeting or Band Meeting.
- 1.7.5 If no nominations are received in accordance with Condition C1.1.2(c), C1.3.1(e), C1.4.1(e) or C1.7.4, the Managing Director of the company which pays the highest annual Track Charges in the Class or the relevant Band shall be deemed to be elected.
- 1.7.6 If an elected representative ceases to be an employee of the Class Member which employed him at the time of his election, he may, providing he is an employee of an Access Party, continue as representative.
- 1.7.7 *Filling casual vacancies*

A unanimous decision in writing, executed on behalf of every member of the relevant Class or Band to appoint a specified person as the Class Representative of that Class or Band to fill a casual vacancy shall be as valid

and effective as if it had been passed at a Class Meeting of that Class or Band Meeting of that Band (as the case may be), provided that:

- (a) the identity of such members shall be determined as at the date of that decision;
- (b) the decision in writing may consist of several versions in the same form; and
- (c) the specified person shall be treated as elected Class Representative upon receiving notice to this effect, together with a copy of the decision, from Network Rail as the secretary of the Class Representative Committee.

## **CONDITION C2 - CLASS REPRESENTATIVE COMMITTEE**

### **2.1 *Composition of Committee***

The Class Representative Committee shall comprise two Class Representatives appointed by Network Rail, one Class Representative appointed by the members of the Non-Franchised Passenger Class and one Class Representative appointed by the members of each of the Bands of both the Franchised Passenger Class and the Non-Passenger Class.

### **2.2 *Elections of Class Representatives***

Class Representatives shall be elected by a majority in number of members of the relevant Class or Band (as the case may be) present (whether in person or by proxy) and voting at the relevant Class Meeting.

### **2.3 *Voting etc.***

Each Class Member shall:

- (a) in respect of the Class and (if relevant) Band of which it is a member, be entitled to participate in each election conducted pursuant to Condition C2.2; and
- (b) at each Annual Class Meeting, use its reasonable endeavours to procure that each Class and (if relevant) Band of which it is a member shall elect its Class Representative or Representatives for the Representation Period commencing on the date of that meeting.

## **2.4 Duration of appointment**

A Class Representative shall, subject to earlier termination of office in accordance with Condition C2.5, be treated as having ceased to hold office (unless re-elected) with effect from the end of its Representation Period.

## **2.5 Loss of office**

A Class Representative:

- (a) may be removed from office prior to expiry of his Representation Period and a replacement Class Representative elected in his place by a majority in number of members of the relevant Class or Band (as the case may be) present (whether in person or by proxy) and voting at the relevant meeting called for the express purpose of such removal and substitute appointment; and
- (b) shall be treated as having resigned from office if he dies or becomes of unsound mind.

## **2.6 Notification of elections**

Network Rail shall, as soon as reasonably practicable following the election of a new Class Representative, notify all Class Members of that election.

## **2.7 Undertakings**

Each Class Representative shall, as a condition of his being a Class Representative, be required to undertake, in favour of Network Rail, to comply with the provisions of this Part C insofar as they relate to the conduct of Class Representatives. Each Class Member shall, if a Class Representative is its employee or officer, use all reasonable endeavours to procure that that Class Representative abides by any such undertaking.

## **2.8 Obligation to remove Class Representatives**

Each Class Member shall, in conjunction with other members of the Class and (if relevant) Band of which it is a member, use all reasonable endeavours to procure the removal of any Class Representative who fails materially to comply with the undertaking entered into pursuant to Condition C2.7.

## **CONDITION C3 - COMMITTEE MEETINGS**

### **3.1 *Committee Meetings***

#### **3.1.1 *Network Rail to call meetings***

Network Rail shall:

- (i) within 14 days following receipt of notice in writing from any Class Representative requisitioning a Committee Meeting and specifying the business to be carried out at that meeting; and
- (ii) in respect of any Proposal for Change, within the period of 7 days following the end of the Consultation Period relating to that proposal, as referred to in Condition C5.3

call a Committee Meeting by giving not less than 7 days, and not more than 28 days, notice specifying:

- (a) the date, venue and time of that meeting; and
- (b) the business of the meeting (which, in a case within paragraph (ii) above, shall include the relevant Proposal for Change).

#### **3.1.2 *Waiver of notice periods***

The period of notice for calling a Committee Meeting notified in accordance with Condition C3.1.1 may be waived prospectively or retrospectively with the consent in writing of all Class Representatives.

#### **3.1.3 *Attendance at Committee Meetings***

Those entitled to attend and speak, but not vote, at a Committee Meeting are:

- (a) Class Members; and
- (b) Potential Access Parties;

and their professional advisers.

#### **3.1.4 *Attendance through communications media***

Those entitled to attend and speak at a Committee Meeting and the Office of Rail and Road may participate in a Committee Meeting

by means of conference telephone or similar communications equipment by which all persons participating in the meeting can hear each other. Any person participating in a meeting in this manner shall be deemed to be present in person at such meeting.

### **3.2 Conduct of Class Representative Committee Meetings**

#### **3.2.1 Regulation of business**

Subject as provided in this Part C, Class Representatives shall establish and from time to time revise rules of procedure to be followed by the Class Representative Committee. The Class Representative Committee shall adhere to such rules of procedure for all Committee Meetings provided that:

- (a) any resolution in respect of such rules of procedure shall only be approved if at least 5 Class Representatives present, and entitled to vote, at a Committee Meeting shall have voted in favour of that resolution; and
- (b) the failure of a Class Representative timeously to cast its vote or intimate its abstention in respect of a resolution shall be treated as a vote in favour of that resolution.

The rules of procedure will not address voting passmarks and the procedure in Condition C5.4 relating to modifications of any Proposal for Change.

#### **3.2.2 Quorum**

No business shall be transacted at any Committee Meeting:

- (a) for so long as there is a vacancy in the post of Class Representative following an event of the kind described in Condition C2.5(b); and
- (b) unless a quorum of Class Representatives is present at that Committee Meeting.

The quorum shall be 5 Class Representatives present of which at least one shall be a Class Representative of the Franchised Passenger Class, at least one shall be a Class Representative of the Non-Passenger Class and at least one shall be a Class Representative of Network Rail. If any Class shall fail to be represented by its Class Representative at more than one successive

Committee Meeting, the quorum for that meeting shall be adjusted so as to exclude the Class Representative of that Class.

### 3.2.3 *Adjournment without a quorum*

If, within half an hour from the time appointed for a Committee Meeting, a quorum is not present, the Committee Meeting shall be adjourned to the same day in the next week at the same time and place (or such other time and place as the chairman of the meeting may determine) and if, at the adjourned meeting, a quorum is not present within half an hour from the time appointed for the meeting, the Class Representatives present shall constitute a quorum.

### 3.2.4 *Chairman*

The Class Representatives present at the Committee Meeting next following the election of Class Representatives pursuant to Condition C2.2 shall elect the chairman of the Class Representative Committee who, unless he dies, resigns or is removed from office for any reason, shall hold office until the first Committee Meeting following the next election of Class Representatives next following the expiry of 12 months from his election as chairman. The chairman may be removed from office, and a vacancy in the office of chairman filled, upon a positive resolution of the Class Representative Committee passed by at least 6 Class Representatives. Any chairman elected to fill a vacancy arising from the termination of the term of office of an incumbent chairman for a reason other than the passage of time shall hold office until the first Committee Meeting following the next election of Class Representatives. The chairman shall have no casting vote.

### 3.2.5 *Rights to appoint and remove Alternates*

Each Class Representative (other than an Alternate Representative) may:

- (a) appoint any other Class Representative or any other person who is willing to act to be an Alternate Representative; and
- (b) remove that Alternate Representative from office.

### 3.2.6 *Notice of appointment or removal*

The appointment or removal of an Alternate Representative shall be by notice given to Network Rail as the secretary of the Class Representative Committee (with all references to Network Rail in this Condition C3.2.6 being construed

accordingly), not later than 2 days before a Committee Meeting and signed by the Class Representative making or revoking the appointment provided that:

- (a) if the appointment or removal of an Alternate Representative is communicated to Network Rail later than, or in a form or manner otherwise than, as so required, then Network Rail shall have discretion to accept the communication as effective for the purposes of the Committee Meeting following that communication; and
- (b) if such communication is accepted as effective, Network Rail shall state this at the start of the relevant Committee meeting.

### 3.2.7 *Rights of Alternates*

An Alternate Representative shall be entitled:

- (a) to receive notice of all Committee Meetings which his appointer is entitled to attend;
- (b) to attend and vote at any such Committee Meeting at which the Class Representative which appointed him is not personally present; and
- (c) generally to perform all the functions of the Class Representative which appointed him as a Class Representative in his absence.

Save as otherwise provided in Conditions C3.2.5-C3.2.8, an Alternate Representative shall be deemed for all purposes to be a Class Representative.

### 3.2.8 *Loss of office of Alternates*

An Alternate Representative shall cease to be an Alternate Representative if the Class Representative which appointed him ceases to be a Class Representative.

### 3.2.9 *Written decisions*

A unanimous decision in writing, executed by or on behalf of every Class Representative, shall be as valid and effective as if it had been passed at a Committee Meeting and may consist of several versions in the same form.



### 3.2.10 *Objection to rules of procedure*

- 3.2.10.1 The Office of Rail and RoadOffice of Rail and Road shall be entitled, at any time, to give a notice of objection, with reasons, to any rules of procedure established pursuant to Condition C3.2.1.
- 3.2.10.2 Any Class Member or any person referred to in Condition C3.1.3(b) shall be entitled, at any time, to give a notice of objection to any rules of procedure established pursuant to Condition C3.2.1 on the basis that the operation of any such rule will have a material and adverse effect on its interests and such notice shall be accompanied by such relevant information in support of such objection as it shall be reasonable to expect the objector to be able to provide.
- 3.2.10.3 If the Office of Rail and RoadOffice of Rail and Road objects to any rule of procedure under Condition C3.2.10.1, the Office of Rail and RoadOffice of Rail and Road may either:
- (a) instruct the Class Representative Committee to revise the relevant rules of procedure to address the Office of Rail and RoadOffice of Rail and Road's objection, in which case the Class Representative Committee shall proceed to make such revisions pursuant to Condition C3.2.1; or
  - (b) instruct a specific change to the rules of procedure in which case the Class Representative Committee shall revise the relevant rule of procedure in accordance with the Office of Rail and RoadOffice of Rail and Road's instructions and Conditions C3.2.1(a) and (b) will not apply in respect of such change.
- 3.2.10.4 If any Class Member or any person referred to in Condition C3.1.3(b) objects to any rule of procedure under Condition C3.2.10.2 the Class Representative Committee will consider such objection and decide whether the rules of procedure should be revised to address such objection.
- 3.2.10.5 If:
- (a) the Class Representative Committee does not revise the rules of procedure to deal with the objection; or

- (b) any Class Member or any person referred to in Condition C3.1.3(b) does not consider that any revision made to the rules of procedure addresses its objection,

the Class Member or any person referred to in Condition C3.1.3(b) may refer that matter to the Office of Rail and Road for final determination. Any such determination by the Office of Rail and Road shall be final and binding on all parties and the Office of Rail and Road may instruct the Class Representative Committee accordingly pursuant to Condition 3.2.10.3(a) or (b).

## **CONDITION C4 - ADMINISTRATION OF CHANGE PROCEDURE**

### **4.1 *Network Rail as secretariat***

4.1.1 Network Rail shall be the secretariat of, and shall provide all administrative and other services reasonably necessary for, Committee Meetings, Class Meetings and Band Meetings, including in relation to the convening of meetings, the service of notices of meetings and preparing and circulating minutes of all meetings.

4.1.2 In its capacity as secretariat, Network Rail will establish, maintain and update, as necessary, a website, which shall be accessible via a prominent link on the Network Rail website, containing:

- (a) the current version of each of the Network Code and the ADRR, including all documents or other instruments which the Network Code expressly states are incorporated into it;
- (b) all previous versions of each of the Network Code and the ADRR (including all documents or other instruments which the Network Code expressly states are incorporated into it) since 1 January 1996 (together with a statement of the dates between which each respective version was in force);
- (c) the current composition of the Class Representative Committee;
- (d) the current rules of procedure to be followed for all Committee Meetings;
- (e) the minutes of the most recent Committee Meeting;
- (f) the date, place and time of the next Committee Meeting;

- (g) a fully searchable archive containing the minutes of all Committee Meetings which have taken place since 1 January 1996;
- (h) a fully searchable archive containing details of all Proposals for Change since 1 January 1996, including:
  - (i) any proposed modification to any Proposal for Change; and
  - (ii) any representations made in respect of any Proposal for Change; and
- (i) any written material prepared by or on behalf of Network Rail and submitted to the Class Representative Committee.

4.1.3 Network Rail shall publish on its website as soon as reasonably practicable after its receipt all information under C4.1.2 (h) (i) and (ii) .

4.1.4 Network Rail shall provide copies of the whole or any part of any of the documents contained on the website to any person upon request and Network Rail shall be entitled to charge for the provision of such copies. Such charge shall not exceed an amount which, in the opinion of the Office of Rail and Road, is reasonable.

#### **4.2 *Notification of Class Representatives and constituents***

Network Rail shall provide a list of the names and addresses of the members of any Class or Band and the names and addresses of all Class Representatives promptly to any Class Member who requests it.

#### **4.3 *Information in relation to Proposals for Change***

Network Rail shall keep each sponsor of a Proposal for Change advised at reasonable and regular intervals of the progress being made by the Class Representative Committee in its consideration of that proposal.

#### **4.4 *Costs***

Network Rail shall bear all the costs of administering the procedures referred to in Condition C4.1 and supplying information in accordance with Condition C4.2 and providing advice in accordance with Condition C4.3.

## **CONDITION C5 - RECEIPT AND NOTIFICATION OF PROPOSALS FOR CHANGE**

### **5.1 *Entitlement to make Proposal for Change***

Any Class Member, any person referred to in Condition C3.1.3(b) or the Office of Rail and Road shall be entitled to make a Proposal for Change for consideration and, if thought fit, approval by the Class Representative Committee. Any such proposal shall be sent to Network Rail and shall:

- (a) be in writing;
- (b) specify the wording of the proposed change and the date or series of dates on which it is proposed that it come into effect, if other than the period of 14 days after any approval notified by the Office of Rail and Road pursuant to Condition C7.1.3; and
- (c) be supported by an explanation in reasonable detail of the reasons for the proposed change.

A Proposal for Change may be made in respect of:

- (a) an established part of the Network Code; and/or
- (b) a part for which amendments have been approved or directed by the Office of Rail and Road under Condition C7 or Condition C8 but which have not taken effect and, in relation to a change being made under Condition C8, no appeal has been received within the timeframe for appeals under Condition C8.3.1. In such a case the Proposal for Change should take account of any such approved or directed amendment. If such a Proposal for Change would affect any such approved or directed amendment, it can only take effect in relation to that part after the amendment on which it is based takes effect.

### **5.2 *Notice of Proposal for Change***

Network Rail shall, within 7 days following receipt of a Proposal for Change from any Class Member, any person referred to in Condition C3.1.3(b), or the Office of Rail and Road or, if later, within 7 days following receipt of any clarification that Network Rail may reasonably request from the sponsor of that proposal:

- (a) give notice of that proposal to each Class Member, each person who, in the opinion of Network Rail, shall be likely to become a Class Member, the Office of Rail and Road and the Secretary of State, unless any such person has notified Network Rail that it does not wish to receive notice of a Proposal for Change; and
- (b) invite the submission to Network Rail of written representations in respect of that proposal within such period as is reasonable in all the circumstances (the “Consultation Period”), being a period of not less than 30 days from the date of notification under paragraph (a) above.

### **5.3 *Calling of meeting to consider Proposal for Change***

Network Rail shall, within the period of 7 days following the end of the Consultation Period:

- (a) call a Committee Meeting in accordance with Condition C3.1.1(ii); and
- (b) supply the Proposal for Change to each Class Representative together with copies of all representations received pursuant to Condition C5.2(b), including any proposed modifications to the Proposal for Change.

### **5.4 *Modification of Proposal for Change***

5.4.1 A modification to any Proposal for Change may be proposed:

- (a) by Network Rail or any of the persons referred to in Condition C5.2(a) during the Consultation Period; or
- (b) by any of the Class Representatives at the Committee Meeting called in respect of such Proposal for Change.

5.4.2 The Class Representative Committee shall consider any modifications, whether material or otherwise, which are proposed to a Proposal for Change.

5.4.3 If the proposed modification to any Proposal for Change is a material modification then:

- (a) if all the Class Representatives present, and entitled to vote, at the Committee Meeting called in respect of such Proposal for Change, shall have voted in favour of the proposed modification, or that proposed modification shall have been approved in accordance with Condition

C3.2.9, no further consultation shall be carried out in respect of such Proposal for Change and the Class Representative Committee shall consider the Proposal for Change, as modified, pursuant to Condition C6.1; or

- (b) if paragraph (a) above does not apply, the Class Representative Committee shall request Network Rail to carry out a further consultation in respect of such Proposal for Change and Condition C6.4 shall apply.

5.4.4 If the proposed modification to any Proposal for Change:

- (a) is not a material modification; and
- (b) 6 or more Class Representatives present, and entitled to vote, at the Committee Meeting called in respect of such Proposal for Change shall have voted in favour of the proposed modification,

then no further consultation shall be carried out in respect of such Proposal for Change and the Class Representative Committee shall consider the Proposal for Change, as modified, pursuant to Condition C6.1.

5.4.5 For the purposes of Condition C5.4, the failure of a Class Representative timeously to cast its vote or intimate its abstention shall be treated as a vote in favour of the proposed modification.

5.4.6 If Condition C5.4.4(a) is satisfied and Condition 5.4.4(b) is not satisfied, the proposed modification shall be disregarded and the Proposal for Change to which it relates shall be considered without taking the modification into account.

5.4.7 If the Class Representatives cannot agree unanimously whether or not a proposed modification is material then, for the purposes of this Condition C5.4, the modification will be treated as though it is a material modification.

## **5.5 Clarification**

The sponsor of a Proposal for Change shall promptly comply with all reasonable written requests of Network Rail for further clarification of the proposal.

## **5.6 Relationship with Condition C8**

This Condition C5 shall not require that any modification to which Condition C8 applies shall first have been proposed by the Office of Rail and Road under this Condition C5.

## **CONDITION C6 - CONSIDERATION BY CLASS REPRESENTATIVE COMMITTEE**

### **6.1 Voting passmark**

The Class Representative Committee shall consider and, if thought fit, approve each Proposal for Change. A Proposal for Change shall have been approved only if:

- (a) 6 or more Class Representatives present, and entitled to vote, at a Committee Meeting shall have voted in favour of that proposal or that proposal shall have been approved in accordance with Condition C3.2.9, provided that the failure of a Class Representative timeously to cast its vote or intimate its abstention shall be treated as a vote in favour of the proposal; and
- (b) where the implementation of the Proposal for Change is likely to have a material and adverse effect on the interests of Network Rail or the members of the Franchised Passenger Class or a significant proportion of them, no relevant group shall have notified the Class Representative Committee of its objection to the proposal within 30 days after the vote referred to in paragraph (a) of this Condition C6.1. In this Condition C6, “relevant group” has the meaning ascribed to it in Condition C6.5.8.

### **6.2 Rights of attendance**

A sponsor of a Proposal for Change and any other person referred to in Condition C3.1.3 shall be entitled to attend any Committee Meeting at which the Proposal for Change is to be considered.

### **6.3 Attendance by Office of Rail and Road**

The Office of Rail and Road shall be entitled to attend or be represented at any Committee Meeting.

#### **6.4 Further consultation**

Network Rail shall, as soon as reasonably practicable following a request by the Class Representative Committee to carry out further consultation in respect of any Proposal for Change, carry out that further consultation.

#### **6.5 Appeal procedure**

6.5.1 If a relevant group shall have exercised its veto, any Class Representative shall be entitled to give a notice of appeal against it.

6.5.2 A notice of appeal shall:

- (a) be given to the Office of Rail and Road, the relevant group and every other Class Representative not later than 35 days after the exercise of the veto;
- (b) contain the reasons why the Class Representative in question considers that the veto should not have effect; and
- (c) request the Office of Rail and Road to determine the matter.

6.5.3 No notice of appeal may be given unless:

- (a) the Class Representative shall be satisfied that the relevant group is entitled to exercise its veto; or
- (b) the entitlement of the relevant group to exercise its veto shall have been established pursuant to the ADRR following a reference for such determination made by the group claiming the veto,

and evidence satisfactory to the Office of Rail and Road shall have been provided to it to that effect.

6.5.4 Without prejudice to Condition C6.5.5, the relevant group and the other Class Representatives shall use their respective reasonable endeavours to procure that the Office of Rail and Road is furnished with sufficient information to dispose of the appeal as soon as reasonably practicable after the date of the notice of appeal.

6.5.5 In relation to any such appeal, the Office of Rail and Road shall, in determining it, have the power:



- (a) to give directions as to the procedure to be followed in the appeal, including in relation to the making of any written and oral submissions and the extent to which any evidence or other submissions made by one party to the appeal shall be disclosed to the other;
- (b) to make any interim order as to the conduct or the positions of the parties pending final determination of the appeal;
- (c) to determine whether the veto shall have effect; and
- (d) to make such orders as it shall think fit in relation to the proportions of the costs of the appeal which shall be borne by any of the parties.

6.5.6 Where any party shall have given a notice of appeal, the Office of Rail and Road shall:

- (a) be entitled to decline to determine the appeal if, having consulted the parties concerned, it shall determine that the appeal should not proceed, including on the grounds that:
  - (i) the matter in question is not of sufficient importance to the industry;
  - (ii) the reference to it is frivolous or vexatious; or
  - (iii) the conduct of the party making the reference ought properly to preclude its being proceeded with; and
- (b) not be liable in damages or otherwise for any act or omission to act on its part (including negligence) in relation to the appeal.

6.5.7 The determination of the Office of Rail and Road shall be final and binding on all parties to Access Agreements.

6.5.8 In this Condition C6.5:

- |                          |   |
|--------------------------|---|
| “the exercise of a veto” | means the giving by a relevant group of a notice of objection as provided for in Condition C6.1(b), and cognate terms and expressions shall be construed accordingly; |
| “notice of appeal”       | means a notice given pursuant to Condition C6.5.2; and  |

“relevant group”

means either of:

- (a) Network Rail; or
- (b) any two of the Class Representatives of the Franchised Passenger Class.

## **CONDITION C7 - CONSEQUENCES OF CLASS REPRESENTATIVE COMMITTEE RECOMMENDATION**

### **7.1 *Decision to Approve***

7.1.1 Network Rail shall, as soon as reasonably practicable following a decision by the Class Representative Committee to approve a Proposal for Change (or following a determination of the Office of Rail and Road that a veto should not have effect following an appeal pursuant to Condition C6.5), submit the proposal to the Office of Rail and Road, together with a written memorandum:

- (a) explaining the reasons for the proposed change;
- (b) containing details of the results of the consultation process (including copies of any representations made pursuant to Condition C5.2(b) which shall have been neither accepted nor withdrawn);
- (c) stating the reasons for any dissent from that decision by any Class Representative; and
- (d) stating the date or series of dates upon which it is considered that the proposal is to take effect, the first date being no earlier than 14 days after the date on which the Office of Rail and Road approves the proposal pursuant to Condition C7.1.3.

7.1.2 Class Members shall use their respective reasonable endeavours to provide any further information required in relation to the consideration of a Proposal for Change by the Office of Rail and Road.

7.1.3 The Office of Rail and Road may notify Network Rail as soon as reasonably practicable of its approval or rejection of a Proposal for Change submitted to it pursuant to Condition C7.1.1.

- 7.1.4 No Proposal for Change shall have effect unless the Office of Rail and Road gives notice to Network Rail in writing that it approves the proposal pursuant to Condition C7.1.3.

## **7.2 *Decision to Reject***

Network Rail shall, as soon as reasonably practicable following a decision of the Class Representative Committee to reject a Proposal for Change, notify the sponsor of that proposal of that decision.

## **7.3 *Procedural Irregularities***

- 7.3.1 If before the effective date or dates of any change (as determined under Condition C9.1.3 and approved by the Office of Rail and Road under Condition C9.1.4) a complaint is made to the Office of Rail and Road concerning a failure to comply with any part of the procedure relating to the relevant Proposal for Change, Condition C7.3.2 shall apply.
- 7.3.2 The Office of Rail and Road shall consider the nature of the complaint and determine either that:
- (a) the change should become effective on the date determined under Condition C9.1.3 subject to Condition C9.1.4; or
  - (b) the change should not become effective on the date determined under Condition C9.1.3 and shall be treated as a new Proposal for Change.
- 7.3.3 A change in respect of which a complaint has been made under Condition C7.3.1 shall not become effective unless and until the Office of Rail and Road makes a determination under Condition C7.3.2(a).
- 7.3.4 If a complaint is made to the Office of Rail and Road concerning a failure to comply with any part of the procedure relating to a Proposal for Change after the effective date or dates of any change, such change will remain in full force and effect as though no complaint had been made.

## **7.4 *Arrangements for implementation of a Change***

The Committee may determine whether a change made in accordance with this Part C (other than Condition C8) shall have effect on a single date or a series of dates and Network Rail shall give notice of such determination to all relevant parties at the same time as it provides notification pursuant to Condition C7.1.1.

## **CONDITION C8 - MODIFICATION BY THE OFFICE OF RAIL AND ROAD**

- 8.1 The Network Code and the ADRR shall have effect with the modifications specified in any notice given by the Office of Rail and Road for the purposes of this Condition C8, provided that the Office of Rail and Road shall be satisfied as to the need for the modification as provided in Condition C8.2, the procedural requirements of Condition C8.4 shall have been satisfied, and the modification shall not have effect until the date provided for in Condition C8.5.
- 8.2 A notice given by the Office of Rail and Road under Condition C8.1 shall have effect if it is satisfied on reasonable grounds that either or both of the following conditions has been satisfied:
- (a) the modification in question is or is likely to be reasonably required in order to promote or achieve the objectives specified in section 4 of the Act; and
  - (b) the interests of any relevant person or persons would be unfairly prejudiced if the modification in question were not made, and the need to avoid or remedy such unfair prejudice outweighs or is likely to outweigh any prejudice which will or is likely to be sustained by any other relevant person or persons if the modification is made, having due regard to the need to enable relevant persons to plan the future of their businesses with a reasonable degree of assurance.
- 8.3.1 A modification specified in a modification notice shall not have effect if its effect would, if made, be:
- (a) to prevent to a material extent the Train Operator or Access Option Holder exercising, or receiving the benefit of, a protected right; or
  - (b) materially to increase any protected obligation of the Train Operator or Access Option Holder

provided that no person shall be entitled to challenge or otherwise call into question the effectiveness of any such modification unless he shall have given notice to the Office of Rail and Road not more than 45 days after the date of the modification notice stating that the modification in question would, if made, have on him any such effect and such notice shall be accompanied by such relevant information in support of such statement as it shall be reasonable to expect him to be able to provide.

8.3.2 Any challenge or other procedure of the kind referred to in Condition C8.3.1 shall, unless the affected operator and the Office of Rail and Road shall otherwise agree, be determined by an arbitrator in accordance with the ADRR within 180 days of the date upon which the affected operator shall have given notice to the Office of Rail and Road as provided for in that Condition.

8.3.3 In this Condition C8.3:

“affected operator”	means a person who shall have given to the Office of Rail and Road a notice of the kind referred to in Condition C8.3.1;
“modification notice”	means a notice given by the Office of Rail and Road pursuant to Condition C8.1;
“protected obligation”	means any obligation specified as such in a relevant agreement;
“protected right”	means any right specified as such in a relevant agreement; and
“relevant agreement”	means an Access Agreement to which the Train Operator or Access Option Holder (as the case may be) is a party and which Network Rail shall have been directed to enter into by the Office of Rail and Road in the exercise of its power under section 17 or 18 of the Act.

8.4 The procedural requirements which require to have been followed for the purposes of Condition C8.1 are:

- (a) in its consideration of the matters referred to in Condition C8.2, the Office of Rail and Road shall have consulted the Secretary of State, Network Rail and the Class Representative Committee, together with all Class Members and any other persons which the Office of Rail and Road shall consider ought properly to be consulted, in relation to the modification which it proposes to make;
- (b) in the consultations referred to in paragraph (a) above, the Office of Rail and Road shall have made available to each person so consulted such drafts of the proposed modification as it shall consider are necessary so

as properly to inform such persons of the detail of the proposed modification;

- (c) the Office of Rail and Road shall have given each person so consulted the opportunity to make representations in relation to the proposed modification and shall have taken into account all such representations (other than those which are frivolous or trivial) in making its decision on the modification to be made;
  - (d) the Office of Rail and Road shall have notified each person consulted pursuant to paragraph (a) above as to its conclusions in relation to the modification in question (including by providing to each such person a copy of the text of the proposed modification) and its reasons for those conclusions; and
  - (e) in effecting the notifications required by paragraph (d) above, the Office of Rail and Road shall have treated as confidential any representation (including any submission of written material) which (and to the extent that) the person making the representation shall, by notice in writing to the Office of Rail and Road or by endorsement on the representation of words indicating the confidential nature of such representation, have specified as confidential information.
- 8.5 A notice under Condition C8.1 shall have effect upon such date, or the happening of such event, as shall be specified in the notice, provided that it shall in no circumstances have effect earlier than 180 days after the date upon which it shall have been given.
- 8.6 In Condition C8.2, “relevant person” means a Class Member and any other person who, in the opinion of the Office of Rail and Road, shall be likely to be a Class Member.
- 8.7 As soon as reasonably practicable after Network Rail shall have received any written material from the Office of Rail and Road pursuant to Condition C8.4, Network Rail shall send a copy to each Class Member.
- 8.8 A notice under Condition C8.1 shall not have effect in relation to any proposed modification of Conditions C8.1 to C8.7 (inclusive) or this Condition C8.8.

## **CONDITION C9 - NOTIFICATION OF CHANGE**

### **9.1 *Notification and effective date***

#### **9.1.1 *Notification to parties***

If the Office of Rail and Road approves the proposed change in accordance with Condition C7.1.3 Network Rail shall ensure that all Class Members and the relevant franchising authority shall be notified of the change and its effective date.

#### **9.1.2 *Effective date of Change***

Without prejudice to Condition C8, a notice under C9.1.1 shall specify the effective date(s) of the proposed change which shall be:

- (a) the date or series of dates determined pursuant to Condition C7.4; or
- (b) unless otherwise determined 14 days from the date of notification made pursuant to Condition C9.1.1.

### **9.2 *Provision of revised texts***

Network Rail shall, as soon as reasonably practicable following issue of a notice under Condition C8.1 or following approval of a Proposal for Change by the Office of Rail and Road pursuant to Condition C7.1.3, supply to all Class Members a revised version of this code or the ADRR (whichever is appropriate) incorporating the change.

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# 1 Introduction

## 1.1 Overview

- 1.1.1 It is the responsibility of Network Rail to establish a timetable for the Network, referred to as the “Working Timetable”.
- 1.1.2 Those entitled to participate in the processes set out in this Part D are defined as “Timetable Participants”.
- 1.1.3 The Working Timetable is re-issued in revised form twice a year. The process for producing the bi-annual revision of the Working Timetable is described in Condition D2.
- 1.1.4 In the period between bi-annual revisions of the Working Timetable, either Network Rail or Timetable Participants may wish to vary the Working Timetable, whether by altering or removing a scheduled Train Slot or by inserting a new Train Slot. Network Rail shall operate the processes described in Condition D3 to facilitate variations to a Working Timetable in appropriate circumstances.
- 1.1.5 In conducting the processes set out in this Part, decisions must be made by Network Rail in accordance with the principles set out in Condition D4.
- 1.1.6 Condition D5 describes the processes by which a Timetable Participant, dissatisfied with a decision of Network Rail made in respect of this Part D, may in specified circumstances appeal against that decision.
- 1.1.7 Network Rail requires access to the Network in order to fulfil its obligations in relation to the Network. The processes by which:
  - (a) the Working Timetable is updated on a bi-annual basis (as described in Condition D2); and
  - (b) variations to the Working Timetable outside that bi-annual process are facilitated (as described in Condition D3);include arrangements to procure access to the Network required by Network Rail. Where such access is required over a period greater than that covered by one revision of the Working Timetable, Network Rail may wish to conduct an extraordinary process of consultation with parties affected by those works. A process for such consultation is described in Condition D6.
- 1.1.8 It is the responsibility of Network Rail and all Timetable Participants to collaborate with each other so that the implementation of the

procedures in this Part D is carried out with optimal efficiency. Network Rail and Timetable Participants shall each establish and maintain systems and resources which are necessary and sufficient to facilitate such collaboration and their compliance with the procedures set out in this Part.

1.1.9 In addition to compliance with the processes described in this Part D, Timetable Participants may be separately required to consult with the Secretary of State, the Scottish Ministers, the Welsh Assembly Government, Transport for London, Passenger Transport Executives, User Representatives, other infrastructure managers and any other parties with the right to be so consulted, regarding proposals for the development of Services.

1.1.10 In this Part D:

- (a) the singular shall include the plural and vice-versa;
- (b) the headings are for convenience only and shall not affect interpretation.

1.1.11 In this Part D, capitalised words have the meanings shown below:

<b>Access Proposal</b>	shall have the meaning shown in Condition D2.4.1;
<b>Ancillary Movement</b>	a train movement which is not an express part of any Services but which is necessary or reasonably required for giving full effect to the train movements which are an express part of a Service and shall include any such train movement as is referred to in paragraph (c) of the definition of “Services” to the extent that it is not expressly provided for in an Access Agreement;
<b>Calendar of Events</b>	is a calendar going forward for a period of at least 4 years showing events which are likely to require significant changes to the Working Timetable in a future bi-annual timetable revision process carried out in accordance with Condition D2;
<b>D-X</b>	shall have the meaning shown in Condition D2.1.5;
<b>Decision Criteria</b>	shall have the meaning shown in Condition D4.6;
<b>Draft Calendar of Events</b>	a draft Calendar of Events;
<b>Draft Rules</b>	shall have the meaning shown in Condition D2.2.3;

<b>Engineering Access Statement</b>	<p>a document, formerly called Rules of the Route, setting out, for any part of the Network, each of the following matters:</p> <ul style="list-style-type: none"> <li>(a) the location, number, timing and duration of any Restrictions of Use; and</li> <li>(b) any alternative train routes or stopping patterns which may apply during any Restriction of Use referred to in paragraph (a) above;</li> </ul>
<b>Event</b>	an event, or grouping of events, shown in the Calendar of Events;
<b>Event Steering Group</b>	<p>shall comprise representatives from Network Rail, relevant funders and any Timetable Participants that:</p> <ul style="list-style-type: none"> <li>(a) are likely to be affected by the Event; and</li> <li>(b) who agree to be on the group.</li> </ul>
<b>Exercised</b>	<p>shall mean as a consequence of:</p> <ul style="list-style-type: none"> <li>(a) submitting an Access Proposal to Network Rail by the Priority Date in accordance with Conditions D2.4 and D2.5; or</li> <li>(b) a Rolled Over Access Proposal;</li> </ul>
<b>Firm Right</b>	<p>a right:</p> <ul style="list-style-type: none"> <li>(a) of a Timetable Participant under an Access Agreement in respect of the quantum, timing or any other characteristic of a train movement; or</li> <li>(b) of Network Rail under the Rules;</li> </ul> <p>and which in either such case is not expressed to be subject to any contingency outside the control of the right holder (save that in the case of (a), the right may be subject to the Rules);</p>
<b>Flexing Right</b>	<p>a right, exercisable by Network Rail in allocating a Train Slot in the New Working Timetable, to vary a Train Slot:</p> <ul style="list-style-type: none"> <li>(a) sought in an Access Proposal ; or</li> <li>(b) arising from a Rolled Over Access Proposal; or</li> <li>(c) sought in a Train Operator Variation Request,</li> </ul> <p>in any way within and consistent with the Exercised Firm Rights of the relevant Timetable Participant or, where the Train Slot which is being varied is a Strategic Train Slot, in any way without limitation;</p>
<b>Initial Consultation Period</b>	shall have the meaning shown in Condition D2.3.3;

<b>International Freight Capacity</b>	<p>any capacity on the Network:</p> <p>(a) required to be available to comply with the obligations relating to the carriage of rail freight through the Channel Tunnel in clause 3.2 of the Channel Tunnel usage contract dated 29 July 1987 between The Channel Tunnel Group Limited, France-Manche SA, The British Railways Board and La Société Nationale des Chemins de Fer Français; and referred to in clause 3 of the Back-to-Back Agreement relating to the Channel Tunnel usage contract dated 10 May 1994 between the British Railways Board, European Passenger Services Limited, the British Railways Board acting through its Railfreight Distribution Division, Railtrack Plc and the Secretary of State for Transport (as may be amended from time to time); or</p> <p>(b) reserved for allocation or that has been allocated by the International Freight Corridor One Stop Shop</p> <p>in each case such capacity to be represented and included in the New Working Timetable and Working Timetable by way of International Freight Train Slots;</p>
<b>International Freight Capacity Notice</b>	a notice issued in accordance with Condition D9 setting out International Freight Train Slots;
<b>International Freight Corridor</b>	the network corridor between infrastructure managers operating over part of the Network designated as an international rail freight corridor for the purposes of Regulation 913/2010;
<b>International Freight Corridor One Stop Shop</b>	the one stop shop set up under Regulation 913/2010 to allocate capacity on the International Freight Corridor;
<b>International Freight Train Slot</b>	a Train Slot included in the New Working Timetable and Working Timetable to represent International Freight Capacity;
<b>International Freight Variation</b>	shall have the meaning shown in Condition D3.1.5;
<b>International Operator</b>	each Timetable Participant which has rights to train movements through the Channel Tunnel;
<b>International Path</b>	any Train Slot on the Network which is used for carrying goods or passengers through the Channel Tunnel and, in relation to a Train Slot used for carrying goods through the Channel Tunnel, it also means any connecting Train Slot used for the primary purpose of conveying the goods which have passed or are to pass through the Channel Tunnel (but excluding any International Freight Train Slot);

<b>Management of Strategic Capacity on the Network (Network Rail's Code of Practice)</b>	the document which sets out the principles and procedures that Network Rail will follow to manage strategic capacity across the Network, issued by Network Rail in August 2010, as may be amended from time to time;
<b>Network Rail Variation</b>	shall have the meaning shown in Condition D3.1.2;
<b>Network Rail Variation Request</b>	a request made by Network Rail for a Network Rail Variation;
<b>Network Services</b>	shall have the meaning given to it in section 82(2) of the Railways Act 1993;
<b>New Working Timetable</b>	shall have the meaning shown in Condition D2.1.6;
<b>One Stop Shop Service</b>	the service offered by Network Rail under which an International Operator can apply to Network Rail to obtain an extension to an International Path over the network of one or more adjoining infrastructure managers belonging to Rail Net Europe;
<b>Possessions Strategy Notice</b>	shall have the meaning set out in Condition D6.3.1;
<b>Possessions Strategy Participants</b>	shall have the meaning set out in Condition D6.1.1;
<b>Possessions Strategy Proposal</b>	shall have the meaning set out in Condition D.6.1.2;
<b>Principal Change Date</b>	shall have the meaning set out in Condition D2.1.3;
<b>Prior Working Timetable</b>	shall have the meaning set out in Condition D2.1.6;
<b>Priority Date</b>	shall have the meaning set out in Condition D2.4.4;
<b>Rail Net Europe</b>	the association set up by a majority of European rail infrastructure managers and allocation bodies to enable fast and easy access to European rail, as well as to increase the quality and efficiency of international rail traffic;
<b>Railway Operational Code</b>	shall have the meaning shown in Part H of this code;
<b>Regulations</b>	the Railways Infrastructure (Access, Management and Licensing of Railway Undertaking) Regulations 2016 (SI no 645 of 2016), as may be amended from time to time and/or such other relevant legislation taking effect in Great Britain in respect of the same subject matter as those Regulations;
<b>Regulation 913/2010</b>	Regulation (EU) No.913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight, as may be amended from time to time;

<b>Rolled Over Access Proposal</b>	where an Access Proposal was submitted in a previous revision of the Working Timetable resulting in Train Slots being included in the Prior Working Timetable which the relevant Timetable Participant does not seek to vary in the New Working Timetable in accordance with this Part D;
<b>Route Utilisation Strategy</b>	a strategy established and maintained to promote the effective and efficient use and development of the capacity available on the Network, consistent with the funding that is, or is likely to become, available during the period of the strategy;
<b>Rules</b>	the Timetable Planning Rules and the Engineering Access Statement;
<b>Short Term Plan</b>	shall have the meaning shown in Condition D3.7.1;
<b>Strategic Capacity Statement</b>	the statement published in accordance with the Management of Strategic Capacity on the Network (Network Rail's Code of Practice) setting out Strategic Paths;
<b>Strategic Path</b>	capacity for potential use by new services to be included in the New Working Timetable and Working Timetable by way of a Strategic Train Slot;
<b>Strategic Train Slot</b>	a Train Slot included in the New Working Timetable and Working Timetable to represent a Strategic Path;
<b>Subsidiary Change Date</b>	shall have the meaning shown in Condition D2.1.3;
<b>Timetable Change Date</b>	shall have the meaning shown in Condition D2.1.3;
<b>Timetable Participant</b>	(a) an Access Beneficiary; or (b) a Potential Access Party;
<b>Timetable Period</b>	shall have the meaning shown in Condition D2.1.6;

<b>Timetable Planning Rules</b>	<p>a document, formerly called Rules of the Plan, regulating, for any part of the Network, the standard timings and other matters necessary to enable trains to be included in the New Working Timetable or scheduled into the Working Timetable applicable to that part of the Network, being rules which specify (amongst other matters) any required:</p> <ul style="list-style-type: none"> <li>(a) timings (including specified allowances) allowed for travel between specified points on the Network for each type of train and for each type of traction used, taking into account any particular constraints imposed by railway vehicles which may form part of the train;</li> <li>(b) timing margins or allowances for stopping at junctions and other specified points;</li> <li>(c) minimum timing margins or headways between successive trains travelling on the same section of track;</li> <li>(d) minimum and maximum time periods for stopping at stations and other specified points; and</li> <li>(e) restrictions as to the speed of railway vehicles on any section of track;</li> </ul>
<b>Timetable Preparation Period</b>	shall have the meaning shown in Condition D2.6.1;
<b>Timetable Variation</b>	shall have the meaning shown in Condition D3.1.3;
<b>Timetable Variation by Consent</b>	shall have the meaning shown in Condition D3.6.1;
<b>Timetable Week</b>	shall have the meaning shown in Condition D3.2.1;
<b>Timetabling Panel</b>	shall have the meaning shown in the ADRR;
<b>Timing Load</b>	in relation to a Service, the timing reference code which details the maximum speed and particular combination of traction type and trailing weight, together with whether any vehicles may be conveyed to which local speed restrictions will apply;
<b>Train Operator Variation</b>	shall have the meaning shown in Condition D3.1.1;
<b>Train Operator Variation Request</b>	shall have the meaning shown in Condition D3.3.1;
<b>Train Slot</b>	a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement;
<b>TW-X</b>	shall have the meaning shown in Condition D3.2.1;



<b>Working Hours</b>	any hour during the period 09:00 to 17:00 on a Working Day; and
<b>Works</b>	any inspection, maintenance, renewal, repair, replacement, improvement, enhancement or development of, or any other work in relation to, any part of the Network.

## 2 Bi-Annual Timetable Revision Process

### 2.1 Preliminary

2.1.1 The Working Timetable shall show every train movement on the Network, including:

- (a) every Service;
- (b) every Ancillary Movement;
- (c) every Strategic Train Slot;
- (d) every International Freight Train Slot;
- (e) the times of:
  - (i) departure from origin and arrival at destination;
  - (ii) arrival at and departure from every intermediate stopping point;
  - (iii) such passing points, in accordance with the Timetable Planning Rules, as Network Rail (acting reasonably) considers appropriate; and
  - (iv) all relevant timing allowances.

The Working Timetable shall also include freight train planning publications and documents detailing platform arrangements.

2.1.2 Network Rail shall re-issue the Working Timetable in revised form on two occasions in each year, after a consultation and revision process conducted by Network Rail in accordance with this Condition D2

2.1.3 The implementation dates for the two annual revisions of the Working Timetable will conform with Schedule 4 of the Regulations. To the extent permitted by the Regulations, following consultation with other infrastructure managers, Network Rail may vary the change implementation dates from time to time, provided that all Timetable Participants have been informed of and not objected to the change. Each change implementation date is referred to as a "Timetable Change Date". The first and main change implementation date, occurring in the winter of a calendar year, is referred to as the "Principal Change Date". The second change implementation

date, occurring in the summer after the Principal Change Date, is referred to as the “Subsidiary Change Date”.

2.1.4 This Condition D2 describes the process by which Network Rail will revise the Working Timetable on each of the Timetable Change Dates. Unless stated otherwise in this Part D, this process will be followed regardless of whether the change is to be implemented on a Principal Change Date or on a Subsidiary Change Date.

2.1.5 For the purposes of this Part D, a Timetable Change Date shall be designated by the letter “D”. The sequence of events culminating in the adoption of a revised Working Timetable is designated by a series of milestone dates and steps, all of which refer to a week in the period prior to date “D”. Each week commences at 02:00 on a Sunday and expires at 01:59 on the following Sunday. So, for example, “D minus 26” (or “D-26”) refers to the 26<sup>th</sup> week prior to date “D”. Where in this Part D any step or event is required or stated to occur by any week designated in this way, it must occur no later than 5pm on Friday of the preceding week. So, for example, a step which is required to occur no later than “D-26” must occur no later than:

- (a) 5pm on Friday;
- (b) in the week commencing on the Sunday which occurs 27 weeks prior to a Timetable Change Date.

2.1.6 To produce the timetable to take effect on a Timetable Change Date, Network Rail will use as the starting point the timetable published at D-26 in the process related to the immediately preceding Timetable Change Date (except that in relation to the International Freight Train Slots to be included in the timetable to take effect on a Principal Change Date, Network Rail shall reflect the International Freight Train Slots published in the International Freight Capacity Notice published at D-60 in the process relating to the preceding Principal Change Date along with any amendments made as a result of any appeal) but may delete any Train Slots (but not any International Freight Train Slots) in respect of which it believes, acting reasonably and after consultation with the relevant Timetable Participant (if appropriate), that the relevant Timetable Participant, or its successor, will not have the necessary access rights at the time of the intended operation of the Train Slots (“the Prior Working Timetable”). If any subsequent variations are made to the Prior Working Timetable as a result of the appeal process, then they shall also be incorporated into it. The Prior Working Timetable is then subject to a process of amendment under Condition D2 and during this period shall be referred to as the “New Working Timetable”. The timetable which the New Working Timetable becomes on a Timetable Change Date is the Working

Timetable. The period between Timetable Change Dates is referred to as the “Timetable Period”.

- 2.1.7 Not later than D-73 in relation to the Principal Change Date only, Network Rail shall publish to all Timetable Participants a calendar showing the milestone dates which will apply (for the purposes of this Condition D2) to the process of planning the New Working Timetables to take effect as Working Timetables on the Principal Change Date and the Subsidiary Change Date.

## **2.2 Revision of Timetable Planning Rules and Engineering Access Statement – D-64 to D-44**

- 2.2.1 Both the Timetable Planning Rules and the Engineering Access Statement (together referred to as “the Rules”) are revised on a bi-annual basis, each revised version being operative for the same Timetable Period as the Working Timetable to which they pertain. The Rules must be revised and updated, in accordance with the procedures described in this Condition D2.2, as a first stage in the preparation of a New Working Timetable.

2.2.1A The Rules shall permit the operation of International Freight Train Slots included in the applicable International Freight Capacity Notice.

- 2.2.2 Between D-64 and D-60, Network Rail shall consult with Timetable Participants in respect of any proposed changes to the Rules.

- 2.2.3 Following consultation in accordance with Condition D2.2.2, and not later than D-59, Network Rail shall provide to all Timetable Participants a draft of the revised Rules (the “Draft Rules”), provided that:

- (a) where “D” is a Principal Change Date, the Draft Rules to be provided and finalised shall be both those for the Timetable Period commencing on that Principal Change Date and those for the Timetable Period commencing on the immediately succeeding Subsidiary Change Date;
- (b) where “D” is a Subsidiary Change Date, the Draft Rules to be provided and finalised shall pertain only to the Timetable Period commencing on that Timetable Change Date and shall contain only revisions:
  - (i) which are not material; or
  - (ii) the need for which was not reasonably foreseeable at the time when the prior revision of the Rules was made.

2.2.4 Following distribution of the Draft Rules and by D-54:

- (a) Network Rail shall consult with Timetable Participants in respect of the Draft Rules provided to them in accordance with D2.2.3 and in respect of any representations made pursuant to paragraph (b) below;
- (b) Timetable Participants may make representations to Network Rail in respect of any changes they propose or objections they may have to the Draft Rules provided to them in accordance with D2.2.3.

2.2.5 Following D-54 and by D-44, Network Rail shall consider the representations and objections made to it by Timetable Participants pursuant to Condition D2.2.4 and any changes to International Freight Train Slots reflected in the applicable International Freight Capacity Notice and may amend the Draft Rules. Not later than D-44, Network Rail shall issue the final revised Rules to all Timetable Participants.

2.2.6 In preparing revised Rules, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.1 and to provide to Timetable Participants its reasons for making the revisions to the Rules.

2.2.7 Between D-44 and publication of the New Working Timetable at D-26, Network Rail may further revise the Rules where it considers, acting reasonably, such revision necessary or desirable in order to optimise that New Working Timetable. Before making any such further revisions to the Rules, Network Rail must first consult with all Timetable Participants who may be affected by the proposed changes. Network Rail will then inform all affected Timetable Participants of any such changes as soon as practicable after they are made. The amending power created by this Condition D2.2.7 is without prejudice to the amending power referred to in Condition D3.4.

2.2.8 Subject to Condition D2.2.9 below, any Timetable Participant dissatisfied with any decision of Network Rail in respect of those Rules (including any decision to revise those Rules pursuant to Condition D2.2.7) is entitled to appeal against any part of it. Any such appeal shall be conducted in accordance with Condition D5 and must be made by a Timetable Participant:

- (a) in respect of any decision to revise the Rules pursuant to Condition D2.2.7, within five Working Days of receipt of Network Rail's decision;
- (b) otherwise within fifteen Working Days of receipt of Network Rail's decision.

2.2.9 No appeal may be brought pursuant to Condition D2.2.8 in respect of any part of the Rules which conforms with any Possessions Strategy Notice which has:

- (a) not been appealed in the timeframe for appeal set out in Condition D6.4.1; or
- (b) has been appealed but has been finally determined by a Timetabling Panel or the Office of Rail and Road.

## **2.3 Timetable consultation – D-55 to D-40**

2.3.1 Any Timetable Participant wishing to introduce significant new Services or make significant changes to its Services shall notify Network Rail at the earliest opportunity and, where possible, before D-55. If Network Rail considers that the introduction of such new or changed Services may necessitate substantial timetable changes, it may commence the Initial Consultation Period, referred to in Condition D2.3.3 below, before D-55. In any event, Network Rail shall consult with Timetable Participants who may be affected by the proposed new or changed Services and shall provide them with all available relevant information in respect of those proposals.

2.3.2 Not later than D-45, Network Rail shall publish the Strategic Capacity Statement which is relevant to the preparation of the New Working Timetable. The Strategic Capacity Statement published no later than D-45 shall be deemed to be an Access Proposal, submitted to Network Rail in accordance with Conditions D2.4 and D2.5, in relation to the Strategic Paths contained in it.

2.3.3 During the period from D-55 to D-40 (or such extended period referred to in Condition D2.3.1):

- (a) Timetable Participants shall indicate the changes (if any) that they propose should be made in preparing the New Working Timetable;
- (b) Network Rail shall consult with Timetable Participants in respect of the New Working Timetable.

The period of consultation required by this Condition is referred to as the “Initial Consultation Period”.

2.3.4 During the Initial Consultation Period, Network Rail shall:

- (a) use its reasonable endeavours to answer enquiries made by Timetable Participants in connection with matters that may affect or relate to the New Working Timetable;

- (b) facilitate and co-ordinate dialogue with all Timetable Participants and (as may be appropriate) between Timetable Participants in order to identify opportunities to develop strategic initiatives and to promote network benefits such as connections, complementary services patterns and efficiency of operation.

2.3.5 Not later than D-48, Network Rail shall consult with International Operators and other infrastructure managers and shall provisionally include in the New Working Timetable the International Paths which any International Operator wishes to operate.

2.3.6 Not later than D-45 Network Rail shall provide to the Timetable Participants a copy of the Prior Working Timetable. If any changes are made to the Prior Working Timetable as a result of the appeal process under Condition D2.7, then Network Rail shall notify these changes to Timetable Participants as soon as reasonably practicable.

2.3.7 The consultation process set out in this Condition D2.3 shall not extend to International Freight Capacity.

## **2.4 Submission of Access Proposals by Timetable Participants – before and after the Priority Date at D-40**

2.4.1 A Timetable Participant shall set out its requirements in respect of the New Working Timetable in a written proposal, to be referred to as an “Access Proposal” where:

- (a) it wishes to exercise any Firm Rights and/or Contingent Rights and/or any expectation of rights to obtain Train Slots in respect of the relevant Timetable Period, where those rights were not exercised to obtain Train Slots in the Prior Working Timetable; and/or
- (b) it wishes to make changes to any Train Slot in the Prior Working Timetable;
- (c) it wishes to set out its requirements in response to a notification by Network Rail under Condition D2.4.6; and/or
- (d) it wishes to use any International Freight Train Slot where the criteria in Condition D2.4.9 are met.

2.4.2 Where a Timetable Participant does not intend using a Train Slot, which is included in the Prior Working Timetable, in the relevant Timetable Period, it shall notify this fact to Network Rail

in writing by D-40 or as soon as practicable thereafter.

- 2.4.3 Access Proposals may be submitted to Network Rail during the period up to D-26. However, Timetable Participants shall submit their Access Proposals (and any revised Access Proposals) as early as reasonably practicable prior to D-26 in order to facilitate optimal planning of the New Working Timetable by Network Rail and to ensure optimal consultation between Network Rail and all Timetable Participants.
- 2.4.4 Access Proposals submitted by D-40 (“the Priority Date”) are given priority in the compilation of the New Working Timetable in certain circumstances set out in Condition D4.2. Access Proposals submitted after the Priority Date but by D-26 will be incorporated by Network Rail into the New Working Timetable as far as reasonably practicable, taking into account the complexity of the Access Proposal including any reasonable foreseeable consequential impact on the New Working Timetable and the time available before the end of the Timetable Preparation Period, and in accordance with the principles set out in Condition D4.2.
- 2.4.5 Any subsequent or revised Access Proposal submitted by a Timetable Participant shall amend an Access Proposal submitted earlier where it sets out different requirements to the earlier submitted Access Proposal regarding the manner in which a right is to be exercised. In such case the date on which the subsequent or revised Access Proposal is submitted will be treated, for the purposes of Condition D4.2.2, as the date of notification of the relevant right.
- 2.4.6 Where a Timetable Participant has:
- (a) submitted an Access Proposal which cannot be accommodated in the New Working Timetable; or
  - (b) a Train Slot in the Prior Working Timetable which cannot be accommodated in the New Working Timetable; or
  - (c) submitted a proposal purporting to be an Access Proposal but which is defective or incomplete,
- 2.4.7 Network Rail must notify the Timetable Participant of this fact, as soon as possible after it has become aware of it, so that the Timetable Participant has the opportunity to submit a further Access Proposal under Condition D2.4.1(c).
- 2.4.8 An Access Proposal in relation to all or any part of an International Freight Train Slot listed in section A of the applicable International Freight Capacity Notice may not be



made under this Part D.

- 2.4.9 An Access Proposal in relation to all or any part of an International Freight Train Slot listed in section B of the applicable International Freight Capacity Notice may not be made under this Part D unless that proposal is in connection with a train service, the purpose of which is the carriage of goods through the Channel Tunnel or the conveyance of goods which have passed or are to pass through the Channel Tunnel.

## **2.5 Content of an Access Proposal**

- 2.5.1 Each Access Proposal shall include as a minimum in respect of each Train Slot, save to the extent that Network Rail expressly agrees in writing to the contrary:

- (a) the dates on which Train Slots are intended to be used;
- (b) the start and end points of the train movement;
- (c) the intermediate calling points;
- (d) the times of arrival and departure from any point specified under paragraphs (b) and (c) above;
- (e) the railway vehicles or Timing Load to be used;
- (f) any required train connections with other railway passenger services;
- (g) the proposed route;
- (h) any proposed Ancillary Movements;
- (i) any required platform arrangements at the start, end and all intermediate calling points;
- (j) any relevant commercial and service codes; and
- (k) the proposed maximum train speed and length and, in relation to a freight train, the proposed maximum train weight.

- 2.5.2 Where an Access Proposal has been submitted by a Timetable Participant, Network Rail shall be entitled to require any further information in respect of that Access Proposal that it reasonably considers to be necessary or beneficial to the preparation of the New Working Timetable.

## **2.6 Timetable Preparation – D-40 to D-26**

2.6.1 During the Timetable Preparation Period (D-40 to D-26) (“Timetable Preparation Period”), Network Rail shall compile the proposed New Working Timetable.

2.6.2 Between D-40 and D-26:

- (a) all Timetable Participants shall have access to the evolving draft of the New Working Timetable either:
  - (i) by way of “read-only” remote computer access or such other electronic means reasonably requested by a Timetable Participant ; or
  - (ii) to the extent that a Timetable Participant does not have the required systems to facilitate remote computer access, by read-only computer access upon attendance at such of Network Rail’s offices specified by Network Rail;
- (b) Network Rail shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable, and shall continue to answer enquiries and facilitate and co-ordinate dialogue as stated in Condition D2.3.4.

2.6.3 In compiling the New Working Timetable, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.

## **2.7 New Working Timetable Publication – D-26**

2.7.1 The New Working Timetable shall be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in this Condition D2.7.

2.7.2 Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it (other than in respect of International Freight Train Slots consulted under Condition D9.2), provided that an appeal is lodged within twenty Working Days of its publication. All such appeals shall be conducted in accordance with Condition D5.

2.7.3 Where a Timetable Participant has enquiries or requires further information from Network Rail regarding the published New Working Timetable, Network Rail shall respond fully and promptly and where possible, taking into account the nature of the enquiry or information requested and the date this is

received by Network Rail, so as to enable a Timetable Participant to comply with the timescales in Condition D2.7.2.

2.7.4 Network Rail shall promptly make all revisions to the New Working Timetable required by all appeal decisions, and shall notify all Timetable Participants upon completion of those changes.

## **2.8 Summary**

2.8.1 A timeline, showing a summary of the bi-annual timetable amendment process, is attached at Annex 1. Where there is any conflict between the timeline and the wording of Conditions D1-7, the wording of Conditions D1-7 shall prevail.

## **3 Variations to the Working Timetable**

### **3.1 Overview**

3.1.1 From D-26 and during the relevant Timetable Period, Timetable Participants may wish to vary either the New Working Timetable, if it is before the Timetable Change Date, or otherwise the Working Timetable on an ad hoc basis by:

- (a) adding an additional Train Slot on one or more occasions;
- (b) amending the detail of one or more Train Slots;
- (c) removing one or more Train Slots.

Any such variation is referred to as a “Train Operator Variation”. The process to be followed where a Timetable Participant seeks a Train Operator Variation is set out in Condition D3.3.

3.1.2 From D-26 and during the relevant Timetable Period, Network Rail may wish to vary either the New Working Timetable, if it is before the Timetable Change Date, or otherwise the Working Timetable on an ad hoc basis by:

- (a) adding an additional Train Slot on one or more occasions;
- (b) amending the detail of one or more Train Slots;
- (c) removing one or more Train Slots;

(but in each case not any Train Slot that is an International Freight Train Slot) in order to facilitate a Restriction of Use. Any

such variation is referred to as a “Network Rail Variation”. The process to be followed where a Network Rail Variation is sought with more than 12 weeks notice is set out in Condition D3.4. The process to be followed where a Network Rail Variation is sought with less than 12 weeks notice is set out in Condition D3.5.

3.1.3 Train Operator Variations and Network Rail Variations are collectively referred to as “Timetable Variations”.

3.1.4 In considering or making any Timetable Variation, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Conditions D4.3 and D4.4.

3.1.5 From D-26 and during the relevant Timetable Period, Network Rail may vary either the New Working Timetable, if it is before the Timetable Change Date, or otherwise the Working Timetable on an ad hoc basis by:

- (a) amending the detail of one or more International Freight Train Slots; or
- (b) removing one or more International Freight Train Slots.

Any such variation is referred to as an “International Freight Variation”. Network Rail may only make an International Freight Variation in the circumstances set out in Condition D3.1.6.

3.1.6 Network Rail may only make an International Freight Variation to:

- (a) reflect the allocation by the International Freight Corridor One Stop Shop of an International Freight Train Slot in section A of an International Freight Capacity Notice in accordance with Regulation 913/2010;
- (b) reflect the allocation by Network Rail of an International Freight Train Slot in section B of an International Freight Capacity Notice in accordance with the provisions of this Part D;
- (c) reflect an International Freight Train Slot in section A of an International Freight Capacity Notice becoming available for allocation by Network Rail in accordance with the provisions of this Part D;
- (d) reflect changes to an International Freight Train Slot required as a result of an agreement it has reached with the International Freight Corridor One Stop Shop;

- (e) in the case of an International Freight Train Slot in section A of an International Freight Capacity Notice, reflect or facilitate a Restriction of Use (but only where that Restriction of Use is needed in relation to a case of force majeure (including urgent and unforeseeable safety critical work) within the meaning of Regulation 913/2010); or
- (f) in the case of an International Freight Train Slot in section B of an International Freight Capacity Notice, reflect or facilitate a Restriction of Use.

### **3.2 Timeline for the Planning of Timetable Variations**

3.2.1 Network Rail Timetable Variations are planned by Network Rail on a week by week basis. Each week of a Working Timetable is referred to as a “Timetable Week”. Each Timetable Week commences at 00:01 on a Saturday and expires at 24:00 on the following Friday. The sequence of events by which variations are finalised is designated by a series of milestone dates and steps, all of which refer to a week in the period prior to the commencement of Timetable Week “TW”. So, for example, “TW minus 12” (or “TW-12”) refers to the 12<sup>th</sup> week prior to the start of a given Timetable Week “TW”. Where in this Part D any step or event is required or stated to occur by any week designated in this way, it must occur no later than 5pm on Friday of the preceding week. So, for example, a step which is required to occur no later than “TW-12” must occur no later than:

- (a) 5pm on Friday;
- (b) in the week commencing on the Sunday which occurs 13 weeks prior to the commencement of week TW.

3.2.2 Not later than D-26, Network Rail shall provide to all Timetable Participants a calendar pertaining to each Timetable Week, showing the milestone dates which will apply (pursuant to this Condition D3) to the planning of all Timetable Variations in respect of that Timetable Week.

### **3.3 Train Operator Variations after D-26**

3.3.1 Where a Timetable Participant seeks a Train Operator Variation, it shall submit to Network Rail a written request, referred to as a “Train Operator Variation Request”.

3.3.2 A Train Operator Variation Request shall contain a full description of the variation sought and, where it relates to the

addition or amendment of any Train Slot to be included in the Working Timetable, shall provide the same information in respect of the variation as would be contained in an Access Proposal (save that where a proposed Train Slot amendment does not involve revision of any information previously supplied to Network Rail in an Access Proposal for that Train Slot, the Train Operator Variation Request need not repeat that information).

3.3.3 From D-26 and during the relevant Timetable Period, a Timetable Participant is entitled to make a Train Operator Variation Request and Network Rail shall have the power to accept, reject or modify it, subject to the timeframes set out in Conditions D3.3.6 and D3.3.7 below and acting in accordance with Condition D4.3.

3.3.4 Where a Train Operator Variation Request is received:

- (a) on any day which is not a Working Day; and/or
- (b) after 10:00 hours on a Working Day;

it shall be deemed to have been received on the next Working Day thereafter.

3.3.5 For the purposes of calculating Network Rail's response time to a Train Operator Variation Request set out in Condition D3.3.6, the day of Network Rail's receipt of a Train Operator Variation Request is described as day 1 and each Working Day following this adds a day onto the description. For example, the Working Day after the day of receipt of the request is day 2.

3.3.6 Except in relation to a Train Operator Variation Request which includes a One Stop Shop Service which is dealt with in Condition D3.3.7, Network Rail shall notify its acceptance, rejection or modification of a Train Operator Variation Request, by the following latest times:

- (a) as soon as reasonably practicable, where the request is to operate a Train Slot on day 1 or day 2.
- (b) by 15:00 hours on day 1, where the request is to operate a Train Slot on day 3;
- (c) by 10:00 hours on day 2, where the request is to operate a Train Slot on day 4;
- (d) by 15:00 hours on day 2, where the request is to operate a Train Slot on day 5;
- (e) by 15:00 hours on day 3, where the request is to operate a Train Slot on day 6;

- (f) by 10:00 hours on day 4, where the request is to operate a Train Slot on day 7;
- (g) where (a), (b), (c), (d), (e) or (f) do not apply, within five Working Days of receipt of the request.

3.3.7 In relation to a Train Operator Variation Request which includes a One Stop Shop Service, Network Rail shall notify its acceptance, rejection or modification of the Train Operator Variation Request as soon as reasonably practicable.

3.3.8 Where Network Rail fails to notify its response to a Train Operator Variation Request in accordance with Condition D3.3.6 and the request, if accepted, would not give rise to any conflict with:

- (a) the New Working Timetable after it is published at D-26; or
- (b) the relevant Working Timetable; or
- (c) the Rules,

it shall be deemed to have accepted the request.

3.3.9 Subject to Condition D3.3.10 below, where a Timetable Participant is dissatisfied with any final decision of Network Rail in response to a Train Operator Variation Request, it may appeal against that decision in accordance with Condition D5, provided that it submits its appeal as soon as reasonably practicable and, in any event, no later than five Working Days after it is notified of the relevant decision by Network Rail.

3.3.10 Any appeal regarding a Train Operator Variation Request which includes a One Stop Shop Service can only be made in relation to the part of the request concerning the Network.

3.3.11 Where Network Rail rejects or modifies any Train Operator Variation Request it must provide written reasons for its decision.

3.3.12 A Train Operator Variation Request in relation to all or any part of an International Freight Train Slot listed in section A of the applicable International Freight Capacity Notice may not be made under this Part D.

3.3.13 A Train Operator Variation Request in relation to all or any part of an International Freight Train Slot listed in section B of the applicable International Freight Capacity Notice may not be made under this Part D unless that request is in connection with a train service, the purpose of which is the carriage of goods through the Channel Tunnel or the conveyance of goods which

have passed or are to pass through the Channel Tunnel.

### **3.4 Network Rail Variations with at least 12 Weeks Notice**

3.4.1 The procedures described in this Condition D3.4 are designed to facilitate the planning of Network Rail Restrictions of Use at least 12 weeks prior to the start of each Timetable Week.

3.4.2 Network Rail shall be entitled to make a variation to the Working Timetable provided that:

- (a) the Network Rail Variation is made only for the purpose of taking Restrictions of Use which are consistent with the Rules, as published following the process set out in Condition D2.2 or as amended in accordance with the procedure established pursuant to Condition D3.4.3; and
- (b) Network Rail complies with the procedure set out in this Condition D3.4.

3.4.3 Network Rail shall include in the Rules a procedure to enable amendment of the Rules, following their finalisation in accordance with Condition D2.2. This amending power is without prejudice to the amending power referred to in Condition D2.2.7, and is to be utilised in order to facilitate changes which Network Rail considers necessary to take Restrictions of Use.

3.4.4 The procedure referred to in Condition D3.4.3:

- (a) must require that no amendment to the Rules may be made unless Network Rail has consulted with all Timetable Participants likely to be affected by the amendment;
- (b) must require that all decisions of Network Rail be made by application of the Decision Criteria in accordance with Condition D4.6;
- (c) may authorise changes to the procedure.

3.4.5 All amendments to the Rules made pursuant to the procedure referred to in Condition D3.4.3 shall be subject to the appeal procedures in Condition D5 as if they were made pursuant to a procedure set out in this Part D.

3.4.6 Notwithstanding anything stated elsewhere in this Part D, where any amendment is made to the procedure referred to in Condition D3.4.3 by use of that procedure, the amendment shall not take effect until the determination of any appeal against the same.



- 3.4.7 Where Network Rail proposes to make any variation to the Working Timetable consequent upon an amendment to the Rules made in accordance with this Condition D3.4, Network Rail shall provide to each Timetable Participant, by TW-30, its proposals for Restrictions of Use in respect of the corresponding Timetable Week. All such proposals may be amended or supplemented by Network Rail at any time prior to TW-26 and such amendments or supplements should also be provided to Timetable Participants prior to TW-26.
- 3.4.8 After TW-30 but by TW-26, Network Rail shall consult with each Timetable Participant affected (directly or indirectly) by the Restrictions of Use proposed pursuant to Condition D3.4.7 and shall seek to agree all Network Rail Variations to be made .
- 3.4.9 To facilitate the planning of any Network Rail Variation, Network Rail may require that any Timetable Participant shall submit a revised Access Proposal in respect of any Train Slot.
- 3.4.10 Where Network Rail requires a revised Access Proposal:
- (a) the requirement must be notified to the affected Timetable Participant no later than TW-22;
  - (b) Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reasons for this;
  - (c) Network Rail shall specify a reasonable period in which the revised Access Proposal must be provided, and in any event the revised Access Proposal shall be submitted no later than TW-18.
- 3.4.11 Network Rail may modify, accept or reject a revised Access Proposal and where it modifies or rejects any revised Access Proposal, it must provide written reasons for its decision.
- 3.4.12 Where a revised Access Proposal has not been submitted by a Timetable Participant as required by Network Rail, Network Rail shall be entitled to make a Network Rail Variation of any Train Slot in respect of which the revised Access Proposal was required and no appeal may be made in respect of Network Rail's decision.
- 3.4.13 Not later than TW-14, Network Rail shall notify all Timetable Participants of its decision in respect of Network Rail Variations to be made pursuant to the procedure in this Condition D3.4.
- 3.4.14 Not later than TW-13, any Timetable Participant affected by Network Rail's decision notified pursuant to Condition D3.4.13 shall inform Network Rail whether it accepts or disputes that

decision.

3.4.15 At TW-12, Network Rail shall record and provide to all Timetable Participants, in accordance with Condition D3.7.1, the Network Rail Variations to be made pursuant to this Condition D3.4.

3.4.16 Subject as provided in Condition D3.4.12, any Timetable Participant which is dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation may appeal against it in accordance with Condition D5.

### **3.5 Network Rail Variations with less than 12 Weeks Notice**

3.5.1 It may be necessary for Restrictions of Use to be arranged by Network Rail with less than 12 weeks notice or otherwise outside the process described in Condition D3.4. The following paragraphs of this Condition D3.5 are intended to facilitate such Restrictions of Use.

3.5.2 Where Network Rail proposes to make any variation to the Working Timetable in circumstances where it is not reasonably practicable to comply with the timing requirements of Condition D3.4, Network Rail shall follow the procedures set out in Condition D3.4 save that:

- (a) the timing requirements specified there; and
- (b) Conditions D3.4.13, D3.4.14 and D3.4.15;

shall not apply. In carrying out those procedures, Network Rail shall be permitted (for itself) and shall prescribe (for affected Timetable Participants) such time periods for each step as are reasonably practicable in the circumstances. Network Rail shall notify all affected Timetable Participants of its final decision in respect of any such change as soon as reasonably practicable. Any variation to a Working Timetable made pursuant to this Condition D3.5.2 shall be a "Network Rail Variation" for the purposes of this Part D.

3.5.3 Any Timetable Participant which is dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation made pursuant to Condition D3.5.2 may appeal in accordance with Condition D5.

### **3.6 Timetable Variations by consent**

3.6.1 Notwithstanding anything stated in this Condition D3, where Network Rail and all affected Timetable Participants have so consented in writing, a Timetable Variation may be made without the need for compliance with such of the requirements of

this Condition D3 as are specified in the consent. Such a variation is referred to as a “Timetable Variation by Consent”.

### **3.7 Publication of Timetable Variations**

3.7.1 Where, pursuant to the processes described in this Condition D3, any Timetable Variation or Timetable Variation by Consent has been finalised, it shall be recorded by Network Rail in one or more schedules (each referred to as a “Short Term Plan”). Each Short Term Plan shall be made available to affected Timetable Participants (by the same means as are described in Condition D2.6.2(a)) as soon as reasonably practicable after the relevant variation has been approved by Network Rail, and the affected part(s) of the New Working Timetable or Working Timetable shall be annotated to refer to the relevant Short Term Plan(s).

### **3.8 Operation of Part H**

3.8.1 In addition to any variation to the New Working Timetable or Working Timetable arising pursuant to the procedures set out in this Condition D3, variations may also arise from time to time by reason of the operation of the Railway Operational Code, and this Condition D3 is subject to the operation of that Code.

### **3.9 Summary**

3.9.1 A timeline, showing a summary of the process for variations to the Working Timetable, is attached at Annex 2. Where there is any conflict between the timeline and the wording of Conditions D1-7, the wording of Conditions D1-7 shall prevail.

## **4 Decisions by Network Rail**

### **4.1 Decisions concerning the Rules**

4.1.1 In conducting the processes set out in Condition D2.2 by which the Rules are revised on a bi-annual basis (including the amendment process described in Condition D2.2.7), Network Rail shall make all decisions by application of the Decision Criteria in the manner set out in Condition D4.6.

### **4.2 Decisions arising in the preparation of a New Working Timetable**

4.2.1 In compiling a New Working Timetable in accordance with Condition D2.6, Network Rail shall apply the Decision Criteria in

accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2.

4.2.2 Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:

- (a) a New Working Timetable shall conform with the Rules and the applicable International Freight Capacity Notice applicable to the corresponding Timetable Period;
- (b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;
- (c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right;
- (d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:
  - (i) first to:
    - (A) the Firm Rights of any Timetable Participant that will subsist during the whole of the Timetable Period and which have been Exercised; and
    - (B) any rights Network Rail has for Network Services included in the Rules;
  - (ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that Network Rail considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;
  - (iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will be

Firm or Contingent Rights in force during the Timetable Period;

- (iv) fourth to any:
  - (A) rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5. Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to Network Rail; and
  - (B) Strategic Paths contained in the Strategic Capacity Statement.

#### **4.3 Decisions concerning Train Operator Variations**

4.3.1 In responding to a Train Operator Variation Request, Network Rail shall conduct itself as follows:

- (a) it is entitled to exercise its Flexing Right;
- (b) when exercising its power set out in Condition D3.3.3 Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 except that it shall not accept a Train Operator Variation Request if to do so would give rise to any conflict with any Train Slot already scheduled in:
  - (i) the New Working Timetable after it is published at D-26 or the relevant Working Timetable, unless it is a Strategic Train Slot or an International Freight Train Slot for which the criteria for use in Condition D2.4.9 are met and which has not already been allocated to a Timetable Participant; or
  - (ii) the Rules;
- (c) where the Decision Criteria have been applied as set out in sub-paragraph (b) immediately above but two or more such requests would give rise to conflict were they to be accepted, they shall be prioritised in the order in which they were submitted and any conflict resolved accordingly.

#### 4.3.2 Where a Train Operator Variation Request:

- (a) pertains to a Train Slot to be used for the carriage of passengers in connection with any sporting or other public event; and
- (b) would, if accepted, conflict with any Train Slot already scheduled in the New Working Timetable or Working Timetable, unless it is a Strategic Train Slot; and
- (c) would in the absence of such conflict be accepted (or accepted on varied terms) by Network Rail;

Network Rail shall consult with the Timetable Participant entitled to the Train Slot and shall seek its consent to effect a variation of the scheduled Train Slot to the extent necessary to accommodate the relevant request (or that request as may be varied). Any Timetable Participant so consulted shall not unreasonably withhold or delay its consent to the proposed variation where the relevant request proposes the use of a Train Slot for the carriage of passengers in materially greater numbers than are usually carried on the relevant part of the Network on the days and times in question.

#### 4.3.3 Where any Timetable Participant consulted by Network Rail in accordance with Condition D4.3.2:

- (a) consents to the proposed variation of its Train Slot; or
- (b) unreasonably withholds or delays its consent in breach of Condition D4.3.2;

Network Rail shall be entitled to make a variation in respect of that Train Slot (including the removal of that Train Slot) to the extent necessary to facilitate the relevant request. Where, consequent upon such variation, Network Rail is required by the terms of an Access Agreement to pay any compensation to the affected Timetable Participant, the Timetable Participant which made the relevant Train Operator Variation Request shall reimburse the amount of that payment to Network Rail.

#### 4.3.4 Notwithstanding anything stated elsewhere in this Part D, Network Rail shall be entitled to reject any Train Operator Variation Request if it:

- (a) pertains to a Timetable Variation which has in substance been made previously pursuant to Condition D3 and has been rejected; or
- (b) is substantially the same as any part of an Access Proposal made and rejected during the course of the bi-annual timetable revision process described in

Condition D2;

unless there has been a material change in circumstances which would affect Network Rail's application of the Decision Criteria in Condition D4.6 when deciding whether or not to accept the Train Operator Variation Request.

#### **4.4 Decisions concerning Network Rail Variations**

4.4.1 In making any decision in the course of implementing the procedures set out in Conditions D3.4 or D3.5, Network Rail:

- (a) is entitled to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10;
- (b) may not effect any Network Rail Variation to the extent that the variation is inconsistent with the Rules;
- (c) shall, subject to the over-riding principles set out in sub-paragraphs (a) and (b) above, apply the Decision Criteria in accordance with Condition D4.6.

#### **4.5 Decisions concerning Possessions Strategy Notices**

4.5.1 In making any decision concerning the content of a Possessions Strategy Notice, Network Rail shall apply the Decision Criteria in accordance with Condition D4.6.

#### **4.6 The Decision Criteria**

4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be 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 ("the

Objective”).

4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (“the Considerations”) in accordance with Condition D4.6.3 below:

- (a) maintaining, developing and improving the capability of the Network;
- (b) that the spread of services reflects demand;
- (c) maintaining and improving train service performance;
- (d) that journey times are as short as reasonably possible;
- (e) maintaining and improving an integrated system of transport for passengers and goods;
- (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
- (g) seeking consistency with any relevant Route Utilisation Strategy;
- (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
- (i) mitigating the effect on the environment;
- (j) enabling operators of trains to utilise their assets efficiently;
- (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates; and
- (l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.

4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and



Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

4.6.4 The Objective and the Considerations together form the Decision Criteria.

#### **4.7 Finality of decisions**

4.7.1 Save where expressly otherwise stated in this Part D, where Network Rail has announced a final decision in respect of any process regulated by this Part D, that decision shall be:

- (a) binding on Timetable Participants save to the extent that it is changed by an appeal authorised by this Part D;
- (b) binding on Network Rail save to the extent that:
  - (i) Network Rail is expressly permitted by any provision of this Part D to deviate from or amend that decision; or
  - (ii) a decision is changed by an appeal authorised by this Part D.

### **5 Appeals**

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

5.1.1 Where an appeal is expressly authorised by this Part D, a Timetable Participant may refer a decision for determination by a Timetabling Panel in accordance with the ADRR.

5.1.2 Where a deadline for bringing an appeal is expressly stated in this Part D, an appeal in respect of such a decision must be made by the stated deadline. Otherwise, an appeal brought pursuant to this Part D must be made:

- (a) within five Working Days of receipt of the decision to which objection is made; or
- (b) where the period referred to in (a) includes Christmas Day, within ten Working Days of that decision.

- 5.1.3 Where an appeal is made against a New Working Timetable as envisaged by Condition D2.7.2 the appeal shall be determined by the Timetabling Panel within ten Working Days of final submission to it of all relevant information.

## **5.2 Appeal to Office of Rail and Road**

- 5.2.1 Where either Network Rail or a Timetable Participant is dissatisfied with the decision of a Timetabling Panel under Condition D5.1, it may refer the matter to the Office of Rail and Road for determination under Part M, provided that any such referral must be made:

- (a) within five Working Days of receipt of the Timetabling Panel's written reasoned determination to which objection is made; or
- (b) where the period referred to in (a) above includes Christmas Day, within ten Working Days of receipt of such receipt.

## **5.3 Powers of dispute resolution bodies**

- 5.3.1 In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail and Road (as the case may be) may exercise one or more of the following powers:

- (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;
- (b) it may direct that a challenged decision of Network Rail shall stand;
- (c) it may substitute an alternative decision in place of a challenged decision of Network Rail;

provided that the power described in (c) above shall only be exercised in exceptional circumstances.

- 5.3.2 Where general directions have been given in accordance with Condition D5.3.1, the relevant appeal body may, on the application of Network Rail brought in accordance with Condition D5.3.3, make such further orders as it shall consider appropriate in order to provide the parties with guidance as to the interpretation and application of such general directions.

- 5.3.3 Any application made by Network Rail pursuant to Condition D5.3.2 must be made within:

- (a) five Working Days of the relevant decision; or
- (b) where the said period of five Working Days would include Christmas Day, ten Working Days.

#### **5.4 Status of Decisions**

5.4.1 Save where expressly stated otherwise in this Part D, where an appeal to a Timetabling Panel pertaining to this Part D is pending, the relevant decision of Network Rail shall remain binding until such time as the Timetabling Panel determines otherwise.

5.4.2 Save where expressly stated otherwise in this Part D, where an appeal to the Office of Rail and Road pertaining to Part D is pending, the relevant decision of the Timetabling Panel shall remain binding until such time as the Office of Rail and Road determines or orders otherwise.

#### **5.5 Binding effect of appeal rulings**

5.5.1 Where an appeal is brought pursuant to this Part D, the parties to the appeal shall be bound by:

- (a) the ruling of the Timetabling Panel, unless or until ordered or determined otherwise by the Office of Rail and Road;
- (b) the ruling of the Office of Rail and Road.

#### **5.6 Implementing an appeal ruling**

5.6.1 Network Rail shall be bound and empowered to take such steps as may be necessary to implement all rulings made by a Timetabling Panel or the Office of Rail Regulation pursuant to this Condition D5. All such steps shall be taken promptly.

#### **5.7 Liability of Network Rail**

5.7.1 Where a decision of Network Rail is overturned on appeal, Network Rail shall only be liable to any Timetable Participant in damages in respect of that decision where it was made in bad faith or was unreasonable.

## **6 Possessions Strategy Notices**

### **6.1 Possessions Strategy Proposal**

6.1.1 Where Network Rail proposes implementing any Works which require a programme of Restrictions of Use extending over:

- (a) a period of more than one calendar year; or
- (b) a period which contains two or more Timetable Change Dates;

it may at its discretion elect to implement the procedure set out in this Condition D6. Where it so elects, the procedure must be implemented by Network issuing a Possession Strategy Proposal not later than D-90 and shall be concluded by Network Rail issuing a Possession Strategy Notice not later than D-64. References in this Condition D6 to “D-x” refer to x number of weeks before the Timetable Change Date on which the Working Timetable containing the first proposed Restriction of Use will come into effect. The parties entitled to participate in that procedure shall be all Timetable Participants who may be affected by the proposed Restrictions of Use (who shall be referred to as “Possessions Strategy Participants”).

6.1.2 Where Network Rail elects to implement the procedure set out in this Condition D6, it shall do so by serving written notice on all Possessions Strategy Participants, a “Possessions Strategy Proposal”, not later than D-90, which shall:

- (a) provide sufficient particulars of:
  - (i) the proposed Works; and
  - (ii) the proposed strategy for Restrictions of Use pertaining to the Works;

as will enable each recipient to understand the likely effect of the proposed Works on its Services;

- (b) provide an explanation of Network Rail’s reasons for the proposed Restrictions of Use strategy.

### **6.2 Consultation**

6.2.1 Following service of a Possessions Strategy Proposal, Network Rail shall consult with all parties on whom it has been served. Each recipient shall be afforded a reasonable period (to be specified by Network Rail, having regard to the likely effect of the Possessions Strategy Proposal on each recipient’s Services)

in which to make submissions and counter-proposals to Network Rail in respect of the proposed strategy for Restrictions of Use pertaining to the Works.

### **6.3 Finalisation of Possessions Strategy – Possessions Strategy Notice**

6.3.1 Following the consultation process described in Condition D6.2, Network Rail shall make its final decision concerning the strategy for Restrictions of Use that will be adopted in order to effect the Works, and will notify its decision to all Possessions Strategy Participants not later than D-64, by means of a formal notice detailing the strategy (to be referred to as a “Possessions Strategy Notice”).

6.3.2 Where, in finalising a Possessions Strategy Notice, Network Rail has rejected counter-proposals put to it by a Possessions Strategy Participant, it shall give to that party written reasons for that rejection when it serves its Possession Strategy Notice.

### **6.4 Appeal**

6.4.1 Where any Possessions Strategy Participant is dissatisfied with any aspect of any Possessions Strategy Notice, it may appeal in accordance with Condition D5. Any such appeal must be made within twenty Working Days of the Possessions Strategy Notice being served on it.

### **6.5 Relationship with the Rules**

6.5.1 The fact that the process under this Condition D6 has been followed and a Possession Strategy Notice issued does not in any way affect the applicability of the process set out in

Condition D2.2 which, in those circumstances, still must be followed. However, where any part of the Rules conform with a Possession Strategy Notice then a decision of Network Rail regarding that part of the Rules can not be appealed in the circumstances set out in Condition D2.2.9.

6.5.2 In the event of any inconsistency between any Possessions Strategy Notice and the Rules, once they have been finalised in accordance with the process set out in Condition D2.2, the Rules shall prevail.

## **6.6 Relationship with Part G**

6.6.1 This Condition D6 is without prejudice to Part G.

## **6.7 Amendment of Possessions Strategy Notice**

6.7.1 Network Rail shall include within the Timetable Planning Rules a procedure to enable amendment or withdrawal of a Possessions Strategy Notice. That procedure shall provide that:

- (a) no such change shall be made unless Network Rail has consulted, to the extent reasonably practicable, with any Possessions Strategy Participant likely to be affected by that change;
- (b) that all decisions of Network Rail made pursuant to that procedure shall be made by application of the Decision Criteria in accordance with Condition D4.6.

6.7.2 All amendments to a Possessions Strategy Notice made pursuant to the procedure referred to in Condition D6.7.1 shall be subject to the appeal procedures in Condition D5.

## **7 Calendar of Events and Event Steering Group**

### **7.1 Calendar of Events**

7.1.1 Not later than D-64, Network Rail shall issue a Draft Calendar of Events to Timetable Participants and funders

7.1.2 Timetable Participants and funders may make representations to Network Rail in respect of any changes they propose or objections they have to the Draft Calendar of Events no later than D-59

7.1.3 By D-54, Network Rail shall consider the proposals and

objections made to it by Timetable Participants and funders pursuant to Condition D7.1.2 and publish the Calendar of Events

7.1.4 Where Network Rail has not included in the Calendar of Events any events proposed by a Timetable Participant or funder in accordance with Condition D7.1.2, it shall explain to the relevant Timetable Participant or funder why this is the case.

## **7.2 Event Steering Group**

7.2.1 In relation to each Event, Network Rail shall set up and chair an Event Steering Group. The Event Steering Group shall be set up in sufficient time prior to the relevant Event so that it can achieve its objectives set out in Condition D7.2.2.

7.2.2 The objectives of an Event Steering Group shall be to:

- (a) agree a project plan to achieve a smooth transition for the necessary timetable changes, arising from the Event, through Condition D2 by way of timely industry input into the process ("the Project");
- (b) oversee and facilitate delivery of the Project;
- (c) carry out appropriate consultation with Passenger Focus, London TravelWatch, Rail Freight Group and Freight Transport Association during the course of the Project.

7.2.3 Members of the Event Steering Group shall participate in and contribute to the Event Steering Group so that it achieves its objectives.

## **8 Miscellaneous**

### **8.1 Directions issued by the Office of Rail and Road**

8.1.1 Notwithstanding anything else stated in this Part D, Network Rail shall be bound and entitled to make or give effect to such amendments or changes to a Working Timetable as may be directed from time to time by the Office of Rail and Road in the exercise of its statutory powers, except in relation to any amendment or change which would be impossible to make

without infringing the Firm Rights of another.

## **8.2 Confidentiality**

8.2.1 Network Rail shall not be required to keep confidential the identity of, or any information provided to it by, any Timetable Participant.

## **8.3 Accreditation of Train Planners**

8.3.1 Following consultation with Timetable Participants, Network Rail may from time to time establish and revise procedures for:

- (a) requiring planners employed or engaged by Timetable Participants to assist in the processes prescribed by this Part D on behalf of Network Rail ("Planners") to be accredited;
- (b) accrediting Planners;
- (c) regulating the work undertaken by accredited Planners.

8.3.2 Network Rail shall send to Timetable Participants a copy of the procedures referred to in Condition D8.3.1, and any revisions to them, as soon as reasonably practicable after their finalisation.

## **8.4 Removal of Train Slots, other than Strategic Train Slots and International Freight Train Slots, from Working Timetable where no Access Rights exist**

8.4.1 Any movements of trains operated by any person must be made pursuant to permission to use the track for the purpose of or in connection with the operation of those trains under an Access Agreement ("Access Rights"). If, by 22:00 hours on the day before a Timetable Change Date and after consultation with the person proposing to move the trains, Network Rail reasonably considers that the person proposing to move the trains will not have the necessary Access Rights by the intended date of operation of the Train Slots, then it may remove the Train Slot(s) for the movement of those trains from the Working Timetable due to commence the following day.

8.4.2 Condition D8.4.1 shall not apply to Strategic Train Slots nor to International Freight Train Slots.



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

**8.5.1 Where:**

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

then Network Rail shall notify the freight Train Operator of its intention to remove the Train Slots from the Working Timetable.

8.5.2 Upon receipt of a notice under Condition D8.5.1, the freight Train Operator shall respond to Network Rail in writing within 10 Working Days stating that it either accepts or disagrees with Network Rail's decision

8.5.3 If the freight Train Operator disagrees with Network Rail's decision under Condition D.8.5.1, then in addition to its response under Condition D8.5.2, it shall also at the same time refer the matter for determination in accordance with the ADRR

8.5.4 If the freight Train Operator fails to respond to Network Rail in writing within 10 Working Days of receiving a notice under Condition D8.5.1, it will be deemed to have accept Network Rail's decision

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

8.5.6 Within 10 Working Days of making its decision following the process set out in Condition D8.5.5, Network Rail shall advise the Timetable Participant who made the relevant report of the outcome

8.5.7 Conditions D8.5.1 and D8.5.5 shall not apply to International Freight Train Slots.

## **8.6 Consultation**

8.6.1 Where in this Part D, any party is under an obligation to consult with another, the party obliged to initiate the consultation shall provide the consultee with:

- (a) sufficient information for the consultee to be able to comment on the subject matter of the consultation; and
- (b) a reasonable time in which to respond to the information provided.

## **9 International Freight Capacity Notice**

### **9.1 Overview**

9.1.1 Not later than D-70 in relation to the Principal Change Date, Network Rail shall publish an initial International Freight Capacity Notice ("Initial International Freight Capacity Notice") setting out the International Freight Train Slots to be in the timetable for two Timetable Periods from the next Principal Change Date.

9.1.2 During the period from D-70 to D-65, Network Rail shall consult with Timetable Participants in respect of the International Freight Train Slots included in the Initial International Freight Capacity Notice and Timetable Participants may make representations to Network Rail in respect of any changes they propose or objections they may have in relation to those International Freight Train Slots.

9.1.3 Network Rail shall consider representations made to it by Timetable Participants pursuant to D9.2. Network Rail may revise the International Freight Train Slots included in the Initial International Freight Capacity Notice and not later than D-60 shall provide to all Timetable Participants an updated International Freight Capacity Notice.

9.1.4 Any Timetable Participant dissatisfied with the International Freight Train Slots included in the updated International Freight Capacity Notice provided under Condition D9.3 is entitled to appeal, provided that an appeal is lodged within five Working Days of receipt of that updated International Freight Train

Capacity Notice. Any such appeal shall be conducted in accordance with Condition D5.

## Annex 1 - Timeline for the timetable development process

Milestone	What happens
D-73	Network Rail issues the timetable process dates for both the Principal Change Date and the Subsidiary Change Date 73 weeks before the Principal Change Date
D-70	Network Rail issues draft International Freight Capacity Notice (in relation to Principal Change Date only)
D-70 to D-65	Network Rail consults Timetable Participants on its proposed International Freight Train Slots
<b>Revision of the Timetable Planning Rules and Engineering Access Statement (collectively known as the Rules)</b>	
D-90	If Network Rail wants to rely on a Possessions Strategy Notice it must issue a Possessions Strategy Proposal to all Possessions Strategy Participants for consultation
D-64	Network Rail issues its decision in a Possessions Strategy Notice which Possessions Strategy Participants may appeal within 20 Working Days of receipt
D-64 to D-60	Network Rail consults Timetable Participants on its proposed changes to the Rules and its anticipated Restrictions of Use
D-60	Network Rail considers representations made by Timetable Participants and provides a final version of the International Freight Capacity Notice. Timetable Participants may appeal the determinations in the final International Freight Capacity Notice within 5 Working Days of receipt
D-59	Network Rail issues the draft Rules for consultation
D-59 to D-54	Timetable Participants may make representations or objections to the draft Rules
D-54 to D-44	Network Rail considers all representations or objections and prepares revised Rules
D-44	Network Rail issues revised Rules which Timetable Participants may appeal within 15 Working Days of receipt
D-44 to D-26	After consultation with any affected Timetable Participants Network Rail may make minor revisions to the Rules in order to optimise the New Working Timetable. Timetable Participants may appeal these revisions within 5 Working Days of receipt
<b>Timetable consultation, preparation and publication</b>	
Up to D-64	Timetable Participants and funders inform Network Rail of any events they think should be included in the Draft Calendar of Events
D-64	Network Rail issues Draft Calendar of Events
D-55	Timetable Participants planning significant new services or significant amendments to their services must notify Network Rail as soon as possible and before D-55 if possible.
D-54	Network Rail issues Calendar of Events
D-55 to D-40	Initial Consultation Period. Timetable Participants discuss their proposals with Network Rail which carries out a consultation and facilitation process with other Timetable Participants
D-48	Network Rail consults International Operators and includes provisional paths in the New Working Timetable

<b>Milestone</b>	<b>What happens</b>
D-45	<p>Network Rail issues the Prior Working Timetable which will be the starting point for the New Working Timetable</p> <p>No later than D-45, Network Rail shall publish the Strategic Capacity Statement which is relevant to the preparation of the New Working Timetable.</p>
D-40	Priority Date
D-40 to D-26	<p>Timetable Preparation Period</p> <p>Throughout this period a draft of the emerging New Working Timetable is available online.</p> <p>Timetable Participants may submit Access Proposals at any time and Network Rail will, as far as reasonably practical, incorporate these in the New Working Timetable</p>
D-26	New Working Timetable is published (subject to the result of any appeals which must be made with 20 Working Days of its publication)

## Annex 2

### Timeline for Timetable Variations under Condition D3

#### Train Operator Variations

Milestone	What happens
n/a	A Timetable Participant can request variations to its Train Slots at any time between D-26 and the end of the relevant Timetable Period
n/a	If the request is to vary a Train Slot which is due to operate within 7 days, Network Rail must respond within the timescales set out in D3.3.6 which increase incrementally with the number of days notice given by the Timetable Participant. If the request is to vary a Train Slot with more than 7 days notice, Network Rail must respond to the request within 5 Working Days
n/a	If Network Rail fails to notify its response within the specified time and the requested variation, if accepted, would not conflict with the Rules or any Train Slots already scheduled in the timetable, Network Rail will be deemed to have accepted the request
n/a	If Network Rail rejects or modifies a Train Operator Variation Request it must give its reasons
n/a	A Timetable Participant may appeal Network Rail's decision as soon as reasonably practicable but not later than 5 Working Days after being notified of the decision
n/a	In relation to a variation request which includes a One Stop Shop Service, Network Rail must respond to the request as soon as reasonably practicable

#### Network Rail Variations with at least 12 weeks notice

Milestone	What happens
TW-30	Network Rail provides to Timetable Participants its proposals for Restrictions of Use in respect of the Corresponding Week.
TW-30 to TW-26	Network Rail consults with each Timetable Participant likely to be affected and seeks to agree all Network Rail Variations. During this time Network Rail may amend or supplement its proposals as long as they are provided to Timetable Participants by TW-26.
TW-22	Network Rail may require a Timetable Participant to submit a revised Access Proposal in respect of any Train Slot within a reasonable timeframe and by no later than TW-18.
TW-18	The latest date by which a Timetable Participant can be required to submit a revised Access Proposal. If a Timetable Participant does not submit one in the required timeframe, Network Rail may vary the Train Slot and the Timetable Participant may not appeal.
TW-14	Network Rail notifies Timetable Participants of its decision.
TW-13	Timetable Participant to notify Network Rail whether it accepts or disputes the decision.
TW-12	Network Rail records the Timetable Variation in the Short Term Plan.

#### Network Rail Variations with less than 12 weeks notice

Milestone	What happens
n/a	In such cases Network Rail must follow the procedure in D3.4 but with timescales for each step as are reasonable in the circumstances.
n/a	Timetable Participant may appeal in accordance with D5

#### Timetable Variations by Consent

Milestone	What happens
n/a	With the written consent of Network Rail and all affected Timetable Participants a timetable variation may be made without having to comply with Condition D3.

# Part E - Environmental Protection

## Explanatory Note

- A. *Part E is concerned with environmental protection. Train Operators are required to notify Network Rail of any materials they propose to transport which would, by virtue of their nature or the quantity transported, be likely to give rise to Environmental Damage if they were to escape, and are required to provide Network Rail with a copy of any relevant authority for their carriage (such as a licence or certificate of registration).*
- B. *Network Rail and Train Operators must promptly notify each other of any circumstances which are reasonably foreseeable as likely to give rise to Environmental Damage.*
- C. *Where Network Rail becomes aware or is given a direction by a competent authority that as a direct or indirect result of the activities of a Train Operator, Environmental Damage has occurred or is likely to occur and action is required to prevent, mitigate or remedy that damage, it must make an assessment on the best information available to it at that time as to which of Network Rail and the Train Operators using that part of the Network is or are the most appropriate persons to take such action.*
- D. *In making its assessment, Network Rail is obliged to have due regard to certain specified criteria. Network Rail is further obliged to give notice to affected Train Operators within specified time limits of its decision and the reasons therefore. If an affected Train Operator disagrees with Network Rail's assessment, it may appeal in accordance with the ADRR.*
- E. *If a Train Operator fails to take any action required of it to prevent, remedy or mitigate Environmental Damage within a reasonable time or to the reasonable satisfaction of Network Rail or otherwise in cases of urgency, provisions exist for Network Rail to take the necessary action.*
- F. *Subject to Network Rail having complied with conditions F4 and G5 (respectively Vehicle and Network Change imposed by competent authorities) and to having given to all affected Train Operators as much notice as shall be reasonably practicable, Network Rail has the right to restrict track access on a temporary basis where necessary to deal with Environmental Damage but must use its reasonable endeavours to minimise those restrictions.*
- G. *This Explanatory Note does not form part of the Network Code.*

## DEFINITIONS

In this Part E, unless the context otherwise requires:

"Environmental Condition"

means:

- (a) Any Environmental Damage; or
- (b) Any event, circumstance, condition, operation or activity which it is reasonably foreseeable is likely to result in Environmental Damage

Which (in either case) in Network Rail's reasonable opinion could result in Network Rail incurring any material liability or being subject to the Direction of any Competent Authority;

"Environmental Damage"

means any material injury or damage to persons, living organisms or property (including offence to man's senses) or any pollution or impairment of the environment resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration;

"relevant liability"

means the obligation of any person to make any payment or to take or secure the taking of any action in relation to an Environmental Condition or the Direction of a Competent Authority of the kind referred to in Condition E2.1.1(b); and

"relevant steps"

in relation to a Train Operator, means the steps of the kind referred to in Condition E2.1.3(e)(i).



## **CONDITION E1 - ENVIRONMENTAL INFORMATION REQUIREMENTS**

### **1.1 *Train Operator's licence compliance***

Each Train Operator shall provide Network Rail with a copy of its written environmental protection policy and operational objectives and management arrangements giving effect to that policy, as submitted to the Office of Rail and Road pursuant to its licence authorising it to be the operator of trains.

### **1.2 *Network Rail's licence compliance***

Network Rail shall provide each Access Beneficiary with a copy of its written environmental protection policy and operational objectives and management arrangements giving effect to that policy, as submitted to the Office of Rail and Road pursuant to its network licence.

### **1.3 *Information as to materials to be transported***

Each Train Operator shall from time to time, and within a reasonable time of being requested to do so by Network Rail, provide Network Rail with:

- (a) information as to any materials it proposes to transport on the Network which would by virtue of their nature or the quantity transported be likely to give rise to Environmental Damage if those materials were to be discharged or emitted or to escape or migrate;
- (b) in relation to such materials as are referred to in sub-paragraph (a) above, a copy of any licence, authorisation, consent or certificate of registration required for their carriage.

### **1.4 *General information - Train Operator***

Each Train Operator shall promptly notify Network Rail (and where such notification is given orally shall promptly confirm such notification in writing) of any circumstances of which the Train Operator is aware and which it is reasonably foreseeable are likely to give rise to Environmental Damage as a result of or affecting the activities of the Train Operator. Each Train Operator shall at all times exercise due diligence to inform itself of any circumstances which would require such notification.

### **1.5 *General information - Network Rail***

Network Rail shall promptly notify a Train Operator (and where such notification is given orally shall promptly confirm such notification in writing) of any circumstances of which Network Rail is aware and which it is reasonably foreseeable are likely to give rise to Environmental Damage which may affect the Train Operator. Network Rail shall at all times exercise due diligence to inform itself of any circumstances which would require such notification.

## **CONDITION E2 - REMEDIAL ACTION**

### **2.1 *Assessment as to appropriate persons to take relevant steps***

#### **2.1.1 *Network Rail's assessment***

Where:

- (a) Network Rail becomes aware that, as a direct or indirect result of the activities of a Train Operator, an Environmental Condition exists or has occurred and Network Rail reasonably considers that action is required to prevent, mitigate or remedy that Environmental Condition; or
- (b) Network Rail is given a Direction by a Competent Authority that some action is required to prevent, mitigate or remedy an Environmental Condition resulting directly or indirectly from the activities of a Train Operator

Network Rail shall make an assessment, on the best information available to it at the relevant time, as to which of Network Rail and the Train Operators with permission to use the relevant part of the Network is or are the persons who would be the most appropriate to take any relevant steps, and, if more than one is appropriate, in what proportions.

#### **2.1.2 *Relevant criteria***

In making an assessment under Condition E2.1.1, Network Rail shall have due regard:

- (a) to the likelihood that the person in question may be liable (other than pursuant to this Part E) to make any payment or to take or omit to take any action in relation to the Environmental Condition or Direction in question, whether under any Access Agreement to which it is a party or otherwise;
- (b) in relation to the steps to be taken and the objectives of those steps, to the efficiency and economy with which the steps may be taken, and the effectiveness of those steps, if that person takes those steps, irrespective of the matters referred to in paragraph (a) above; and
- (c) all other relevant circumstances of the case.

### 2.1.3 *Notice of Network Rail's assessment*

Within 60 days of making its assessment, Network Rail shall give notice to each affected Train Operator of:

- (a) the Environmental Condition or Direction of Competent Authority in question;
- (b) the assessment;
- (c) its reasons for reaching the assessment;
- (d) the availability for inspection by the Train Operator of such information as Network Rail shall have used in making the assessment; and
- (e) the steps which Network Rail reasonably considers:
  - (i) will be necessary to prevent, mitigate or remedy the Environmental Condition or the events or circumstances giving rise to the Direction of the Competent Authority in question, or to comply with the Direction in question; and
  - (ii) which should be taken by the Train Operator in question.

### 2.1.4 *Compliance with Train Operator's request for information*

Network Rail shall comply with any reasonable request of an affected Train Operator for additional information in relation to the relevant liability or Network Rail's assessment, within a reasonable time of the request.

### 2.1.5 *Disagreement with Network Rail's assessment*

If an affected Train Operator shall be dissatisfied with Network Rail's assessment or with any other statement or information provided by Network Rail pursuant to Condition E2.1.3, it shall be entitled to refer the matter for resolution in accordance with the ADRR. It shall lose that entitlement if it fails to make the reference within 120 days of the later of:

- (a) the date of its receipt of Network Rail's assessment; and
- (b) the date upon which it receives any further information to which it is entitled pursuant to this Condition E2.1.

## **2.2 Requirement to take relevant steps**

### **2.2.1 Obligation**

Subject to Conditions E2.1.5, E2.7 and E2.8, the Train Operator shall:

- (a) take the steps of which Network Rail gives it notice pursuant to Condition E2.1.3(e), provided Network Rail shall have given it a reasonable opportunity to do so; and
- (b) bear the costs of taking those steps.

### **2.2.2 Network Rail assistance and supervision**

In cases where the Train Operator reasonably requires access to any part of the Network in order to take any relevant steps, Network Rail shall provide the Train Operator with such assistance and co-operation as shall be reasonable in that respect.

## **2.3 Network Rail's right to take relevant steps**

If:

- (a) the Train Operator fails to take any relevant step within a reasonable time or to the reasonable satisfaction of Network Rail; or
- (b) in Network Rail's reasonable opinion, either:
  - (i) it is necessary to take any relevant step urgently; or
  - (ii) it is not reasonably practicable in the circumstances for the Train Operator to take any relevant step,

Network Rail shall be entitled to take the step in question and to be reimbursed by the Train Operator for a fair proportion of the reasonable costs of doing so. Network Rail shall give notice to the Train Operator in question of any step taken pursuant to this Condition E2.3.

## **2.4 Liability of Network Rail**

Where Network Rail takes any steps in accordance with Condition E2.3, it shall not be liable to the Train Operator for any direct physical damage which is caused as a result of the taking of such steps except to the extent that Network Rail, or any person acting on behalf of or on the instructions of Network Rail, has been negligent or has failed to perform any obligation.

## **2.5 Access to land**

Each Train Operator shall use all reasonable endeavours to procure that Network Rail shall be given such right of access to any land upon which plant, equipment, rolling stock or machinery of the Train Operator is located as may be reasonably necessary to enable Network Rail to take any relevant steps.

## **2.6 General right to restrict access to Network**

- 2.6.1 Subject to having complied with Conditions F4 and G5 and to having given to all affected Train Operators as much notice as shall be reasonably practicable, Network Rail shall have the right to restrict permission to use the Network to the extent and for such period as is reasonably necessary to prevent, mitigate or remedy an Environmental Condition or to comply with a relevant Direction of a Competent Authority in respect of an Environmental Condition.
- 2.6.2 Where permission to use the Network is restricted pursuant to Condition E2.6.1, Network Rail shall use all reasonable endeavours to keep the extent and duration of such a restriction to a minimum and shall keep all affected Train Operators reasonably and regularly informed of the steps being taken by Network Rail to remove the restriction.

## **2.7 Payments to be made on without prejudice basis**

Payments by a Train Operator under this Condition E2 shall be made without prejudice to the right of the Train Operator's right to recover the whole or any part of the amounts in question from Network Rail or any other person, whether under an Access Agreement or in any other way.

## **2.8 Action taken will not prejudice later claim**

No action taken by a Train Operator in compliance with its obligations under this Condition E2 shall prejudice the right of the Train Operator at a later date to claim that any other person has the relevant liability.

# Part F - Vehicle Change

## Explanatory Note

- A. *Part F provides a procedure through which changes to railway vehicles, the use of which is permitted in the access contract and related safety documentation, may be assessed and implemented. Vehicle Change includes any alteration to the physical characteristics of vehicles, including but not limited to, any increase in the length of any trains beyond that permitted by the relevant access contract and supporting operational documentation and any introduction of different vehicles on to the relevant routes which, in any case, is likely materially to affect the maintenance or operation of the Network or the operation of trains on the Network.*
- B. *The general principle is that before any Vehicle Change can be implemented:*
- (i) it must be formally proposed under Part F; and*
  - (ii) it must be accepted by Network Rail and those Access Beneficiaries whom it will affect; or*
  - (iii) to the extent that there is any dispute as to whether the change should be implemented, or the terms on which it should be implemented, such dispute must be resolved (whether by agreement or in accordance with the ADRR) in favour of the change being implemented, although any such dispute should not prevent the implementation of the Vehicle Change, if such change is safety related.*
- C. *Condition F1 imposes a general obligation on Network Rail to facilitate Vehicle Change, which includes a number of specific obligations to provide information to Access Beneficiaries and to publish documents generated under Part F on its website. Network Rail is also obliged to publish model terms and conditions which it is prepared to use in connection with the implementation of Vehicle Change proposals.*
- D. *Where an Access Beneficiary wishes to make a Vehicle Change proposal, through either the normal Vehicle Change procedure or the Expedited Procedure, the process is as follows:*
- (i) The Access Beneficiary (the “Sponsor”) gives a notice of proposal to Network Rail, affected Access Beneficiaries and other relevant persons. Such notice may include an election to use the Expedited Procedure but must include sufficient information to allow Network Rail and affected Access Beneficiaries to assess the proposed change. This would include, technical compatibility with the Network, all vehicle characteristics required to assess the proposed change, and proposals as to how Network Rail or*

*affected Access Beneficiaries should be compensated for the costs, losses and expenses which they may incur as a result of the implementation of the proposed change. Network Rail must then evaluate the proposal and be permitted to consult with Access Beneficiaries and other relevant persons about the effects of the proposal.*

- (ii) If the Access Beneficiary elects to use the Expedited Procedure, consultees have 14 days within which to raise initial comments or concerns. A response indicating that a blocking right may apply will be treated as an objection to the use of the Expedited Procedure. All responses should be supported by reasons. If any consultee objects with a valid concern, the Vehicle Change cannot be implemented using the Expedited Procedure but this does not prevent the proposed change continuing to be considered under the normal Vehicle Change procedure. If at any time between implementation of the proposed Vehicle Change, under the Expedited Procedure, and the timescale for implementation under the full Vehicle Change procedure, a consultee raises an objection by declaring a blocking right, then the implementation of the Vehicle Change under the Expedited Procedure must be reversed and, if necessary compensation paid. However, consideration of the proposed change under the normal Vehicle Change procedure would continue unless it is withdrawn by the Sponsor.*
- (iii) Within 30 days of receiving a notice from an Access Beneficiary, Network Rail is required to give a notice setting out the Sponsor's proposal and adding further information on its own account (in particular, where it disagrees with elements of the Sponsor's proposal). The notice includes a deadline for Network Rail to respond to the Sponsor's notice of proposal, which may be adjusted in the light of consultation.*
- (iv) If the deadline for responses is 90 or more days after the date of the notice of proposal, the Sponsor may require Network Rail to submit preliminary responses or estimates of the costs, losses and expenses which it may incur as a result of the implementation of the proposed change.*
- (v) Network Rail is entitled to be reimbursed 75% of its reasonable costs of assessing a Vehicle Change proposal by the Sponsor. The Sponsor may require Network Rail to provide it with estimates of such assessment costs, or to cease incurring such costs.*
- (vi) In responding formally to a Vehicle Change proposal, Network Rail must state whether it, or another Access Beneficiary, objects to the proposal in principle or on the grounds that it contains insufficient information, or whether it, or another operator of railway assets, objects on compensation grounds. The benefits of the change to an Access Party and its chances of recouping its costs or losses from third parties (including passengers) are to be taken into account when determining the amount of any compensation.*

- (vii) *The Sponsor must then either reach agreement with Network Rail and other Access Beneficiaries to the extent that they raise objections to the proposal, refer the matters in dispute in accordance with the ADRR or abandon the proposal. Implementation will then depend on whether the ADRR proceedings result in a determination that the change should be implemented on terms which are acceptable to the Sponsor. If there are no objections to the proposal the Sponsor is entitled to implement it.*
  - (viii) *After a Vehicle Change has become established, the arrangements for its implementation may be varied according to the terms of any contractual variation procedure which forms part of the terms and conditions specified in the notice of proposal and/or is subsequently agreed as a result of the consultation and response process.*
- E. *Condition F2.10 allows Access Beneficiaries to implement a change for safety reasons, ensuring that the Vehicle Change procedure, whilst having to be completed, does not delay such implementation. The Vehicle Change procedure must be undertaken where a Vehicle Change for safety reasons lasts for more than three months.*
- F. *Where a Vehicle Change is required as a result of a Change of Law or a Direction from a Competent Authority, the normal Vehicle Change procedure will be applied. In such cases, each Access Party will be responsible for its own costs and losses.*
- G. *This Explanatory Note does not form part of the Network Code.*



## DEFINITIONS

In this Part F, unless the context otherwise requires:

- “Authorised variation” means a variation to an established Vehicle Change, where:
- (a) the terms and conditions on which the Vehicle Change in question was established contain a variation procedure;
  - (b) that variation procedure has been followed in accordance with its terms; and
  - (c) the result of the operation of that variation procedure is that the established Vehicle Change has been varied;
- “established Vehicle Change” means a change which the Sponsor is entitled by this Part F to carry out, and “establish” and “establishment” of a Vehicle Change shall be construed accordingly;
- “Expedited Procedure” means the procedure set out in Condition F3.4;
- “modification” includes additions, alterations and omissions, and cognate expressions shall be construed accordingly;
- “relevant response date” means, in relation to a proposal for a Vehicle Change under this Part F, the later of such dates as are reasonably specified by Network Rail under Condition F2.3.1(b)(i) or Condition F2.4.3 as the date on or before which Network Rail is to give notice of its response to that proposal under Condition F3.1, having regard to:
- (a) the size and complexity of the change; and
  - (b) the likely impact of the change on the operation of the Network and Access Beneficiaries,
- and which shall not be:
- (A) less than 60 days; or

(B) unless Network Rail and the Sponsor agree otherwise in writing, more than 90 days,

from the date on which Network Rail's notice under Condition F2.3.1(c) is given;

“Specified Equipment” means, in respect of an Access Agreement, any railway vehicle the use of which is permitted on the track pursuant to that agreement;

“Sponsor” means, in relation to a proposal for a Vehicle Change under Condition F2.1, the Access Beneficiary which has made the proposal;

“variation” means any modification to the terms or conditions (including as to the specification of the works to be done, their timing, the manner of their implementation, the costs to be incurred and their sharing, and the division of risk) on which an established Vehicle Change is to be carried out, and “varied” and any other cognate words shall be construed accordingly;

“variation procedure” means, in relation to an established Vehicle Change, a procedure which:

- (a) forms part of the terms and conditions on which the Vehicle Change is established; and
- (b) provides for the established Vehicle Change itself to be varied after it has been first established; and

“Vehicle Change” means, in relation to an Access Beneficiary:

- (a) any change to Specified Equipment (or, in the case of an Access Option Holder, any change to the type or performance specification of any vehicle specifically identified within an access option) including by way of:
  - (i) any alteration (not being a change within paragraph (b) below) to the physical characteristics of Specified Equipment (or, in

the case of an Access Option Holder, any change to the type or performance specification of any vehicle specifically identified within an access option);

- (ii) any increase in the length of any trains beyond that permitted by that Access Beneficiary's Access Agreement; or
  - (iii) the inclusion in Specified Equipment of any railway vehicle which is not so included; or
  - (iv) the inclusion in an access option of any vehicle which is not so included; or
- (b) any material variation to an established Vehicle Change which has yet been implemented, other than authorised variation;

which, in any case, is likely materially to affect the maintenance or operation of the Network or the operation of trains on the Network, but excluding any authorized variation.

## **CONDITION F1 - FACILITATION OF VEHICLE CHANGE**

### **1.1 *Obligation to facilitate Vehicle Change***

Network Rail shall take all reasonable steps to facilitate the development, establishment and implementation of any proposal for Vehicle Change.

### **1.2 *Limit of obligation***

Condition F1.1 does not oblige Network Rail to do anything which it is not required to do under its network licence.

### **1.3 *Facilitation***

The obligation of Network Rail under Condition F1.1 includes:

- (a) the provision to an Access Beneficiary of such information concerning the condition, capacity and/or capability of the Network as:

- (i) Network Rail is required at any time to hold or have appropriate access to under its network licence; and
  - (ii) that Access Beneficiary may reasonably request in connection with the development of a proposal for Vehicle Change (whether the proposal is made by that Access Beneficiary or another person);
- (b) the publication on its website (subject to Condition A3 of the Network Code) of:
  - (i) every proposal for Vehicle Change made by an Access Beneficiary under Condition F2.1;
  - (ii) every response to a proposal for Vehicle Change made by Network Rail under Condition F3.1;
  - (iii) every determination of matters which have been referred in accordance with the relevant ADRR under Condition F5.1;
  - (iv) every authorised variation;
  - (v) standard forms, produced after consultation with every other Access Party and approved by the Office of Rail and Road, for the notification under this Part F of proposals for Vehicle Change, and of responses to such proposals, which:
    - (A) may include different forms for different types of Vehicle Change having regard to the size, complexity and value of the change in question; and
    - (B) shall be used by any person notifying or responding to a proposal for Vehicle Change under this Part F, unless it is not reasonably practicable for it to do so; and
  - (vi) model terms, produced after consultation with every other Access Party and approved by the Office of Rail and Road, by way of supplement to the terms of this Part F and on which Network Rail is prepared to contract for or in connection with the implementation of a Vehicle Change which:

- (A) shall provide appropriate and proportionate forms of contract for different types of Vehicle Change having regard to the size, complexity and value of the change;
  - (B) may include variation procedures; and
  - (C) shall, so far as reasonably practicable, form the basis of any terms and conditions relating to the implementation of a Vehicle Change which are proposed by an Access Beneficiary or under Condition F2;
- (c) the provision of a preliminary response to an Access Beneficiary's proposal for Vehicle Change under Condition F2.4;
- (d) such consultation before a notice of a proposal for a Vehicle Change is submitted by an Access Beneficiary as may reasonably be expected to enable that operator to assess the feasibility and affordability of the proposed change; and
- (e) such consultation with the persons specified in Condition F2.1(b) before a notice of a proposal for a Vehicle Change is submitted by an Access Beneficiary as:
  - (i) Network Rail considers reasonably necessary; and
  - (ii) any such person may reasonably request,

to enable the proposal to be developed in an efficient and economical manner; and
- (f) If requested, provision of the names and contact details of each Access Beneficiary which Network Rail considers may be affected by the implementation of the proposed Vehicle Change.

## **CONDITION F2 - INITIATION OF VEHICLE CHANGE PROCEDURE**

### **2.1 *Submission of proposal***

If an Access Beneficiary wishes to make a Vehicle Change, it shall:

- (a) submit to Network Rail and each Access Beneficiary that may be affected by the implementation of the proposed Vehicle Change as advised by Network Rail to the Access Beneficiary under Condition F1.3(f) or which has notified

the Access Beneficiary that it may be so affected, a proposal for such change;

- (b) indicate to Network Rail and each Access Beneficiary referred to under Condition F2.1 (a) whether it wishes to implement the proposed change using the Expedited Procedure;
- (c) provide details to Network Rail of all Access Beneficiaries to which the proposal for change has been submitted under Condition F2.1 (a);
- (d) notify:
  - (i) the Secretary of State;
  - (ii) the Office of Rail and Road; and
  - (iii) each Passenger Transport Executive, Transport for London, the Scottish Ministers, and the Welsh Assembly Government if such bodies may be affected by the implementation of the proposed Vehicle Change;

that it has submitted a proposal for Vehicle Change to Network Rail; and

- (e) permit Network Rail to consult with the persons specified in Condition F2.1(d) to the extent provided for under Condition F2.3 subject to such requirements as to confidentiality as are reasonable.

## **2.2 Content of Sponsor's notice of proposal**

A notice of proposal for Vehicle Change given by a Sponsor under Condition F2.1 shall:

- (a) state:
  - (i) the reasons why it is proposed to make the change;
  - (ii) the nature of the change, including:
    - (A) any material change which the Sponsor proposes to make to the physical characteristics of any vehicle which is already included within the Specified Equipment; and

- (B) a description of any vehicle which is not already included within the Specified Equipment, but which the Sponsor proposes to include within the Specified Equipment;
  - (iii) in the case of any vehicle of the kind referred to in Condition F 2.2(a)(ii)(A):
    - (A) whether it is proposed to operate it on any part of the Network on which it does not already operate; and
    - (B) whether it is proposed to operate it at higher speeds or tonnages or to a larger gauge than it has previously been operated over any part of the Network on which such a vehicle already operates;
  - (iv) in the case of any vehicle of the kind referred to in Condition F2.2(a)(ii)(B), over what parts of the Network, and at what speeds, it proposes to operate such vehicles;
  - (v) the proposed timetable for the implementation of the change, including whether it intends to implement the change using the Expedited Procedure;
  - (vi) the Sponsor's proposals (if any) for the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to any Access Party in respect of the change; and
  - (vii) any additional terms and conditions which the Sponsor proposes should apply to the change, including any proposed variation procedure; and
- (b) be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the persons specified in Condition F2.1(b), to enable:
- (i) Network Rail; and
  - (ii) any persons specified in Condition F2.1(b),

to assess the likely effect of the proposed change on its business, its assets and its performance of any obligations or the exercise of any rights or discretions which it has in relation to railway services.

## **2.3 Evaluation of proposal and consultation**

2.3.1 If Network Rail receives a proposal for Vehicle Change under Condition F2.1, it shall:

- (a) evaluate and discuss that proposal with the Sponsor for such period as is reasonable having due regard to the likely impact of the proposed Vehicle Change on either or both of Network Rail and other operators of trains;
- (b) within 30 days of the date on which the Sponsor's notice under Condition F2.1 was given, give a notice to the persons specified in Conditions F2.1 (a) (with the exception of Network Rail) and (d), with a copy to the Sponsor, inviting them to submit comments on the proposed Vehicle Change by a specified date, which shall not be earlier than 10, or later than 7 days before the relevant response date, stating:
  - (i) the relevant response date and the obligations of Access Parties under Conditions F2 and F3;
  - (ii) Network Rail's estimate of the likely impact of the change on the operation and performance of the Network; and
  - (iii) Network Rail's own proposals as to:
    - (A) the arrangements for, and any proposed terms applicable to, the implementation of the change;
    - (B) the arrangements for determining and paying any compensation in respect of the change;
    - (C) the timetable for implementation of the change;
    - (D) the division of the costs of carrying out the change; and
    - (E) the additional terms and conditions (if any) which should apply to the change, including any variation procedure;
- (c) send the proposal for Vehicle Change to any Access Beneficiary that may be affected by the implementation of the proposed Vehicle Change if the



Sponsor has not already done so in accordance with Condition F2.1 (a); and

- (d) provide details to the Sponsor of all Access Beneficiaries (if any) to which Network Rail has sent the proposal for Vehicle Change under Condition F2.3.1 (c).

2.3.2 In preparing a notice under Condition F2.3.1, Network Rail:

- (a) shall comply with the standards specified in Condition F2.2(b); and
- (b) in respect of each of the matters specified in Condition F2.3.1(b)(iii):
  - (i) shall have regard to any relevant statements and proposals contained in the Sponsor's notice under Condition F2.1;
  - (ii) shall give reasons for any differences between those statements and proposals and its own proposals under Condition F2.3.1(b)(iii); and
  - (iii) may annex to its notice any proposal contained in the Sponsor's notice under Condition F2.1 with which it agrees, stating its agreement, and, where appropriate, that it has no proposals of its own on the matter concerned.

2.3.3 If an Access Beneficiary receives a proposal for Vehicle Change under Condition F2.1 or Condition F2.3.1 (c), it shall evaluate and discuss the proposal with Network Rail for such period as is reasonable having due regard to the likely impact of the proposed Vehicle Change on that Access Beneficiary.

## **2.4 Preliminary response and estimate**

2.4.1 Except in the circumstances and to the extent specified in Condition F2.4.2, Network Rail shall, when consulted by the Sponsor, take all reasonable steps to comply with any request of the Sponsor to provide the Sponsor, within a reasonable period of time, and at no cost to the Sponsor:

- (a) a preliminary estimate of those costs, losses and expenses referred to in Condition F3.2 which may be incurred by Network Rail; or
- (b) a preliminary written response in respect of a proposed Vehicle Change, which shall:

- (i) be binding on Network Rail, unless Network Rail indicates otherwise; and
- (ii) if it is negative, include reasons.

2.4.2 Network Rail shall not be obliged to comply with a request from the Sponsor under Condition F2.4.1:

- (a) unless:
  - (i) the relevant response date is 90 or more days after the date on which Network Rail's notice under Condition F2.3.1(b) was given; and
  - (ii) the request is made within 7 days of the Sponsor receiving Network Rail's notice under Condition F2.3.1(b); or
- (b) to the extent that Network Rail is unable to comply with such a request, having regard to the information reasonably available to it.

2.4.3 After consultation with the Sponsor Network Rail may notify a later relevant response date to the Sponsor and the persons to whom it gave its notice under Condition F2.3.1(b).

## **2.5 Reimbursement of costs**

Subject to Conditions F2.4 and F3, Network Rail shall be entitled to reimbursement by the Sponsor of 75% of all costs incurred by Network Rail in assessing any Vehicle Change proposed by the Sponsor. Those costs shall be the minimum reasonably necessary for Network Rail to carry out that assessment.

## **2.6 Provision of estimate of costs by Network Rail**

Network Rail shall, upon request from the Sponsor from time to time, provide the Sponsor with written estimates of the costs of assessing a proposal for Vehicle Change submitted by the Sponsor (as referred to in Condition F2.5) including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that evaluation before commencing such work; and

- (b) upon request from the Sponsor from time to time, provide the Sponsor or its agents with such information as may be reasonably necessary to enable the Sponsor to assess the reasonableness of any estimate.

## **2.7 Accuracy of estimates**

Network Rail shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

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

Network Rail shall, if requested by the Sponsor at any time, incur no further costs (except any costs that cannot reasonably be avoided) in respect of any proposal for Vehicle Change made by the Sponsor.

## **2.9 Relationship with Network Change**

If the implementation of a proposed Vehicle Change also requires the implementation of a Network Change, the Sponsor shall follow the procedures and satisfy the requirements of both this Part F and Part G and the requirement for a Network Change shall not preclude the right of the Sponsor to follow the procedure in this Part F for a Vehicle Change or vice versa.

## **2.10 Vehicle Change for safety reasons**

To the extent that a Vehicle Change is required to be made by an Access Beneficiary for safety reasons, the Access Beneficiary shall not be obliged to implement the procedure set out in this Part F in relation to that change until the change has lasted for three months (or such longer period as may be specified in the relevant Access Beneficiary's Access Agreement). Upon expiry of the relevant period, the Access Beneficiary shall promptly commence implementing and thereafter comply with the procedure set out in this Part F as if the relevant Vehicle Change were a Vehicle Change proposed by the Access Beneficiary.

# **CONDITION F3 - RESPONSE TO VEHICLE CHANGE PROPOSAL**

## **3.1 Obligation to give notice of response**

Network Rail shall give notice to the Sponsor, if:

- (a) it considers that one or more of the following conditions has been satisfied:

- (i) the implementation of the change would necessarily result in Network Rail breaching any access contract (other than an access contract to which the Sponsor is a party);
  - (ii) the Sponsor has failed in a material respect to comply with its obligations under Condition F2.2 provided that Network Rail shall first have given the Sponsor a reasonable opportunity to remedy that failure; or
  - (iii) the implementation of that change would result in a material adverse effect on the maintenance or operation of the Network or operation of trains on the Network, which in any such case cannot adequately be compensated under this Condition F3;
- (b) any Access Beneficiary shall have given notice to Network Rail that it considers that any of the conditions specified in paragraph (a) above has been satisfied;
- (c) it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either
  - (i) in accordance with compensation terms proposed under Condition F2,
  - (ii) in the absence of any compensation terms proposed under Condition F2, or
  - (iii) on compensation terms other than those proposed under Condition F2; and/or
- (d) any other operator of railway assets shall have given notice to Network Rail that it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either
  - (i) in accordance with compensation terms proposed under Condition F2,
  - (ii) in the absence of any compensation terms proposed under Condition F2, or
  - (iii) on compensation terms other than those proposed under Condition F2.

Any notice of the kind referred to in paragraphs (a) or (b) above shall include the reasons for the opinion in question. Any notice of the kind mentioned in paragraphs (c) or (d) above shall include a statement of the amount of compensation required and the means by which the compensation should be paid, including any security or other assurances of payment which the Sponsor should provide. Any such statement shall contain such detail as is reasonable to enable the Sponsor to assess the merits of the statement.

### **3.2 *Amount of compensation***

Subject to Condition F3.3, the amount of the compensation referred to in Condition F3.1 shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by Network Rail or the operator in question as a consequence of the implementation of the proposed change other than any such costs, losses or expenses which are attributable to the Sponsor improving its ability to compete with other operators of railway assets.

### **3.3 *Benefits to be taken into account***

There shall be taken into account in determining the amount of compensation referred to in Condition F3.1:

- (a) the benefit (if any) to be obtained or likely in the future to be obtained by Network Rail or any other operator of trains as a result of the proposed Vehicle Change; and
- (b) the ability or likely future ability of Network Rail or any other operator of trains to recoup any costs, losses and expenses from third parties including passengers and customers.

### **3.4 *Rights in relation to implementation of Vehicle Change under the Expedited Procedure***

#### **3.4.1 If**

- (a) the Sponsor has elected under Condition F2.1 (b) to use the Expedited Procedure; and
- (b) within 14 days of the date of the notice in question:
  - (i) the Sponsor's notice under Condition F2.1; or, if later

- (ii) within 14 days of Network Rail sending the Sponsor's proposal to any Access Beneficiary that may be affected by the implementation of the proposed Vehicle Change in accordance with Condition F2.3.1 (c),

an Access Party gives notice to the Sponsor that it considers that any of the conditions specified in Condition F3.1(a) may be satisfied, which notice has not been withdrawn, the proposed Vehicle Change shall not be implemented using the Expedited Procedure.

In any other case and subject to the other provisions of the Network Code and the remainder of this Condition F3.4, the Sponsor shall be entitled for the purposes of the Network Code (but subject to any such other authorisations, approvals, consents and certifications as may be required) to implement the proposed change.

- 3.4.2 The Sponsor shall be liable to pay compensation (if any) to each person specified in Condition F2.1 (b) calculated in accordance with the relevant provisions of Condition F3.
- 3.4.3 If, at any time between the implementation of the change and the relevant response date, an Access Beneficiary gives notice to the Sponsor and Network Rail as appropriate that it considers that any of the conditions specified in Condition F3.1(a) have been satisfied, the Sponsor shall, as soon as reasonably practicable take all action necessary to reverse the implementation of the Vehicle Change.
- 3.4.4 All notices served by an Access Party under Conditions F3.4.1 and F3.4.3 shall specify the reasons why that Access Party believes that any of the conditions specified in Conditions F3.1(a) have been satisfied.
- 3.4.5 If a Vehicle Change is not implemented in accordance with the Expedited Procedure or the implementation of the Vehicle Change is reversed in accordance with Condition F3.4.3, unless the change proposal is withdrawn by the Sponsor, the change proposal shall be treated as a proposal for change where the Sponsor has not elected under Condition F2.1 (b) to use the Expedited Procedure.

## **CONDITION F4 - CHANGES IMPOSED BY COMPETENT AUTHORITIES**

Where an Access Beneficiary is required (other than at the request or instigation of the Access Beneficiary) to implement a Vehicle Change as a result of any Change of Law or any Direction of any Competent Authority other than the Office of Rail and Road exercising any of its functions which do not fall within the definition of 'safety functions' as defined in section 4 of the Act:

- (a) each Access Party shall, except to the extent that the relevant Change of Law or Direction otherwise requires, comply with Conditions F2.1, F2.2 and F2.3 (other than Conditions F2.2(a)(vi) and F2.3.1(b)(iii)(B) and (D)) in respect of that Vehicle Change;
- (b) Network Rail shall make such alterations (if any) to the Network as are reasonably necessary to accommodate that Vehicle Change and each Access Party shall, except to the extent that the relevant Change of Law or Direction otherwise requires, comply with Conditions G1.1 and G1.2 (other than Condition G1.2(c)(iv)); and
- (c) each Access Party shall bear its own costs and losses arising out of the implementation of the Vehicle Change and the consequences thereof.

## **CONDITION F5 - APPEAL PROCEDURE**

### **5.1 *Right of appeal in accordance with the ADRR***

If any Access Party is dissatisfied as to:

- (a) any matter concerning the operation of the procedure set out in this Part F;
- (b) the contents of any notice given by Network Rail under Condition F3.1 (and, in particular, the amount of any compensation referred to in that Condition); or
- (c) any estimate referred to in Condition F2.6,

it may refer the matter for determination in accordance with the ADRR.

## **CONDITION F6 - ESTABLISHMENT AND IMPLEMENTATION**

## **6.1 Implementation of a proposed Vehicle Change**

6.1.1 With the exception of any Vehicle Change implemented under Conditions F2.10 and F3.4, the Sponsor shall be entitled to implement a proposed Vehicle Change if:

- (a) Network Rail has not given notice under Condition F3.1 by the relevant response date; or
- (b) Network Rail has given notice by the relevant response date under Condition F3.1 (c) and either the amount of any compensation referred to in Condition F3.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition F5; or
- (c) Network Rail has received notice from an Access Beneficiary under Condition F3.1(d) and either the amount of any compensation referred to in Condition F3.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition F5; and
- (d) there is no other unresolved dispute under this Part F (whether under this Condition F6 or otherwise) as regards the proposed change between the Sponsor and Network Rail or any Access Beneficiary.

6.1.2 The Sponsor may, if it considers it expedient to do so in order to confirm whether or not Condition F6.1.1 has been satisfied, instruct Network Rail to issue a notice to all affected Access Beneficiaries when the Sponsor reasonably believes that it is entitled to implement a proposed Vehicle Change and Network Rail shall then serve such a notice within 7 days of the instruction.

6.1.3 The Sponsor's entitlement to implement a proposed Vehicle Change shall be treated as confirmed 35 days after Network Rail has served a notice in respect of that Vehicle Change in accordance with Condition F6.1.2 unless:

- (a) Network Rail gives notice to the Sponsor within 35 days disputing the Sponsor's entitlement to implement that Vehicle Change under Condition F6.1.1 and giving full particulars of its reasons; or
- (b) Network Rail receives notice from an Access Beneficiary within 21 days of the notice served by Network Rail disputing the Sponsor's entitlement to implement that Vehicle Change under Condition F6.1.1 and giving full particulars of its reasons.



6.1.4 If the Sponsor does not agree with the contents of a notice served by Network Rail or an affected Access Beneficiary in accordance with Condition F6.1.3, the Sponsor may:

- (a) refer the matter for determination in accordance with the ADRR and Condition F5 shall apply; or
- (b) withdraw the proposed Vehicle Change.

## **6.2 When a Vehicle Change may not be Implemented**

6.2.1 The Sponsor shall not be entitled to implement a proposed Vehicle Change unless it is so entitled to do so under Condition F6.1.1.

6.2.2 For the purposes of the Condition F6.1.1, unresolved disputes shall include:

- (a) a notice has been served under Condition F3.1(a) or (b) which has not been withdrawn, resolved under Condition F5 or agreed not to apply; and
- (b) a notice has been served under Condition F3.1(c) or (d) which has not been agreed or resolved as referred to in Condition F6.1.1 (b) or (c) or otherwise agreed, resolved or withdrawn.



# Part G - Network Change

## Explanatory Note

- A. *Part G is concerned with the procedures which Access Parties must go through when certain types of change to the Network (defined as “Network Change”) occur or are proposed.*
- B. *The definition of “Network Change” is broad, and much of it is expressed in non-exhaustive terms (i.e. after some general words of definition, Network Change is said to “include” certain specific things by way of illustration or example, but that does not necessarily mean that other things are excluded). The definition should always be considered carefully and in its entirety before any decision is made as to whether a particular change falls within the scope of Part G (see generally the Rail Regulator’s judgment in Network Rail Infrastructure Limited v Great North Eastern Railway Limited [2003] RR 2). The following specific points should also be noted:*
- (i) only changes which are likely to have a material effect on the operation of the Network or of trains operated on the Network are Network Changes;*
  - (ii) Network Changes can either be physical (e.g. changes to the layout, configuration or condition of the Network) or operational (e.g. the introduction of a speed restriction on a section of track, a change to the way Network Rail maintains track or a change to the monitoring points used in the application of Schedule 8 of the Track Access Agreements), but operational changes are only Network Changes if they last, or are likely to last, for more than six months;*
  - (iii) the definition of Network Change includes changes which will generally be seen in a positive light (e.g. enlargement of capacity on a stretch of track) as well as changes which are more likely to be characterised as having a negative impact (e.g. reduction of capacity or deterioration in condition);*
  - (iv) closures of lines which are covered by the statutory procedures under the Act (i.e. lines which are, or have in the preceding five years been, used for passenger services) and changes made under the Systems Code are not Network Changes; and*
  - (v) closures of lines which are not covered by the statutory procedures under the Act (i.e. lines which are, or have in the preceding five years, been used only for freight services) are Network Changes.*
- C. *From a procedural point of view, Part G divides Network Changes into two categories: those proposed by Network Rail and those proposed by an Access Beneficiary. All Network Changes, whether proposed by Network Rail or by an Access Beneficiary, are implemented by Network Rail.*

- D. *The general principle is that before any Network Change can be implemented:*
- (i) it must be formally proposed under Part G; and*
  - (ii) it must be accepted by those Access Beneficiaries whom it will affect (and, where the change is proposed by an Access Beneficiary, by Network Rail); or*
  - (iii) to the extent that there is any dispute as to whether the change should be implemented, or the terms on which it should be implemented, such dispute must be resolved (whether by agreement or in accordance with the ADRR) in favour of the change being implemented.*
- E. *However, it is recognised that:*
- (i) safety considerations will sometimes dictate that Network Rail must make a Network Change very quickly, without recourse to all the procedures under Part G. In such cases, Network Rail's obligations under Part G may be subordinated to the interests of safety to a greater or lesser extent, depending on the circumstances (see further Condition G1.10); and*
  - (ii) where a Network Change is required to be made as a result of a Change of Law or a Direction of a Competent Authority, most of the normal obligations of Access Parties under Part G do not apply (see further Condition G9).*
- F. *Condition GA imposes a general obligation on Network Rail to facilitate Network Change, which includes a number of specific obligations to provide information to Access Beneficiaries and to publish documents generated under Part G on its website. Network Rail is also obliged to publish model terms and conditions which it is prepared to use in connection with the implementation of Network Change proposals.*
- G. *Conditions G1 and G2 are concerned with proposals made by Network Rail. Conditions G3 and G4 are concerned with proposals made by Access Beneficiaries. Conditions G5 to G7 inclusive are concerned with proposals made by Network Rail using the Complex Projects Procedure. Condition G8 is concerned with the expiry and reversal process of a Short Term Network Change. G9 is concerned with mandatory changes (resulting from a Change of Law or a Direction of a Competent Authority). Condition G10 is concerned with the processes that may be adopted for establishing and implementing Network Changes. Condition G11 is concerned with dispute resolution in connection with Network Change proposals.*
- H. *Except where it elects to follow the Complex Projects Procedure (see note J below for guidance), where Network Rail wishes to make a Network Change proposal the procedure is as follows:*
- (i) Network Rail gives a notice of proposal and sets a deadline for Access Beneficiaries to respond to it. Conditions G1.1 and G1.2 specify the persons to whom the notice must be given and what it must contain. In*

*particular, the notice is to contain information on the likely material effects of the Network Change and the reasons for its proposal and proposals as to how affected Access Beneficiaries should be compensated for the costs, losses and expenses which they may incur as a result of the implementation of the proposed change.*

- (ii) Network Rail consults with operators of railway assets likely to be affected by the proposed change and may adjust the deadline for responses in the light of consultation.*
- (iii) If the deadline for responses is 60 or more days after the date of Network Rail's notice, Network Rail may require Access Beneficiaries to submit preliminary responses or estimates of the costs, losses and expenses which they may incur as a result of the implementation of the proposed change.*
- (iv) Access Beneficiaries are entitled to be reimbursed 75% of their reasonable costs of assessing a Network Change proposal by Network Rail. Network Rail may require Access Beneficiaries to provide it with estimates of such assessment costs, or to cease incurring such costs.*
- (v) In responding formally to a Network Change proposal, an Access Beneficiary must either accept the proposal in its entirety or object to it on one or more of the grounds specified in Condition G2.1.1(a). Grounds for objection fall into four categories: objections to the proposed change because it would breach the Access Beneficiary's access contract; objections to the change proposal on the grounds that it does not contain sufficient information to allow the Access Beneficiary to make an informed response; objections to the proposed change on the grounds that it would result in a material deterioration in performance that could not adequately be compensated; and objections to the proposed change because it does not take into account the reasonable expectations of the Access Beneficiary in relation to the future use of the part of the Network in question. When making a claim for compensation for costs, losses and expenses which it may incur as a result of the proposed change, an Access Beneficiary must state on what terms it believes such compensation should be paid. The benefits of the change to the Access Beneficiary and its chances of recouping its costs or losses from third parties (including passengers) are to be taken into account when determining the amount of such compensation.*
- (vi) Network Rail must then either reach agreement with any objecting Access Beneficiaries, refer the matters in dispute in accordance with the ADRR or abandon the proposal. Implementation will then depend on whether the ADRR proceedings result in a determination that the change should be implemented on terms which are acceptable to Network Rail. If no Access Beneficiary objects to a Network Change proposal, Network Rail is entitled to implement following the procedure set out in Condition G10.*

- I. *The Short Term Network Change process allows Network Rail to propose to maintain any part of the Network at less than the published capability for a specified period. Condition G8 provides Access Beneficiaries with the ability to request, at Network Rail's cost, the reversal of any such change should they have a reasonable expectation as to the future use of the relevant part of the Network before the expiry of the specified period.*
- J. *Where Network Rail wishes to make a Network Change proposal using the Complex Projects Procedure, this should be carried out as follows:*
- (i) Before giving formal notice of a proposal for a Network Change which it intends to progress using the Complex Projects Procedure, Network Rail must advise all affected Access Beneficiaries that it intends to initiate that procedure. The information provided must include details of the proposed change, the reasons for it being progressed and a draft plan setting out the intended stages and timetable for the procedure. Network Rail must also include a draft Scope of the proposal.*
  - (ii) Network Rail must consult with all affected Access Beneficiaries on the information it has provided. Access Beneficiaries must take all reasonable steps to supply any information that Network Rail has requested to enable it to develop its proposal, and to provide a response to Network Rail within 30 days (or such longer period as Network Rail may specify) of receiving the consultation information. Due consideration must be given to the views contained in all responses and where Network Rail disagrees with the views of any Access Beneficiary, it must send a written explanatory response to that Access Beneficiary.*
  - (iii) Once the consultation process outlined above has been completed, Network Rail may, if it wishes to proceed with the proposed Network Change, issue a notice of intended Scope to each affected Access Beneficiary.*
  - (iv) Upon receipt of a notice of intended Scope, each Access Beneficiary must within 30 days (or longer if specified by Network Rail) respond in writing to Network Rail stating whether it agrees to the Scope. It can only refuse to agree if it believes that if the Scope were to be proposed as a Network Change at least one of the 'normal' reasons for rejection of a Network Change proposal, set out in Condition G2.1.1(a), would apply (see note H(v) above). Access Beneficiaries who do not respond within the specified timescales, e.g. 30 days, are deemed to have agreed to the Scope.*
  - (v) If the Scope cannot be agreed by Network Rail and an affected Access Beneficiary, either party can refer the matter to dispute (using the process set out in Condition G11).*
  - (vi) Access Beneficiaries are entitled to be reimbursed 100% of their minimum reasonable costs of assessing Network Rail's notice of proposed Scope. Network Rail may require Access Beneficiaries to provide it with accurate*

*estimates of such assessment costs to enable it to assess whether they are reasonable, or if necessary to cease incurring any further costs.*

- (vii) At any time before a Network Change notice is issued, Network Rail may issue further notices of intended Scope to consult about the inclusion of further elements which it would like to form part of the Scope.*
- (viii) If Network Rail chooses to proceed with a Network Change using the Complex Projects Procedure it may issue a Network Change notice or notices (using the process in Condition G1) to consult on the implementation of Preparatory Works to facilitate the development of the project. Access Beneficiaries must take all reasonable steps to facilitate such works, although they have the same rejection or acceptance rights as they would if the Preparatory Works were issued as a Network Change proposal in their own right.*
- (ix) Once the Scope has been agreed by an Access Beneficiary, Network Rail may issue a Network Change notice to consult on the implementation of the proposed change. An Access Beneficiary cannot reject elements of the Scope which are included in such a proposal for Network Change, unless the Scope has changed from that which was agreed such that it is likely materially to affect that Access Beneficiary. If an Access Beneficiary is thus prevented from rejecting the Network Change proposal under normal grounds but would otherwise have been able to do so, it can reject the proposal if it believes the proposal for Network Change is not to the benefit of the industry as a whole.*

*K. Where an Access Beneficiary wishes to make a Network Change proposal, the procedure is as follows:*

- (i) The Access Beneficiary ("Sponsor") gives a notice of proposal to Network Rail. Condition G3.2 prescribes the contents of such a notice. In particular, the notice is to contain information on the likely material effects of the Network Change and the reasons for its proposal and proposals as to how Network Rail and affected Access Beneficiaries should be compensated for the costs, losses and expenses which they may incur as a result of the implementation of the proposed change. Network Rail must then evaluate the proposal and be permitted to consult with Access Beneficiaries and other relevant persons about the effects of the proposal.*
- (ii) Within 30 days of receiving the Sponsor's notice, Network Rail gives a notice setting out the Sponsor's proposal and adding further information on its own account (in particular, where it disagrees with elements of the Sponsor's proposal). The notice includes a deadline for Network Rail to respond to the Sponsor's notice of proposal, which may be adjusted in the light of consultation.*
- (iii) If the deadline for responses is 90 or more days after the date of Network Rail's notice, the Sponsor may require Network Rail to submit preliminary*

*responses or estimates of the costs, losses and expenses which it may incur as a result of the implementation of the proposed change.*

- (iv) Network Rail is entitled to be reimbursed 75% of its reasonable costs of assessing a Network Change proposal by the Sponsor. The Sponsor may require Network Rail to provide it with estimates of such assessment costs, or to cease incurring such costs.*
- (v) In responding formally to a Network Change proposal, Network Rail must state on its own behalf and on behalf of any other Access Beneficiary, whether the proposal is accepted in its entirety or objected to on one or more of the grounds specified in Condition G4.1.1(a) or (b). If a Network Change proposal is accepted and Network Rail and/or an affected Access Beneficiary make a claim for compensation for costs, losses and expenses which it may incur as a result of the proposed change, Network Rail must state on what terms it (or another Access Beneficiary) believes such compensation should be paid. The benefits of the change to Network Rail or any other Access Beneficiary and their chances of recouping their costs or losses from third parties (including passengers) are to be taken into account when determining the amount of any compensation.*
- (vi) The Sponsor must then either reach agreement with Network Rail and other Access Beneficiaries to the extent that they raise objections to the proposal, refer the matters in dispute for determination in accordance with the ADRR or abandon the proposal. Implementation will then depend on whether the ADRR proceedings (see further Condition G10) result in a determination that the change should be implemented. If there are no objections to the proposal the Sponsor is entitled to require Network Rail to implement it following the procedure set out in Condition G9.*
- (vii) Where a proposal for Network Change proposed by an Access Beneficiary requires the implementation of a Vehicle Change, that Access Beneficiary must follow the required procedures under Part F as well as those under Part G.*

*L. This Explanatory Note does not form part of the Network Code.*



## Revised Part G

### DEFINITIONS

In this Part G, unless the context otherwise requires:

“authorised variation”	means a variation to an established Network Change, where: <ul style="list-style-type: none"><li>(a) the terms and conditions on which the Network Change in question was established contain a variation procedure;</li><li>(b) that variation procedure has been followed in accordance with its terms; and</li><li>(c) the result of the operation of that variation procedure is that the established Network Change has been varied;</li></ul>
“change”	includes: <ul style="list-style-type: none"><li>(a) improvement or deterioration, enlargement or reduction; and</li><li>(b) for the purposes of paragraph (b) of the definition of Network Change, a series of changes;</li></ul>
“Complex Projects Procedure”	means the procedure set out in Conditions G5 to G7;
“Effective Date”	means the date specified in a notice of proposal of a Short Term Network Change upon which the Short Term Network Change is proposed to become effective;
“Established Date”	means the first date upon which a Short Term Network Change can be implemented in accordance with Condition G10, whether or not the change is implemented on that day;
“established Network Change”	means a change falling within the definition of “Network Change” and which:

- (a) in the case of a Network Change proposed by Network Rail, Network Rail is entitled to carry out having complied with the procedural and other requirements of this Part G; and
- (b) in the case of a Network Change proposed by an Access Beneficiary, Network Rail is required by this Part G to carry out,

and “establish” and “establishment” of a Network Change shall be construed accordingly;

“Expiry Date”

means the date specified in a notice of proposal in relation to a Short Term Network Change which shall not be more than two years, or such longer period as is agreed between Network Rail and each Access Beneficiary that may be affected by the implementation of the proposed Short Term Network Change or determined in accordance with Condition G11, from the later of the Effective Date and the Established Date;

“Governmental Body”

means any local, national or supra-national agency, authority, department, inspectorate, minister, ministry, official, court, tribunal, or public or statutory person (whether autonomous or not and including the Office of Rail and Road);

“method of delivery”

includes the means of securing access to an operational document and the ability to make use of the data contained in an operational document;

“modification”

includes additions, alterations and omissions, and cognate expressions shall be construed accordingly;

“Network Change”

means, in relation to an Access Beneficiary:

- (a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:
  - (i) the Network; or
  - (ii) trains operated by, or anticipated as being operated in accordance with the terms of

any access option, by or on behalf of that Access Beneficiary on the Network; or

- (b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:
  - (i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and
  - (ii) has lasted or is likely to last for more than six months,

including

- (x) a temporary speed restriction;
  - (y) a material change to the location of any of the specified points referred to in Condition B1.1(a); or
  - (z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or
- (c) any material variation to an established Network Change, other than an authorised variation,

but does not include a closure (as defined in the Railways Act 2005) or a change made under the Systems Code;

“Preparatory Works”

means testing, trials, pilot activities, surveys and all other activities reasonably necessary to develop the proposed Network Change;

“Relevant Costs”

means, in respect of any Network Change implemented in accordance with Condition G9:

- (a) in respect of Network Rail, all costs, direct losses and expenses (including loss of revenue and liabilities to other Access Beneficiaries but

excluding liabilities under any Access Beneficiary's Access Agreement as a consequence of any Restriction of Use in connection with the implementation of that Network Change) incurred by Network Rail as a consequence of the implementation of that Network Change;

- (b) in respect of any Access Beneficiary, the amounts which would otherwise be due under that Access Beneficiary's Access Agreement as a consequence of any Restriction of Use in connection with the implementation of that Network Change;

"relevant response date"

means:

- (a) in relation to a proposal for a Network Change under Condition G1, the later of such dates as are reasonably specified by Network Rail under Condition G1.2(a) and Condition G1.3.2 as the date on or before which an Access Beneficiary is to give notice of its response to that proposal under Condition G2.1, having regard to:

- (i) the size and complexity of the change; and
  - (ii) the likely impact of the change on the Access Beneficiary,

and which shall not be less than 30 days from the date on which the notice of the proposal for change is given; and

- (b) in relation to a proposal for a Network Change under Condition G3, the later of such dates as are reasonably specified by Network Rail under Condition G3.3.1(c)(i) and Condition G3.4.3 as the date on or before which it is to give notice of its response to that proposal under Condition G4.1, having regard to:

- (i) the size and complexity of the change; and

- (ii) the likely impact of the change on Access Beneficiaries,

and which shall not be:

- (A) less than 60 days; or
- (B) unless Network Rail and the Sponsor agree otherwise in writing, more than 90 days,

from the date on which Network Rail's notice under Condition G3.3.1(c) is given;

**"Scope"** means those elements of the scope of a proposed Network Change that are set out in a notice issued by Network Rail under Condition G5.4;

**"Short Term Network Change"** means a Network Change which Network Rail specifies as such in any proposal made under Condition G1, being a Network Change which involves only a temporary reduction in the capability of the Network for a defined period of time during which there is no reasonable expectation of a requirement for the capability being temporarily withdrawn;

**"Sponsor"** means, in relation to a proposal for a Network Change under Condition G3.1, the Access Beneficiary which has made the proposal;

**"variation"** means any modification to the terms or conditions (including as to the specification of the works to be done, their timing, the manner of their implementation, the costs to be incurred and their sharing, and the division of risk) on which an established Network Change is to be carried out, and "varied" and any other cognate words shall be construed accordingly; and

**"variation procedure"** means, in relation to an established Network Change, a procedure which:

- (a) forms part of the terms and conditions on which the Network Change is established; and
- (b) provides for the established Network Change itself

to be varied after it has been first established.

## **CONDITION GA - FACILITATION OF NETWORK CHANGE**

### **A1 *Obligation to facilitate Network Change***

Network Rail shall take all reasonable steps to facilitate the development, establishment and implementation of any proposal for Network Change.

### **A2 *Limit of obligation***

Condition GA1 does not oblige Network Rail to do anything which it is not required to do under its network licence.

### **A3 *Facilitation***

The obligation of Network Rail under Condition GA1 includes:

- (a) the provision to an Access Beneficiary of such information concerning the condition, capacity and/or capability of the Network as:
  - (i) Network Rail is required at any time to hold or have appropriate access to under its network licence; and
  - (ii) that Access Beneficiary may reasonably request in connection with the development of a proposal for Network Change (whether the proposal is made by that Access Beneficiary or another person);
- (b) the publication on its website (subject to Condition A3 of the Network Code) of:
  - (i) every proposal for Network Change made by Network Rail under Condition G1.1 or by an Access Beneficiary under Condition G3.1;
  - (ii) every response to a proposal for Network Change made by an Access Beneficiary under Condition G2.1 or by Network Rail under Condition G4.1;
  - (iii) the determinations of matters which have been referred for determination in accordance with the ADRR under Condition G11.1 and which fall to be published in accordance with the ADRR;
  - (iv) every authorised variation;

- (v) standard forms, produced after consultation with every other Access Party and approved by the Office of Rail and Road, for the notification under this Part G of proposals for Network Change, and of responses to such proposals, which:
  - (A) may include different forms for different types of Network Change having regard to the size, complexity and value of the change in question; and
  - (B) shall be used by any person notifying or responding to a proposal for Network Change under this Part G, unless it is not reasonably practicable for it to do so; and
- (vi) model terms and conditions, produced after consultation with every other Access Party and approved by the Office of Rail and Road, by way of supplement to the terms of this Part G and on which Network Rail is prepared to contract for or in connection with the implementation of a Network Change which:
  - (A) shall provide appropriate and proportionate forms of contract for different types of Network Change having regard to the size, complexity and value of the change in question;
  - (B) may include variation procedures; and
  - (C) shall, so far as reasonably practicable, form the basis of any terms and conditions relating to the implementation of a Network Change which are proposed by Network Rail under Condition G1 or by an Access Beneficiary under Condition G3;
- (c) the provision of a preliminary response to a proposal for Network Change by an Access Beneficiary under Condition G3.4;
- (d) such consultation before a notice of a proposal for a Network Change is submitted by an Access Beneficiary as may reasonably be expected to enable that Access Beneficiary to assess the feasibility and affordability of the proposed change; and
- (e) such consultation with the persons specified in Condition G1.1(a) and G3.1(b) before a notice of a proposal for a Network Change is given by Network Rail or submitted by an Access Beneficiary as:
  - (i) Network Rail considers reasonably necessary; and

- (ii) any person specified in Condition G1.1(a) and G3.1(b) may reasonably request,

to enable the proposal to be developed in an efficient and economical manner.

## **CONDITION G1 - NETWORK CHANGE PROPOSAL BY NETWORK RAIL**

### **1.1 *Notice of proposal***

Subject to Conditions G1.9 and G1.10, if Network Rail wishes to make a Network Change, it shall:

- (a) give notice of its proposal for Network Change to:
  - (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;
  - (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
  - (iii) the Office of Rail and Road; and
  - (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change; and
- (b) without delay publish on its website a summary of its proposal for Network Change.

### **1.2 *Content of notice of proposed Network Change***

A notice of a proposed Network Change given by Network Rail under Condition G1.1 shall:

- (a) state the relevant response date and the obligations of Access Parties under Conditions G1 and G2;
- (b) indicate whether and to what extent the proposed Network Change has been progressed using the Complex Projects Procedure;
- (c) indicate whether the proposed Network Change is a Short Term Network Change;



- (d) invite the persons specified in Condition G1.1(a)(ii)-(iv) to submit comments by the relevant response date;
- (e) contain:
  - (i) the reasons why it is proposed to make the change, including the effects it is intended or may reasonably be expected to have on the operation of the Network or on trains operated on the Network;
  - (ii) a specification of the works to be done (including a plan showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);
  - (iii) the proposed times within which the works are to be done and when they are intended or may reasonably be expected to be begun and completed;
  - (iv) Network Rail's proposals (if any) for the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change;
  - (v) in the case of a Short Term Network Change:
    - (A) Network Rail's proposals as to the Effective Date;
    - (B) Network Rail's proposals as to the Expiry Date;
    - (C) the estimated timescale in which the change could reasonably be reversed if so requested by an Access Beneficiary based on its reasonable expectations as to future use of the Network; and
    - (D) the capability of the relevant section of the Network before the proposed Short Term Network Change (and any Short Term Network Change which it succeeds) and the proposed reduction to that capability;
  - (vi) any additional terms and conditions which Network Rail proposes should apply to the change, including any proposed variation procedure;
  - (vii) the results of any consultation undertaken in accordance with Condition G5; and

- (viii) the results of any Preparatory Works undertaken in accordance with Condition G6; and
- (f) be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the persons specified in Condition G1.1(a), to enable any such person to assess the likely effect of the proposed change on its business and its performance of any obligations or the exercise of any discretions which it has in relation to railway services.

### **1.3 Consultation**

- 1.3.1 Network Rail shall, after giving notice of any proposal for Network Change under Condition G1.1, consult with each operator of railway assets likely to be materially affected by the proposed change to the extent reasonably necessary so as properly to inform that operator of the change and to enable that operator to assess the consequences for it of the proposed change.
- 1.3.2 After consultation under this Condition G1.3, Network Rail may notify a later relevant response date to the persons to whom the notice of proposal for Network Change was given.

### **1.4 Obligations on Access Beneficiaries to facilitate Network Change**

- 1.4.1 Except in the circumstances and to the extent specified in Condition G1.4.2, an Access Beneficiary shall, when consulted by Network Rail under Condition G1.3, take all reasonable steps to comply with any written request of Network Rail to provide Network Rail, within a reasonable period of time and at no cost to Network Rail, with:
  - (a) a preliminary estimate of those costs, losses and expenses referred to in Condition G2.2; or
  - (b) a preliminary written response in respect of the proposed Network Change, which shall:
    - (i) be binding on the Access Beneficiary, unless the Access Beneficiary indicates otherwise; and
    - (ii) if it is negative, include reasons.
- 1.4.2 An Access Beneficiary shall not be obliged to comply with a request from Network Rail under Condition G1.4.1:

- (a) unless:
  - (i) the relevant response date is 60 or more days after the date on which the proposal for Network Change was given; and
  - (ii) the request is made at the same time as Network Rail gives its notice under Condition G1.1; or
- (b) to the extent that the Access Beneficiary is unable to comply with such a request, having regard to the information reasonably available to it.

### **1.5 Reimbursement of costs**

Subject to Conditions G1.4 and G2, each Access Beneficiary shall be entitled to reimbursement by Network Rail of 75% of all costs incurred by that Access Beneficiary in assessing any Network Change proposed by Network Rail. Those costs shall be the minimum reasonably necessary for that Access Beneficiary to carry out that assessment.

### **1.6 Further information regarding costs**

Each Access Beneficiary shall, upon request from Network Rail from time to time, provide Network Rail with written estimates of the costs of assessing a proposal for Network Change proposed by Network Rail (as referred to in Condition G1.5) including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that evaluation before commencing such work; and
- (b) upon request from Network Rail from time to time, provide Network Rail with such information as may be reasonably necessary to enable Network Rail to assess the reasonableness of any estimate.

### **1.7 Accuracy of estimates**

Each Access Beneficiary shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

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

An Access Beneficiary 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 proposal for Network Change made by Network Rail.

## **1.9 *Changes to the operation of the Network***

In the case of a Network Change within the meaning of paragraph (b) of that term's definition, Network Rail may commence implementing the procedure set out in this Part G and shall, upon notice being given by the relevant Access Beneficiary to Network Rail at any time after the expiry of the relevant period, promptly commence implementing and thereafter comply with that procedure as if that change were a Network Change proposed by Network Rail.

## **1.10 *Network Change for safety reasons***

To the extent that a Network Change within the meaning of paragraph (a) of that term's definition is required to be made by Network Rail for safety reasons, Network Rail shall not be obliged to implement the procedure set out in this Part G in relation to that change until the change has lasted for three months. Upon expiry of the relevant period, Network Rail shall promptly commence implementing and thereafter comply with the procedure set out in this Part G as if the relevant Network Change were a Network Change proposed by Network Rail.

# **CONDITION G2 - RESPONSE BY ACCESS BENEFICIARY TO NETWORK CHANGE PROPOSAL**

## **2.1 *Obligation to give notice of response***

2.1.1 The Access Beneficiary shall give notice to Network Rail if it considers that:

- (a) one or more of the following conditions has been satisfied:
  - (i) the implementation of the proposed change would necessarily result in Network Rail breaching an access contract to which that Access Beneficiary is a party;
  - (ii) Network Rail has failed, in respect of the proposed change, to provide sufficient particulars to that Access Beneficiary under Condition G1.2;
  - (iii) the implementation of the proposed change would result in a material deterioration in the performance of that Access Beneficiary's trains which cannot adequately be compensated under this Condition G2 or (where that Access Beneficiary is a

Train Operator) in respect of a Restriction of Use in connection with the implementation of the proposed change under that Train Operator's Access Agreement; or

(iv) the proposed change does not adequately take account of the reasonable expectations of the Access Beneficiary as to the future use of the relevant part of the Network; and/or

(b) one or more of the conditions set out in Condition G2.1.1(a) has been satisfied but it is prevented by Condition G5.7 from objecting to the proposed Network Change and the proposed Network Change is not, on the basis of the available evidence and taking account of the alternative solutions available and the progress made with the proposed Network Change, to the benefit of the industry as a whole; and/or

(c) it should be entitled to compensation from Network Rail for the consequences of the implementation of the change either:

(i) in accordance with compensation terms proposed under Condition G1; or

(ii) on terms other than those proposed (if any) under Condition G1.

2.1.2 Any notice of the kind referred to in Condition G2.1.1(a) above shall include the reasons for the Access Beneficiary's opinion. Any notice of the kind mentioned in Condition G2.1.1(c)(ii) above shall include the reasons why the Access Beneficiary considers that any compensation terms proposed under Condition G1 are inappropriate and shall detail:

(a) the amount of compensation required and the methodology used to calculate the amount of compensation required; or

(b) if the Access Beneficiary is not reasonably able to provide details of the amount of compensation required, the methodology to be used to calculate the amount of compensation required; and in either case

(c) the means by which the compensation should be paid, including any security or other assurances of payment which Network Rail should provide.

The notice referred to above shall contain such detail as is reasonable to enable Network Rail to assess the merits of the Access Beneficiary's decision.

## **2.2 Amount of compensation**

Subject to Condition G2.3 and Condition G2.4.1, the amount of the compensation referred to in Condition G2.1 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 Access Beneficiary as a consequence of the implementation of the proposed change.

### **2.3 *Benefits to be taken into account***

There shall be taken into account in determining the amount of compensation referred to in Condition G2.2:

- (a) subject to Condition G2.4.2, the benefit (if any) to be obtained or likely in the future to be obtained by the Access Beneficiary as a consequence of the proposed Network Change; and
- (b) the ability or likely future ability of the Access Beneficiary to recoup any costs, losses and expenses from third parties including passengers and customers.

### **2.4 *Restrictions of Use***

2.4.1 The amount of the compensation referred to in Condition G2.2 shall exclude 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 Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change.

2.4.2 The benefits taken into account in determining the amount of the compensation for the proposed change under Condition G2.3 shall exclude the benefit (if any) to be obtained or likely in the future to be obtained by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change (with that exclusion including any compensation payable to that Train Operator in respect of that Restriction of Use under its Access Agreement).

## **CONDITION G3 - NETWORK CHANGE PROPOSAL BY ACCESS BENEFICIARY**

### **3.1 *Notice of proposal***

An Access Beneficiary shall, if it wishes Network Rail to make a Network Change:

- (a) submit to Network Rail a proposal for such change; and

- (b) permit Network Rail to consult with:
  - (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;
  - (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
  - (iii) the Office of Rail and Road; and
  - (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change,

to the extent provided for under Condition G3.3.1(b), subject to such requirements as to confidentiality as are reasonable.

### **3.2 *Content of Sponsor's notice of proposal***

A notice of a proposed Network Change given by the Sponsor under Condition G3.1 shall:

- (a) contain:
  - (i) the reasons why it is proposed to make the change, including the effects it is intended or expected to have on the operation of the Network or on trains operated on the Network;
  - (ii) a specification of the works to be done (including a plan or plans showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);
  - (iii) the proposed times within which the works are to be done and when they are intended or expected to be begun and completed;
  - (iv) the Sponsor's proposals (if any) for the division of the costs of carrying out the change including any proposals in relation to the calculation or payment of compensation to Network Rail or any Access Beneficiary in respect of the change; and

- (v) the additional terms and conditions (if any) which the Sponsor proposes should apply to the change, including any variation procedure; and
- (b) be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the persons specified in Condition G3.1(b), to enable:
  - (i) Network Rail; and
  - (ii) any person specified in Condition G3.1(b),

to assess the likely effect of the proposed change on its business and its performance of any obligations or exercise of any discretions which it has in relation to railway services.

### **3.3 *Evaluation of proposal and consultation***

3.3.1 If Network Rail receives a proposal for Network Change under Condition G3.1, it shall:

- (a) evaluate and discuss the proposal for change with the Sponsor for such period as is reasonable having due regard to the likely impact of the proposed Network Change on either or both of Network Rail and other operators of trains;
- (b) consult with each person specified in Condition G3.1(b) likely to be materially affected by the proposed change to the extent reasonably necessary so as properly to inform them of the change and to enable them to assess the consequences for them of the change; and
- (c) for the purpose of the consultation under Condition G3.3.1(b), within 30 days of the date on which the Sponsor's notice under Condition G3.1 was given, give a notice to the persons specified in Condition G3.1(b), with a copy to the Sponsor, inviting them to submit comments by the relevant response date and stating:
  - (i) the relevant response date and the obligations of Access Parties under Conditions G3 and G4;
  - (ii) the reasons given by the Sponsor under Condition G3.2(a)(i) for proposing to make the change;



- (iii) Network Rail's estimate of the likely impact of the change on the operation and performance of the Network; and
- (iv) Network Rail's own proposals as to:
  - (A) the arrangements for, and any proposed terms applicable to, the implementation of the change;
  - (B) the specification of the works to be done (including a plan or plans showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);
  - (C) the times within which the works are to be done and when they are intended or expected to be begun and completed;
  - (D) the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change; and
  - (E) any additional terms and conditions which should apply to the change, including any proposed variation procedure.

3.3.2 In preparing a notice under Condition G3.3.1(c), Network Rail:

- (a) shall comply with the standard specified in Condition G3.2(b); and
- (b) in respect of each of the matters specified in Condition G3.3.1(c)(iv):
  - (i) shall have regard to any relevant statements and proposals contained in the Sponsor's notice under Condition G3.1;
  - (ii) shall give reasons for any differences between those statements and proposals and its own proposals under Condition G3.3.1(c)(iv); and
  - (iii) may annex to its notice any proposal contained in the Sponsor's notice under Condition G3.1 with which it agrees, stating its agreement, and, where appropriate, that it has no proposals of its own on the matter concerned.

### **3.4 Facilitation of Network Change by Network Rail**

3.4.1 Except in the circumstances and to the extent specified in Condition G3.4.2, Network Rail shall, when consulted by the Sponsor, take all reasonable steps to comply with any written request of the Sponsor to provide the Sponsor, within a reasonable period of time, and at no cost to the Sponsor, with:

- (a) a preliminary estimate of those costs, losses and expenses referred to in Condition G4.2 which may be incurred by Network Rail; and/or
- (b) a preliminary written response in respect of the proposed Network Change, which shall:
  - (i) be binding on Network Rail, unless Network Rail indicates otherwise; and
  - (ii) if it is negative, include reasons.

3.4.2 Network Rail shall not be obliged to comply with a request from the Sponsor under Condition G3.4.1:

- (a) unless:
  - (i) the relevant response date is 90 or more days after the date on which Network Rail's notice under Condition G3.3.1(c) was given; and
  - (ii) the request is made within 7 days of the Sponsor receiving Network Rail's notice under Condition G3.3.1(c); or
- (b) to the extent that Network Rail is unable to comply with such a request, having regard to the information reasonably available to it.

3.4.3 After consultation with the Sponsor and under Condition G3.3.1(b), Network Rail may notify a later relevant response date to the Sponsor and the persons to whom it gave its notice under Condition G3.3.1(c).

### **3.5 *Reimbursement of costs***

Subject to Conditions G3.4 and G4, Network Rail shall be entitled to reimbursement by the Sponsor of 75% of all costs incurred by Network Rail in assessing any Network Change proposed by the Sponsor. Those costs shall be the minimum reasonably necessary for Network Rail to carry out that assessment.

### **3.6 *Provision of estimate of costs by Network Rail***

Network Rail shall, upon request from the Sponsor from time to time, provide the Sponsor with written estimates of the costs of assessing a proposal for Network Change submitted by the Sponsor (as referred to in Condition G3.5) including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that assessment before commencing such work; and
- (b) upon request from the Sponsor from time to time provide the Sponsor or its agents with such information as may be reasonably necessary to enable the Sponsor to assess the reasonableness of any estimate.

### **3.7     *Accuracy of estimates***

Network Rail shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

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

Network Rail shall, if requested by the Sponsor at any time, incur no further costs (except any costs that cannot reasonably be avoided) in respect of any proposal for Network Change made by the Sponsor.

### **3.9     *Relationship with Vehicle Change***

If the implementation of a Network Change proposed by the Sponsor also requires the implementation of a Vehicle Change in respect of the trains operated by the Sponsor, the Sponsor shall follow the procedures and satisfy the requirements of both this Part G and Part F and the requirement for a Vehicle Change shall not preclude the right of the Sponsor to follow the procedure in this Part G for a Network Change or vice versa.

## **CONDITION G4 - RESPONSE BY NETWORK RAIL TO NETWORK CHANGE PROPOSAL**

### **4.1     *Obligation to give notice of response***

4.1.1 Network Rail shall give notice to the Sponsor if:

- (a) it considers that one or more of the following conditions has been satisfied:

- (i) the implementation of the proposed change would necessarily result in Network Rail breaching any access contract (other than an access contract to which the Sponsor is a party);
  - (ii) the Sponsor has failed in a material respect to comply with its obligations under Condition G3.2 provided that Network Rail shall first have given the Sponsor a reasonable opportunity to remedy that failure;
  - (iii) the implementation of the proposed change would result in a material adverse effect on the maintenance or operation of the Network or the operation of any train on the Network which in any such case cannot adequately be compensated under this Condition G4 or in respect of a Restriction of Use in connection with the implementation of the proposed change under the relevant Train Operator's Access Agreement; or
  - (iv) the proposed change does not adequately take account of the reasonable expectations of an Access Party (other than the Sponsor) as to the future use of the relevant part of the Network;
- (b) any Access Beneficiary shall have given notice to Network Rail that it considers that any of the conditions specified in paragraph (a) above has been satisfied;
- (c) it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either:
- (i) in accordance with compensation terms proposed under Condition G3; or
  - (ii) on terms other than those proposed (if any) under Condition G3; and/or
- (d) any Access Beneficiary shall have given notice to Network Rail that it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either:
- (i) in accordance with compensation terms proposed under Condition G3; or
  - (ii) on terms other than those proposed (if any) under Condition G3.

4.1.2 Any notice of the kind referred to in Conditions G4.1.1(a) and (b) above shall include the reasons for the opinion in question. Any notice of the kind

mentioned in Conditions G4.1.1(c)(ii) and (d)(ii) above shall include the reasons why Network Rail or the relevant Access Beneficiary considers that any compensation terms proposed under Condition G3 are inappropriate and shall detail:

- (a) the amount of compensation required and the methodology used to calculate the amount of compensation required; or
- (b) if Network Rail or the relevant Access Beneficiary is not reasonably able to provide details of the amount of compensation required, the methodology to be used to calculate the amount of compensation required; and in either case
- (c) the means by which the compensation should be paid, including any security or other assurances of payment which the Sponsor should provide.

The notice referred to above shall contain such detail as is reasonable to enable the Sponsor to assess the merits of Network Rail or the relevant Access Beneficiary's decision.

## **4.2 Amount of compensation**

Subject to Condition G4.3, the aggregate of the amount of the compensation referred to in Condition G4.1 shall be:

- (a) subject to Condition G4.4.1 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 Network Rail or the relevant Access Beneficiary in question as a consequence of the implementation of the proposed change other than any such costs, losses or expenses which are attributable to the Sponsor improving its ability to compete with other operators of railway assets; and
- (b) an amount equal to the amount of costs, direct losses or expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by Network Rail as consequence of implementing a Network Change including the recovery of any payments made by Network Rail to the relevant Train Operator under that Train Operator's Access Agreement for the relevant Restriction(s) of Use.

## **4.3 Benefits to be taken into account**

There shall be taken into account in determining the amount of compensation referred to in Condition G4.2:

- (a) subject to Condition G4.4.2 the benefit (if any) to be obtained or likely in the future to be obtained by Network Rail or the relevant Access Beneficiary as a consequence of the implementation of the proposed change; and
- (b) the ability or likely future ability of Network Rail or the relevant Access Beneficiary to recoup any costs, losses and expenses from third parties including passengers and customers.

#### **4.4 Restrictions of Use**

- 4.4.1 The amount of the compensation referred to in Condition G4.2 shall in respect of any Train Operator exclude 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 that Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change.
- 4.4.2 The benefits taken into account in determining the amount of the compensation for the proposed change under Condition G4.3 shall in respect of any Train Operator exclude the benefit (if any) to be obtained or likely in the future to be obtained by that Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change (with that exclusion including any compensation payable to that Train Operator in respect of that Restriction of Use under its Access Agreement).

### **CONDITION G5 - SCOPE OF COMPLEX PROJECTS**

#### **5.1 Consultation prior to making a proposal for Network Change using the Complex Projects Procedure**

Before submitting a proposal for Network Change which Network Rail intends to establish using the Complex Projects Procedure, Network Rail shall provide the following information to each Access Beneficiary which it considers may be affected by the implementation of the proposed Network Change:

- (a) that Network Rail intends to initiate the Complex Projects Procedure in respect of the proposed Network Change;
- (b) the details of the proposed Network Change which Network Rail can reasonably make available;

- (c) the reasons why Network Rail believes that the proposed Network Change is required including the effects it is intended or may reasonably be expected to have on the operation of the Network or on trains operated on the Network;
- (d) the reasons why Network Rail believes that the proposed Network Change should be established in accordance with the Complex Projects Procedure;
- (e) any other information Network Rail reasonably believes an affected Access Beneficiary may reasonably require to understand the proposed Network Change;
- (f) a draft plan setting out the intended stages and timetable for the Complex Projects Procedure; and
- (g) the Scope that Network Rail intends to propose under Condition G5.4.

## **5.2 Consultation with affected Access Beneficiaries**

Network Rail shall, having provided the information set out in Condition G5.1, consult with each Access Beneficiary which it considers may be affected by the proposed change. During the consultation process Network Rail shall give due consideration to the views of each Access Beneficiary and, where Network Rail disagrees with the views of an Access Beneficiary, shall provide that Access Beneficiary with a written response setting out the reasons why Network Rail disagrees with the views of that Access Beneficiary.

## **5.3 Facilitation by Access Beneficiaries**

Access Beneficiaries consulted under Condition G5.2 shall take all reasonable steps to make the consultation process effective, including:

- (a) the taking of all reasonable steps to provide Network Rail with such information as Network Rail reasonably requests in connection with the development of the proposal for Network Change under Condition G5.1; and
- (b) the provision to Network Rail of a response to Network Rail's consultation under Condition G5.2 in relation to the proposed Network

Change within 30 days of being consulted by Network Rail, or such longer period as Network Rail may specify.

#### **5.4 *Notice of intended Scope***

Once the consultation procedure set out in Conditions G5.2 and G5.3 has concluded, Network Rail may, if it wishes to proceed with the proposed Network Change using the Complex Projects Procedure, issue a notice of intended Scope to each Access Beneficiary which it considers may be affected.

#### **5.5 *Response to notice of intended Scope***

Each Access Beneficiary that receives a notice of intended Scope from Network Rail under Condition G5.4 shall, within 30 days, or such longer period as Network Rail specifies, of the receipt of such notice, respond to Network Rail in writing stating either that it:

- (a) agrees to the Scope set out in the notice; or
- (b) does not agree to the Scope set out in the notice and it considers that there is a reasonable likelihood that, if the Scope were to be proposed as part of a Network Change under Condition G1, the Access Beneficiary would be likely to succeed in preventing the Network Change being established solely due to it being entitled to give notice under Condition G2.1.1(a).

Any notice under (b) above that an affected Access Beneficiary does not agree to the Scope set out by Network Rail in the notice of intended Scope shall include the reasons why the affected Access Beneficiary does not so agree.

If an Access Beneficiary receives a notice of intended Scope from Network Rail under Condition G5.4 and fails to respond to Network Rail in writing within 30 days, or such longer period as Network Rail specifies, of the receipt of such notice, the affected Access Beneficiary shall be deemed to have agreed to the Scope as if the affected Access Beneficiary had given notice to Network Rail under Condition G5.5(a).

#### **5.6 *Failure to agree Scope***

If an Access Beneficiary does not agree to the Scope under Condition G5.5(b), then Network Rail and the Access Beneficiary may enter into discussions with a view to agreeing the Scope, including any changes to the Scope which may



be appropriate. At any time after an Access Beneficiary serves a notice under Condition G5.5(b) any Access Party may refer the issue in accordance with the ADRR for determination in accordance with Condition G11.

### **5.7 *Effect of agreement of Scope***

Once the relevant Scope of the proposed Network Change has been agreed under Conditions G5.5 or G5.6 or determined under Condition G5.6 with an Access Beneficiary, that Access Beneficiary shall not be entitled to give notice to Network Rail subsequently under Condition G2.1.1(a) to challenge any elements of the Network Change to the extent included in the Scope except where there is a change to the Scope which is likely materially to affect the Access Beneficiary since the Scope was agreed under Conditions G5.5 or G5.6 or determined under Condition G5.6.

### **5.8 *Costs incurred by Access Beneficiaries due to the consultation process***

An Access Beneficiary shall be entitled to reimbursement by Network Rail of 100% of all costs reasonably incurred by that Access Beneficiary in complying with its obligations under Conditions G5.3 and G5.5. The costs shall be the minimum reasonably necessary for that Access Beneficiary to carry out the assessment.

### **5.9 *Further information regarding costs***

Each Access Beneficiary shall, upon request from Network Rail from time to time, provide Network Rail with written estimates of the costs of complying with its obligations under Conditions G5.3 and G5.5 including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that evaluation before commencing such work; and
- (b) upon request from Network Rail from time to time, provide Network Rail with such information as may be reasonably necessary to enable Network Rail to assess the reasonableness of any estimate.

### **5.10 *Accuracy of estimates***

Each Access Beneficiary shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

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

An Access Beneficiary 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 consultation in respect of a proposed Network Change to which this Condition G5 applies.

#### **5.12 *Further agreement of Scope***

If, at any time before Network Rail issues a notice of proposed change under Condition G1.1, Network Rail wishes to agree further elements of the proposed Network Change to be included in the Scope, Network Rail may issue further notices of intended Scope in respect of such further elements in accordance with Conditions G5.1 to G5.11 and once agreed or determined in accordance with Conditions G5.5 or G5.6 such further elements will be included in and form part of the Scope.

### **CONDITION G6 - PREPARATORY WORKS**

#### **6.1 *Network Rail's obligations in relation to Preparatory Works***

Network Rail may, if it wishes to proceed with a proposed Network Change using the Complex Projects Procedure, make proposals for the implementation of Preparatory Works under Condition G1, and except as provided in this Condition G6, Access Beneficiaries shall have the same rights in respect of such proposals as if each proposal of Preparatory Works was a separate Network Change proposal.

#### **6.2 *Obligations of Access Beneficiaries in relation to Preparatory Works***

Each Access Beneficiary which is likely to be affected by the Preparatory Works shall take all reasonable steps to facilitate the Preparatory Works which are undertaken by Network Rail including by the taking of all reasonable steps to provide Network Rail with such information as Network Rail reasonably requests in connection with the development of the Preparatory Works.

#### **6.3 *Further Preparatory Works***

If at any time Network Rail is reasonably of the view that further Preparatory Works are required, Network Rail shall propose such further Preparatory Works in accordance with this Condition G6.

### **CONDITION G7 - COMPLEX PROJECTS NETWORK CHANGE**

If, having previously agreed or determined the Scope in accordance with Conditions G5.5 or G5.6, Network Rail wishes to implement a Network Change which it has

progressed using the Complex Projects Procedure, it shall propose the Network Change in accordance with Condition G1.

## **CONDITION G8 - SHORT TERM NETWORK CHANGE**

### **8.1 *Reversal of a Short Term Network Change***

- 8.1.1 An Access Beneficiary may request in writing that Network Rail reverse the effect of a Short Term Network Change before its Expiry Date if the effect of the Short Term Network Change would prevent the Access Beneficiary using the Network in a manner consistent with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network.
- 8.1.2 The Access Beneficiary shall include with any notice requesting the reversal of the effect of a Short Term Network Change served under Condition G8.1.1 evidence to support the Access Beneficiary's claim of reasonable expectations as to the future use of the relevant part of the Network which requires that reversal.
- 8.1.3 The Access Beneficiary shall provide Network Rail with such further information as Network Rail may reasonably require to enable Network Rail to assess the reasonableness of the Access Beneficiary's request to reverse the effect of a Short Term Network Change.
- 8.1.4 Upon receipt of a notice to reverse the effect of a Short Term Network Change served under Condition G8.1.1, Network Rail shall:
- (a) reverse the effect of the Short Term Network Change at its own cost by the later of the following:
    - (i) the earlier of:
      - (A) the estimated timescale for reversal set out in the notice of proposed Network Change served under Condition G1.1; and
      - (B) the timescale within which Network Rail can complete the reversal without incurring any greater cost than would have reasonably been incurred by Network Rail had the effect of the Short Term Network Change been reversed in accordance with the estimated timescale for reversal set out in the notice of proposed Network Change served under Condition G1.1; or

- (ii) the earliest use for which the Access Beneficiary can demonstrate a reasonable expectation as to future use; or
- (b) respond to the Access Beneficiary in writing within 30 days stating that Network Rail does not believe that the effect of the Short Term Network Change is preventing the Access Beneficiary using the Network in accordance with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network and giving reasons for its decision.

Network Rail shall not be liable to any Access Beneficiary if and to the extent that the date of the requested reversal is earlier than the date by which Network Rail must reverse the effect of the Short Term Network Change as calculated under Condition G8.1.4(a).

## **8.2 *Expiry of a Short Term Network Change***

Network Rail shall restore at its own cost any part of the Network which has been subject to a Short Term Network Change to its original capability as set out in the notice of proposal for the Short Term Network Change by the Expiry Date unless and to the extent that:

- (a) a Network Change has been implemented in place of the Short Term Network Change; or
- (b) a further Short Term Network Change has been implemented.

## **8.3 *Notification of reversal of a Short Term Network Change prior to the Expiry Date***

Network Rail shall publish details of each Short Term Network Change which is reversed prior to the Expiry Date.

## **CONDITION G9 - CHANGES IMPOSED BY COMPETENT AUTHORITIES**

Where Network Rail is required (other than at its own request or instigation) to implement a Network Change as a result of any Change of Law or any Direction of any Competent Authority other than the Office of Rail and Road exercising any of its functions which do not fall within the definition of 'safety functions' as defined in section 4 of the Act:

- (a) Network Rail shall, except to the extent that the relevant Change of Law or Direction otherwise requires, comply with Conditions G1.1 and G1.2 (other than Condition G1.2(e)(iv)) in respect of that Network Change;

- (b) each Access Beneficiary shall make such alterations (if any) to its railway vehicles and its Services as are reasonably necessary to accommodate that Network Change and shall, except to the extent that the relevant Change of Law or Direction otherwise requires, comply with Conditions F2.1, F2.2 and F2.3 (other than Conditions F2.2(a)(vi) and F2.3.1(c)(v)(B) and (D));
- (c) subject to Condition G9(d), each Access Party shall bear its own costs or losses arising out of the implementation of the Network Change or the consequences thereof;
- (d) where Network Rail recovers compensation in respect of that Network Change from a Competent Authority or some other Governmental Body, it shall pay to Access Beneficiaries:
  - (i) where any compensation paid to Network Rail in relation to that Network Change is sufficient to cover the Relevant Costs of the Access Beneficiary and of Network Rail, the Relevant Costs of the Access Beneficiary; and
  - (ii) where such compensation is not so sufficient, such proportion of that compensation as the Access Beneficiary's Relevant Costs bears to the sum of Network Rail's Relevant Costs and all the Access Beneficiary's Relevant Costs in respect of that Network Change; and
- (e) Network Rail shall use reasonable endeavours to negotiate with the relevant Competent Authority or Governmental Body (as applicable) a level of compensation in respect of that Network Change which is sufficient to ensure that the Access Beneficiary receives compensation for all of its Relevant Costs. Network Rail shall from time to time consult with the Access Beneficiary and keep the Access Beneficiary informed in reasonable detail of the progress of such negotiations.

## **CONDITION G10 - ESTABLISHMENT AND IMPLEMENTATION**

### **10.1 *Implementation of a Network Rail proposed Network Change***

10.1.1 Network Rail shall be entitled to implement a proposed Network Change if:

- (a) it has not received a notice from any Access Beneficiary under Condition G2.1 by the relevant response date; or
- (b) it has received notice by the relevant response date from an Access Beneficiary under Condition G2.1(c) and either the amount of any compensation referred to in Condition G2.1 has been agreed, or

resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and

- (c) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between Network Rail and any affected Access Beneficiary.

10.1.2 Network Rail may, if it considers it expedient to do so in order to confirm whether or not Condition G10.1.1 has been satisfied, issue a notice to all affected Access Beneficiaries when it reasonably believes it is entitled to implement a proposed Network Change.

10.1.3 Network Rail's entitlement to implement a proposed Network Change shall be treated as confirmed 21 days after it has served a notice in respect of that Network Change in accordance with Condition G10.1.2 unless it receives notice from an Access Beneficiary within those 21 days disputing Network Rail's entitlement to implement that proposed Network Change under Condition G10.1.1 and giving full particulars of its reasons.

10.1.4 If Network Rail does not agree with the contents of a notice served by an affected Access Beneficiary in accordance with Condition G10.1.3, Network Rail may:

- (a) refer the matter for determination in accordance with the ADRR and Condition G11 shall apply; or
- (b) withdraw the proposed Network Change.

## **10.2 Implementation of a Sponsor proposed Network Change**

10.2.1 The Sponsor shall be entitled to instruct Network Rail to implement a proposed Network Change if:

- (a) Network Rail has not given notice under Condition G4.1 by the relevant response date; or
- (b) Network Rail has given notice by the relevant response date under Condition G4.1.1(c) and either the amount of any compensation referred to in Condition G4.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; or
- (c) Network Rail has received notice from an Access Beneficiary under Condition G4.1.1(d) and either the amount of any compensation referred to in Condition G4.1 has been agreed, or resolved, or the

method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and

- (d) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between the Sponsor and any Access Party.

10.2.2 The Sponsor may, if it considers it expedient to do so in order to confirm whether or not Condition G10.2.1 has been satisfied, instruct Network Rail to issue a notice to all affected Access Beneficiaries when the Sponsor reasonably believes that it is entitled to instruct Network Rail to implement a proposed Network Change and Network Rail shall then serve such a notice within 7 days of the instruction.

10.2.3 The Sponsor's entitlement to instruct Network Rail to implement a proposed Network Change shall be treated as confirmed 35 days after Network Rail has served a notice in respect of that Network Change in accordance with Condition G10.2.2 unless:

- (a) Network Rail gives notice to the Sponsor within 35 days disputing the Sponsor's entitlement to require the implementation of that Network Change under Condition G10.2.1 and giving full particulars of its reasons; or
- (b) Network Rail receives notice from an Access Beneficiary within 21 days of the notice served by Network Rail disputing the Sponsor's entitlement to require the implementation of that Network Change under Condition G10.2.1 and giving full particulars of its reasons.

10.2.4 If the Sponsor does not agree with the contents of a notice served by Network Rail or an affected Access Beneficiary in accordance with Condition G10.2.3, the Sponsor may:

- (a) refer the matter for determination in accordance with the ADRR and Condition G11 shall apply; or
- (b) withdraw the proposed Network Change.

### **10.3 When a Network Change may not be implemented**

10.3.1 Network Rail shall not be entitled, and a Sponsor shall not be entitled to require Network Rail, to implement a proposed Network Change unless it is so entitled to implement, or require the implementation of that Network Change under Condition G10.1.1 or Condition G10.2.1.

10.3.2 For the purposes of the Conditions G10.1.1 and G10.2.1, unresolved disputes shall include:

- (a) a notice has been served under Condition G2.1.1(a) or (b) or Condition G4.1.1(a) or (b) which has not been withdrawn, resolved under Condition G11 or agreed not to apply; and
- (b) a notice has been served under Condition G2.1.1(c) or Condition G4.1.1(c) or (d) which has not been agreed or resolved as referred to in Condition G10.1.1(b) or G10.2.1(b) or (c) or otherwise agreed, resolved or withdrawn.

## **CONDITION G11 - APPEAL PROCEDURE**

### **11.1 *Right of referral in accordance with the ADRR***

If any Access Party is dissatisfied as to:

- (a) any matter concerning the operation of the procedure in this Part G;
- (b) the contents of any notice given under Condition G2.1, G4.1, G5.5, G8.1.1 or G10 (and, in particular, the amount of any compensation referred to in those Conditions);
- (c) any estimate referred to in Condition G1.6 or G3.6;
- (d) the:
  - (i) proposed Expiry Date; or
  - (ii) estimated timescale in which a Short Term Network Change can be reasonably reversed,

in a notice of proposed Network Change given under Condition G1.1; or

- (e) the reasons given by Network Rail as to why it does not believe that the effect of the Short Term Network Change is preventing the Access Beneficiary using the Network in accordance with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network under Condition G8.1.4(b),

that Access Party may refer the matter for determination in accordance with the ADRR.



# Part H – Railway Operational Code

## Explanatory Note

- A. *Part H sets out a requirement for Network Rail, in consultation with the industry, to establish a Railway Operational Code (the “ROC”). The ROC has the objective of sustaining operation of train services on the network in accordance with the working timetable, as well as where necessary restoring operation in accordance with the working timetable, having regard to the needs of passengers and freight customers; the interests of safety and security; the efficient and economical operation of the network and of trains operating on it; and criteria published by the Office of Rail and Road.*
- B. *The ROC is to be kept under regular review, and covers such issues as notification of disruptive events; contingency plans; clearance of track blockages and assistance to failed trains; emergency timetabling procedures; control arrangements; train regulation; seasonal-preparedness; and other matters necessary or expedient to achieve its objective.*
- C. *Part H also sets out a procedure for varying the ROC, which includes all ROC Sections and Subsidiary Documentation. A ROC Section may also set out its own procedure for varying the ROC Section in question or Subsidiary Documentation produced under that ROC Section. Subsidiary Documentation may itself also contain procedures governing its own variation which are additional to or are intended to replace the procedures set out in Part H.*
- D. *Guidance on the management of operational disruption is now contained in the ROC, which can be found on Network Rail’s website.*
- E. *This Explanatory Note does not form part of the Network Code.*

## DEFINITIONS

In this Part H, unless the context otherwise requires:

“appeal” means, in relation to a ROC Section, the exercise by a person of a right under this Part H to make a reference in that respect in accordance with the ADRR;

“Appeal Body” means the dispute resolution forum from time to time constituted under or appointed to make the decision in accordance with the ADRR;

“Disruptive Event” means any event or circumstance which materially prevents or materially disrupts the operation of trains or any part of the Network in accordance with the Working Timetable;

“established” means, in relation to a ROC Section, or a variation to a ROC Section, as the case may be, that the ROC Section or the variation has come into effect whether:

- (a) following publication of the ROC Section or the variation (or if publication is not required notification of the ROC Section or the variation to affected Train Operators and Freight Customer Access Option Holders) with no appeal being lodged within the time limit for such appeal or, if such an appeal has been lodged, it has not been proceeded with; or
- (b) following any interim or final determination of an appeal in that respect if an appeal is lodged and proceeded with,

and subject always to:

- (i) adjustment following final determination of an appeal under Condition H4; or
- (ii) variation under Condition H5,

and “establish” and “establishment” shall be

“Extended Disruption”	<p>construed accordingly;</p> <p>means a Disruptive Event which is likely to be of sufficient duration as to make it practicable to adopt a revised timetable;</p>
“Objective”	<p>means the objective of the Railway Operational Code specified in Condition H1.2;</p>
“ORR ROC Criteria”	<p>means any document published by the Office of Rail and Road from time to time specifying the matters to which the Office of Rail and Road will expect to have regard and the relative weight which it will expect to be placed on such matters when any reference made under Condition HA7 is considered by an Appeal Body;</p>
“Permitted Exemptions”	<p>has the meaning ascribed to it in Condition H3.3;</p>
“Railway Operational Code”	<p>has the meaning ascribed to it in Condition H1.1;</p>
“ROC Plan”	<p>means a plan for the establishment of the Railway Operational Code which shall:</p> <ul style="list-style-type: none"> <li>(a) comply in all respects with this Part H;</li> <li>(b) be consistent with the ORR ROC Criteria;</li> <li>(c) specify a clear and achievable timetable for the establishment of each ROC Section and the full Railway Operational Code; and</li> <li>(d) show in reasonable detail the proposed organisation of the Railway Operational Code; and</li> </ul>
“ROC Section”	<p>means a section of the Railway Operational Code covering one or more of the matters specified in Condition H3 or any part of them.</p>
“Subsidiary Documentation”	<p>means all plans, procedures and documents which are required to be produced under one or more ROC Sections and designated as Subsidiary Documentation under them.</p>

## **H1     *Railway Operational Code and its Objective***

### **H1.1   *Railway Operational Code***

The Railway Operational Code is a code established under this Part H and references to the Railway Operational Code include each ROC Section when it is established and all Subsidiary Documentation.

### **H1.2   *Objective***

The objective of the Railway Operational Code is to sustain and, where necessary, restore expeditiously the operation of Services in accordance with the Working Timetable and in a manner consistent with the ORR ROC Criteria, having regard to:

- (a)     the needs of passengers and freight customers;
- (b)     the interests of safety and security; and
- (c)     the efficient and economical operation of the Network and of trains operating on it.

### **H1.3   *Relationship to the Network Code***

The Railway Operational Code:

- (a)     may only be varied under Part H of the Network Code; and
- (b)     does not form part of the Network Code.

## **H2     *Obligation to observe the Railway Operational Code***

H2.1 Network Rail and each Train Operator shall comply with the Railway Operational Code.

H2.2 Each Freight Customer Access Option Holder shall comply with those ROC Sections that are expressed in the Railway Operational Code to apply to Freight Customer Access Option Holders.

## **H3     *Scope of Railway Operational Code***

H3.1 The Railway Operational Code contains:

- (a) a specification of the procedures and policies by which Network Rail, in cooperation with Train Operators and Freight Customer Access Option Holders, will promote achievement of the Objective, including:
  - (i) a procedure for notification of, and communication in relation to, Disruptive Events or reasonably foreseeable Disruptive Events;
  - (ii) train regulation policies;
  - (iii) an emergency timetable procedure in the event of Extended Disruption;
  - (iv) arrangements for clearance of track blockages and assistance for failed trains;
  - (v) arrangements for:
    - (A) the provision of equipment to deal with adverse weather conditions; and
    - (B) the preparation for and response to seasonal disruptions;
  - (vi) control arrangements; and
  - (vii) other matters which it is necessary or expedient should be covered in order to promote achievement of the Objective;
- (b) procedures for reviewing and monitoring the effectiveness of the Railway Operational Code; and
- (c) procedures for the production, review, approval and publication of Subsidiary Documentation.

### H3.2 *Publication*

The ROC shall be published on its website by Network Rail subject to:

- (a) Condition A3 of the Network Code; and
- (b) Permitted Exemptions.

### H3.3 *Permitted Exemptions*

Permitted Exemptions are any matters contained in a ROC Section in respect of which the ORR ROC Criteria provide that general publication under Condition H3.2 is not required.

### H3.4 *Subsidiary Documentation*

All Subsidiary Documentation shall:

- (a) be of a standard which is consistent with promoting the achievement of the Objective and the requirement for compliance under Condition H2; and
- (b) be subject to procedures for review and (where applicable) approval which are in accordance with the ORR ROC Criteria.

## **H4 *Appeals***

### H4.1 *Right of appeal in accordance with the ADRR*

Subject to Condition H4.3, if any Train Operator or Freight Customer Access Option Holder is dissatisfied as to any matter concerning or in connection with:

- (a) any variation of a ROC Section issued under Condition H5; or
- (b) any decision by Network Rail not to implement a variation proposed by a Train Operator or Freight Customer Access Option Holder under Condition H5.2,

the Train Operator or Freight Customer Access Option Holder may refer the matter for determination in accordance with the ADRR (as supplemented or varied by this Condition H4).

### H4.2 *Time limits for appeal*

A Train Operator's or Freight Customer Access Option Holder's right of appeal under Condition H4.1 shall lapse if the relevant matter is not referred in accordance with the ADRR in the case of a variation under Condition H5.5:

- (a) if Condition H5.5(a) applies, within 30 days of the later of the date on which it is published and the date on which it is notified to that Train

Operator or Freight Customer Access Option Holder under Condition H5.9, or

- (b) if Condition H5.5(b) applies, within the period specified for such appeal in the relevant ROC Section.

#### H4.3 *Information to be sent in relation to the appeal*

Without prejudice to Condition H4.6, if there has been a reference for determination in accordance with the ADRR under Condition H4.1:

- (a) in the case of a referral under Condition H4.1, Network Rail shall provide the Train Operator or Freight Customer Access Option Holder and the relevant ADRR Panel with the name and address of every other Train Operator and Freight Customer Access Option Holder who Network Rail reasonably considers may be affected by the ROC Section variation within 7 days of the making of the reference; and
- (b) the person making the reference shall:
  - (i) include with his reference a statement in reasonable detail as to the matter in question and his reasons for making the reference; and
  - (ii) within 14 days of the reference Network Rail shall publish a copy of the reference and the statement specified in Condition H4.4(b)(i).

#### H4.4 *Criteria for appeal*

Any matter referred under Condition H4.1 or H4.2 shall be determined by reference to the most effective manner of promoting the achievement of the Objective.

#### H4.5 *Issue of adjusted ROC Section*

When any appeal brought under this Condition H4 has been finally concluded, Network Rail shall promptly publish on its website and, if the outcome of the appeal is the adjustment of the ROC Section, send to each affected Train Operator and Freight Customer Access Option Holder and any other person who notified Network Rail that it wished to be consulted under Condition H5.6(c) and the Office of Rail and Road the ROC Section as adjusted by the outcome of such appeal.

## **H5     *Variations to Railway Operational Code***

Conditions H5.1 to Conditions H5.4 inclusive apply to all variations to the Railway Operational Code including all Subsidiary Documentation. Notwithstanding the provisions of Conditions H5.1 to H5.4 inclusive:

- (a) additional procedures for varying Subsidiary Documentation may be contained in and required by a ROC Section or the Subsidiary Documentation itself, and
- (b) procedures for varying Subsidiary Documentation in substitution for those under all or any of Conditions H5.1 to H5.4 inclusive may also be contained in and required by the relevant Subsidiary Documentation itself.

Conditions H5.5 and H5.9 apply only to variations to ROC Sections.

### **H5.1   *Mandatory Variations***

Network Rail shall propose variations to the Railway Operational Code:

- (a) at any time if it reasonably considers that this is necessary in order better to promote the achievement of the Objective, striking a balance between:
  - (i) the need for Network Rail, Train Operators and Freight Customer Access Option Holders to be able to plan their businesses with a reasonable degree of assurance; and
  - (ii) the need for flexibility to address new requirements, including new timetables, introduction of new rolling stock and changes to the infrastructure and traffic patterns; and
- (b) at any time, whether or not paragraph (a) above applies, if required to do so by notice from the Office of Rail and Road.

### **H5.2   *Variations proposed by a Train Operator or Freight Customer Access Option Holder***

A Train Operator or Freight Customer Access Option Holder may propose to Network Rail variations to the Railway Operational Code if it reasonably



considers that this is necessary in order better to promote the achievement of the Objective and any such proposal shall include:

- (a) the reasons why it is proposed to make the variation; and
- (b) details of the proposed variation.

#### H5.3 *Procedure for variations proposed by a Train Operator or Freight Customer Access Option Holder*

Following receipt of a proposed variation to the Railway Operational Code from a Train Operator or Freight Customer Access Option Holder under Condition H5.2 Network Rail shall:

- (a) evaluate and discuss the proposed variation with that Train Operator or Freight Customer Access Option Holder for such period as is reasonable having due regard to the likely impact of the proposed variation on any of Network Rail, other operators of trains and other Freight Customer Access Option Holder; and
- (b) following the evaluation and discussion;
  - (i) implement the variation under Condition H5.4; or
  - (ii) propose a variation under Condition H5.1 to implement the proposed variation; or
  - (iii) inform the Train Operator or Freight Customer Access Option Holder that Network Rail does not propose to implement the proposed variation, giving reasons for its decision.

#### H5.4 *Variations by agreement*

- (a) Subject to the provisions of Condition H5.4(b), if Network Rail and any relevant Train Operator or Freight Customer Access Option Holder agree a variation to the Railway Operational Code which affects only that Train Operator or Freight Customer Access Option Holder:
  - (i) Network Rail shall notify the Office of Rail and Road of the proposed variation; and

- (ii) the variation shall become effective on the date agreed for its implementation (which shall be not less than 7 days from the date of Network Rail's notice under Condition H5.4(a)(i));
- (b) If Network Rail and any relevant Train Operator or Freight Customer Access Option Holder agree a variation to the Railway Operational Code which affects only that Train Operator or Freight Customer Access Option Holder and is a variation to Subsidiary Documentation only, the variation shall become effective on the date agreed for its implementation and Condition H5.4(a)(i) and (ii) shall not apply.

#### H5.5 *Variations proposed by Network Rail*

Where any change to the Railway Operational Code under Condition H5.1 is a change to a ROC Section, Network Rail shall:

- (a) follow the procedure for establishing the variation under Conditions H5.6, H5.7 and H5.8; or
- (b) if the proposed variation falls within any modification procedure contained in the relevant ROC Section as established, Network Rail shall follow that procedure provided that such modification procedure contains:
  - (i) a right of appeal for any Train Operator or Freight Customer Access Option Holder who is dissatisfied as to any matter concerning or in connection with the variation and a time limit for bringing that appeal; and
  - (ii) a mechanism for establishing the variation,

and in either case, Network Rail shall specify the reason for the variation and the timing for implementing the variation (which shall not be less than 30 days from the date of notification of the proposed variation in accordance with the relevant procedure).

#### H5.6 *Consultation on a ROC Section variation*

Where Condition H5.5(a) applies, Network Rail shall:

- (a) publish and send details of the proposed variation to each affected Train Operator and Freight Customer Access Option Holder, the Secretary of State, the Office of Rail and Road, any Passenger

Transport Executive, the Scottish Ministers, Transport for London and the Welsh Assembly Government;

- (b) consult each Train Operator and Freight Customer Access Option Holder likely to be affected by the proposed variation, and invite the submission to it of representations or objections within a period or not less than 30 Working Days from the date of notification; and
- (c) if the Secretary of State, the Office of Rail and Road, any Passenger Transport Executive, the Scottish Ministers, Transport for London or the Welsh Assembly Government gives notice to Network Rail that it wishes to be consulted on any matter concerning the ROC Section, consult with that party.

H5.7 Each Train Operator, Freight Customer Access Option Holder or other party consulted under H5.6 shall:

- (a) consider the matters on which Network Rail has consulted it; and
- (b) give notice to Network Rail of any representations or objections it wishes to make in relation to the consultation no later than the date for concluding the consultation specified under Condition H5.6(b).

H5.8 Following consideration of all representations and objections received under Condition H5.7, Network Rail shall consider whether the proposed variation should be implemented and if it concludes that it should, then Network Rail shall act in accordance with Condition H5.9 and thereby, subject to Condition H4, establish the variation.

#### H5.9 *Issue of varied ROC Section*

Network Rail shall publish on its website in accordance with Condition H3.2 any variation to a ROC Section, and send a copy of the revised ROC Section to each affected Train Operator and Freight Customer Access Option Holder, the Office of Rail and Road and any other person who notified Network Rail that it wished to be consulted under Condition H5.6(c).

#### H5.10 *Consequential changes to ROC Sections*

Where any changes are made to this Part H that require consequential changes to be made to any ROC Section, those consequential changes shall be made and be effective from the date on which the relevant change to Part H is established. Network Rail shall, within 30 Working Days of the

establishment of the revised Part H, make any necessary changes to the Railway Operational Code and publish and issue any revised ROC Sections in accordance with Condition H5.9

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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.



- 1.1.2 Where there has been a change of Access Rights' holder, Part J also sets out mechanisms for calculating any necessary corresponding change to cordon caps held by the Part J Access Beneficiary losing the rights. This process is detailed in Condition J6 in relation to Level Two Rights that have been transferred pursuant to Condition J4 and in Condition J8 where Level Two Rights have been transferred under the process set out in Condition J7.
- 1.1.3 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 and Road can direct Network Rail to hold such a meeting.
- 1.1.4 Condition J10 allows Network Rail to amend access rights in order to achieve 'Better Use' and subject to certain criteria. An Access Right Change is subject to ORR approval.
- 1.1.5 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 and Road can direct Network Rail to do so.
- 1.1.6 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 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 Office of Rail and Road 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;
“Counter Notice”	means a notice given by the Part J Access Beneficiary to Network Rail under Condition J4.8, 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;
“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 13 of the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations 2016; as amended from time to time and/or 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);
“Office of Rail and Road Determination”	means a determination made by the Office of Rail and Road following a reference made under Condition J11.2;
“Office of Rail and Road’s Model Passenger Track Access Contract”	means the model passenger track access contract published by the Office of Rail and Road under section 21 of the Act, as amended from time to time;
“Office of Rail and Road’s Model Freight Track Access Contract”	means the model freight track access contract published by the Office of Rail and Road under section 21 of the Act, as amended from time to

time;

“Office of Rail and Road’s Model Track Access Contract (Freight Customer Access)”	means the model track access contract for freight customer access published by the Office of Rail and Road under section 21 of the Act, as amended from time to time;
“Part J Access Beneficiary”	means a Train Operator or a Freight Customer Access Option Holder;
“Period for Objections”	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: (a) any Affected Person; or (b) an Incumbent 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”

means, in relation to:

(a) a Failure to Use Notice; or

(b) a Third Party Notice,

as applicable, the Quantum Access Right to which such notice refers and:

(i) any Train Slot, including any Y-Path, or part of it in the Working Timetable which relates to that Quantum Access Right;

(ii) any Ancillary Movements or Stabling that Network Rail (or the Applicant in relation to Condition J7.3) considers:

(A) are directly associated with the relevant Quantum Access Right; and

(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

(iii) any Access Proposal relating to any such Quantum Access Right;

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

### 1.3

### 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 ) 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), 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 ) 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**

- 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

## **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 and Road pursuant to Condition J2.1.3.

2.1.3 Network Rail shall notify the 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 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 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 and Road pursuant to Condition J2.11.3.

2.11.3 Network Rail shall notify the 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 and Road pursuant to Condition J2.12.2.

## **2.13 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 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 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 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 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 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 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 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 and Road’s Model Passenger and Model Freight Track Access Contracts and clause 14.2(a)-(l) of the 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 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 and Road pursuant to Condition J4.7.1(c); and
- (c) Network Rail shall notify the 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 and Road pursuant to Condition J4.8.2(c); and
- (c) Network Rail shall notify the 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).

**Grounds for Objection**

4.9.1 An Access Beneficiary may object to a surrender specified in a Failure to Use Notice on the grounds that ("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

**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 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.

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.

#### 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 J.4.11, 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 accordance with Condition J4.12.1 it will be deemed to have accepted Network Rail's decision.

4.13 **Surrender of Access Rights**

- 4.13.1 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 and Road pursuant to Condition J4.12.2; or
- (b) on the date specified in the Office of Rail and Road Determination, if applicable.

- 4.13.2 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 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.

#### 4.14 **Access Proposals**

4.14.1 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.

## 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**

## **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 notice

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

- (c) Network Rail shall notify the 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).

## 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 and Road pursuant to Condition J7.5.5(c); and
- (c) Network Rail shall notify the 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 J7.5.5(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 the 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.

**7.9 Surrender of Access Rights**

- 7.9.1 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 and Road pursuant to Condition J7.8.2; or
  - (b) on the date specified in the Office of Rail and Road Determination, if applicable.
- 7.9.2 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 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.
- 7.8.3 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.

## 7.10 **Grant to Applicant**

7.10.1 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:
  - (i) the date stated in a notice given to the Office of Rail and Road pursuant to Condition J7.5.5(c), J7.4.1(c) or J7.8.2 or the date specified in the Office of Rail and Road Determination (as applicable);
  - (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
- (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.

## 7.11 **Access Proposals**

7.11.1 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**

**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 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 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 and Road. The Office of Rail and Road 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 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.

## 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 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 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 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 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 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 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 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 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 and Road power to direct an Access Right Change**

10.16.1 If the 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 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 and Road.

10.16.2 The 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 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 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 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**

### **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 and Road**

12.2.1 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 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.

# Part K – Information

## Explanatory Note

- A. *Part K provides for the two-way flow of key information between Access Parties both on a regular and an ad-hoc basis.*
- B. *Network Rail is required to produce annual information, mirroring the business planning and stewardship obligations under its network licence, and update the annual information and report on progress against the information contained in it.*
- C. *Network Rail is entitled to request information from an Access Beneficiary, and an Access Beneficiary is similarly entitled to request information from Network Rail, where this is reasonably requested for either party to plan its business with a reasonable degree of assurance.*
- D. *Part K will have effect subject to a notice or notices served by the Office of Rail and Road concerning the types and classes of information, timeliness of provision, quality (including completeness and accuracy) and level of detail of the information.*
- E. *Save as provided in the notice or notices served by the Office of Rail and Road, the information to be provided under Part K is to be complete and accurate in all material respects to the greatest extent reasonably practicable.*
- E. *This Explanatory Note does not form part of the Network Code.*

## DEFINITIONS

In this Part K:

“Accounting Period”	means each of thirteen consecutive periods in each Relevant Year, each such period being 28 days in length, save that the length of the first and last period in the Relevant Year shall be such as shall be adopted by Network Rail;
“Information”	means Network Rail Annual Information, Network Rail Monitoring Information and Requested Information;
“Monitoring Period”	shall consist in each financial year commencing on 1 April of one of four consecutive periods, each of which shall comprise three consecutive Accounting Periods except the last which shall comprise four consecutive Accounting Periods, or such periods beginning and ending on such other dates as the Office of Rail and Road may specify in a notice;
“Network Rail Annual Information”	means the information specified in Condition K1.1;
“Network Rail Annual Report”	means the report referred to in Condition K3.1;
“Network Rail Monitoring Information”	means the information specified in Condition K1.2;
“Network Rail Monitoring Report”	means the report referred to in Condition K3.2;
“Relevant Network”	means that part of the Network comprising any Strategic Planning Route which the relevant Train Operator is permitted to use or to which the access option of an Access Option Holder

	relates;
"Relevant Year"	means each 12 month period beginning 1 April;
"Requested Information"	means the information specified in Condition K1.3; and
"Strategic Planning Route"	means a route for route planning purposes designated in the delivery plan (including its related route plans) which Network Rail is required to produce under Condition 1 of its network licence as a "strategic planning route" or "strategic route".

## **CONDITION K1 – INFORMATION COVERED BY PART K**

### **1.1 Network Rail Annual Information**

Network Rail Annual Information means, in relation to any Access Beneficiary:

- (a) projections of future network quality and capability requirements;
- (b) planned activities and volumes of work in respect of the carrying out of:
  - (i) relevant activities; and
  - (ii) network services in relation to the Relevant Network to be carried out by any other person;
- (c) the expected effect of relevant activities on the quality and capability of the Relevant Network, the quality of network services and the ability of users to provide improved services to their customers; and
- (d) the expected effect of relevant activities on the outputs required of Network Rail and established in the last access charges review.

In this Condition K1.1:

"duty" means the duty incumbent on Network Rail to achieve the purpose to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of Network Rail to finance its licensed activities;



“purpose”

is to secure:

- (a) the operation and maintenance of the network;
- (b) the renewal and replacement of the network; and
- (c) the improvement, enhancement and development of the network,

in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of:

- (i) the quality and capability of the network; and
- (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network;

“relevant activities”

means the activities which are necessary or expedient in order to carry out the duty;

“relevant asset categories” means track, signalling and telecommunications, structures, electrification equipment, stations, maintenance depots, real and heritable property, information systems and such other categories of material asset as are necessary or expedient so as to facilitate compliance by Network Rail with the duty; and

terms used in Condition K1.1 shall have the same meaning as in Condition 1 of the network licence of Network Rail and in the event of any conflict terms defined in the network licence shall prevail.

## **1.2 Network Rail Monitoring Information**

Network Rail Monitoring Information means, in relation to any Access Beneficiary:

- (a) information as to any changes to the programmes of work contained in the last Network Rail Annual Report and Network Rail Monitoring Report which changes are likely materially to affect the operation of trains operated by any Access Beneficiary on the Network;

- (b) a statement of Network Rail's actual performance on the Relevant Network in the immediately preceding Monitoring Period, and its projected performance on the Relevant Network for the remainder of the Relevant Year;
- (c) information as to the addition or removal of temporary speed restrictions on the Relevant Network in the immediately preceding Monitoring Period, and any temporary speed restrictions which are likely to be added or removed in the current Monitoring Period and in the remainder of the Relevant Year;
- (d) a statement of the duration of any temporary speed restrictions on the Relevant Network in the immediately preceding Monitoring Period and the likely duration of any temporary speed restrictions in the current Monitoring Period and in the remainder of the Relevant Year; and
- (e) a statement of the efficiency of possession utilisation on the Relevant Network in the immediately preceding Monitoring Period, including the proportion of possessions cancelled or subject to late change.

### **1.3 Requested Information**

Requested Information means:

- (a) in relation to information to be provided by Network Rail, such information as an Access Beneficiary may reasonably request from time to time in order to plan its business with a reasonable degree of assurance, including information on relevant assets which Network Rail is required to maintain under Condition 1 of its network licence; and
- (b) in relation to information to be provided by an Access Beneficiary, such information as Network Rail may reasonably request from time to time in order to plan its business with a reasonable degree of assurance,

in each case

- (i) subject to the request for the information concerned being made in writing and identifying expressly that it is a request made under this Part K; and
- (ii) to the extent specified in a notice given by the Office of Rail and Road under Condition K6.1.

## **CONDITION K2 - PROVISION OF INFORMATION**

### **2.1 Provision of Information by Network Rail**

Network Rail shall, subject to Condition K3.3, make available to each Access Beneficiary:

- (a) Network Rail Annual Information;
- (b) Network Rail Monitoring Information; and
- (c) Requested Information,

in accordance with this Part K.

## **2.2 Provision of Information by each Access Beneficiary**

Each Access Beneficiary shall make available to Network Rail Requested Information in accordance with this Part K.

## **2.3 Limitation on use of Information by Network Rail**

Any Information provided to Network Rail under this Part K may only be used by Network Rail subject to the limitations in Condition 14 of its network licence and in accordance with this code.

## **2.4 Form of Information**

Any Information made available under this Part K shall be in such form and level of detail as is reasonably necessary to enable:

- (a) Network Rail to assess the effect of the matters disclosed in the Information provided to it on its provision of network services and fulfilment of its network licence obligations; and
- (b) the relevant Access Beneficiary to assess the effect of the matters disclosed in the Information provided to it on its Services.

## **2.5 Quality of information**

Subject to Condition K6, Information provided by any party under this Part K shall, to the greatest extent reasonably practicable, be complete and accurate in all material respects.

# **CONDITION K3 – PROVISION OF NETWORK RAIL ANNUAL INFORMATION AND NETWORK RAIL MONITORING INFORMATION**

## **3.1 Provision of annual report**

Subject as provided in Condition K3.3, Network Rail Annual Information shall be provided as an annual report and in form and detail consistent with that applicable to any annual update of the delivery plan (including its related route plans) mentioned in Condition 1 of the network licence of Network Rail.

## **3.2 Provision of report**

Subject as provided in Condition K3.3, Network Rail Monitoring Information shall be provided in the form of a report for each Monitoring Period.

## **3.3 Provision of information at election of Access Beneficiary**

- (a) Network Rail shall not be obliged to provide any Access Beneficiary with Network Rail Annual Information or Network Monitoring Information unless that Access Beneficiary has notified Network Rail that it elects to receive such information. Any such election shall have effect 28 days from the date it is received by Network Rail and shall continue until any date specified for its duration by the Access Beneficiary in the notice or (if no date is specified) until the election is withdrawn. An Access Beneficiary may withdraw or vary any such election made by it at any time by giving 28 days notice to Network Rail. The ability of an Access Beneficiary to seek Requested Information shall not be prejudiced by any failure by that Access Beneficiary to elect to receive information under this Condition K3.3.
- (b) Where an Access Beneficiary makes or has made an election to receive Network Rail Annual Information or Network Monitoring Information it may, either in the election or subsequently, inform Network Rail which elements of that information it wishes to receive. Network Rail shall use all reasonable endeavours, following consultation where appropriate with the Access Beneficiary, to meet the Access Beneficiary's request in respect of those elements of that information.
- (c) Where Network Rail complies with any request by an Access Beneficiary under Condition K3.3(b) regarding the elements of information required to be provided, it shall not also have to provide to that Access Beneficiary the balance of the information which is not required by that Access Beneficiary.

## **CONDITION K4 - TIMING OF PROVISION OF INFORMATION**

### **4.1 Provision of Information by Network Rail**

Network Rail shall provide to each Access Beneficiary, having elected to receive such information under Condition K3.3 and while its election remains effective:

- (a) Network Rail Annual Information by such date as shall be agreed between Network Rail and the relevant Access Beneficiary or, where the Office of Rail and Road specifies a date upon the application of any party, by the date specified;
- (b) Network Rail Monitoring Information within 28 days after the beginning of each Monitoring Period, unless the Office of Rail and Road agrees to the provision of such information on another date upon the application of any party, in which event the Network Rail Monitoring Information shall be provided on such other date; and
- (c) Requested Information in a timely manner after such information is requested, subject to Condition K4.4.

## **4.2 Updating Information by Network Rail**

If:

- (a) a proposed final Local Output is the subject of an appeal under Condition L7, or is varied under Condition L9, the relevant Network Rail Annual Information and Network Rail Monitoring Information shall be updated and reissued as soon as reasonably practicable after the date on which the Local Output or the variation is finally established (following any appeal where relevant) and has become effective; and
- (b) insofar as any Information provided by Network Rail relates to any of Network Rail's future plans, and at any time during the Relevant Year such plans alter to the extent that such alterations are likely to have a material adverse effect on achievability of Network Rail's current Local Output Commitments under Part L, then Network Rail shall promptly notify the relevant Access Beneficiary of any necessary changes to that Information.

## **4.3 Provision of Information by Access Beneficiary**

Each Access Beneficiary shall provide to Network Rail Requested Information in a timely manner after such information is requested, subject to Condition K4.4.

## **4.4 Provision of Requested Information**

A party receiving a request for Requested Information shall within 15 Working Days of receipt of that request either (i) fulfil the request or (ii) notify the requesting party of the likely timescales and extent to which it reasonably expects to be able to fulfil the request and/or (iii) identify to the requesting party any element of the request which it considers it will not be able to fulfil or is not obliged to provide.

## **CONDITION K5 – APPEAL PROCEDURE**

### **5.1 Right of appeal to senior officers or in accordance with the ADRR**

If any Access Party is dissatisfied as to:

- (a) any matter concerning the operation of the procedure set out in this Part K;
- (b) any refusal by an Access Party to provide Requested Information;
- (c) the interpretation by an Access Party of the provisions of this Part K or any notice given by the Office of Rail and Road under Condition K6.1 in relation to whether or not any information requested is Requested Information; or

- (d) the adequacy of information provided or the time taken to provide that information, in each case in response to a Request for Requested Information,

the matter shall be referred by that Access Party for review by the Access Parties concerned, with the review process to involve a senior manager of each of those Access Parties. If those Access Parties fail to reach a resolution within 28 days of the referral, either party may refer the matter for determination in accordance with the ADRR.

## **CONDITION K6 - APPLICATION OF PART K**

### **6.1 Extent and timing of information obligations**

This Part K shall have effect to the extent, including as to:

- (a) the types or classes of information to be provided;
- (b) the times within which information must be provided;
- (c) the categories of persons to whom information of different types or classes is to be provided; and
- (d) the quality of information and the level of detail with which it must be provided (including the extent to which it must be complete and accurate),

as are specified in a notice or notices given by the Office of Rail and Road.

### **6.2 Asset information**

No notice under Condition K6.1 may have effect to the extent that it requires Network Rail to provide asset information:

- (a) of a type or class;
- (b) to a quality or level of detail; or
- (c) within a time,

which is more onerous than it is required to do under Condition 1 of its network licence. In this Condition K6.2, “asset information” is information which Network Rail is required to maintain on relevant assets under that condition of its network licence.

### **6.3 Consultation**

No notice may be given by the Office of Rail and Road under Condition K6.1 unless it has first:

- (a) published the notice it intends to give and its reasons for that

intention; and

- (b) considered any representations which it has received in relation to the proposed notice and reasons.

#### **CONDITION K7 - OTHER OBLIGATIONS TO CONTINUE**

This Part K is:

- (a) without prejudice to any other obligation of any Access Party to provide information under any other provision of this code or the relevant Access Agreement; and
- (b) subject to the confidentiality provisions of this code and the relevant Access Agreement.

# Part L – Performance

## CONDITION LA

### DEFINITIONS

In this Condition LA of Part L, unless the context otherwise requires:

“Class Representative”	is as defined in Part C;
“Condition Precedent (Franchised)”	has the meaning ascribed to it in Condition LA1.2;
“Franchised Passenger Class”	is as defined in Part C;
“franchised passenger train operator”	means a member of the Franchised Passenger Class;
“individual Joint Performance Process” or “individual JPP”	has the meaning ascribed to it in Condition LA3;
“Joint Performance Improvement Plan” or “JPIP”	has the meaning ascribed to it in Condition LA4;
“JPIP Party”	means any of the TAC Parties between whom a JPIP has from time to time been agreed in accordance with this Part L;
“Joint Performance Review ” or “JPR”	means a meeting held pursuant to Condition LA3.2 or LA3.5;
“Non-Franchised Passenger Class”	is as defined in Part C;
“Non-Passenger Class”	is as defined in Part C;
“Performance Objectives”	has the meaning ascribed to it in Condition LA2;
“Remedial Plan”	means a plan agreed pursuant to Condition LA5.1.
“Reporting Period”	means



- (a) each consecutive period of 28 days commencing on 1 April in each year, provided that the length of the first and last such period in any year may be varied by up to 7 days upon notice by Network Rail; or
- (b) as between any TAC Parties, such alternative period as may be agreed between them.

## **CONDITION LA1 – RELATIONSHIP WITH PART L**

### **LA1.1 Replacement of Part L**

This Condition LA1 (including its related definitions) has effect from its incorporation into the Network Code and:

- (a) the remainder of Condition LA shall have effect to the extent and in the circumstances set out below; and
- (b) Part L shall cease to have effect to the extent and in the circumstances set out below.

### **LA1.2 Condition LA and franchised passenger train operators**

As from the occurrence of the Condition Precedent (Franchised), the remainder of Condition LA shall have effect in relation to all franchised passenger train operators. The Condition Precedent (Franchised) shall be the receipt by Network Rail of notice in writing stating that Condition LA shall have effect and given by:

- (a) members of the Franchised Passenger Class (the identity of such members being determined as at the date of the notice) representing not less than 90% in number of such members; or
- (b) the Class Representatives for the Franchised Passenger Class.

### **LA1.3 Condition LA and other operators**

In relation to Train Operators other than franchised passenger train operators, the remainder of Condition LA shall have effect in relation to any such Train Operator upon the later of the following:

- (a) Conditions L1 to L11 inclusive ceasing to have effect in relation to that Train Operator by virtue of Condition LA1.5; and
- (b) Receipt by Network Rail of notice in writing from that Train Operator stating that Condition LA shall have effect.

If at any time the remainder of Condition LA has effect in relation to Train Operators who then consist of all members of the Non-Franchised Passenger Class or the Non-Passenger Class, then it shall also have effect in relation to all future members of the relevant Class, whether or not paragraphs (a) and (b) above apply to such future members. Network Rail shall then forthwith publish notice on its website, confirming when this applies to all such future members.

### **LA1.4 Part L and franchised passenger train operators**

As from the occurrence of the Condition Precedent (Franchised), Conditions L1 to L11 inclusive shall cease to have effect in relation to all franchised passenger train operators and:

- (a) Network Rail shall have no further obligations for the benefit of franchised passenger train operators in respect of the provision or achievement of a Local Output Commitment;
- (b) this shall be without prejudice to any accrued liability, including as to appeal proceedings, in respect of any Local Output Commitment as at the later of:
  - (i) the occurrence of the Condition Precedent (Franchised); and
  - (ii) 1 April 2006.

### **LA1.5 Part L and other operators**

In relation to Train Operators other than franchised passenger train operators, Conditions L1 to L11 inclusive shall cease to have effect in relation to any such Train Operator upon receipt by Network Rail of notice in writing from that Train Operator stating that those Conditions shall cease to have effect.

If at any time Conditions L1 to L11 inclusive no longer have effect in relation to Train Operators who then consist of all members of the Non-Franchised Passenger Class or the Non-Passenger Class, then they shall also have no effect in relation to all future members of the relevant Class,

whether or not such notice shall be given by such future members. Network Rail shall then forthwith publish notice on its website, confirming when this applies to all such future members.

#### **LA1.6 Part L and other operators – transitional arrangements**

Upon Conditions L1 to L11 inclusive ceasing to have effect on any Train Operator other than a franchised passenger train operator, as provided in Condition LA1.5:

- (a) Network Rail shall have no further obligations for the benefit of that Train Operator in respect of the provision or achievement of a Local Output Commitment;
- (b) this shall be without prejudice to any accrued liability, including as to appeal proceedings, in respect of any Local Output Commitment applying to that Train Operator as at the date upon which such Conditions cease to have effect.

#### **LA1.7 Interpretation**

References in this Condition LA1 to Conditions L1 to L11 inclusive shall include their related definitions, although references to “Local Output Commitment” shall be interpreted as though its definition had continued to exist, notwithstanding that Conditions L1 to L11 shall have ceased to have effect.

### **CONDITION LA2 – OBJECTIVES**

#### **LA2.1 Performance Objectives**

The objectives of this Condition LA (the “**Performance Objectives**”) are to

- (a) provide for the improvement, on a continuous basis, of performance both as between the TAC Parties and of the rail industry as a whole, through a process for liaison and cooperation in performance improvement to be applied between those parties, and
- (b) provide a process of reporting to the Office of Rail and Road and (in the case of franchised passenger train operators) the appropriate franchising authority on the performance of trains and the Network on a cooperative basis as between the TAC Parties and on a consistent basis as between different Train Operators (while having regard to the differing nature of their operations).

### **LA2.2 Achievement of Performance Objectives**

Each TAC Party shall participate in the performance reporting, planning, monitoring and reviewing procedures set out in this Condition LA in order to achieve the Performance Objectives.

### **LA2.3 Limits**

This Condition LA shall require participation as set out in Condition LA2.2, but

- (a) does not provide a cause of action in relation to the failure either to agree or to achieve any performance targets or levels or improvement plans;
- (b) other than as regards such participation and without limiting obligations arising under any franchise agreement to which it is a party or under a licence with respect to a railway asset of which that person is a holder or otherwise, shall not require any person to whom it applies to do or omit to do anything; and
- (c) shall neither relieve any person of any responsibility it may have in relation to its operations, acts or omissions nor transfer any such responsibility to any other person.

## **CONDITION LA3 – INDIVIDUAL JOINT PERFORMANCE PROCESS**

### **LA3.1 Process for Liaison and Cooperation**

The TAC Parties shall establish an individual JPP for regular liaison and cooperation between themselves with a view to fulfilling the Performance Objectives. The individual JPP shall be consistent with the ability to enable performance reporting at national level and to compare performance as between different Train Operators, while facilitating the parties' ability to accommodate needs at local level. It may be documented within the JPIP.

### **LA3.2 Frequency of Meeting**

The individual JPP shall include at least a Joint Performance Review between the TAC Parties each Reporting Period during the term of each relevant Access Agreement between them. It may also provide for more frequent review meetings and less frequent planning or strategic meetings. Notwithstanding the process, either TAC Party may require a Joint Performance Review to be held at any time by giving at least 14 days'

written notice to the other with a proposed agenda of items to be considered.

### **LA3.3 Attendance at Meetings**

The individual JPP shall provide for meetings to involve suitably senior representatives from all parties, attending on a consistent basis so far as reasonably practicable, so as to facilitate the participation referred to in LA2.2 achieving the Performance Objectives in an efficient and effective manner.

### **LA3.4 The Reporting Period Joint Performance Review**

The individual JPP shall provide for the Joint Performance Review held each Reporting Period to address at least:

- (a) presentation by Network Rail of performance data in respect of the previous Reporting Period relevant to the TAC Parties;
- (b) an analysis of that performance data;
- (c) a comparison against any applicable JPIP, including an assessment of reasons for any shortfalls or improved achievement in comparison with any relevant JPIP performance targets and any relevant JPIP action plans;
- (d) consideration of actions which may be planned, tested, implemented or revised, taking into account past and current performance, the performance experience of other Train Operators and any future circumstances reasonably anticipated. Actions may be planned to be taken individually, jointly or jointly with other third parties.

### **LA3.5 Joint Meetings**

The individual JPP may provide for JPRs to be held either in whole or in part between Network Rail and two or more Train Operators where those Train Operators are all reasonably likely to be materially affected by the matters to be addressed.

### **LA3.6 Documentation of the Process and Amendments**

The individual JPP between the TAC Parties shall be agreed by them by the latest of (a) three months after the Network Code is amended to include this Condition, (b) in relation to any Train Operator who gives

notice under Condition LA1.5, one month after the giving of such notice and (c) one month after the date of the relevant Access Agreement between the TAC Parties, and shall be documented in writing signed by the TAC Parties. Once agreed, either party may at any time propose amendments to the process which are consistent with the requirements of this Condition LA and the parties shall then apply their reasonable endeavours to agree whether and if so what amendments should be made.

#### **LA3.7 Notice to the Office of Rail and Road and the appropriate franchising authority**

If the individual JPP is not agreed by the time specified in Condition LA3.6 or if any proposed amendment to the process is not resolved within three months of its first being raised in writing, either TAC Party may give notice to the Office of Rail and Road and (where a relevant Train Operator is a franchised passenger rail operator) the appropriate franchising authority as provided in Condition LA5.2.

### **CONDITION LA4 - JOINT PERFORMANCE IMPROVEMENT PLAN**

#### **LA4.1 Parties to a JPIP**

Except to the extent that it is agreed otherwise under Condition LA7.1, Network Rail and each Train Operator shall agree a JPIP which covers all the parts of the Network over which that Train Operator has rights of access. This does not preclude a JPIP being agreed between Network Rail and more than one Train Operator.

#### **LA4.2 Period**

Each JPIP shall specify the period to which it relates. It is anticipated that elements of a JPIP may relate to differing periods, reflecting the short, medium or long term nature of the plans concerned.

#### **LA4.3 Contents of a JPIP**

A JPIP shall contain such matters as are agreed between the JPIP Parties as being designed to achieve the Performance Objectives for the period covered by that JPIP, including:

- (a) performance metrics to be used for reporting on performance, the information to be provided by each party to the other for the purpose of such reporting, the format for regular reporting of

- performance and any more detailed process required to support the compilation, review and agreement of such reports;
- (b) performance targets in respect of the JPIP Party or Parties, which may include,
    - (i) stretch targets,
    - (ii) performance levels at which a Remedial Plan will be established;
    - (iii) performance levels at which a shortfall in performance shall be notified to the Office of Rail and Road and (where the relevant JPIP Party is a franchised passenger train operator) the appropriate franchising authority; and
  - (c) specific actions planned to be taken by one or both of the JPIP Parties (either together or separately and whether or not involving third parties) which are designed to help improve performance generally or to help achieve any stretch performance targets in the JPIP or (where these targets have been met) to maintain performance at least at these levels and to achieve further performance improvements which are reasonably practicable.

#### **LA4.4 Review of JPIP**

The JPIP Parties shall maintain the JPIP under regular ongoing review as part of the JPIP and shall make such amendments as are agreed as being designed to maintain or improve the achievement of the Performance Objectives.

#### **LA4.5 Compatibility of JPIPs**

Without prejudice to the Performance Objectives in relation to improvement of the rail industry as a whole, each JPIP Party shall endeavour to ensure, so far as is reasonable, that:

- (a) no JPIP contains actions, targets or performance levels that are incompatible with actions, targets or performance levels included in other JPIPs, or which are known, or could reasonably be expected to be known, by it to conflict with any other obligations of that JPIP Party; and
- (b) a JPIP shall not be inconsistent with the continued development of performance arrangements where the JPIP spans, or ends upon, the end of a franchise.

#### **LA4.6 Information for the Office of Rail and Road**

Network Rail shall, except to the extent that the Office of Rail and Road may otherwise request, provide the Office of Rail and Road with copies (which may be in electronic format) of all JPIPs and any modifications of them made from time to time.

### **CONDITION LA5 - REMEDIAL PLANS AND FAILURE TO AGREE**

#### **LA5.1 Remedial Plan**

If at any time:

- (a) one or more of the performance targets (other than any which is described as a stretch performance target) contained in a JPIP is not achieved; or
- (b) in the opinion of either JPIP Party, acting reasonably, any performance target (other than any which is described as a stretch performance target) contained in a JPIP will not be achieved within the time periods set out in that JPIP; or
- (c) if the JPIP specifies that a Remedial Plan is required at a particular level of performance and that level has been reached,

then the JPIP Parties shall use all reasonable endeavours to agree specific actions for inclusion in the JPIP which are designed to restore the level of



performance as soon as reasonably practicable (with the timescales for the restoration being specified) to at least the level of that performance target or Remedial Plan trigger point as specified to be achieved by that time (a “**Remedial Plan**”).

#### **LA5.2 Notice to the Office of Rail and Road and the appropriate franchising authority**

##### **5.2.1 If:**

- (a) the TAC Parties are unable to agree a JPIP or any amendment to a JPIP proposed by either of them; or
- (b) the TAC Parties are unable to agree regarding the reasons for any particular shortfall in performance or the actions which either or both should be taking to address that shortfall in performance; or
- (c) the JPIP Parties are unable to agree a Remedial Plan where one is required by this Condition; or
- (d) a Remedial Plan is considered by either party to it to be unlikely to be effective, or has not proved to be effective in each case in achieving the required level of performance and the JPIP Parties have been unable to agree further amendments to the Remedial Plan to take account of that actual or anticipated failure; or
- (e) where the JPIP Plan sets levels at which a shortfall in performance is to be notified to the Office of Rail and Road and/or the appropriate franchising authority, and those levels have been reached,

then either party may give notice to the Office of Rail and Road and (where a relevant Train Operator is a franchised passenger rail operator) the appropriate franchising authority setting out the circumstances that have led to the relevant shortfall in performance and/or lack of agreement. The party intending to give notice shall, before doing so, notify the other party or parties of its intention to do so and provide details of its concerns on which that notice is to be based. The relevant parties shall, within 14 days of that notification (or within such other period as may be agreed) consider those

concerns at a JPR or other meeting at which each will ensure that a suitably senior representative is present. The parties may, in considering those concerns, agree means of resolution, but are not bound to do so. Subject to this, following such meeting (or in its absence, if the failure to hold one within the relevant period is not attributable to the party intending to give notice), the notice may be given.

- 5.2.2 Any notice to the Office of Rail and Road and the appropriate franchising authority given pursuant to Condition LA5.2.1 shall be accompanied by such supporting evidence as the JPIP Party giving the notice considers appropriate. Any such notice shall be copied at the same time together with the accompanying supporting information by the party serving that notice to the other TAC Party.

## **CONDITION LA6 - PERFORMANCE REPORTING**

**LA6.1** Each TAC Party shall provide to the other information in its possession or under its control reasonably required by the other for the purposes of any Joint Performance Review or the agreement of any JPIP to which that TAC Party is a party.

**LA6.2** The parties to each JPIP shall keep under regular review the terms of that JPIP relating to the regular reporting and review of performance, recognising that there are efficiencies and other benefits to be secured through the adoption of common formats and processes of such reporting across the Network and that these are expected to evolve over time. Accordingly and without prejudice to any arrangements in a JPIP which are specific to monitoring initiatives or aspects of performance particular to that JPIP, a JPIP Party shall not unreasonably withhold its consent to proposals for change to the JPIP insofar as they relate to changes to such common formats and processes of reporting in circumstances where such changes have been agreed between Network Rail and a majority of other Train Operators in the same Class (as defined in Part C of the Network Code).

## **CONDITION LA7 – APPLICATION**

### **LA7.1 Limited Application**

Where the nature of the access rights enjoyed by a Train Operator is such that the Performance Objectives would not be usefully served by the full application of this Condition LA, Network Rail and that Train Operator may agree the extent to which this Condition LA shall be applied as regards that Train Operator.

### **LA7.2 Revision of Limited Application**

If either party is subsequently of the opinion that the circumstances have become such that the Performance Objectives would be usefully served by the full application, or a different application, of Condition LA, then that party may by notice to the other require the review of that agreement or revoke it.

## **DEFINITIONS**

In this Part L, unless the context otherwise requires:

- “Appeal” in relation to a Local Output Commitment, means the exercise by a Train Operator of a right under this Part L to make a reference in that respect in accordance with the ADRR
- “Class” has the meaning ascribed to it in Part C of this Network Code;
- “Class A Local Output” means, in relation to a Relevant Year, a level of operational performance relating to:
- (a) delays to or cancellations of train services; or
  - (b) such other matter relating to operational performance in respect of which an Access Agreement provides for one party to be entitled to receive from the other:
    - (i) compensation based on a tariff (including, in the case of a breach of contract, whether by way of liquidated damages or otherwise); or
    - (ii) a variation in the amount of compensation due depending on the quality, timeliness or any other aspect of the performance of an obligation;
- “Class B Local Output” means, in relation to a Relevant Year, a level of capability or quality of the Network or any other matter which is not the subject of a Class A Local Output;
- “Established” in relation to a Local Output Commitment, means the Local Output Commitment has come into effect for the benefit of the Train Operator in question, whether:
- (a) following the LOC Statement in that respect having been given to the Train Operator and either no Appeal having been lodged or, if such an Appeal has been lodged, it has not been proceeded with; or
  - (b) following the final determination of an Appeal in that respect,

and subject always to:

- (i) adjustment under Condition L7;
- (ii) suspension under Condition L8; and
- (iii) variation under Condition L9,

and “Establish” and “Establishment” shall be construed accordingly;

“Excess Aggregate Local Outputs” in the case of either Class A or Class B Local Outputs for a Relevant Year, means a Local Output Commitment the achievement of which would, when taken together with all other Local Output Commitments for that Relevant Year, either:

- (a) make it impossible for Network Rail to achieve one or more other Local Output Commitments; or
- (b) commit Network Rail to a level of operational performance, capability or quality of the Network, or any other matter, materially beyond the targets and other requirements of Network Rail established by the Office of Rail and Road in the most recent access charges review;

“Expiry” in relation to a Local Output Commitment, means either:

- (a) the end of the obligations in question as determined or effected in accordance with the relevant LOC Statement; or
- (b) the Establishment of a Local Output Commitment which, in terms of the LOC Statement in which it is contained, replaces or supersedes the earlier Local Output Commitment;

“Local Output” means a Class A Local Output and/or a Class B Local Output;

“Local Output Commitment” has the meaning ascribed to it in Condition L2;

“LOC Statement” in relation to a Train Operator, means the statement of Network Rail’s Local Output Commitment to that Train Operator, given by Network Rail and as Established under this Part L;

“LOC Suspension Notice” means a notice given under Condition L8;

“Mandatory Variation Notice”	means a notice given under Condition L9.3;
“Office of Rail and Road’s	means a document or documents published by LOC Criteria” the Office of Rail and Road from time to time specifying the matters to which the Office of Rail and Road will expect to have regard and the relative weight which it will expect to place on such matters when considering any reference made to it under Condition L7;
“Performance Plan”	means a statement by Network Rail, forming part of a LOC Statement, of its plans for the carrying out of such maintenance, repair, renewal, enhancement or other modification of such parts of the Network as will enable it to discharge its Local Output Commitments in respect of a Train Operator;
“Reasonable Grounds”	means, in relation to a Local Output, that Network Rail is or will be unable to achieve that Local Output (in whole or in part) as a result of not having obtained a Relevant Consent or being unable to comply with a Relevant Rule and Procedure having acted, in relation to the obtaining of the Relevant Consent or the compliance with the Relevant Rule and Procedure, with due efficiency and economy and in a timely manner, including in all respects with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced network owner and operator;
“Relevant ADRR Forum”	means Forum as defined in the ADRR;
“Relevant Consents”	means all consents, permissions, approvals, authorisations, acceptances, certifications, licences, exemptions, filings, registrations, notarisations and other matters, official or otherwise, which are required (or which would, in accordance with the standards of a reasonable and prudent person, normally be obtained of or from any competent authority or third party) in connection with the achievement of any Local Output;
“Relevant Rules and Procedures”	means all applicable Railway Group Standards, the Health and Safety at Work etc. Act 1974, the Disability Discrimination Act 1995, the Channel Tunnel Rail Link Act 1996, the Transport and Works Act 1992, the Railways Act 1993, the Transport Act 2000, this Network Code, any relevant regulations or directives made by the

European Union, all laws, by-laws, codes, common law, instruments, licences, regulations, requirements, rules, safety cases and other rules or procedures which concern the giving of any Relevant Consent or are otherwise relevant to the achievement of a Local Output; and

“Relevant Year” means each 12 month period beginning 1 April.

## **CONDITION L1 - EFFECT OF PART L**

### **1.1 General**

This Part L shall have effect:

- (a) in relation to members of such Class or Classes as are specified by the Office of Rail and Road in a notice given to the parties and published on its website;
- (b) from such date or dates or the happening of such event or events as are specified; and
- (c) subject, where relevant, to the transitional provisions in Condition L11.

### **1.2 Procedural**

In relation to a notice under Condition L1.1:

- (a) it may specify different dates or events for different Classes;
- (b) more than one notice may be given; but
- (c) none may have retrospective effect.

## **CONDITION L2 - LOCAL OUTPUT COMMITMENTS**

A Local Output Commitment is an obligation, Established under this Part L, owed by Network Rail to a Train Operator, and concerning:

- (a) operational performance; or
- (b) the capability or quality of the Network or other matters,

as more particularly defined in this Part L as, respectively, Class A Local Outputs and Class B Local Outputs, and as specified in the relevant LOC Statement.

### **CONDITION L3 - OBLIGATION TO ACHIEVE LOCAL OUTPUTS**

Network Rail shall achieve each Local Output Commitment specified in a LOC Statement.

### **CONDITION L4 - CONTENT OF LOC STATEMENT**

Each LOC Statement shall specify:

- (a) the Relevant Year to which it relates;
- (b) details of the Local Outputs which are to be achieved for the benefit of the relevant Train Operator in that Relevant Year and in the next two following Relevant Years; and
- (c) where relevant, the dates on which those Local Outputs are to be achieved in the Relevant Years.

### **CONDITION L5 - DURATION OF LOCAL OUTPUT COMMITMENT**

#### **5.1 *Effective period***

A Local Output Commitment has effect from its Establishment until its Expiry.

#### **5.2 *Preservation of accrued rights***

The variation, replacement or super session of a Local Output Commitment shall not affect any accrued rights of the Train Operator in relation to any failure by Network Rail to achieve the relevant Local Outputs while the Local Output Commitment was effective.

### **CONDITION L6 - ESTABLISHMENT OF LOCAL OUTPUTS AND PERFORMANCE PLANS**

#### **6.1 *Draft LOC Statement***

Not later than the 30 November before the start of each Relevant Year, Network Rail shall send to each Train Operator a draft of the LOC Statement in respect of that Train Operator, containing:

- (a) details of the Local Outputs which Network Rail proposes should be included in a Local Output Commitment:
  - (i) in respect of that Train Operator; and
  - (ii) in respect of any other Train Operator which Network Rail reasonably considers may, if included in a Local Output



Commitment, affect the first-mentioned Train Operator;

- (b) its proposed Performance Plans in those respects;
- (c) its best estimate of the timing of the carrying out of the works contemplated by the Performance Plans;
- (d) its best estimate of the date of achievement of the Local Outputs in question; and
- (e) a statement as to whether, in Network Rail's reasonable opinion, such works or the achievement of the Local Outputs in question are likely to constitute a Network Change under Part G.

## **6.2 Adequacy of Performance Plans**

Each Performance Plan shall be prepared in sufficient detail so as to enable the Train Operator to assess its adequacy and its likely effect on its Services.

## **6.3 Consultation on draft LOC Statement**

As soon as reasonably practicable after the date on which Network Rail sent the draft LOC Statement to the relevant Train Operator, Network Rail shall:

- (a) consult that Train Operator in relation to the Local Outputs and Performance Plans specified in the draft LOC Statement, and shall invite the submission to it of representations or objections in respect of them;
- (b) schedule and attend a meeting between Network Rail and all of the Train Operators whose Services may be affected by the implementation of any such Local Output and Performance Plan with a view to establishing the specification of that Local Output and the timing of any works to be done to achieve it and the time at which it will come into effect; and
- (c) consult that Train Operator in relation to any representation which the Train Operator has made or may wish to make in relation to funding arrangements relevant to the Local Outputs,

and Network Rail shall conclude such consultation and meeting by the 15 January before the start of the Relevant Year.

## **6.4 Response on consultation**

Each Train Operator consulted under Condition L6.3 shall:

- (a) consider the matters on which Network Rail has consulted it; and

- (b) give notice to Network Rail of any representations or objections it wishes to make in relation to the consultation no later than the date for concluding the consultation specified in Condition L6.3.

## **6.5 Decision and Establishment**

Following consideration of all representations and objections received under Condition L6.4, Network Rail shall:

- (a) decide on the Local Outputs which will make up the Local Output Commitments in question, and the associated Performance Plans; and
- (b) send to the relevant Train Operator, each other Train Operator which Network Rail reasonably considers may be affected and the Office of Rail and Road, a LOC Statement in that respect,

and thereby Establish the Local Output Commitments in question.

## **6.6 Timing**

Network Rail shall send the LOC Statement in question to the persons entitled to receive it not later than the 28 February before the start of the Relevant Year to which it relates.

## **6.7 Non-provision of LOC at election of Train Operator**

Network Rail may give notice to any Train Operator requiring it to elect, by notice to Network Rail, if it wishes not to receive a LOC Statement relating to one or more Relevant Years. The Train Operator shall elect accordingly and such decision shall have effect in relation to the Relevant Years specified by the Train Operator.

## **6.8 Saving**

The obligations in this Condition L6 are without prejudice to Conditions L7 (Appeals), L8 (LOC Suspension Notices) and L9 (Variations to Local Output Commitments) and Parts D and G of this Network Code.

## **CONDITION L7 - APPEALS**

### **7.1 Right of appeal in accordance with the ADRR**

Subject to Condition L7.2, if any Train Operator is dissatisfied as to:

- (a) any matter concerning or in connection with the Establishment of a Local Output Commitment made in respect of it; or
- (b) any variation of such a Local Output Commitment issued under Condition L9.2,

the Train Operator may refer the matter for determination in accordance with the ADRR (as supplemented or varied by this Condition L7).

### **7.2 Time limits for appeal**

A Train Operator's right of appeal under Condition L7.1 shall lapse if that Train Operator has not referred the relevant matter in accordance with the ADRR:

- (a) in the case of a new Local Output Commitment, by the 31 March before the start of the Relevant Year or, if later, within 31 days of receiving a LOC Statement sent under Condition L6.5(b); and
- (b) in the case of a variation under Condition L9.2, within 28 days of receiving notification under Condition L9.2(a).

### **7.3 Information to be sent in relation to the appeal**

Without prejudice to Condition L7.4 or 7.5, if there has been a reference under Condition L7.1:

- (a) Network Rail shall provide the Train Operator and the Secretary with the name and address of every other Train Operator who Network Rail reasonably considers may be affected by the Local Output Commitment within 7 days of the making of the reference; and
- (b) the TAC Party making the reference shall:
  - (i) include with its reference a statement in reasonable detail as to the matter in question and its reasons for making the reference; and
  - (ii) within 14 days of making the reference, send a copy of the reference and the statement specified in Condition L7.3(b)(i) to the other party to the dispute and, where Network Rail has made the

reference, to every other affected Train Operator or, where a Train Operator has made the reference, to every other affected Train Operator of which it has notice under Condition L7.3(a) and to the Office of Rail and Road.

#### **7.4 Obligation to provide evidence**

Without prejudice to Condition L7.5, each of Network Rail, the relevant Train Operator and every other affected Train Operator shall, as soon as reasonably practicable after the date of any reference under Condition L7.1, use their respective reasonable endeavours to procure that the Secretary is furnished with sufficient information and evidence so that any matter referred under Condition L7.1 may be properly considered. All information and evidence provided under this Condition L7.4 shall be copied to the Office of Rail and Road.

#### **7.5 Power of Relevant ADRR Forum**

In relation to a reference made under Condition L7.1, the parties shall request the Relevant ADRR Forum to have regard to the need to issue the LOC Statement as soon as reasonably practicable and the Relevant ADRR Forum shall, in determining the matter in question, have the power:

- (a) to give directions as to the procedure to be followed in the appeal, including in relation to the making of any written or oral submissions and the extent to which any evidence or other submissions made by one party to the appeal shall be disclosed to the other; except that directions given by the Relevant ADRR Forum under this Condition L7.5 shall not be inconsistent with the ADRR;
- (b) to require any other affected Train Operator to make submissions or provide evidence, whether orally or in writing or both;
- (c) to make any interim order as to the conduct or the positions of the parties pending final determination of the matter; and/or
- (d) to make such orders as it thinks fit in relation to the proportions of the costs of the proceedings in question (assessed in such manner as the Relevant ADRR Forum determines) which shall be borne by either or both of the parties.

#### **7.6 Criteria for appeal**

Any matter referred under Condition L7.1 shall be determined by reference to the Office of Rail and Road's LOC Criteria.

## **7.7 Obligation to comply with determinations**

7.7.1 Each party to a dispute which has been the subject of a reference under Condition L7.1 shall comply with an interim order of the kind referred to in Condition L7.5(c).

7.7.2 A determination made following a reference under Condition L7.1 shall be final and binding on:

- (a) Network Rail;
- (b) the relevant Train Operator; and
- (c) all other affected Train Operators, whether or not any of them has been required to provide evidence or make submissions under Conditions L7.4 or L7.5.

## **7.8 Issue of adjusted LOC Statement**

When any appeal brought under this Condition L7 has been finally concluded, Network Rail shall promptly issue a further LOC Statement to the relevant Train Operator (with a copy to the Office of Rail and Road) containing the revised Local Output Commitment applicable to that Train Operator, as adjusted by the outcome of such appeal.

## **CONDITION L8 - LOC SUSPENSION NOTICES**

### **8.1 When a LOC Suspension Notice may be given**

The Office of Rail and Road may give a LOC Suspension Notice in relation to any Local Output Commitment, any variation under Condition L9.1 or L9.2 or any revision issued under Condition L7.8, if:

- (a) it has consulted with Network Rail, the relevant Train Operator and the Secretary of State on the Local Output Commitment, the variation or the revision; and
- (b) it reasonably believes that allowing the Local Output Commitment, the variation or the revision to become effective is likely to result in Network Rail committing to Excess Aggregate Local Outputs.

## **8.2 Content of LOC Suspension Notice**

A LOC Suspension Notice shall state that the Local Output Commitment or the variation or the revision in question shall not become effective, to the extent (including as to time) specified in the LOC Suspension Notice, unless and until:

- (a) the Office of Rail and Road issues a further notice confirming that the Local Output Commitment, variation or revision may become effective; and/or
- (b) any Local Output is reduced to a level specified by the Office of Rail and Road in the LOC Suspension Notice; and/or
- (c) Network Rail takes the steps specified in the LOC Suspension Notice to Establish the Local Output Commitment on revised terms.

## **8.3 Timing of LOC Suspension Notice**

A LOC Suspension Notice may only be given:

- (a) in relation to a Local Output Commitment, on or before 30 April in the Relevant Year to which it relates; and
- (b) in relation to a revision or a variation to a Local Output Commitment, within 42 days of the Office of Rail and Road receiving notification under Condition L7.8, L9.1(a) or L9.2(a).

## **8.4 Effect of LOC Suspension Notice**

If the Office of Rail and Road gives a LOC Suspension Notice, the Local Output Commitment, the variation or the revision to which the notice relates shall not become effective until the requirements of the LOC Suspension Notice are complied with.

## **8.5 Mandatory variations**

The power of the Office of Rail and Road to give a LOC Suspension Notice is in addition to its power to require mandatory variations to a Local Output Commitment under Condition L9.3.

# **CONDITION L9 - VARIATIONS TO LOCAL OUTPUT COMMITMENTS**

## **9.1 Variations by agreement**

If Network Rail and the Train Operator agree a variation to a Local Output Commitment:

- (a) Network Rail shall notify the Office of Rail and Road of the proposed variation; and
- (b) the variation shall become effective on the date agreed for its implementation (which shall not be less than 45 days from the date of such notice) subject to the issue of a LOC Suspension Notice, in which event the variation shall come into effect under Condition L8.

## **9.2 Variations on Reasonable Grounds**

If Network Rail proposes a variation to a Local Output Commitment relying on Reasonable Grounds:

- (a) Network Rail shall notify the Train Operator (with a copy to the Office of Rail and Road) of the proposed variation, the timing for implementing the variation (which shall not be less than 30 days from the date of such notice) and specify the Reasonable Grounds relied on; and
- (b) the variation shall become effective on the date proposed for its implementation, subject to the Train Operator bringing an Appeal in relation to the variation under Condition L7 within 28 days of receiving notification under Condition L9.2(a), in which event the variation shall come into effect upon the final determination of the reference, subject to any adjustments under Condition L7.8.

## **9.3 Mandatory variation to Local Output Commitments**

If:

- (a) any proposed Local Output Commitment or variations to Local Output Commitments have been the subject of an Appeal by a Train Operator or Network Rail under Condition L7; or
- (b) relevant changes (as that term is defined in paragraph 4(2) of Schedule 4A to the Act) to access agreements have come into operation by virtue of Schedule 4A to the Act,

the Office of Rail and Road may give a Mandatory Variation Notice to Network Rail and to any Train Operator:

- (i) requiring any Local Output Commitment which is in effect between Network Rail and that Train Operator to be varied to the extent required

to ensure that Network Rail does not commit to Excess Aggregate Local Outputs; and

- (ii) specifying the process and timing for varying the relevant Local Output Commitment,

and the relevant Local Output Commitment shall be varied in accordance with the Mandatory Variation Notice.

#### **9.4 Issue of varied Local Output Commitment**

When any LOC Suspension Notice containing a variation is given under Condition L8 or any Mandatory Variation Notice is given under this Condition L9, Network Rail shall promptly issue a further statement to the relevant Train Operator (with a copy to the Office of Rail and Road) containing the revised Local Output Commitment applicable to that Train Operator, as varied by the terms of the relevant notice.

### **CONDITION L10 - PROCEDURES FOR ISSUING LOCAL OUTPUT COMMITMENTS AND PERFORMANCE PLANS**

#### **10.1 Timing**

The Office of Rail and Road may vary the dates and other timing requirements provided for in this Part L:

- (a) if and to the extent that the Priority Date established under Part D has been varied in order to comply with a Community obligation (as defined in the European Communities Act 1972); and/or
- (b) if it is satisfied on reasonable grounds that it is necessary or expedient to make such variations to promote or achieve the objectives specified in section 4 of the Act.

#### **10.2 Procedure**

A variation under Condition L10.1 may only be made by notice given by the Office of Rail and Road to Network Rail and each affected Train Operator.

#### **10.3 Requirement for prior consultation**

A notice given by the Office of Rail and Road under Condition L10.2 shall not have effect unless:

- (a) the Office of Rail and Road has first consulted Network Rail and each affected Train Operator in relation to the proposed notice in question;
- (b) in the consultations referred to in Condition L10.3(a), the Office of Rail and Road has made available to Network Rail and each affected Train



- Operator such drafts of the proposed notice as it considers are necessary so as properly to inform them of its contents;
- (c) the Office of Rail and Road has given Network Rail and each affected Train Operator the opportunity to make representations in relation to the proposed notice and has taken into account all such representations (other than those which are frivolous or trivial) in making its decision on the notice to be given; and
  - (d) the Office of Rail and Road has notified Network Rail and each affected Train Operator as to its conclusions in relation to the notice in question (including by providing to each such person a copy of the text of the proposed notice) and its reasons for those conclusions.

## **CONDITION L11 - TRANSITIONAL PROVISIONS**

### **11.1 General**

If Part L is brought into effect in respect of any Class or Classes for Relevant Year 2004 then it shall have effect in respect of Relevant Year 2004 subject to the adaptations in these transitional provisions.

### **11.2 Definitions**

In this Condition L11:

- (a) “2004 LOC Statement Issue Date” means, in relation to any Class, the date falling 20 Working Days after the date on which the Office of Rail and Road brings Part L into effect for that Class;
- (b) “Relevant Year 2004” means the period beginning 121 days after the 2004 LOC Statement Issue Date and concluding on 31 March 2005; and
- (c) other words or expressions defined in Part L shall have the same meanings in this Condition L11 as they have in the remainder of Part L.

### **11.3 Relevant Year 2004**

In respect of Relevant Year 2004 the LOC Statement shall specify:

- (a) that the LOC Statement relates to Relevant Year 2004;
- (b) details of the Local Outputs which are to be achieved for the benefit of the relevant Train Operator in Relevant Year 2004 and in the next following Relevant Year; and
- (c) where relevant, the dates on which those Local Outputs are to be achieved in Relevant Year 2004 and the next following Relevant Year.

#### **11.4 Changes to dates in Part L in respect of Relevant Year 2004**

In respect of Local Output Commitments to be Established in Relevant Year 2004:

- (a) the date in Condition L6.1 shall be the 2004 LOC Statement Issue Date instead of 30 November;
- (b) the date in Condition L6.3 shall be 46 days after the 2004 LOC Statement Issue Date instead of 15 January;
- (c) the date in Condition L6.6 shall be 89 days after the 2004 LOC Statement Issue Date instead of 28 February;
- (d) the date in Condition L7.2(a) shall be 120 days after the 2004 LOC Statement Issue Date instead of 31 March; and
- (e) the date in Condition L8.3(a) shall be 150 days after the 2004 LOC Statement Issue Date instead of 30 April.



## Part M – Appeals

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## 1 Introduction

### 1.1 Overview

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

### 1.2 Interpretation

1.2.1 In this Part M:

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

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

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

## **2 Notice of Appeal**

### **2.1 Requirements**

2.1.1 Any appeal made under this Part M must:

- (a) comply with the requirements of Condition M3; and
- (b) be served on the Office of Rail and Road and the Respondent(s):
  - (i) within five Working Days of receipt of the decision to which objection is made;
  - (ii) where the period referred to in Condition M2.1(b)(i) includes Christmas Day, within ten Working Days of that decision.

2.1.2 The Office of Rail and Road may extend the timeframe referred to in Condition M2.1(b) if it considers it appropriate to do so.

## **3 Content of a Notice of Appeal**

### **3.1 Content of a Notice of Appeal**

3.1.1 A notice of appeal must:

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

## **4 Right of The Office of Rail and Road to Refuse to Hear an Appeal**

### **4.1 Grounds of decision**

4.1.1 Within 10 Working Days of service of a notice of appeal pursuant to Condition M2, the Office of Rail and Road may decide that the appeal should not proceed to it, including on the grounds that:

- (a) the matter in question is not of sufficient importance to the industry;
- (b) the reference is frivolous or vexatious;
- (c) the conduct of the party making the reference ought properly to preclude its being proceeded with; or
- (d) it is appropriate or convenient for the matter instead to be disposed of by the High Court (in Scotland, by the Court of Session).

### **4.2 Consequences of decision**

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

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

## **5 Respondent's Notice**

### **5.1 Requirements**

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

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

- 5.1.2 In the event that a Respondent seeks more time to serve such a notice the Office of Rail and Road may, upon the Respondent providing the Office of Rail and Road with evidence which satisfies it that an extension of the timeframe for service of the notice is appropriate, grant such longer period for service of the notice as it considers necessary:

## **6 Expedited Process**

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

- 6.1.1 Where a party to the appeal believes that the appeal should be dealt with on an expedited basis, it should make representations to the Office of Rail and Road, copied to the other party, explaining why it believes this to be the case and its proposed timetable for the appeal. Where the Appellant makes such representations, it should do so as part of its Notice of Appeal. Where the Respondent makes such representations, it should do so within two Working Days of receipt of the Notice of Appeal.
- 6.1.2 On receipt of representations in accordance with Condition M6.1.1, the Office of Rail and Road shall give the other party to the appeal an opportunity to make any representations in response.
- 6.1.3 Having received any representations in accordance with Conditions M6.1.1 and 6.1.2, where the Office of Rail and Road believes it is in the interests of justice to do so, it shall order that the appeal is heard on whatever expedited timeframe it considers appropriate.

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

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

## **7 Matters to be Considered on Appeal**

### **7.1 Scope**

- 7.1.1 Every appeal will be limited to a review of the decision of the lower tribunal unless the Office of Rail and Road considers that



in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

## **7.2 Grounds**

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

## **8 Powers of the Office of Rail and Road**

### **8.1 ORR's Powers**

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

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

## **9 Immunity of the Office of Rail and Road**

### **9.1 Immunity of Office of Rail and Road**

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

## **10 Obligation to Comply with Determination of Appeal**

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

10.1.1 All Appellants and Respondents shall:

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

## **11 Effective Date of Office of Rail and Road's Decision**

### **11.1 Effective Date of Office of Rail and Road's Decision**

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

# **Annex**

## **Access Dispute Resolution Rules**

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## **EXPLANATORY NOTE**

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

*This explanatory note provides a brief overview of the purpose and structure of the Access Dispute Resolution Rules (ADRR).*

*The ADRR themselves are intended to be a readable single point of reference for parties involved in a dispute (and other Access Parties or Potential Access Parties). However, further background, and the templates required for use in connection with the ADRR are available at the access disputes website <http://www.accessdisputesrail.org/>.*

### **Overview**

*The purpose of the ADRR is to provide a clear, coherent, and effective structure for dealing with those rail disputes arising under access agreements and access conditions/codes that should be dealt with under access-specific processes.*

### **Structure**

***Chapter A** of the ADRR sets out principles which should be applied throughout the determination procedure by the parties, Chairs, arbitrators, experts and others involved. Those using the Rules are expected to respect the principles and have regard to them at all stages in the determination procedure. Failure to do so is intended to carry penalties including potential adverse costs awards.*

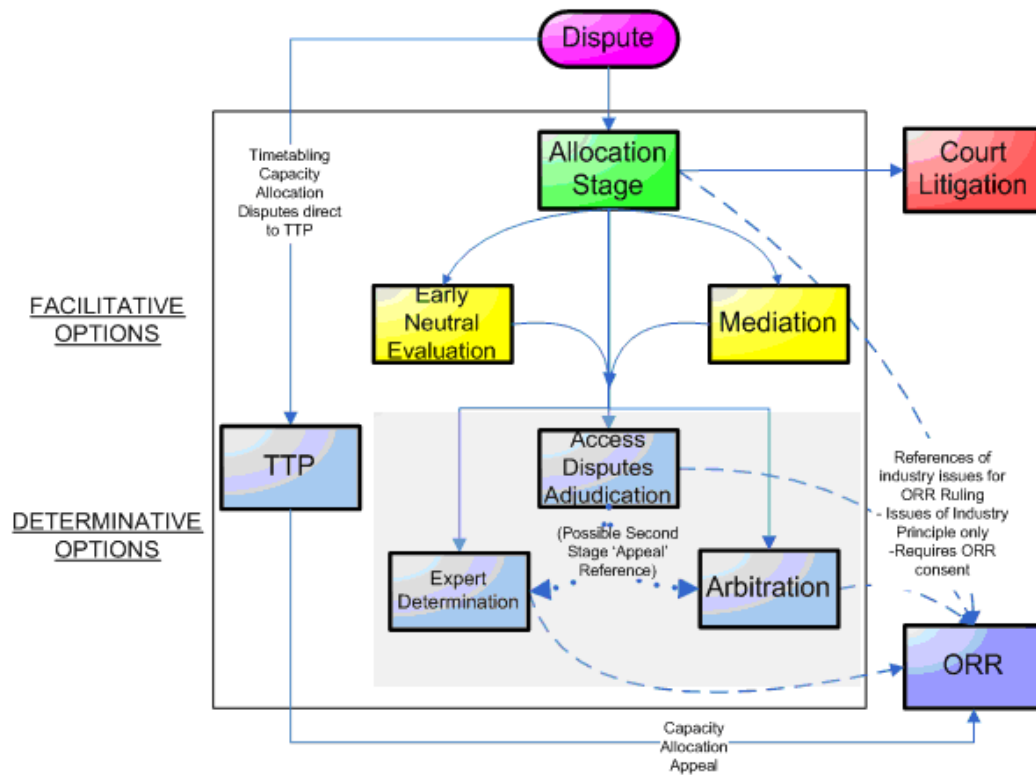
***Chapter B** provides the mechanism by which a dispute will be initiated and allocated to the agreed or most appropriate forum.*

***Chapter C** describes the mechanism by which issues of wider industry concern and issues of a regulatory nature (including those which come within the scope of the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations 2016) can be referred to the industry Regulator at any stage of the process.*

***Chapters D-I** set out the Rules applicable to each of the dispute resolution processes provided for in the Rules. These include facilitative and determinative processes which may be conducted in parallel (particularly in the case of mediation in parallel with a determinative process) or by way of offering a means of appeal from a first instance decision.*

***Chapter J** contains the constitutional, governance and administrative arrangements required to provide the services contained within the Rules.*

*In addition it is envisaged that it will be possible in certain cases to refer cases outside these Rules to ORR under the Access, Management and Licensing of Railway Undertakings Regulations or to court on particular issues for which a commercial jurisdiction is most beneficial. The following diagram illustrates how allocation can take place:*



## DEFINITIONS AND INTERPRETATION

1 *In these rules, unless the context otherwise requires, the following words and phrases where capitalised shall mean:*

Term	Definition
Access Conditions	In relation to an access contract, whichever of the Network Code, the National Station Access Conditions, the Independent Station Access Conditions or the Depot Access Conditions (or successor documents) or any other document carrying out a similar purpose is incorporated by reference in that access contract;
Act	The Railways Act 1993 as amended from time to time and/or such other legislation taking effect in Great Britain in respect of the same subject matter as that act;
ADA	Access Disputes Adjudication in accordance with Chapter G;
Agency Company	The Agency Company constituted in accordance with Rule J42;
Allocation Chair	The individual appointed by the Committee pursuant to Rule J20, or, where the context so allows, another individual appointed as a substitute by the Secretary to discharge the role of the Allocation Chair in respect of a specific dispute;
Arbitration Acts	Means those acts in force from time to time governing arbitration proceedings in England, Wales and/or Scotland (including in England and Wales the Arbitration Act 1996 and in Scotland the Administration of Justice (Scotland) Act 1972);
Arbitrator	An arbitrator and includes, in Scotland, an arbiter;
Band; Class; Franchised Passenger Class; Non-Franchised Passenger Class; Non-Passenger Class; Representative Committee	Have the definitions in Part C of the Network Code;
CAHA	The Claims Allocation and Handling Agreement dated 1 April 2011 as amended from time to time;
CAHA Registrar	The Registrar appointed in accordance with CAHA;
Case Summary	Is as defined by Rule D6(a) in respect of a mediation and Rule E5(a) in respect of an ENE;
Committee	The Access Disputes Committee constituted under Rule

<b>Term</b>	<b>Definition</b>
	J2;
Committee Chair	A Committee Member appointed as Committee Chair pursuant to Rule J19;
Committee Member	A person appointed to the Committee pursuant to Rule J6;
Conflict of Interest	Includes bias or an appearance of bias, a potential conflict of interest and any circumstances in which a reasonable third party may consider that there is a real risk of a conflict of interest existing or arising in the future;
Costs	Professional and other costs and expenses which would be recoverable following a judgment in Court proceedings in England;
Delay Attribution Board	The Delay Attribution Board constituted in accordance with Condition B6.2 of the Network Code;
Dispute Party	An Involved Party which is likely to be materially affected by the outcome of the dispute and is putting its position to the Forum and/or requesting a determination from a Forum;
Document	Hard copy or electronic data of any kind and in any format including internal or external correspondence, emails or other communications, documents, spreadsheets and databases;
ENE	Early Neutral Evaluation in accordance with Chapter E;
Evaluation Documents	Is as defined in Rule E5(b);
Existing Resolution Service Parties	Is as defined in Rule J61;
Forum	Each Hearing Chair of an ADA or Timetabling Panel, evaluator, mediator, arbitrator and determining expert appointed under these Rules;
Hearing Chair	An individual appointed by the Secretary to determine a dispute referred to TTP or ADA in accordance with these Rules;
Human Rights Act	The Human Rights Act 1998 as amended from time to time and/or such other legislation taking effect in Great Britain in respect of the same subject matter as that act;
Industry Advisor	An individual appointed as such in accordance with Rule J29;
Involved Party	In relation to a dispute, dispute procedure or dispute resolution process means a party directly involved in the dispute including the Secretary, all Dispute Parties, and



<b>Term</b>	<b>Definition</b>
	the Forum;
Mediation Documents	Are those defined in Rule D6(b);
Network Code	The document entitled Network Code maintained by Network Rail as amended from time to time;
Notice of Dispute	A notice issued by a Resolution Service Party wishing to refer a dispute to resolution in accordance with these Rules;
ORR	The Office of Rail and Road (and where relevant the former Rail Regulator) or any successor body or regulator;
Panel Member	In respect of a dispute to be resolved by TTP or ADA, each individual member of the panel appointed from time to time in respect of that dispute;
Principles	The principles set out in Rules A5-A10;
Procedure Agreement	Is as defined in Rule B9;
Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations	the Railways Infrastructure (Access, Management and Licensing of Railway Undertaking) Regulations 2016 (SI no 645 of 2016), as may be amended from time to time and/or such other relevant legislation taking effect in Great Britain in respect of the same subject matter as those Regulations;
Railway Safety Levy	Has the meaning ascribed to railway safety levy in Regulation 2 of the Railway Safety Levy Regulations 2006;
Reference	In respect of a reference to ORR, is as defined in Rule C6;
Referring Party	Is as defined in Rule C2;
Regulatory Issue	<p>A principle, issue or process connected with the railway industry (and any interactions between such principles, issues and processes) which</p> <ul style="list-style-type: none"> <li>(a) concerns the regulated structure of the industry as a whole or a material part of it, or</li> <li>(b) relates to or is closely aligned with a matter on which the ORR has regulatory oversight (from time to time); or</li> <li>(c) is connected with the ORR's duties, functions or powers as a regulator including without limitation under the Railways Act 1993 s4;</li> </ul>
Related Dispute	A dispute which in the reasonable opinion of the Allocation

<b>Term</b>	<b>Definition</b>
	Chair raises similar or connected factual or legal issues;
Resolution Service Party	A party entitled to use the dispute resolution service described in these Rules, in accordance with regulated access contracts, agreements with the Committee or otherwise, having made payments to the Committee in accordance with Chapter J;
RIDR Rules	The Rail Industry Dispute Resolution Rules;
Secretariat	Individuals appointed as such in accordance with Rule J39;
Secretary	The individual appointed as such in accordance with Rule J34;
Statement of Case	Any of the initial submissions setting out a Dispute Party's case including a statement of claim, reference, statement of defence, reply, answers and response and such other Documents as a Hearing Chair, arbitrator or determining expert shall identify as such;
Timetabling Dispute	A dispute arising out of or concerning issues of timetabling, timetable change and/or changes in the allocation of capacity, for which the TTP is identified in the relevant Underlying Contract as the relevant dispute resolution process;
Timetabling Panel	The panel including a Hearing Chair and one or more members of the Timetabling Pool appointed in respect of a dispute to be resolved by TTP.
Timetabling Pool	The pool of potential members of Timetabling Panels established under Rule H2;
TTP	The dispute resolution process for resolving Timetabling Disputes in accordance with Chapter H of these Rules; and
Underlying Contract	Any contract (or to the extent applicable any other source of a reference to a dispute) under which disputes are or can be referred to resolution under these Rules, and this may include such interrelated contracts as govern access to infrastructure.

## Interpretation

2 Unless the context otherwise requires:

- (a) terms and expressions defined in the Railways Act 1993 shall, unless the contrary intention appears, have the same meaning in these Rules;
- (b) the use of male pronouns and other words connoting the male gender shall encompass the equivalent female word;

- (c) use of the singular shall include the plural
- (d) references to statutory provisions shall be construed as references to those provisions as amended or re-enacted or as their application is modified by other statutory provisions from time to time and shall include references to any statutory provisions of which they are re-enactments (whether with or without modification).
- (e) any agreement, instrument, licence, standard, timetable, code or other document referred to in these Rules or entered into, approved, authorised, accepted or issued by a person pursuant to this code shall be construed, at the particular time, as a reference to that agreement, instrument, licence, standard, timetable, code or other document, as it may then have been amended, varied, supplemented or novated.
- (f) words and expressions defined in the Interpretation Act 1978 shall have the same meaning in these Rules and the rules of interpretation contained in that Act shall apply to the interpretation of these Rules.
- (g) where in these Rules any obligation of any party is required to be performed within a specified time limit that obligation shall continue after that time limit if the party fails to comply with that obligation within the time limit.
- (h) the words "include" and "includes" are to be construed without limitation.
- (i) references to Rules and Chapters are to Rules and Chapters of these Rules;
- (j) references to the law shall be to the law of England except where otherwise provided to be the law of Scotland and shall include all binding legislation (including regulations and statutory instruments) and directly effective European law; and
- (k) the headings in these Rules are used for convenience only and shall not affect the interpretation of the Rules.

## **CHAPTER A – THE PRINCIPLES AND OPERATION OF THE DETERMINATION PROCEDURE**

- 1 The Principles set out in this Chapter A are intended to be applied to the whole of the conduct and determination of disputes by all parties including the Allocation Chair, the Secretary and each Forum.
- 2 Except as otherwise provided in these Rules, any and all references in any contractual document to resolution or determination of a dispute, matter or issue under or in accordance with the whole or any part of, or any process subject to or governed by:
  - (a) the Access Dispute Resolution Rules (or ADRR) incorporated into (or annexed to) the Network Code; or
  - (b) the Network Code itself;shall be a reference to resolution in accordance with these Rules as a whole and (unless otherwise provided in these Rules) no such reference shall restrict or otherwise limit or determine the process or processes to be adopted under these Rules to resolve or determine any dispute or issue.

### **Purpose**

- 3 The determination procedure for disputes described in these Rules is intended to:
  - (a) include one or more dispute resolution processes appropriate to the dispute;
  - (b) include at least one available determinative stage which is objectively impartial and fair trial compliant;
  - (c) provide a relatively swift and easy to access disputes process for all cases where this is appropriate;
  - (d) be able to accommodate larger cases of significant value or wider importance including cases that reasonably require extensive documentation and/or witness evidence;
  - (e) provide a mechanism for the parties or any relevant Forum to obtain a determination on Regulatory Issues from ORR;
  - (f) allow parties to resolve disputes as efficiently and effectively as possible;
  - (g) allow the parties flexibility to identify and adopt the most appropriate dispute resolution process(es) for each dispute; and
  - (h) avoid the use by any party of any dispute resolution process to delay, frustrate or avoid determination or resolution of the dispute.
- 4 The Allocation Chair and each Forum under these Rules shall have regard to the Principles:
  - (a) when making any procedural decisions; and
  - (b) at any stage when Costs are awarded.

## **PRINCIPLES**

### **Determinations and Remedies**

- 5 Each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis. Each and every Forum shall act in accordance with the law; and all its decisions, including its determinations and decisions on procedure, shall be in accordance with the law.
- 6 Each and every Forum shall:
- (a) where the Access Conditions or Underlying Contract require that a specific remedy be granted, grant that remedy accordingly; or
  - (b) Where a specific remedy is provided for at law, grant that remedy accordingly; or
  - (c) where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Forum, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Underlying Contract after due consideration of all remedies and orders that could properly be made.

### **Precedent**

- 7 In reaching its determination, each and every Forum shall:
- (a) take note of relevant published ADA or TTP determinations (and those of any predecessor bodies) and of any other relevant tribunal excluding (to the extent referred to in (b) below) the ORR, as persuasive authority but need not be bound by them;
  - (b) be bound by any relevant decision of the ORR on a Regulatory Issue and any relevant decisions of the courts.

### **Impartiality**

- 8 Members of Forums may be appointed in part due to their particular industry expertise. Nonetheless, all members of Forums shall exercise their functions impartially and not on behalf of any specific organisation, company, business, trade or profession.

### **Duties of Dispute Parties**

- 9 Dispute Parties shall at all times:
- (a) co-operate with any reasonable request of the Allocation Chair, any Forum, the Secretary and each other;
  - (b) conduct themselves in good faith with the objective of resolving the dispute; and
  - (c) avoid antagonistic or unduly adversarial behaviour.
- 10 Dispute Parties shall provide voluntarily, or where reasonably requested, to each other, to the Allocation Chair, the Secretary and to any Forum, all material required for the effective consideration and determination of the dispute, mindful of the requirements of Rules F19, G24, H26, and I19 on Documents.

## **OPERATION OF THE RULES**

### **Funding**

- 11 The delivery of the dispute resolution service provided for in these Rules will be funded by potential users of the service in accordance with Chapter J.

### **The Role of the Allocation Chair and Secretary**

- 12 The Allocation Chair:
- (a) has oversight (under the powers contained in Chapter B) of the effective overall case management of a dispute;
  - (b) will consider any disputes referred under Chapter B in accordance with these Rules and the Dispute Parties' proposals for the procedure for resolution of them including whether any issues should or could be referred to the ORR;
  - (c) may, at the request of any Resolution Service Party, give guidance on dispute procedure prior to the reference of any dispute for resolution under these Rules;
  - (d) where the Dispute Parties are not in agreement will seek to facilitate an agreement between them concerning the most appropriate determination procedure;
  - (e) has responsibility for any allocation hearing including directions for any submissions, the hearing itself and any decisions connected with allocation.
- 13 The Allocation Chair may, where reasonable to do so, delegate the performance of any of his functions in any dispute to the Secretary appointed under Rule J34 or any member of the Secretariat appointed under Rule J39 but such delegation shall not affect the obligations and responsibilities of the Allocation Chair set out in Rule A12.
- 14 The Secretary:
- (a) has responsibility for appointing Hearing Chairs and Industry Advisors from a register maintained by the Secretary and, where parties are unable to agree, arbitrators and determining experts.
  - (b) shall assist the Allocation Chair, as required, in the discharge of the functions in Rule A12;
  - (c) shall receive disputes referred under Chapter B, record them and allot a case number to them;
  - (d) is responsible for managing the delivery of the determination procedure allocated to the dispute;
  - (e) may at the request of any Resolution Service Party, give guidance on dispute procedure prior to the reference of any dispute for resolution under these Rules.

### **Timely Determination**

- 15 Subject to the other provisions of these Rules and any specific timescale provisions of the Access Conditions, Underlying Contract or any other legal requirements, a

Forum shall reach its determination in a timely manner consistent with the nature and complexity of the dispute.

### **Consequences of procedural default**

- 16 If a Dispute Party is in procedural default, the Allocation Chair or Forum (as appropriate) may, whether or not upon the application of the other Dispute Party, make one or more of the following orders:
- (a) that the defaulting party comply with its obligation;
  - (b) that the defaulting party is prohibited from relying upon the information or other matter which it has failed to provide in accordance with these Rules or a valid direction;
  - (c) that the dispute can proceed to determination without one or more steps being taken which have not been taken because of the procedural default; and/or
  - (d) that the Costs arising from or connected with the procedural default be paid by the defaulting party on an interim or final basis.

In addition, and where appropriate to do so, adverse inferences may be drawn by any Forum in respect of the position for which the defaulting party contends.

- 17 For the purposes of Rule A16 procedural default shall include:
- (a) failure to take a step by the time required by these Rules;
  - (b) failure to comply with any direction of the Allocation Chair, the Secretary or any Forum;
  - (c) failure to abide by the Principles.

### **Representation**

- 18 A Dispute Party is entitled to be represented by such person(s) (legally qualified or otherwise), as it chooses.
- 19 A Dispute Party shall not be prejudiced by its choice of one category of representative as against another. It shall, however, ensure that:
- (a) the competencies, skills and knowledge of any chosen representative are appropriate to the issues involved in the dispute (content, subject and value);
  - (b) where a representative is also a witness, that representative is able to perform both duties in full;
  - (c) where a representative is not a witness, any appropriate witnesses are present at the hearing to provide relevant information; and
  - (d) its representatives shall respect and act at all times in accordance with the Principles.

### **Hierarchy**

- 20 In the event of conflict (when using these Rules) between the Act, the Access Conditions, an Underlying Contract, and these Rules the following order of precedence shall apply:

- (a) the Act;
- (b) the Access Conditions;
- (c) these Rules; and
- (d) the Underlying Contract.

### **Service of Documents and Notice**

21 Documents may be served:

- (a) in person on any director of any party, in which case service shall be deemed to take place on the day on which the documents are given to the director in person;
- (b) by personal delivery to the registered address or principal business address within the UK of any party, or such other address (including that of a representative or adviser) as that party identifies in connection with the relevant dispute; in which case service shall be deemed to take place on the day of delivery or, if delivery is made after 5pm, the following working day;
- (c) by first class post, to the registered address or principal business address within the UK of any party, or such other address (including that of a representative or adviser) as that party identifies in connection with the relevant dispute; in which case service shall be deemed to take place two working days after posting;
- (d) by email, to any party which has previously identified in writing an electronic address for service of documents in connection with the relevant dispute (including the address of a representative or adviser) in which case service shall be deemed to take place on the day of receipt, or if receipt is after 5pm, the day following receipt. For the purposes of this Rule A20(d) the Secretary will accept documents sent to him at ***sec.adc@btconnect.com***;
- (e) by fax to the advertised fax number of any Party, in which case service shall be deemed to take place on the day of transmission or, if transmission is completed after 5pm, the following working day;
- (f) where a party has no registered address or principal business address within the UK, service may be made in accordance with the above requirements to the Secretary on behalf of that party. The Secretary shall be considered to be the relevant party's agent for service and shall take all reasonable efforts to transmit the documents on to the party at such address as is specified outside the UK.

Provided that, in all cases in which documents are sent to any company or corporate entity, such documents are addressed "Urgent; for the attention of the Company Secretary" or addressed to a person representing the party who has previously confirmed in writing his willingness to receive such documents on behalf of the party.

22 In these Rules, whenever any notice is required to be given in writing, writing shall include email.

23 Any reference to pages is a reference to A4 pages containing reasonably legible typescript at 1.5 line spacing. All documents submitted shall be made in a form



compatible with software agreed with the Secretary from time to time and all attachments should be where reasonably possible, in electronic format.

- 24 All documents, correspondence, communications and other material including spoken statements, submissions and communications shall be in the English language.
- 25 In the event that any date specified in these Rules for service of documents or any action by any party, Forum, Allocation Chair, Hearing Chair or Secretary or any other date specified would fall between 25 December and 31 December in any year, it shall be extended by seven days. Any such date falling on a public holiday in England (or where the matter is being conducted subject to Scottish law, in Scotland) shall be extended to the next working day.

## **CHAPTER B – INITIATING A DISPUTE AND ALLOCATION**

- 1 Disputes proceedings will be initiated and referred for allocation in accordance with the following Rules.

### **NOTIFICATION OF A DISPUTE**

- 2 A Resolution Service Party wishing to refer a dispute shall serve a written Notice of Dispute on the Secretary and shall serve a copy of the Notice of Dispute on every other party to the dispute.
- 3 The Notice of Dispute shall, unless otherwise advised by the Secretary, normally be in accordance with the template format for a Notice of Dispute (found on the access disputes website) and shall do all of the following:
  - (a) state the contract and relevant contractual clause under which the reference is made (or such other basis for the reference under these Rules);
  - (b) list the other parties concerned whether as a Dispute Party to the dispute or otherwise;
  - (c) summarise the basis of the claim including a brief list of issues;
  - (d) state whether the Dispute Parties have already agreed on a determination procedure, or, if not, specify the referring party's initial preference for a determination procedure, including, if it believes it is a Timetabling Dispute, a statement to this effect; and
  - (e) state whether exceptional circumstances exist requiring an expedited hearing or process.
- 4 Valid service of a Notice of Dispute upon the Secretary in accordance with Rule B2 shall amount to the issuing of proceedings relating to the dispute for the purposes of all relevant limitation periods or provisions. Provided that the dispute has not subsequently been finally resolved or withdrawn (upon the occurrence of which all relevant limitation periods shall be calculated by excluding the period during which the claim was subject to these Rules), no party shall raise any argument, defence or exclusion in subsequent proceedings (whether under these Rules or otherwise) on the basis of the expiry, after the date of valid service of a Notice of Dispute in accordance with Rule B2, of any limitation period.

### **ALLOCATION PROCESS**

- 5 All Timetabling Disputes shall be referred to a Timetabling Panel in accordance with Chapter H. Following service of a Notice of Dispute relating to such a dispute the process under Chapter H shall commence and the Secretary shall appoint a Timetabling Panel in accordance with Rule H11. If either party raises any objection then the Hearing Chair of the Timetabling Panel shall consider the best way to proceed.
- 6 All disputes referred to resolution in accordance with these Rules under Condition B2.4.4 of the Network Code shall be referred to an ADA in accordance with Chapter G as a single stage dispute resolution process with no appeal. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the Secretary shall appoint a Hearing Chair for the dispute in accordance with Rule G8. If either party raises any objection then the Hearing Chair shall consider the best way to proceed.

- 7 Except as stipulated in Rule B8, all disputes referred for resolution in accordance with these Rules under Part J of the Network Code shall be referred to an ADA in accordance with Chapter G with a right of appeal to the ORR for determination in accordance with Part M of the Network Code. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the Secretary shall appoint a Hearing Chair for the dispute in accordance with Rule G8. If either party raises any objection then the Hearing Chair shall consider the best way to proceed.
- 8 All disputes referred for resolution in accordance with these Rules under Condition J10.14 of the Network Code shall:
- (a) if concerning Condition J10.14.1, be referred to an ADA in accordance with Chapter G or referred for expert determination in accordance with Chapter I.
  - (b) if concerning Condition J10.14.2, be referred for expert determination in accordance with Chapter I.
- 9 Unless otherwise ordered by the Allocation Chair, following service of a Notice of Dispute upon him, the Secretary:
- (a) shall allot a case number to the dispute and notify this case number to all Involved Parties including those identified in the Notice of Dispute according to Rule B3(b);
  - (b) where he reasonably believes that another party or parties are likely to be directly affected by the outcome of the dispute and it is appropriate that they should be informed of the existence of the dispute, may seek clarification from the party initiating proceedings about why that party has not been identified in accordance with Rule B3(b) and inform the Allocation Chair or relevant Hearing Chair (as appropriate) accordingly;
  - (c) (unless a Procedure Agreement has already been drawn up or served on him) shall set a date and time for an allocation hearing to take place within 28 days of the service of the Notice of Dispute upon him or such other time as the Dispute Parties may agree;
  - (d) (unless a Procedure Agreement has already been drawn up or served on him) shall provide initial directions to the parties setting out the following initial timetable (or such variation of the timetable as the Allocation Chair shall approve):
    - (i) fixing a date and time of the allocation hearing, a provisional method by which such allocation hearing shall take place (in writing, in person at a specified location, or by telephone conference or otherwise) and an estimated duration for the allocation hearing;
    - (ii) encouraging the parties to seek to agree a determination procedure between them and in the event of reaching such an agreement immediately to notify him accordingly;
    - (iii) requiring each party to serve upon him and exchange with the other parties a statement, at least seven days before the hearing, containing that party's:
      - (A) assessment of the basis of the claim and a brief list of issues. Alternatively agreement with the basis of the claim and list of issues provided with the Notice of Dispute; and

- (B) preferences for the Forum and any facilitative stages together with short reasons in support of such process; and
- (C) assessment of any issues which should be referred to the ORR together with the proposed form of words for the reference and short reasons in support of such a reference.

Such statements should each be less than three pages long unless the Allocation Chair directs otherwise.

- 10 The Secretary shall assist the parties to reach an agreement regarding the most appropriate determination procedure and whether any issues can or should be referred to the ORR or to the courts. In doing so the Secretary shall act in a facilitative role impartially between the parties and shall not seek to impose his own assessment or preference upon the parties.
- 11 If the parties reach agreement upon a determination procedure, they shall confirm their agreement and the terms of that agreement to the Secretary by way of a written procedure agreement (the "Procedure Agreement") executed by or confirmed in writing on behalf of all Dispute Parties. The form of the Procedure Agreement received by the Secretary shall be definitive evidence of the agreement reached and shall specify at least:
  - (a) the dispute resolution process or processes agreed by the parties and the order in which they will take place (or specify that facilitative processes are to take place in parallel to other dispute resolution processes);
  - (b) where appropriate, the basis on which any appeal or reference to a second (or later) stage may be made;
  - (c) (subject to the provisions of the Network Code Part M) where in exceptional circumstances the ORR has identified that the matter is appropriate for it to determine (and the parties have requested that it do so) and has therefore agreed to act as an appeal body, confirmation of ORR's agreement. Parties should note that, except as expressly provided in these Rules, ORR will not generally accept the role of appeal body unless exceptional circumstances can be shown justifying it taking on this role; and
  - (d) where any dispute is agreed to be referred to the courts at any stage, specify the timescale (which shall not be less than 2 months nor more than 9 months) by which any claim must be initiated following conclusion of any prior stages, otherwise the dispute will be deemed withdrawn.
- 12 The Procedure Agreement may specify dispute resolution processes provided for in these Rules (including Court proceedings) or otherwise (provided that agreement from any tribunal/ determinative body not provided for in these Rules is obtained before a reference to it is agreed). The Procedure Agreement may not specify that a dispute be referred to a Timetabling Panel unless it is a Timetabling Dispute.
- 13 The Procedure Agreement may also specify any agreed timings for commencement of any dispute resolution process, the terms of any reference agreed to be made to the ORR by the Dispute Parties and any other agreement between the parties regarding the procedure to be adopted.
- 14 The Allocation Chair shall preside over any allocation hearing which takes place. At an allocation hearing he shall:

- (a) consider the Notice of Dispute, the written statements of the parties and any oral representations from the parties;
- (b) ask questions to identify the most appropriate determination procedure and whether any issues exist which could be referred to the ORR;
- (c) seek to facilitate an agreement between the parties on the most appropriate determination procedure and whether any issues exist which should be referred to the ORR;
- (d) having heard each party's full submissions, if no agreement has been reached, state clearly any view he has of the most appropriate determination procedure;
- (e) in the event that any party claims the right to refer a matter or issue directly to the ORR under the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (without the need to first refer the matter to a Timetabling Panel), determine whether it is arguable that such a right exists and if so direct the reference of the matter to the ORR;
- (f) in the event that any party claims the right to refer a matter or issue to a Timetabling Panel and subsequently to the ORR in accordance with the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations, determine whether it is arguable that such a right exists and if so refer the matter to a Timetabling Panel followed by appeal to the ORR. There is a presumption that disputes referred to resolution under Condition D5.1.1 of the Network Code shall, unless there are compelling reasons to the contrary relating to subject matter, be allocated to a Timetabling Panel. Consequently the Allocation Chair shall not allocate a dispute ostensibly falling within Condition D5.1.1 other than to a Timetabling Panel without first inviting written representations from the Dispute Parties on his intention to do so (to be provided by the parties within seven days of the request or such other time as he shall specify) and giving proper consideration to any representations made;
- (g) in the event that the parties agree that an issue would be best determined by the ORR but are unable to agree to the wording of the necessary reference, determine the wording of the reference and write to the ORR (copying the parties) identifying the issue and requesting that the issue be considered in accordance with Chapter C;
- (h) in the event that agreement in principle on the resolution procedure has been reached, but the parties are unable to agree on the timings of each stage (including adjustments to the default timings in these Rules), determine the timings to be applied following consideration of the parties' submissions in that respect;
- (i) in the event that agreement is reached between the parties (including agreement following the exercise by the Allocation Chair of his powers under (g) and/or (h)), the Allocation Chair shall draw up, with the parties' assistance, the Procedure Agreement and the parties shall execute it or confirm it in writing;
- (j) in the event that no agreement is reached between the parties and neither (e) or (f) applies, determine that, unless the parties reach a contrary agreement within seven days of the allocation hearing, the matter shall be referred to final determination by arbitration subject to Chapter F as a one stage determination

procedure with appeal only in accordance with the Arbitration Acts and shall draw up the Procedure Agreement accordingly and shall sign it as Allocation Chair.

- (k) in the event that no agreement is reached between the parties under Rule B8(a), shall determine that, unless the parties reach a contrary agreement within seven days of the allocation hearing, the matter shall be referred to final determination by expert determination subject to Chapter I and shall draw up the Procedure Agreement accordingly and shall sign it as Allocation Chair.
- 15 Following an allocation hearing in accordance with Rule B14 the Allocation Chair may at his discretion write formally to all parties stating his view on the best allocation of the dispute and the approach taken by the parties leading to the actual allocation of the dispute.
- 16 Following service upon him of a Procedure Agreement in accordance with Rule B11 or drawing up of a Procedure Agreement in accordance with Rule B5, 6, 7 or 14, the Secretary shall write to all the Involved Parties:
- (a) dispensing with any remaining stages of any previous directions;
  - (b) confirming receipt of the Procedure Agreement and recording the determination procedure to be adopted for the dispute;
  - (c) confirming the first dispute resolution process and the first dates required by these Rules in respect of that process; and
  - (d) where the first dispute resolution process is ADA or TTP, identifying the Hearing Chair appointed for the dispute;
- 17 For the purposes of these Rules the first dispute resolution process specified in the Procedure Agreement shall commence upon the date on which the Secretary writes to the Involved Parties in accordance with Rule B16. Subsequent dispute resolution processes provided for in the Procedure Agreement shall commence upon receipt by the Secretary in accordance with these Rules of notice from any party of that party's decision to refer the dispute to such dispute resolution process in accordance with these Rules.
- 18 In discharging his roles in respect of allocation under this Chapter B, the Allocation Chair shall have regard to:
- (a) these Rules including the Principles;
  - (b) the allocation criteria (if any) published from time to time by the Committee on the access disputes website;
  - (c) the objective importance of the dispute to the Dispute Parties;
  - (d) the complexity of the issues;
  - (e) the significance (if any) to the railway industry of the issues involved;
  - (f) the scale of any financial claims involved; and
  - (g) the relevant laws including the Arbitration Acts, the Railways Act, the Railways (Access, Management and Licensing of Railway Undertakings) Regulations and the right to a fair trial at common law and under the Human Rights Act.

- 19 The Allocation Chair (aided by the Secretary) shall continue to actively encourage and facilitate resolution of disputes throughout the life of the dispute. All parties and all Forums shall have liberty to apply to the Allocation Chair at any stage in respect of a restructuring of the determination procedure including as appropriate the addition of any facilitative process in parallel with determinative processes or otherwise.
- 20 In exceptional circumstances requiring an expedited hearing or process or where alternative actions or directions are required, the Allocation Chair may at any stage on the application of any party give directions varying the timescales provided for in these Rules and nothing in this Chapter B shall restrict such directions being given.
- 21 Upon the application of any Dispute Party or at his own instigation the Allocation Chair may order that any two or more disputes be joined or heard and resolved together where such disputes appear to him in his absolute discretion to concern the same or similar subject matter and where it is in the interests of efficient and fair resolution to do so.
- 22 Subject to the Arbitration Acts, any party may at any stage issue or initiate proceedings before the High Court in England, or the Court of Session in Scotland, for any interim remedies including injunctions, interdict or specific implement and nothing in this Chapter B shall prevent them from so doing.

## **CHAPTER C – REFERENCE TO THE ORR IN THE COURSE OF A DISPUTE RESOLUTION PROCESS**

- 1 This section describes how issues connected to disputes may be referred to the ORR by the parties, the Allocation Chair or any Forum at any stage of the determination procedure and the basis on which ORR will determine such references.

### **ISSUES TO BE REFERRED**

- 2 Issues may only be referred to the ORR under these Rules by:
- (a) the parties together acting by agreement;
  - (b) the Allocation Chair in accordance with the provisions of Chapter B; or
  - (c) any Forum acting in accordance with these Rules
- in each case a "Referring Party"
- 3 A Referring Party may at any stage or stages in a dispute refer to ORR any discrete issue or matter which is connected to or forms part of a dispute and:
- (a) concerns information to which ORR has access and which is not readily available from another source; or
  - (b) is or concerns a Regulatory Issue; or
  - (c) is an issue or matter of wider railway industry relevance which would benefit from ORR's industry specific experience and/or knowledge.
- 4 The purpose of a reference to ORR is to obtain answers to issues of general application to the railway industry (or a significant part of it) in respect of which ORR has relevant information or knowledge which may inform the resolution of the Dispute Parties' respective entitlements. Consequently (except where it is legally required to hear specific claims) ORR may at its discretion decline references which relate solely to one or more parties' specific factual or financial position or refuse to determine any party's rights on the basis of the particular facts applicable to that party. The ORR may exercise its discretion not to consider the substantive commercial issues in dispute or give an opinion on the merits of the dispute or on the proposed Forum for resolution.
- 5 The provisions of this Chapter C are without prejudice to any statutory or Access Conditions provisions which provide a right for a party to refer an appeal to ORR.

### **PROCESS FOR REFERENCES**

- 6 Where a Referring Party decides to refer an issue or matter to the ORR it shall send a Reference to the ORR (copied to all other Involved Parties) ("Reference") containing the following:
- (a) the Referring Party's formulation of a specific question or questions for the ORR to answer with sufficient clarity to enable the ORR to understand the nature of the answer requested from it; and
  - (b) a brief explanation of how the issue or matter fulfils the requirements of Rule C3; and



- (c) a statement of the steps which have already been taken to resolve the issue; and
- (d) (at the discretion of that Dispute Party) a statement from each Dispute Party of no more than three pages:
  - (i) stating that Dispute Party's position in respect of the Reference; and
  - (ii) explaining why the Reference should or should not be decided by the ORR; and
  - (iii) attaching any relevant Documents which the party wishes to bring to the attention of the ORR in connection with ORR's decision on whether the Reference should be decided by it.

Where applicable, the Referring Party should also state whether it believes that any party has a right to refer the issue or matter to ORR in accordance with the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations or the Network Code or otherwise.

- 7 For the purposes of this Chapter C, References to ORR may be sent to the following email address: [adrr.references@orr.gsi.gov.uk](mailto:adrr.references@orr.gsi.gov.uk)
- 8 ORR will aim to acknowledge receipt of a Reference within seven days to the Referring Party.
- 9 ORR will consider the Reference including any statements served under Rule C6 and will respond in writing within 21 days or such other period as ORR shall specify to the Referring Party (copying to all other Involved Parties):
  - (a) to advise it that the ORR declines to respond to the Reference and that the issue remains a matter for the relevant dispute Forum to determine and to provide reasons for this decision; or
  - (b) to provide a response on questions of fact and/or copies of relevant Documents or records in response to the Reference; or
  - (c) where the ORR accepts the Reference, but requires additional time, information or submissions to consider its response, to set directions and a timetable for any further stages in responding to the Reference.
- 10 Following receipt of a response from the ORR in accordance with Rule C9, the relevant Forum, if appropriate, shall give directions concerning any procedural steps required in light of the response including whether a stay is required pending further consideration by ORR.
- 11 Following completion of its process, ORR shall send its final written determination of the Reference to the Involved Parties. Following receipt of a final determination the Allocation Chair or the relevant Forum, as the case may be, shall give further directions concerning any procedural steps required in light of the determination.
- 12 Subject to any order from ORR for partial or complete redaction, all References, statements and submissions made under this Chapter C and all responses provided by ORR may be published by the ORR and shall also be made accessible from the access disputes website.

- 13 In accordance with Rule A4, ORR's determinations will be applied (in accordance with Rule A7(b) by relevant Forums to the resolution of the dispute on the basis of the Dispute Parties' respective entitlements. Consequently, subject to any specific legal obligations on ORR in considering a reference received under this Chapter C, ORR's determinations on the the Regulatory Issues raised will be made in accordance with the Dispute Parties' respective entitlements. The ORR will not take account of any argument raised by any Dispute Party which is not based upon the parties' respective entitlements or would have the effect of avoiding or rendering ineffective any Resolution Service Party's existing entitlements.

## **CHAPTER D – FACILITATIVE PROCESS RULES – MEDIATION**

- 1 Mediation under these Rules is a private facilitative dispute resolution process in which a neutral mediator tries to help the parties to reach a negotiated settlement.

### **Disputes to be submitted to mediation**

- 2 Any dispute which the Dispute Parties have agreed shall be submitted to mediation under these Rules shall proceed according to the Rules of this Chapter D. Such agreement may be made when the dispute arises or previously or in the Procedure Agreement or while any other dispute resolution process is taking place and may be made orally or in writing. Any mediation agreed by the parties which is not specified in the Procedure Agreement shall commence upon notification to the Secretary in writing by all parties (or confirmation in writing of such a notification on behalf of all parties) of their agreement to mediate.

### **Beginning a mediation**

- 3 Upon commencement of a mediation (in accordance with the Procedure Agreement and Rule B17 or otherwise), the Secretary shall promptly approach all parties to the dispute and liaise with and assist the parties in identifying, choosing and retaining a suitable mediator if not already done.
- 4 If no mediator can be agreed by the parties within 21 days of the date of commencement of the mediation, the Secretary shall recommend an appropriate individual from lists maintained by him or otherwise. If any party rejects the recommended individual then the mediation will be deemed to have failed and the Secretary shall write to the Involved Parties stating that that mediation stage has been terminated on the date of his letter.
- 5 Upon appointment of a mediator, the parties and the mediator will agree a date for the mediation session within 60 days of appointment of the mediator (subject to contrary agreement on timescales between the parties).

### **Exchange of Information**

- 6 Following appointment of a mediator, each party shall prepare the following documents:
  - (a) a concise summary ("the Case Summary") of its case in the dispute ; and
  - (b) all documents to which the summary refers and any others to which it may wish to refer to in the mediation ("the Mediation Documents").
- 7 The parties will exchange the Case Summary and Mediation Documents with each other at least seven days before the mediation session, or other such date as may be agreed between the parties and the mediator. Copies shall be sent directly to the mediator on the same date.
- 8 Subject to contrary agreement between the parties:
  - (a) each Case Summary shall be a maximum of ten pages long; and
  - (b) a joint set of documents will be provided to the mediator containing the Mediation Documents requested by each party.

### **The Mediation**

- 9 The mediator, where appropriate, will:
- (a) consult with the parties before the mediation session;
  - (b) read before the mediation session each Case Summary and all the Mediation Documents sent to him;
  - (c) determine the procedure for the mediation including the mediation session;
  - (d) facilitate the drawing up of any settlement agreement;
  - (e) be bound by the terms for the appointment of a mediator agreed with the parties; and
  - (f) abide by the terms of this Chapter D.
- 10 The mediation session will take place at the place and time stated by the mediator which is best suited to the location of the Dispute Parties.
- 11 No recording or transcripts of the mediation session will be made.
- 12 Each party shall be represented at the mediation session by at least one individual who shall be a senior manager with full decision-making authority to settle the dispute. If there is any restriction on that authority this should be discussed with the mediator before the mediation session. Parties should inform the mediator prior to the date of the mediation session of the identity of its representation which may include professional or other advisers. No other persons may attend without the mediator's agreement.
- 13 The mediator may see each party on his own if he sees fit. The mediator shall not be entitled to disclose matters told to him in confidence without the permission of the party disclosing such matters.
- 14 Within seven days of the end of the mediation session, if the parties have not resolved the dispute by agreement and only if all the parties request, the mediator may advise the parties of his non-binding views as to the likely outcome of the dispute if it were to be referred back to the determination procedure and/or what he considers would be a fair settlement of the dispute.

### **Settlement Agreement**

- 15 Any settlement reached in the mediation will not be legally binding until it has been recorded in writing and signed by the parties.

### **Confidentiality**

- 16 The mediation is and shall be kept confidential.
- 17 The parties, their representatives and advisers, the mediator and the Secretary shall keep confidential all Documents, submissions, statements and other information disclosed in the mediation, including any agreement for the settlement of the dispute, except when and insofar as disclosure is necessary:
- (a) to implement or enforce the agreement for settlement of the dispute; or
  - (b) to comply with an obligation to disclose owed to any financial associate of the party making the disclosure or any obligations at law.

- 18 Its use in the mediation shall not affect the extent to which any Document, submission, statement or other information disclosed in the mediation is admissible or subject to disclosure or production (or, in Scotland, recoverable by commission and diligence under section 1 of the Administration of Justice (Scotland) Act 1972 or otherwise) in any subsequent arbitration, legal or other proceedings involving the parties.
- 19 New Documents generated in the course and for the purposes of the mediation shall be treated as being on the same basis as without prejudice negotiations in an action in the courts.

### **Costs**

- 20 Unless the parties otherwise agree, each party shall bear its own costs of the mediation. The parties shall share equally the mediator's fees and expenses, any costs of his appointment and all other administrative costs of the procedure.

### **Termination of the mediation**

- 21 The mediation shall terminate upon the earliest of:
- (a) the occurrence of the events in Rule D4;
  - (b) service by one party to the mediation on the others and on the mediator of a notice of withdrawal from the mediation;
  - (c) the provision to all parties by the mediator of his views in accordance with Rule D14;
  - (d) the expiry of 14 days from the end of the mediation session;
  - (e) withdrawal of the mediator from the mediation; or
  - (f) the conclusion of a written settlement agreement.
- 22 Upon termination any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of the termination and its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the Secretary of its intention to refer the matter to another dispute resolution process (unless such other process has already been commenced) within 28 days of termination the claim shall be deemed to have been withdrawn.

### **Exclusion of liability**

- 23 None of the Allocation Chair, the Secretary or any mediator shall be liable to any party for any act or omission (including negligence) in connection with any mediation under these Rules unless the act or omission is shown to have been in bad faith.

### **Mediator barred from further proceedings**

- 24 The mediator shall not be entitled to act in any capacity in relation to the subject matter of the mediation in which he acted as mediator in any subsequent arbitration, legal or other similar proceedings.

## **CHAPTER E – FACILITATIVE PROCESS RULES – EARLY NEUTRAL EVALUATION**

- 1 Early Neutral Evaluation (ENE) under these Rules is a private facilitative dispute resolution process in which a neutral evaluator provides a confidential assessment of the likely merits of the case and tries to help the parties to reach a negotiated settlement.

### **Disputes to be submitted to ENE**

- 2 Any dispute which the Dispute Parties have agreed shall be submitted to ENE under these Rules shall proceed according to the Rules of this Chapter E. Such agreement may be made when the dispute arises or previously or in the Procedure Agreement or while any other dispute resolution process is taking place and may be made orally or in writing. Any ENE agreed by the parties which is not specified in the Procedure Agreement shall commence upon notification of the Secretary in writing by all parties (or confirmation in writing of such a notification on behalf of all parties) of their agreement to an ENE.

### **Beginning an ENE**

- 3 Upon commencement of an ENE (in accordance with the Procedure Agreement and Rule B17 or otherwise), the Secretary shall promptly approach all parties to the dispute and liaise with and assist the parties in identifying, choosing and retaining a suitable evaluator, if not already done.
- 4 In the event that no evaluator can be agreed by the parties within 21 days of commencement of the ENE, the Secretary shall recommend an appropriate individual from lists maintained by him or otherwise. If any party rejects the recommended individual then the ENE will be deemed to have failed and the Secretary shall write to all involved Parties stating that that ENE stage has been terminated on the date of his letter.

### **Exchange of Information**

- 5 Following appointment of an evaluator, each party will prepare the following documents:
  - (a) a concise summary ("the Case Summary") of its case in the dispute; and
  - (b) all documents to which the summary refers and any others to which it considers to be relevant to the evaluation ("the Evaluation Documents").

Unless the evaluator specifies otherwise, each Case Summary should be limited to 15 pages.

- 6 The evaluator will specify the date for exchange of submissions and the parties will exchange the Case Summary and Evaluation Documents with each other on that date. Copies shall be sent directly to the evaluator on the same date.
- 7 Within seven days of the receipt by him of the Case Summaries and Evaluation Documents the evaluator shall notify the parties of any further submissions he requires before making the evaluation including any questions he requires the parties to answer, the date for provision of such further submissions and if necessary the time for an oral hearing. The evaluator need not hold an oral hearing if he considers it unnecessary.

### **The Evaluation**

- 8 The evaluator where appropriate, will:
- (a) read each Case Summary and all the Evaluation Documents sent to him;
  - (b) determine whether any further submissions are required by him and whether an oral presentation from the parties would assist him;
  - (c) provide a written statement of his evaluation of the dispute
  - (d) facilitate the drawing up of any settlement agreement;
  - (e) be bound by the terms for the appointment of an evaluator agreed with the parties; and
  - (f) abide by the terms of this Chapter E.
- 9 Any oral hearing will take place at the place and time stated by the evaluator who will chair and determine the procedure for the hearing. No recording or transcripts of the hearing will be made. Unless the evaluator orders otherwise each party shall be limited to one submission of up to one hour. The evaluator may require the parties to answer questions posed by him.
- 10 Within seven days of any hearing or confirmation from the evaluator that there will be no hearing, or such other date as the parties and the evaluator shall agree, the evaluator shall provide a written statement of his evaluation to all parties. The evaluation will state, on the basis of the information provided to him:
- (a) the evaluator's assessment of the dispute, the background and each party's arguments in respect of the facts;
  - (b) the evaluator's conclusions on, or his best estimate of, the likely outcome of the case and the merits of each party's case;
  - (c) the key issues or facts which the evaluator identifies as influencing the likely outcome of the case; and
  - (d) at his discretion, any suggestions on a fair or appropriate settlement of the dispute as between the parties.
- 11 No party shall be bound to adopt the views expressed, or accept the advice provided, by the evaluator.

### **Settlement Agreement**

- 12 Any settlement reached in connection with the ENE will not be legally binding until it has been recorded in writing and signed by the parties.

### **Confidentiality**

- 13 The evaluation is and shall be kept confidential.
- 14 The parties, their representatives and advisers, the evaluator and the Secretary shall keep confidential all Documents, submissions, statements and other information disclosed in the ENE, including any agreement for the settlement of the dispute, except when and insofar as disclosure is necessary:

- (a) to implement or enforce the agreement for settlement of the dispute; or
  - (b) to comply with an obligation to disclose owed to any financial associate of the party making the disclosure or any obligations at law.
- 15 Its use in the ENE shall not affect the extent to which any Document, submission, statement or other information disclosed in the ENE is admissible or subject to disclosure or production (or, in Scotland, recoverable by commission and diligence under section 1 of the Administration of Justice (Scotland) Act 1972 or otherwise) in any subsequent arbitration, legal or other proceedings involving the parties.
- 16 The evaluator's evaluation shall be treated as being on the same basis as without prejudice negotiations in an action in the courts.

### **Costs**

- 17 Unless the parties otherwise agree, each party shall bear its own costs of the ENE. The parties shall share equally the evaluator's fees and expenses, the costs of his appointment and all other administrative costs of the procedure.

### **Termination of the ENE**

- 18 The ENE shall terminate upon the earliest of:
- (a) the occurrence of the events in Rule E4;
  - (b) the service by one party to the ENE on the others and on the evaluator of a notice of withdrawal from the ENE;
  - (c) withdrawal of the evaluator from the ENE; or
  - (d) provision of the evaluation to the parties.
- 19 Upon termination any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of the termination and its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the Secretary of its intention to refer the matter to another dispute resolution process (unless such other process has already been commenced) within 28 days of termination, the claim shall be deemed to have been withdrawn.

### **Exclusion of liability**

- 20 None of the Allocation Chair, the Secretary or any evaluator shall be liable to any party for any act or omission (including negligence) in connection with any ENE under these Rules unless the act or omission is shown to have been in bad faith.

### **Jurisdiction and governing law**

- 21 ENEs shall take place in such location as the parties agree (or in default of agreement at such place as the evaluator specifies being appropriate for all parties and himself). Unless otherwise agreed by the parties, evaluations shall be subject to English law, except where the Underlying Contract has arisen confers permission to use railway assets situated entirely in Scotland or the Underlying Contract in question is governed by Scottish law, in which case the ENE shall be subject to Scottish law. For the purposes of this Rule E21, where a single Underlying Contract confers permission to use track in both Scotland and England, the railway



assets in question shall be treated as being situated partly in Scotland and partly in England.

**Evaluator barred from further proceedings**

- 22 The evaluator shall not be entitled to act in any capacity in relation to the subject matter of the ENE in which he acted as evaluator in any subsequent arbitration, legal or other similar proceedings.

## **CHAPTER F – DETERMINATIVE PROCESS RULES – ARBITRATION**

- 1 Arbitration under these Rules is a private determinative dispute resolution process subject to the Arbitration Acts in which a neutral arbitrator determines the dispute on the basis of the parties' respective legal rights in accordance with the evidence and argument presented to him.

### **Disputes to be decided by arbitration**

- 2 Any dispute which the parties to the dispute have agreed shall be submitted to arbitration under these Rules or which has otherwise been allocated to arbitration as a first, second or appeal stage dispute resolution process in accordance with these Rules, shall proceed according to the Rules of this Chapter F.
- 3 Any arbitration under these Rules shall proceed before a sole arbitrator.

### **Beginning an arbitration and appointing the arbitrator**

- 4 Upon commencement of an arbitration (in accordance with the Procedure Agreement and Rule B17 or otherwise), the Secretary shall promptly approach all Dispute Parties and liaise with and assist the parties in identifying, choosing and retaining a suitable arbitrator, if not already done.
- 5 In the event that no arbitrator can be agreed by the parties within 21 days of the commencement of the arbitration, the Secretary shall propose an appropriate individual, from lists maintained by him and published on the access disputes website, or otherwise. That individual shall be appointed by the parties as arbitrator unless any party notifies the Secretary of a challenge to the appointment on the ground of (real or apparent or potential) bias, Conflict of Interest or a lack of competence within 5 days of notification of the Secretary's choice. If any challenge is made on the ground of bias, Conflict of Interest or lack of competence, the Allocation Chair shall consider the challenge and determine either to:
  - (a) uphold the proposed appointment; or
  - (b) remit the choice to the Secretary with directions concerning how a further choice should be made.

Nothing in this Rule F5 shall affect the power of an arbitrator to determine his own jurisdiction or appointment.

### *Notice of arbitration*

- 6 Upon the appointment of an arbitrator, the Secretary shall send to all the parties to the dispute a notice of the appointment of the arbitrator. The Secretary shall also send to the arbitrator a copy of:
  - (a) this Chapter F and Chapters A, B and C;
  - (b) any template terms for appointment of an arbitrator issued by the Committee;
  - (c) the Notice of Dispute;
  - (d) any statements from the parties made under Rule B7(d)9(d)(iii); and
  - (e) any correspondence from the Allocation Chair made under Rule B15

The Notice of Dispute shall stand as a notice of arbitration and no further notice of arbitration shall be required or served.

### *Change of arbitrator*

- 7 If any arbitrator acting or appointed to act under these Rules resigns, withdraws, dies or refuses to act, the Secretary shall, upon application by the arbitrator or any Dispute Party, on proof satisfactory to the Secretary, declare the position of arbitrator vacant.
- 8 If the arbitrator or any Dispute Party considers that the arbitrator is unable by reason of mental or physical infirmity to perform the duties of his position as arbitrator or is disqualified for any reason from performing those duties, or has delayed unreasonably in the conduct of the arbitration or in the making of any award, the Secretary may, at the request of the arbitrator or any Dispute Party, having heard the arbitrator and the parties if they or any of them wish to be heard, declare the position of arbitrator vacant.
- 9 Where the position of arbitrator shall have been declared to be vacant pursuant to Rule F7 or F8, then Rule F4 shall apply to the appointment of a replacement arbitrator.

### **Procedure**

#### *General*

- 10 The arbitrator shall act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case and dealing with facts raised by his opponent.
- 11 The arbitrator shall adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense to provide a fair means for the resolution of the matters falling to be determined in accordance with each party's rights at law to a fair trial. The arbitrator may give appropriate directions as to any or all aspects of the procedures to be followed and shall have the power at any time to make or amend the procedure (and the directions) to be followed by the parties in the arbitration. The directions shall be in accordance with the Principles.
- 12 Subject to Rule F13, an arbitration shall include an oral hearing which is appropriate in length and content for the just and expeditious determination of the dispute.
- 13 The parties may agree that an arbitration shall be conducted on the basis of written representations only. In such a case, nothing in this Rule shall prevent the arbitrator from requiring one or more oral hearings if he considers it appropriate for the just and expeditious determination of the proceedings.
- 14 Unless the arbitrator rules otherwise (either on his own motion or upon the application of any party), the following timetable and procedure shall apply:
  - (a) within 21 days of the notice of appointment of the arbitrator, the claimant(s) shall serve upon the arbitrator and each other party a written statement of its claim. The statement of claim shall specify all relevant facts and matters and contentions of law (if any, and naming the principal authorities) on which the claimant relies (or admits or denies) and the relief and remedies sought;
  - (b) within 21 days of service by the claimant of the statement of its claim, the other party(s) shall serve upon the arbitrator and the claimant(s) a written statement of its defence (in Scotland, answers). The statement of defence shall specify the defence and all relevant facts and matters and contentions of law (if any, naming the principal authorities) on which the respondent relies (or admits or

denies). The statement of defence may set out any counterclaim which the respondent wishes to make;

- (c) the statements of case served pursuant to sub-paragraphs (a) and (b) above shall be accompanied by copies of any Documents referred to in them or upon which the party serving the statement wishes to rely. That party shall, if so requested, make the originals of such Documents available for inspection by the arbitrator or the other party;
- (d) after service by the respondent of its statement of defence (in Scotland, answers), the arbitrator may:
  - (i) allow the parties an adjustment period within which to adjust the written statements of case so that each material averment of the parties shall be answered (whether by admission, denial, explanation or otherwise). On the expiry of the adjustment period, the statements of case shall be finalised and within seven days thereafter the claimant(s) shall reproduce the statements of case, as adjusted, into a single document (in Scotland, the closed record) and send 2 copies to each of the arbitrator and the other parties to the arbitration; or, alternatively; and/or
  - (ii) within seven days of the service by the respondent of its statement of defence (in Scotland, answers), allow a reply from the claimant(s) limited to responding to new matters and contentions of law raised in the statement of defence (in Scotland, answers) including any counterclaim raised;
- (e) within seven days after the statements of case have been finalised, the arbitrator shall (in consultation with the parties) set a hearing date and the estimated length of the hearing;
- (f) within 21 days after the statements of case have been finalised, each party shall serve upon the arbitrator and the other party signed statements of any factual witnesses upon whose evidence it wishes to rely, together with any copies of Documents referred to in them not already in the possession of the other party. That party shall, if requested to do so, make the originals of such Documents available for inspection by the arbitrator or the other party;
- (g) at least seven days before the hearing, each party shall serve on the other and on the arbitrator its written submissions;

15 Unless ordered otherwise by the arbitrator, at the hearing:

- (a) there shall be no oral opening submissions, but the arbitrator may ask the parties questions arising out of their written submissions or statements of case;
- (b) subject to sub-paragraph (iii) below, the testimony of a witness may be presented in written form, either as a signed statement or as an affidavit duly sworn, provided Rule 14(f) has been complied with. Any party may apply to the arbitrator for an order that any witness whose written statement or affidavit is to be relied upon by a party should attend for oral examination at a hearing and the arbitrator shall make such order unless, having heard the parties, he is satisfied that such oral examination is not likely to assist him in making his award. If a witness is ordered to attend and fails to do so, the arbitrator may:
  - (i) place such weight on the written statement or affidavit as he thinks fit;

- (ii) exclude it altogether; or
- (iii) apply to the court for an order for the citation or attendance of witnesses;

In addition, in making his determination on Costs the arbitrator may take any failure to attend into account;

- (c) factual or expert witnesses who give oral evidence will not be required to provide their evidence in full orally. The parties may cross-examine witnesses on oath or affirmation to the extent permitted by the arbitrator;
- (d) the parties may make oral closing submissions;
- (e) the parties may be legally represented; and
- (f) the arbitrator shall be entitled to receive such evidence as he shall consider relevant, whether or not such evidence would have been admissible in a court of law; and
- (g) the arbitrator shall deliver to the parties a reasoned award within 21 days of the end of the hearing.

#### *Proposed amendments*

- 16 Immediately after his appointment, the arbitrator shall require each party to propose directions to him or to inform him of any amendments to the procedure or the time limits set out in Rule F14 which it considers appropriate (whether because more than two parties will be involved or otherwise). Each party shall send promptly any proposed directions or amendments to the arbitrator and each other party. Before responding or ordering any amendments to the procedure, the arbitrator may require the parties to meet him.

#### *References to the ORR*

- 17 The arbitrator may, on the application of either party or on his own motion, elect to refer any issue or issues to which Rule C3 applies, to the ORR in accordance with Chapter C. Before making any such reference the arbitrator shall:
  - (a) seek submissions from all Dispute Parties on whether a reference should be made and if so the wording of such a reference; and
  - (b) determine the wording of any reference to be made with due regard to such submissions.

#### *Supplemental*

- 18 If he considers it appropriate for the just and expeditious determination of the proceedings, the arbitrator shall be entitled to appoint one or more advisers, assessors or experts on any matter (including matters of law) to report to him on any specific issue. The costs of any such person shall be subject to the provisions of Rule F29. The arbitrator shall provide to the parties the terms of reference, qualifications and experience of any adviser or assessor appointed. Where the arbitrator receives a report from any such person, he shall disclose the report to the parties and afford them an opportunity to comment on it.
- 19 In relation to the production of Documents:

- (a) the arbitrator may, on the application of a Dispute Party, require the production of such specific identified Documents or class of Documents as are within the possession, custody or control of another Involved Party or any third party which the arbitrator considers relevant. The Dispute Parties shall be given the opportunity to inspect and to comment upon any Document so produced;
- (b) if any Document is not supplied to the arbitrator and the other party within such time as the arbitrator shall prescribe, the arbitrator may:
  - (i) proceed with the arbitration on the basis of the Documents already before him;
  - (ii) apply to the Court for an order to produce the Documents; or
  - (iii) strike out (in Scotland, dismiss) the part of the claim or defence to which the Document relates,

and in making his award the arbitrator shall be entitled to draw inferences as he may think fit from the failure to supply the Document. In addition, in making his determination on Costs the arbitrator may take any failure to supply a Document at any stage in the proceedings into account;

- (c) no party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts;
- (d) unless otherwise ordered by the arbitrator, an application by a party to the arbitrator pursuant to sub-paragraph (a) above shall be made not later than 21 days before the date fixed for the hearing; a party in receipt of a request from the arbitrator to produce a Document shall comply with such a request within 14 days;

20 Without prejudice to the powers in Rule A16 and in addition to them, the arbitrator shall have power to strike out (in Scotland, dismiss) part or all of any claim or defence made in the proceedings on any one or more of the following grounds:

- (a) wilful breach of these Rules;
- (b) deliberate non-compliance by a party with any order of the arbitrator; or
- (c) inordinate or inexcusable delay on the part of any party, where such act or omission has, in the opinion of the arbitrator, given rise to a substantial risk that a fair determination of the dispute will not be possible, or which is such as to cause or to have caused serious prejudice to the other party.

21 Without prejudice to the powers in Rule A16 and in addition to them, the arbitrator shall have power to strike out (in Scotland, dismiss) part or all of any claim or defence made in the proceedings if he is satisfied that the claim or defence or any part of it is scandalous, frivolous or vexatious.

22 Without prejudice to the powers in Rule A16 and in addition to them, if any Dispute Party fails to serve a Statement of Case within the period allowed under these Rules or by order of the arbitrator, and fails to remedy his default within 14 days after despatch to him by the arbitrator or any other party to the dispute of notice of that default, the arbitrator shall be entitled to rule that he shall be treated as having abandoned his claim or defence (as the case may be) and, having made such a ruling, the arbitrator shall be entitled to proceed with the reference on a without notice basis.

- 23 Any party who becomes aware that any provision or requirement of these Rules has not been complied with and who fails to state an objection to that failure within a reasonable time shall be deemed to have waived the right to object.

### **Awards**

#### *Final and binding*

- 24 Awards shall be final and binding on the Dispute Parties subject to:
- (a) the provisions (including rights of appeal) of the Arbitration Acts and any other relevant law and
  - (b) the provisions of any agreement between the parties to the dispute, the relevant Access Conditions, and any further right of appeal or reference to another dispute resolution process provided for in the Procedure Agreement.
- 25 If any further dispute resolution process is provided for in the Procedure Agreement then any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the Secretary of its intention to refer the matter to such further dispute resolution process within 28 days of the final award, the final award shall be deemed to have been accepted by all parties.

#### *Power to make orders*

- 26 Subject to any other provision of the Access Conditions and Underlying Contract, the arbitrator may make such orders in his award as he considers necessary to resolve the dispute, including, without limitation, that:
- (a) one party shall pay an amount of money (including damages) to another party, whether that amount is specified in the determination or calculated in accordance with such procedure as the arbitrator shall specify;
  - (b) one Dispute Party should take or not take specified action;
  - (c) the meaning of an agreement or a party's obligations under that agreement are as stated in the determination; or
  - (d) any principal sum the arbitrator may order one party to pay to another shall carry interest at such rate and over such period as he shall determine.

#### *Issue of arbitration award*

- 27 The arbitrator shall send a copy of his award to the parties, the Allocation Chair and the Secretary.

### **Costs**

#### *Discretion to order payment of Costs*

- 28 Whether or not the arbitration reaches the stage of a final award, the arbitrator may order any party to pay some or a specified proportion of any party's Costs incurred in the arbitration, assessed in such manner as the arbitrator shall determine. The arbitrator may make such an order without limitation following any interim or final award.

*Joint and several liability of parties to arbitrators for fees and expenses*

- 29 The Dispute Parties are jointly and severally liable to pay the arbitrator's reasonable fees and expenses.

**Confidentiality**

- 30 Subject to the provisions of Rule C and Rules F31, F32 and G68, all Documents produced or disclosed in the course of an arbitration including all awards shall be treated as confidential by the arbitrator, the Allocation Chair, the Secretary and all parties and shall not be published.

- 31 Unless otherwise agreed by all parties, all Documents produced or disclosed in the course of an arbitration including all awards shall only be used:

- (a) for the purposes of the arbitration, including any appeal against the arbitration award (or, in Scotland, any application under Section 3 of the Administration of Justice (Scotland) Act 1972), or for judicial review, in respect of the award or any subsequent stages of the determination procedure;
- (b) for enforcing the arbitration award; or
- (c) in support of a plea of estoppel (or, for arbitrations taking place in Scotland, of res judicata) in any subsequent proceedings.

- 32 The confidentiality obligations under Rule F30 shall not apply to Documents which are:

- (a) agreed in writing by all the Dispute Parties to be disclosed (including in any Underlying Contract between them);
- (b) made available to the advisers or financial associates of the party in question, upon obtaining an undertaking of strict confidentiality from such persons;
- (c) disclosed on a confidential basis to the ORR or the appropriate franchising authority in the normal course of business; or
- (d) required to be disclosed pursuant to the order of a court of competent jurisdiction.

**Communications**

- 33 Communications for the purposes of the arbitration may be by telephone or email (or such other means as is appropriate) and where by telephone shall be confirmed in writing wherever possible.

**Exclusion of liability**

- 34 None of the Allocation Chair, the Secretary or any arbitrator shall be liable to any party for any act or omission (including negligence) in connection with any arbitration under these Rules unless the act or omission is shown to have been in bad faith.

**Jurisdiction and governing law**

- 35 Arbitrations shall take place in England or Wales and be subject to English law, except where the Underlying Contract in respect of which the dispute has arisen confers permission to use railway assets situated entirely in Scotland or the Underlying Contract in question is governed by Scottish law, in which case the



arbitration shall take place in Scotland and be subject to Scottish law. In either case the arbitrator may order otherwise. For the purposes of this Rule F35, where a single access agreement confers permission to use track in both Scotland and England, the railway assets in question shall be treated as being situated partly in Scotland and partly in England.

**Interim relief granted by the Court**

- 36 In an appropriate case, a party to a dispute which has been or may be submitted to arbitration may apply to the Court for interim relief (whether negative or positive), notwithstanding that the relief sought may overlap with the interim relief which is, or may be, claimed in the arbitration.

## **CHAPTER G – DETERMINATIVE PROCESS RULES – ACCESS DISPUTE ADJUDICATION**

- 1 An Access Dispute Adjudication (ADA) under these Rules is a determinative dispute resolution process in which, with the benefit of advice from independent railway Industry Advisors, a Hearing Chair determines the dispute in a timely and efficient manner on the basis of the parties' respective legal rights in accordance with the evidence and argument presented to him.

### **Disputes to be decided by ADA**

- 2 Any dispute which is to be submitted to an ADA under these Rules shall proceed according to the Rules of this Chapter G.
- 3 Any ADA under these Rules shall proceed before a Hearing Chair and a number of Industry Advisors to be determined by the Hearing Chair in light of the issues in the dispute and/or its value or complexity. Unless otherwise ordered by the Hearing Chair the normal number of Industry Advisors shall be two.
- 4 An ADA shall:
- (a) provide determinations as an adjudication body with relevant railway expertise;
  - (b) endeavour to reach fair, rapid and inexpensive determinations of disputes drawing on that expertise;
  - (c) where appropriate, take the initiative in ascertaining the facts and law relating to the dispute; and
  - (d) balance the formality required to achieve a fair and efficient process with the accessibility required so that the process is quick and easy to use.
- 5 It is an overriding objective of these Rules that disputes referred to an ADA shall be administered in a way which is proportionate to:
- (a) the objective importance of the dispute to the Dispute Parties;
  - (b) the complexity of the issues;
  - (c) the significance (if any) of the issues involved to the railway industry; and
  - (d) the scale of any financial claims involved.

Accordingly having regard to Rule G15, the Hearing Chair shall (where appropriate) adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and value.

- 6 The ADA shall, in the case of unavoidable absence on the day of one Industry Advisor, be quorate to hear a dispute with all other selected Industry Advisors and the Hearing Chair present.

### **Beginning an ADA**

- 7 An ADA shall commence upon the date identified in Rule B17.
- 8 The Secretary shall, on any occasion where the next dispute resolution process provided for in the Procedure Agreement is an ADA stage, appoint a Hearing Chair appropriate to the dispute.

9      The Hearing Chair:

- (a)    has oversight of the effective case management of a dispute which has been referred to an ADA in light of the Principles;
  - (b)    has responsibility to ensure that all procedures of the ADA (at and before ADA hearings) are being implemented fairly and effectively in respect of each dispute;
  - (c)    will review each dispute following submission of statements of case to identify and to itemise in written form for consideration by the ADA all relevant issues of law raised by the dispute a copy which shall be provided promptly to the Dispute Parties;
  - (d)    will make a final determination of the dispute referred to the ADA and prepare a written determination which is legally sound, appropriate in form, and otherwise compliant with this Chapter G;
  - (e)    shall ensure that the final determination of the dispute is circulated promptly and (where applicable) in accordance with any mandatory time requirement; and
  - (f)    may, where reasonable to do so, delegate the performance of any of his functions (with the exception of making the determination of the dispute) in any dispute to the Secretary, however, such delegation shall not affect the obligations and responsibilities of the Hearing Chair set out in this Rule.
- 10      Upon appointment, the Hearing Chair shall adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense to provide a fair means for the resolution of the matters falling to be determined. The Hearing Chair may give appropriate directions as to any or all aspects of the procedures to be followed and shall have the power at any time to make or amend the procedure (and the directions) to be followed by the parties in the ADA. The directions shall be in accordance with the Principles.
- 11      The directions given under Rule G10 shall expressly require the parties to reconsider whether any third parties not already identified and notified to the Secretary, in accordance with Rule B3(b) or otherwise, may be directly affected by the outcome of the dispute and require the parties to notify the Secretary of the identity of any such parties.
- 12      Provided that such extension has no adverse effect upon the date fixed for an oral hearing, the Dispute Parties may agree an extension of any timescales of up to seven days in respect of any stage. For any period beyond that extension a party may seek an order from the Hearing Chair to provide an extension of time for any of the stages specified in the directions. The Hearing Chair shall make his decisions on any request for an extension of time based upon the Principles.
- 13      Subject to Rule G14, an ADA shall include an oral hearing which is appropriate in length and content for the just and expeditious determination of the dispute. In relation to disputes referred under Part J of the Network Code, the oral hearing shall be fixed by the Hearing Chair as soon as practicable after his/her appointment and shall take place, unless exceptional circumstances apply, within 14 days of completion of service of the statements of case referred to in Rules G16(a)-(c) below.

- 14 The parties may agree that an ADA shall be conducted on the basis of written representations only. In such a case, nothing in this Rule shall prevent the Hearing Chair from requiring one or more oral hearings if he considers it appropriate for the just and expeditious determination of the proceedings.
- 15 The ADA process is flexible and may be adapted by the Hearing Chair to accommodate disputes of differing complexity and size and requiring different levels of evidence. The Hearing Chair shall therefore actively consider whether variations on the standard directions (which are for a straightforward matter) set out in Rule G16 are appropriate or justified and will have regard to the submissions of the parties in this respect.
- 16 Subject to Rule G15, unless the Hearing Chair directs otherwise (and subject to any party's right to apply for alternative or revised directions at all stages), the following timetable and procedure shall apply:
- (a) subject to Rule 16(h), within 14 days of the appointment of the Hearing Chair, the claimant(s) shall serve upon the Secretary and each other Involved Party, a written statement of its claim in accordance with the template format for a statement of claim (found on the access disputes website) as may be adapted by the Hearing Chair in respect of a particular dispute. The statement of claim shall include the following:
- (i) names, registered address and any relevant correspondence address (including email address) of the Dispute Parties;
  - (ii) the subject matter of the dispute;
  - (iii) identification of the provision(s) of the Underlying Contract under which the reference is made;
  - (iv) identification of any other provision(s) of the Underlying Contract or other contract(s) which the claimant believes are also relevant to the dispute;
  - (v) a summary of the nature and circumstances of the dispute in sufficient detail for the other Dispute Party to identify the issues raised;
  - (vi) the decision sought from the ADA;
  - (vii) the remedy claimed;
  - (viii) an authorised signature of the referring party; and
  - (ix) copies of the following Documents which shall be annexed and cross referenced to the statement:
    - (A) the relevant extracts of contractual Documents containing the provision(s) under which the referral to the ADA arises and/or provision(s) associated with the substance of the dispute; and
    - (B) any other Documents referred to in the reference.
- (b) subject to Rule 16(h), within 14 days of service by the claimant of the statement of its claim, the other party(s) shall serve upon each other Involved Party a written statement of its defence (in Scotland, answers). The statement of defence shall be in accordance with the template format for a statement of

defence (found on the access disputes website) as may be adapted by the Hearing Chair in respect of a particular dispute and shall include the following:

- (i) a schedule identifying those parts of the statement of claim that it agrees with and those that it disagrees with;
- (ii) the reasons for any disagreement including any further references to provisions of the Underlying Contract or other contract(s) not dealt with in the reference;
- (iii) details of any other related claim;
- (iv) the decision (and, if relevant) any remedy sought from the ADA;
- (v) an authorised signature of the responding party; and
- (vi) copies of the following Documents which shall be annexed and cross referenced to the response if not dealt with in the statement of claim:
  - (A) the relevant extracts of contractual Documents containing the provision(s) under which the referral to the ADA arises and/or provision(s) associated with the substance of the dispute; and
  - (B) any other Documents referred to in the defence.
- (c) the claimant(s) may within seven days of the service by the respondent of its statement of defence (in Scotland, answers), serve upon each Involved Party a reply limited to responding to new matters and contentions of law raised in the statement of defence (in Scotland, answers) and any counterclaim or related claim raised;
- (d) following service of the reply, the Secretary shall write to all parties to inform them that a hearing date will be set in accordance with (e) below and to inquire whether any party intends to make an application for alternative or varied directions and/or a directions hearing at this stage;
- (e) except in relation to a dispute arising under Part J of the Network Code, before the date 14 days after the statements of case referred to in paragraphs (a)-(c) have been finalised, the Secretary shall agree with the Hearing Chair and the parties a hearing date and the estimated length of the hearing. If a date cannot be agreed with one or more parties the Hearing Chair shall determine the hearing date. Unless the parties agree otherwise, or the Hearing Chair determines otherwise having due regard to Rule G15, the hearing date shall be within 35 days of the date on which it is agreed or determined in accordance with this Rule. Upon agreement or determination of a hearing date, the Secretary shall write to all Involved Parties to confirm the date to them;
- (f) the Hearing Chair may raise any questions relating to the dispute he wishes in advance of the hearing. In particular the Hearing Chair shall consider whether any additional third party should be or should have been notified of the dispute subsequent to Rule B3(b) or otherwise and may ask the parties to justify their decision not to notify any such party. If any Industry Advisor or assessor raises a question, the Hearing Chair may in his absolute discretion refer such question to the parties;

- (g) at least seven days before the hearing, each Dispute Party shall serve on all other Involved Parties its written submissions for the hearing and any additional information or responses to questions requested by the Hearing Chair.
  - (h) for disputes referred under Part J of the Network Code the timeframes set out in Rules G16(a) and G16(b) shall be reduced to 7 days.
- 17 At any stage prior to the date on which the Secretary writes to inform the Involved Parties of the date of the hearing, in accordance with Rule G16(e) or otherwise, any third party made aware of the dispute subsequent to Rule B3(b) or otherwise can by notification to the Secretary request to become a claimant, defendant or interested party in the dispute. Any Involved Party which has not requested to become a claimant, defendant or interested party in the dispute by this point shall cease to be an Involved Party.
- 18 Any third party which has not been made aware of the dispute subsequent to Rule B3(b) or otherwise can by notification to the Secretary request to become a claimant, defendant or interested party in the dispute at any stage prior to the final hearing. Unless the request seems to him vexatious or frivolous (in which case he shall request that the Hearing Chair determine appropriate directions) upon receiving such a request, the Secretary shall send copies of the Notice of Dispute and all statements of case to the third party making the request subject to a requirement that that party keep such Documents confidential.
- 19 Any request to become a claimant, defendant or third party in accordance with Rule G17 or 18 shall be considered and determined by the Hearing Chair having considered such submissions and evidence as he shall request. In making his decision the Hearing Chair shall take into account the Principles, the wider interests of the industry, the balance of interests between all relevant parties and such other matters as appear to him to be relevant.

*References to the ORR*

- 20 The Hearing Chair may, on the application of any party or on his own motion, elect to refer any issue or issues to which Rule C3 applies, to the ORR in accordance with Chapter C. Before making any such reference the Hearing Chair shall:
- (a) seek submissions from all Dispute Parties on whether a reference should be made and if so the wording of such a reference; and
  - (b) determine the wording of any reference to be made with due regard to such submissions.

**Length of References, Responses and Joint References and method of service**

- 21 The length of every Statement of Case shall be in proportion to the nature and complexity of the dispute. Unless otherwise agreed by the Hearing Chair the maximum length of submissions shall be as follows:
- (a) a statement of claim or defence shall be no longer than 20 pages; and
  - (b) a reply shall be no longer than 10 pages.
- 22 The normal method of service shall be electronic to the Secretary and other Involved Parties.

### **Directions Hearing**

- 23 The Hearing Chair, if necessary, may at any time (on his own motion or that of any party) require the Dispute Parties to participate in a directions hearing to decide, after hearing representations from the Dispute Parties, any issues relating to the procedures adopted for the dispute including:
- (a) whether further or additional third parties should be notified of the dispute;
  - (b) the procedures most appropriate to the dispute;
  - (c) the nature of the issues in dispute;
  - (d) whether any matters are to be referred to the ORR under Rule G20 or otherwise;
  - (e) an outline timetable;
  - (f) the process and details of the preparation, submission and amendments of statements of case;
  - (g) whether any Document disclosure procedures shall take place;
  - (h) whether the parties shall be permitted to bring expert evidence and if so the details of such expert evidence;
  - (i) the basis and timings for which witness evidence (if any) is to be prepared and exchanged; and/or
  - (j) the appointment by the ADA of assessors.

### **Documents**

- 24 Although Documents reasonably requested should be provided in compliance with the directions specified at Rule G16, disclosure will not ordinarily be ordered. However the Hearing Chair, whether or not on the application of any party and having due regard to Rule G15, has the power to:
- (a) order any Dispute Party to provide by way of formal disclosure and inspection, Documents which it controls and which are relevant to the dispute; and
  - (b) specify the formalities, detail and timings involved.

The Hearing Chair shall exercise this power in accordance with the Principles.

- 25 No party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts.
- 26 Requests and applications to the Hearing Chair for disclosure may be made at any stage of the dispute but (whenever practicable) should be made at the time of or shortly following submission of the relevant Statement of Case giving rise to the request. The timing of any request (by reference to the date when it could first reasonably have been made) may be taken into account by the Hearing Chair when considering a request.
- 27 Without prejudice to any other action open to the Hearing Chair, the Hearing Chair shall be entitled to draw any inference he wishes from any failure to provide adequate or full disclosure by any party or disclosure in accordance with the terms of directions given by him.

- 28 When considering a request for disclosure, the Hearing Chair will consider the commercial sensitivity of the information requested and may exercise his discretion not to grant full disclosure.

### **Witness evidence**

- 29 Subject to any alternative direction from the Hearing Chair, a Dispute Party may rely on any witness evidence it believes to be relevant in its statements of case and at any ADA hearing provided that either a witness summary or a witness statement has been served on all other Involved Parties at least seven days before the hearing.
- 30 A witness summary shall identify in overview the issues on which the witness will give evidence and a summary of the evidence he will give in respect of each such issue. Witness summaries shall be signed by the witness.
- 31 Written witness statements will not normally be required. However if the Hearing Chair permits or requires witness statements to be submitted he shall specify the formalities, detail and timings involved.

### **Experts**

- 32 A Dispute Party can rely, as of right, upon expert evidence completed prior to the date of the reference. Where a Dispute Party wishes to exercise this right it shall attach such evidence to its first Statement of Case and the other Dispute Parties shall be entitled to a direction that they may commission expert reports responding to the particular issues covered by such evidence.
- 33 When considering whether and to what extent to permit the Dispute Parties to commission further expert reports, the Hearing Chair shall consider what evidence is reasonably required to determine the dispute, the Principles and Rule G15.
- 34 The reports of experts shall state:
- (a) the full remit against which the report has been prepared;
  - (b) the identity, qualifications and experience of the person(s) preparing the report;
  - (c) the extent (if any) to which the expert has previously been involved in the subject matter of the dispute and current or recent professional connections with any of the Dispute Parties.

- 35 At any hearing the Hearing Chair, Industry Advisors, or any assessor appointed, may address questions directly to any experts.
- 36 The Hearing Chair shall determine in accordance with the specific requirements of the dispute whether the expert evidence is dealt with either by consideration of reports only or by the attendance and examination of one or more of the experts to answer questions upon their reports, by telephone, conferencing facilities or by any other means.

### **Assessors**

- 37 The Hearing Chair may appoint one or more assessors to facilitate the determination of a dispute. Any such assessor may be (without limitation):
- (a) a technical assessor with a specific area of expertise relevant to one or more issues in the dispute; and/or



(b) a legal assessor.

38 Assessors may help undertake the procedural management of the dispute and prepare such report(s) and guidance on such issues as the Hearing Chair may direct.

39 The Hearing Chair shall provide to the Dispute Parties the terms of reference, qualifications and experience of any assessor appointed and a summary of his advice.

40 The Hearing Chair shall not be bound by the views of an assessor but shall be required to explain his reasons for disagreeing with those views.

### **Hearing Conduct**

41 The hearing will be chaired by the Hearing Chair.

42 Subject to any contrary direction of the Hearing Chair with due regard to Rule G15, the following procedure will be adopted at hearings:

(a) the Hearing Chair, Industry Advisors and any assessor will meet in the absence of the Dispute Parties to discuss issues arising from the papers submitted by the Dispute Parties;

(b) the Hearing Chair, Industry Advisors and any assessor will confirm to the Dispute Parties the extent to which they have read the papers submitted by them;

(c) the claimant's representative will make an opening submission of its case of not longer than 10 minutes, referring if necessary to witness or expert evidence which the claimant wishes the Hearing Chair and Industry Advisors to consider;

(d) the respondent's representative will also make any opening submission of its response and/or counterclaim of not longer than 10 minutes, referring if necessary to additional witness or expert evidence which the respondent wishes the ADA to consider;

(e) if a written witness statement has been provided, the witness will not be required to read out his statement unless the Hearing Chair decides otherwise. If any witness summary has been provided the Hearing Chair shall direct how the evidence shall be admitted and may require the witness to provide his evidence in full orally before cross examination;

(f) if expert evidence is used, the expert will not be required to read out his report unless the Hearing Chair decides otherwise;

(g) the Hearing Chair and Industry Advisors and any assessor may put any relevant questions to the representatives, witness(es) and expert(s);

(h) Dispute Parties may put questions to any witness(es) or expert(s) in their capacity as witnesses or experts, and when any representative is acting as a witness he shall make that clear; and

(i) at the conclusion of questions, representatives may make closing submissions of not more than 10 minutes.

43 The hearing shall be conducted with the Dispute Parties present. Following conclusion of the submissions, the Dispute Parties will withdraw to allow the

Hearing Chair and Industry Advisors to consider the evidence and arguments with any assessor. The Dispute Parties shall remain available to allow the Hearing Chair, Industry Advisors and any assessor to put any additional questions.

- 44 The Secretary will unless otherwise directed by the Hearing Chair make a full note of the evidence given to the ADA. The Hearing Chair may in his discretion direct in advance that a full transcript is taken.
- 45 The Hearing Chair may, subject to any specified requirements of the Access Conditions or Underlying Contract and legal requirement, reserve his determination until a later date.

### **Determinations**

- 46 Having considered the submissions of the parties and the advice of the Industry Advisors and any assessor the Hearing Chair shall make a determination of the dispute in accordance with Rule G47.
- 47 Subject to any other provision of the Access Conditions and Underlying Contract, the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute including, without limitation, that:
  - (a) one Dispute Party shall pay an amount of money (including damages) to another Dispute Party, whether that amount is specified in the determination or calculated in accordance with such procedure as the Hearing Chair shall specify;
  - (b) one Dispute Party should take or not take specified action;
  - (c) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination; or
  - (d) any principal sum the Hearing Chair may order one party to pay to another shall carry interest at such rate and over such period as he shall determine.
- 48 The Hearing Chair's determination of a dispute shall be in writing and comprise:
  - (a) the date of the hearing;
  - (b) the names of the Hearing Chair and Industry Advisors and any assessors present;
  - (c) details of all Dispute Parties (including interested parties);
  - (d) details of the attendance and status of all witnesses and interested parties;
  - (e) a brief summary of the dispute;
  - (f) an identification of the issues of fact and law considered by the Hearing Chair;
  - (g) a summary of the evidence presented;
  - (h) the findings of fact made by the Hearing Chair;
  - (i) identification of any precedents considered;
  - (j) the decisions and conclusions reached, distinguishing clearly between:

- (i) decisions upon legal entitlement;
    - (ii) decisions upon remedy;
    - (iii) guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy;
  - (k) the reasons for those decisions and conclusions (including any relevant legal principles or rules of law applied); and
  - (l) the signed and dated confirmation of the Hearing Chair that the determination is legally sound and appropriate in form.
- 49 The Hearing Chair shall provide a copy of his written reasoned determination to all the Dispute Parties. Where a dispute has arisen in connection with Condition J10.14.1 of the Network Code, the Hearing Chair shall deliver his reasoned written determination within ten working days of final submission to the ADA of all relevant information.
- 50 Except as otherwise provided in the Underlying Contract and without prejudice to Rule G67, the Dispute Parties shall comply with the terms of the determination within such period as shall be specified in the determination.
- 51 If a Dispute Party fails to comply with the terms of the determination, that failure will be dealt with by way of a new dispute through the appropriate mechanism.

#### **Costs**

- 52 The Committee's fees and expenses including costs of any assessors and transcription services relating to the period up to and including the first day of any ADA Hearing shall not be charged to the parties. The parties at the time of the ADA hearing are jointly and severally liable to pay the Committee's reasonable fees and expenses connected with the ADA relating to the period after the first day of the hearing. Subject to Rule G53, the parties shall pay such fees in equal proportions.
- 53 The Hearing Chair shall have power to order one or more Dispute Party to meet part or all of the Costs or expenses of the ADA and of any other Dispute Party assessed by such means as the Hearing Chair shall determine. Any such order shall be made with due regard to the Principles and to the provisions of these Rules including in particular Rule A16(d).
- 54 An order for costs shall only be made where the Hearing Chair is satisfied that either:
- (a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or
  - (b) the conduct of the relevant Dispute Party before or during the references was such as to justify an award of costs being made against it (or them).

- 55 The Hearing Chair may make such an order at any stage including following any interim or final award.

#### **Confidentiality**

- 56 Subject to Rules G57, G59 and G60, and unless otherwise agreed by all parties, all Documents produced or disclosed in the course of an ADA including the

determination shall be treated as confidential by the Hearing Chair, Panel Members, the Allocation Chair, the Secretary and all parties and shall only be used:

- (a) for the purposes of the ADA, including any appeal or further stage in the determination procedure;
- (b) for enforcing the ADA determination; or
- (c) in support of a plea of estoppel (or, for ADAs taking place in Scotland, of *res judicata*) in any subsequent proceedings.

57 The confidentiality obligations under Rule G56 shall not apply to Documents which are:

- (a) agreed in writing by all Dispute Parties to be disclosed (including in any Underlying Contract between them);
- (b) made available to the advisers or financial associates of the party in question, upon obtaining an undertaking of strict confidentiality from such persons;
- (c) disclosed on a confidential basis to the ORR or the appropriate franchising authority in the normal course of business;
- (d) disclosed pursuant to Rule G59 or 60; or
- (e) required to be disclosed pursuant to the order of a court of competent jurisdiction.

58 Within seven days of its receipt of the determination (or such longer period as the Hearing Chair shall allow), any party to the dispute may give notice to the Hearing Chair and the other parties to the dispute:

- (a) that it objects to the publishing of all or some of the Documents specified in Rule G59;
- (b) whether it considers that the Hearing Chair should exercise his discretion to exclude from publication any part of the determination which relates to its affairs; and
- (c) if confidentiality is sought, its justification for considering that the grounds referred to in Rule G61 do not exist.

59 If no notice under Rule G58 is given within the time specified in that Rule, the Secretary shall publish the following Documents on the access disputes website:

- (a) each finalised Statement of Case (including all exhibits and attachments to such statements of case);
- (b) each request from the Hearing Chair for further information and all responses to such requests;
- (c) all written submissions from all parties; and
- (d) all awards and/or determinations from the Hearing Chair.

60 If any Dispute Party serves a notice in accordance with Rule G58, the Hearing Chair shall be entitled to hear the parties on the question of confidentiality and determine which Documents shall be published and/or whether any aspects of such

Documents should be made illegible or excluded prior to publishing. If any such representations shall have been made to him, unless the parties to the dispute otherwise agree the Hearing Chair shall provide the parties to the dispute with his reasons for making his determination on confidentiality. Such reasons shall be given in writing but shall not be published on the access disputes website.

61 There is a presumption that the Documents identified in Rule G57 shall be published provided that:

- (a) publication will not, in the Hearing Chair's reasonable opinion, result in any material adverse effect on the party or parties objecting to publication; and
- (b) the determination contains a finding or findings of wider railway industry significance; and
- (c) it is just in all the circumstances to decline the objection from the objecting party.

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

#### **Communications**

63 Communications for the purposes of the ADA may be by telephone or email (or such other means as are appropriate) and where by telephone shall be confirmed in writing wherever possible.

#### **Exclusion of liability**

64 None of the Allocation Chair, the Secretary, the Hearing Chair or any Industry Advisor shall be liable to any party for any act or omission (including negligence) in connection with any ADA under these Rules unless the act or omission is shown to have been in bad faith.

#### **Jurisdiction and governing law**

65 ADAs shall take place in England or Wales and be subject to English law, except where the Underlying Contract in respect of which the dispute has arisen confers permission to use railway assets situated entirely in Scotland or the Underlying Contract in question is governed by Scottish law, in which case the ADA shall take place in Scotland and be subject to Scottish law. In either case the Hearing Chair may order otherwise. For the purposes of this Rule G65, where a single access agreement confers permission to use track in both Scotland and England, the railway assets in question shall be treated as being situated partly in Scotland and partly in England.

#### **Interlocutory relief granted by the Court**

66 In an appropriate case, a party to a dispute which has been or may be submitted to ADA may apply to the Court for interlocutory relief (whether negative or positive), notwithstanding that the relief sought may overlap with the relief which is, or may be, claimed in the ADA.

#### **Appeal**

67 Following a determination of a dispute by the Hearing Chair any Dispute Party is entitled to appeal in accordance with any relevant provisions in the Procedure

Agreement. If the Procedure Agreement is silent in respect of a right of appeal then each party shall have a right of appeal to arbitration in accordance with these Rules.

- 68 Any further dispute resolution process to which an appeal is made in accordance with Rule G 67, shall be subject to the confidentiality provisions set out in Rules G56 - G61 as if all Documents disclosed and prepared in relation to that further dispute resolution process had been prepared in respect of an ADA.
- 69 If any further dispute resolution process is provided for in the Procedure Agreement or if a right to appeal to arbitration exists in accordance with Rule G67 then any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the Secretary of its intention to refer the matter to such further dispute resolution process within 28 days of the determination of the Hearing Chair, that determination shall be deemed to have been accepted by all parties.

## **CHAPTER H – DETERMINATIVE PROCESS RULES – TIMETABLING PANEL**

### **Purpose**

- 1 The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an access agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots, in:
  - (a) such an access agreement; or
  - (b) the Access Conditions incorporated by reference in the access agreement in question;

### **The Timetabling Pool**

- 2 The Committee shall establish (and have administered by the Secretary) a pool of panel members for the TTP called the Timetabling Pool. The Timetabling Pool shall be primarily made up of individuals with expertise and experience in train services planning and the timetabling development process including the allocation of capacity which will allow them to understand and advise Hearing Chairs upon Timetabling Disputes.
- 3 Individual members of the Timetabling Pool shall be appointed by the following Bands and Classes:
  - (a) two members by each of the three Bands of the Franchised Passenger Class;
  - (b) two members by each of the two Bands of the Non-Passenger Class;
  - (c) two members by the Non-Franchised Passenger Class; and
  - (d) four members by Network Rail.

The members referred to in (a), (b) and (c) shall be appointed by the method used to elect members of the Class Representative Committee under Part C of the Network Code.

- 4 If the numbers of individuals nominated for appointment under Rule H3 (a), (b) and (c) exceeds the numbers specified then one or more election(s) shall be held as required, in each case in accordance with the relevant provisions of Part C of the Network Code.
- 5 Individual members of the Timetabling Pool shall commit to:
  - (a) sit on any Timetabling Panel when requested to do so by the Secretary subject only to diary commitments;
  - (b) hear disputes impartially in accordance with the Principles.

### **Disputes to be decided by a Timetabling Panel**

- 6 Subject to Rule H7 and 8, any dispute which is to be submitted to a Timetabling Panel under these Rules, shall proceed according to this Chapter H.
- 7 Following service upon the Secretary of the Notice of Dispute in relation to a Timetabling Dispute in accordance with Rule B2, any Involved Party may apply to the Hearing Chair for a ruling that:

- (a) the dispute is not a Timetabling Dispute and should be referred to allocation in accordance with Rule B9; and/or
- (b) some aspects of the dispute or issues raised by the dispute are not matters of timetabling, timetable change and/or capacity allocation and are not properly resolved by a Timetabling Panel and consequently should be reserved for determination by another dispute resolution process.

Any such application shall give the reasons relied upon by the applicant in support of the application and be made as soon as possible after the applicant has become aware that a Timetabling Dispute has been notified to the Secretary.

- 8 Upon an application being made in accordance with Rule H7 the Hearing Chair may give such directions as he determines are appropriate to resolve the application and, where appropriate, to remit the dispute or aspects of the dispute to allocation in accordance with Chapter B. Such directions may include, as appropriate, a direction on whether aspects of the dispute which are not referred to a Timetabling Panel should be resolved concurrently or sequentially with any TTP process.
- 9 In taking his decision in accordance with Rule H8 the Hearing Chair shall have regard to the following:
  - (a) there is a presumption that disputes for which a Timetabling Panel is identified in the relevant provisions of the Underlying Contract as the body to determine disputes are Timetabling Disputes and should be resolved in accordance with this Chapter H. Consequently the Hearing Chair shall not allocate a dispute ostensibly falling within such a provision other than to a Timetabling Panel without first inviting written representations from the Involved Parties on his intention to do so and giving proper consideration to any representations made;
  - (b) any determination which may affect the production of the railway operational timetable must be made within the necessary timescales to allow that timetable to be published; and
  - (c) Network Rail may only make adjustments to a timetable which affects train slots allocated to a train operator who is not a party to a dispute, with the assent of all affected parties, or to give effect to a decision of a Timetabling Panel or the ORR.

### **TTP Process**

- 10 The TTP process in respect of a dispute shall commence upon the receipt by the Secretary of the Notice of Dispute in relation to a Timetabling Dispute in accordance with Rule B2.
- 11 Upon commencement of the TTP process in respect of any dispute, the Secretary shall appoint a Timetabling Panel in accordance with Rule H12 and send to all the parties to the dispute, and publish upon the access disputes website, a notice of the appointment of a Timetabling Panel. This notice shall contain sufficient information regarding the matter under dispute that any other Resolution Service Party will be able to determine whether or not it should seek to be recognised as a Dispute Party. The Secretary shall also give the parties notice of the Hearing Chair who has been appointed.
- 12 A Timetabling Panel shall:
  - (a) be appointed by the Secretary;



- (b) consist of a Hearing Chair and three members selected from the Timetabling Pool; and
- (c) in each case include one of the members of the Timetabling Pool appointed by Network Rail, one member of the Timetabling Pool from one of the three Bands of the Franchised Passenger Class and Non-Franchised Passenger Class and, one member of the Timetabling Pool from one of the two Bands of the Non-Passenger Class.

13 The Secretary shall appoint each Timetabling Panel in a manner that:

- (a) is in accordance with the Principles as set out in Rule A 5 - A10 and this Chapter H.
- (b) over time rotates (as evenly as is reasonably achievable given inevitably differing levels of other commitments of individuals) the individuals from the Timetabling Pool hearing disputes subject to any preferences as to the utilisation of their own employees expressed by any organisation which employs two or more such individuals; and
- (c) is in accordance with any further guidance issued to the Secretary by the Committee.

14 A Timetabling Panel shall:

- (a) provide determinations on the basis of the expertise of a knowledgeable peer group with relevant railway expertise;
- (b) endeavour to reach fair, rapid and inexpensive determinations of disputes drawing on that expertise; and
- (c) where appropriate, take the initiative in ascertaining the facts and law relating to the dispute.

15 Members of the Timetabling Pool are chosen because of their particular railway expertise as described at Rule H2. They shall exercise their functions impartially and not on behalf of any specific organisation, Band or Class.

16 It is an overriding objective of these Rules that disputes referred to a Timetabling Panel shall be administered in a way which is proportionate to:

- (a) the objective importance of the dispute to the Dispute Parties;
- (b) the complexity of the issues;
- (c) the significance (if any) of the issues involved to the railway industry; and
- (d) the need to ensure that the production processes for the railway operational timetable are not disrupted to the potential detriment of third parties.

Accordingly the Hearing Chair shall (where appropriate) adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and significance. All procedures adopted must reflect the Principles and this Chapter H.

- 17 The Timetabling Panel shall, in the case of absence on the day of one member (unless it is the Hearing Chair), be quorate to hear a dispute with any two of the three selected members of the Timetabling Pool present.
- 18 The Hearing Chair:
- (a) has oversight of the effective case management of a dispute which has been referred to a Timetabling Panel;
  - (b) has responsibility to ensure that all procedures of the Timetabling Panel (at, before and after TTP hearings) are being implemented fairly and effectively in respect of each dispute;
  - (c) will review each dispute following submission of statements of case to identify and to itemise in written form for consideration by the other Panel Members all relevant issues of law raised by the dispute a copy which shall be provided promptly to the Dispute Parties;
  - (d) will make a final determination of the dispute referred to a Timetabling Panel and prepare a written determination which is legally sound, appropriate in form, and otherwise compliant with this Chapter H;
  - (e) may, where reasonable to do so, delegate the performance of any of his functions (with the exception of making the determination of the dispute and acting as Hearing Chair at any hearing) in any dispute to the Secretary, however, such delegation shall not affect the obligations and responsibilities of the Hearing Chair set out in this Chapter H.
- 19 Any Resolution Service Party can by notification to the Secretary at any stage become a Dispute Party if it fulfils the definition of a Dispute Party, provided that the prior consent of the Hearing Chair is obtained in order for such a Resolution Service Party to become a Dispute Party if such notification is made after any directions hearing pursuant to Rule H25.
- 20 Upon appointment the Hearing Chair may give directions as to any or all aspects of the procedures to be followed. The Hearing Chair shall have the power at any time to make or amend the procedure to be followed by the parties in the TTP. The directions shall be in accordance with the Principles and this Chapter H and with any mandatory time requirements.
- 21 Unless the Hearing Chair directs otherwise (and subject to each party's right to apply for alternative or revised directions at all stages), the following timetable and procedure shall apply:
- (a) if the parties agree to submit a joint reference they shall, within 14 days of notification of the appointment of the Hearing Chair, submit a joint reference in accordance with the template format for a joint reference (found on the access disputes website) as may be adapted by the Hearing Chair in respect of a particular dispute;
  - (b) if the parties do not agree to submit a joint reference in accordance with (a) above,
    - (i) each claimant shall within seven days of notification of the appointment of the Hearing Chair produce and serve upon all Involved Parties a sole reference which shall include:

- (A) names, registered address and any relevant correspondence address (including email address) of the Dispute Parties;
- (B) the subject matter of the dispute;
- (C) identification of the provision(s) of the Access Conditions or any Underlying Contract under which the reference is made;
- (D) identification of any other provision(s) of the Access Conditions or any Underlying Contract which the claimant believes are also relevant to the dispute;
- (E) a summary of the nature and circumstances of the dispute in sufficient detail for the other Dispute Party or Resolution Service Parties to identify the issues and whether they are likely to be materially affected;
- (F) the decision sought;
- (G) the remedy claimed;
- (H) an authorised signature of the referring party; and
- (I) copies of the following Documents which shall be annexed and cross referenced to the reference:
  - 1) the relevant extracts of contractual Documents containing the provision(s) under which the referral to the Timetabling Panel arises and/or provision(s) associated with the substance of the dispute; and
  - 2) any other Documents referred to in the reference.

and which shall be in accordance with the template format for a sole reference (found on the access disputes website) as may be adapted by the Hearing Chair in respect of a particular dispute.

- (ii) each defendant shall within seven days of service on it of such sole reference produce and serve upon all Involved Parties a response which shall include:
  - (A) a schedule identifying those parts of the reference that it agrees with and those that it disagrees with;
  - (B) the reasons for any disagreement including any further references to provisions of the Access Conditions and Underlying Contracts not dealt with in the reference;
  - (C) details of any other related claim;
  - (D) the decision and, (if relevant) any remedy sought from the Hearing Chair;
  - (E) an authorised signature of the responding party; and
  - (F) copies of the following Documents which shall be annexed and cross referenced to the response if not dealt with in the reference:

- 1) the relevant extracts of contractual Documents containing the provision(s) under which the referral to Timetabling Panel arises and/or provision(s) associated with the substance of the dispute; and
- 2) any other Documents referred to in the response.

and which shall be in accordance with the template format for a response (found on the access disputes website) as may be adapted by the Hearing Chair in respect of a particular dispute.

- (c) the Dispute Parties shall send any additional information requested by the Hearing Chair, unless directed otherwise, to the Secretary not later than seven days prior to the hearing;
- (d) an oral hearing lasting no more than one day shall be conducted.

- 22 Provided that such extension has no adverse effect upon the date fixed for an oral hearing, the parties may agree an extension of any timescales of up to seven days in respect of any stage. For any period beyond that extension a party may seek an order from the Hearing Chair for an extension of time for any of the stages specified in the directions. The Hearing Chair shall make his decisions on any request for an extension of time based upon the Principles and this Chapter H.

**Length of References, Responses and Joint References and method of service**

- 23 The length of every reference and response shall be in proportion to the nature and complexity of the dispute. Unless otherwise agreed by the Hearing Chair, the maximum length of submissions shall be as follows:
- (a) a joint reference shall be no longer than 20 pages; and
  - (b) a sole reference or response shall be no longer than 10 pages.

- 24 The normal method of service shall be electronic to the Secretary and other Dispute Parties.

**Directions Hearing**

- 25 The Hearing Chair, may at any time (on his own motion or that of any party) require the Dispute Parties to participate in a directions hearing to decide, after hearing representations from the Dispute Parties, any issues relating to the procedures adopted for the dispute including:
- (a) the procedures most appropriate to the dispute, subject to compliance with the Principles and this Chapter H;
  - (b) the nature of the issues in dispute;
  - (c) an outline timetable;
  - (d) the process and details of the preparation, submission and amendments of statements of case;
  - (e) whether any Document disclosure procedures shall be required to take place;

- (f) the basis and timing in which witness evidence, if any, is to be prepared and exchanged; and/or
- (g) the appointment by the Hearing Chair of assessors.

### **Documents**

- 26 Although Documents reasonably requested should be provided in compliance with the directions specified at Rule H21, disclosure will not ordinarily be ordered. However, the Hearing Chair, whether or not on the application of any Dispute Party, has the power to:
- (a) order any Dispute Party to provide by way of formal disclosure and inspection, Documents which it controls and which are relevant to the dispute; and
  - (b) specify the formalities, detail and timings involved.
- 27 The Hearing Chair shall exercise this power in accordance with the Principles and this Chapter H.
- 28 No party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts.
- 29 Requests and applications to the Hearing Chair for disclosure may be made at any stage of the dispute but (whenever practicable) should be made at the time of or shortly following submission of the relevant joint reference or sole reference or response giving rise to the request. The timing of any request (by reference to the date when it could first reasonably have been made) may be taken into account by the Hearing Chair when considering a request.
- 30 Without prejudice to any other action open to the Hearing Chair, the Hearing Chair shall be entitled to draw any inference he wishes from any failure to provide adequate or full disclosure by any party or disclosure in accordance with the terms of directions given by him.
- 31 When considering a request for disclosure, the Hearing Chair will consider the commercial sensitivity of the information requested and may exercise his discretion not to grant full disclosure.

### **Witness evidence**

- 32 Subject to any alternative direction from the Hearing Chair, a Dispute Party may rely on any witness evidence it believes to be relevant in its statements of case and at any TTP hearing provided that either a witness summary or a witness statement has been served on all other Involved Parties at least seven days before the hearing.
- 33 A witness summary shall identify in overview the issues on which the witness will give evidence and a summary of the evidence he will give in respect of each such issue. Witness summaries shall be signed by the witness.
- 34 Written witness statements will not normally be required. However if the Hearing Chair permits or requires witness statements to be submitted he shall specify the formalities, detail and timings involved.

### **Assessors**

- 35 The Hearing Chair may appoint one or more assessors to facilitate the determination of a dispute. Any such assessor may be (without limitation):

- (a) a technical assessor with a specific area of expertise relevant to one or more issues in the dispute; and/or
  - (b) a legal assessor.
- 36 Assessors may help undertake the procedural management of the dispute and prepare such report(s) and guidance on such issues as the Hearing Chair may direct.
- 37 The Hearing Chair shall provide to the Dispute Parties the terms of reference, qualifications and experience of any assessor appointed and a summary of his advice.
- 38 The Hearing Chair shall not be bound by the views of an assessor but shall be required to explain his reasons for disagreeing with those views.

### **Experts**

- 39 A Dispute Party can rely, as of right, upon expert evidence completed prior to the date of the reference. Where a Dispute Party wishes to exercise this right it shall attach such evidence to its first Statement of Case and the other Dispute Parties shall be entitled to a direction that they may commission expert reports responding to the particular issues covered by such evidence.
- 40 When considering whether and to what extent to permit the Dispute Parties to commission further expert reports, the Hearing Chair shall consider what evidence is reasonably required to determine the dispute, the Principles and this Chapter H.
- 41 The reports of experts shall state:
- (a) the full remit against which the report has been prepared;
  - (b) the identity, qualifications and experience of the person(s) preparing the report;
  - (c) the extent (if any) to which the expert has previously been involved in the subject matter of the dispute and current or recent professional connections with any of the Dispute Parties.
- 42 At any hearing the Hearing Chair, other Panel Members, and/or any assessor appointed, may address questions directly to any experts.
- 43 The Hearing Chair shall determine in accordance with the specific requirements of the dispute whether the expert evidence is dealt with either by consideration of reports only or by the attendance and examination of one or more of the experts to answer questions upon their reports, by telephone, conferencing facilities or by any other means.

### **Hearing Conduct**

- 44 The hearing will be chaired by the Hearing Chair who may, in his absolute discretion make any order in respect of procedure at the hearing which he considers appropriate including whether to admit additional evidence (including oral evidence) from any party and the degree to which weight should be given to such additional evidence.
- 45 Subject to any contrary direction of the Hearing Chair, the following procedure shall be adopted at hearings:

- (a) the Timetabling Panel will meet in the absence of the Dispute Parties to discuss issues arising from the papers submitted by the Dispute Parties;
  - (b) the Timetabling Panel will confirm to the Dispute Parties the extent to which it has read the papers submitted by the Dispute Parties;
  - (c) the Hearing Chair, the other Panel Members and any assessors shall declare any relevant interests;
  - (d) the claimant's representative will make an opening submission of its case of not longer than 10 minutes, referring if necessary to witness or expert evidence which the claimant wishes the Timetabling Panel to consider;
  - (e) the respondent's representative will also make a brief opening submission of its response and/or counterclaim of not longer than 10 minutes, referring if necessary to additional witness or expert evidence which the respondent wishes the Timetabling Panel to consider;
  - (f) if a written witness statement has been provided, the witness will not be required to read out his statement unless the Hearing Chair decides otherwise. If any witness summary has been provided the Hearing Chair shall direct how the evidence shall be admitted and may require the witness to provide his evidence in full orally before cross examination. The Hearing Chair shall direct whether any further witness evidence shall be allowed;
  - (g) if expert evidence is used, the expert will not be required to read out his report unless the Hearing Chair decides otherwise. Whenever expert evidence is being given by any individual that individual shall state that he is giving expert evidence and the basis upon which he claims expertise in the relevant matter;
  - (h) the Hearing Chair, other Panel Members and any assessor may put any relevant questions to the representatives, witness(es) and expert(s);
  - (i) Dispute Parties may put questions to any witness(es) or expert(s) in their capacity as witnesses or experts, and when any representative is acting as a witness he shall make that clear; and
  - (j) at the conclusion of questions, representatives may make closing submissions of not more than 10 minutes.
- 46 The hearing shall be conducted with the Dispute Parties present. Following conclusion of the submissions, the Dispute Parties will withdraw to allow the Timetabling Panel to consider the evidence and arguments (with any assessor). The Dispute Parties shall remain available to allow the Hearing Chair, other Panel Members and any assessor to put any additional questions.
- 47 The Secretary will, unless otherwise directed by the Hearing Chair, make a full note of the evidence given to the hearing. The Hearing Chair may in his discretion direct in advance that a full transcript is taken.
- 48 The Hearing Chair may, subject to any specified requirements of any Access Condition and legal requirement, reserve his determination from the hearing until a later date.

## **Determinations**

- 49 Having considered the submissions of the parties and the advice of the other Panel Members and any assessor, the Hearing Chair shall make a determination of the dispute in accordance with Rule H51.
- 50 Subject to any other provision of the Access Conditions and Underlying Contract, the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute including without limitation that:
- (a) one Dispute Party should take or not take specified action; or
  - (b) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination.
- 51 The Hearing Chair's determination of a dispute shall be in writing and comprise:
- (a) the date of the determination;
  - (b) the names of the Hearing Chair, other Panel Members and any assessors present;
  - (c) details of all parties to the dispute;
  - (d) details of the attendance and status of all experts, witnesses and interested parties;
  - (e) a brief summary of the dispute;
  - (f) an identification of the issues of fact and law considered by the Timetabling Panel;
  - (g) a summary of the evidence presented;
  - (h) the findings of fact made by the Hearing Chair;
  - (i) identification of any precedents considered;
  - (j) the decisions and conclusions reached, distinguishing clearly between:
    - (i) decisions upon legal entitlement;
    - (ii) decisions upon remedy;
    - (iii) guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy;
  - (k) the reasons for those decisions and conclusions (including any relevant legal principles or rules of law applied); and
  - (l) signed and dated confirmation of the Hearing Chair that the determination is legally sound and appropriate in form.
- 52 The Hearing Chair shall provide a copy of his written reasoned determination to all Dispute Parties and the Secretary. The Secretary shall send the determination to each Resolution Service Party and shall arrange for the determination to be immediately published on the access disputes website.



- 53 Subject to appeal in accordance with Rule H58, the Dispute Parties shall comply with the terms of the determination within such period as shall be specified in the determination.
- 54 If a Dispute Party fails to comply with the terms of the determination, that failure will be dealt with by way of a new dispute through the appropriate mechanism.

### **Confidentiality**

- 55 Except for anything published pursuant to Rule H56, unless otherwise agreed by all parties, all Documents produced or disclosed in the course of a TTP shall be treated as confidential by the Panel Members, assessors or others present, the Allocation Chair, the Secretary and all parties and shall only be used:
- (a) for the purposes of the TTP, including any appeal or further stage in the determination procedure;
  - (b) for enforcing the Hearing Chair's determination in the TTP; or
  - (c) in support of a plea of estoppel (or, for determinations taking place in Scotland, of res judicata) in any subsequent proceedings.
- 56 Immediately upon receipt by the Secretary the following Documents shall be published on the access disputes website:
- (a) each finalised Statement of Case;
  - (b) each request for further information from the Hearing Chair and all responses to such requests;
  - (c) all written submissions from all parties; and
  - (d) all awards and/or determinations from the Hearing Chair.

### **Communications**

- 57 Communications for the purposes of the TTP may be by telephone or email (or such other means as is appropriate) and where by telephone shall be confirmed in writing wherever possible.

### **Appeal**

- 58 Following a determination of a Timetabling Dispute by the Hearing Chair of a TTP any Dispute Party is entitled to appeal in accordance with the relevant part of the Access Conditions or Underlying Contract (including, as applicable, Part M of the Network Code).

### **Costs**

- 59 The Hearing Chair shall have power to order one or more Dispute Parties to meet part or all of the Costs of the Timetabling Panel and of any other Dispute Party assessed by such means as the Hearing Chair shall determine.
- 60 An order for Costs shall only be made where the Hearing Chair is satisfied that either:
- (a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or

- (b) the conduct of the relevant Dispute Party before or during the reference was such as to justify an award of Costs being made against it (or them).

Any such order shall be made with due regard to the Principles and this Chapter H.

**Exclusion of liability**

- 61 None of the Allocation Chair, the Secretary, the Hearing Chair or any other Panel Member shall be liable to any party for any act or omission (including negligence) in connection with any TTP under these Rules unless the act or omission is shown to have been in bad faith.

## **CHAPTER I – DETERMINATIVE PROCESS RULES – EXPERT DETERMINATION**

- 1 Expert determination under these Rules is a private determinative dispute resolution process in which a neutral expert (the determining expert) determines the dispute on the basis of the parties' respective legal rights, the information available to him and his own expertise.

### **Disputes to be decided by expert determination**

- 2 Any dispute which the Dispute Parties have agreed shall be submitted to expert determination under these Rules or which has otherwise been allocated to expert determination as a first or second stage or appeal stage dispute resolution process in accordance with these Rules, shall proceed according to the Rules of this Chapter I.
- 3 Any dispute which the parties have agreed should be referred to expert determination under these Rules shall be determined by a sole expert agreed between the parties or appointed by the Secretary in accordance with this Chapter I.

### **Beginning an expert determination and appointing the Determining Expert**

- 4 Upon commencement of an expert determination (in accordance with the Procedure Agreement and Rule B17 or otherwise), the Secretary shall promptly approach all parties to the dispute and liaise with and assist the parties in identifying, choosing and retaining a suitable determining expert, if not already done.
- 5 In the event that no determining expert can be agreed by the parties within 21 days of commencement of the expert determination, the Secretary shall propose an appropriate individual from lists maintained by him and published on the access disputes website, or otherwise. That individual shall be appointed by the parties as determining expert unless either or both parties notify the Secretary of a challenge to the appointment on the ground of (real or apparent or potential) bias, Conflict of Interest or a lack of competence within 3 days of notification of the Secretary's choice. If any challenge is made on the ground of bias, Conflict of Interest or lack of competence, the Allocation Chair shall consider the challenge and determine either to:
  - (a) uphold the proposed appointment; or
  - (b) remit the choice to the Secretary with directions concerning how a further choice should be made.

Nothing in this clause shall affect the power of a determining expert to determine his own jurisdiction or appointment.

#### *Notice of expert determination*

- 6 Upon the appointment of a determining expert, the Secretary shall send to all the parties to the dispute a notice of the appointment of the determining expert. The Secretary shall also send to the determining expert a copy of:
  - (a) this Chapter I and Chapter A, B and C;
  - (b) any template terms for appointment of a determining expert issued by the Committee;

- (c) the Notice of Dispute;
- (d) any statements from the Parties made under Rule B9(d)(iii); and
- (e) any correspondence from the Allocation Chair made under Rule B15

The Notice of Dispute shall stand as a notice of expert determination and no further notice of expert determination shall be required or served.

#### *Change of Determining Expert*

- 7 If any determining expert acting or appointed to act under these Rules resigns, withdraws, dies or refuses to act, the Secretary shall, upon application by the determining expert or any party to the expert determination, on proof satisfactory to the Secretary, declare the office of determining expert vacant.
- 8 If the determining expert or any Dispute Party considers that the determining expert is unable by reason of mental or physical infirmity to perform the duties of his position or is disqualified for any reason from performing the duties of his position, or has delayed unreasonably in the conduct of the expert determination or in the making of any award, the Secretary may, at the request of the determining expert or any Dispute Party, having heard the determining expert and the parties if they or any of them wish to be heard, declare the position of determining expert vacant.
- 9 Where the position of determining expert shall have been declared to be vacant pursuant to Rule 17 or 18, then Rule 14 shall apply to the appointment of a replacement determining expert.

#### **Procedure**

##### *General*

- 10 The determining expert shall act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case and dealing with facts raised by his opponent.
- 11 The determining expert shall adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense to provide a fair means for the resolution of the matters falling to be determined in accordance with each party's rights at law to a fair trial. The determining expert may give appropriate directions as to any or all aspects of the procedures to be followed and shall have the power at any time to make or amend the procedure (and the directions) to be followed by the parties in the expert determination. The directions shall be in accordance with the Principles.
- 12 Subject to Rule 113, an expert determination shall include an oral hearing which is appropriate in length and content for the just and expeditious determination of the dispute.
- 13 The parties may agree that an expert determination shall be conducted on the basis of written representations only. In such a case, nothing in this Rule shall prevent the determining expert from requiring one or more oral hearings if he considers it appropriate for the just and expeditious determination of the proceedings.
- 14 The determining expert may at any stage require one or more Dispute Parties to provide him with any information, data or computations which are within the control of that party or parties and reasonably accessible to them. The determining expert

may further request one or more parties to produce further computations or analysis of data or information where such computations or analysis are reasonably necessary for the purposes of the fair resolution of the dispute and the necessary data, information and competence to prepare such computations or analysis is reasonably available to the relevant party or parties.

- 15 Unless the determining expert rules otherwise (either on his own motion or upon the application of any party), the following timetable and procedure shall apply:
- (a) within 21 days of the notice of appointment of the determining expert, the claimant(s) shall serve upon the determining expert and each other party a written statement of its claim. The statement of claim shall specify all relevant facts and matters and contentions of law (if any, and naming the principal authorities) on which the claimant relies (or admits or denies) and the relief and remedies sought;
  - (b) within 21 days of service by the claimant of the statement of its claim, the other party(s) shall serve upon the determining expert and the claimant(s) a written statement of its defence (in Scotland, answers). The statement of defence shall specify the defence and all relevant facts and matters and contentions of law (if any, naming the principal authorities) on which the respondent relies (or admits or denies). The statement of defence may set out any counterclaim which the respondent wishes to make;
  - (c) the statements of case served pursuant to sub-paragraphs (a) and (b) above shall be accompanied by copies of any Documents referred to in them or upon which the party serving the statement wishes to rely. In addition they shall be accompanied by (or, as appropriate refer to and identify) any computations, models, analysis or data prepared by or for that party upon which the party wishes to rely. That party shall, if so requested, make the originals of such Documents available for inspection by the determining expert or the other party(s) and shall as appropriate make available active electronic copies of such Documents for analysis by the determining expert or the other party(s);
  - (d) The determining expert may raise such questions as he considers necessary or appropriate and require responses from the parties within such time as he specifies.
  - (e) at least seven days before any hearing, each party shall serve on the other and on the determining expert its written submissions;
  - (f) unless ordered otherwise by the determining expert, at the hearing:
    - (i) there shall be no oral opening submissions, but the determining expert may ask the parties questions arising out of their written submissions or statements of case;
    - (ii) subject to sub-paragraph (iii) below, the testimony of a witness may be presented in written form, either as a signed statement or as an affidavit duly sworn. Any party may apply to the determining expert for an order that any witness whose written statement or affidavit is to be relied upon by a party should attend for oral examination at a hearing and the determining expert shall make such order unless, having heard the parties, he is satisfied that such oral examination is not likely to assist him in making his award. If a witness is ordered to attend and fails to do so, the determining expert may:

- (A) place such weight on the written statement or affidavit as he thinks fit;
- (B) exclude it altogether; or
- (C) apply to the Court for an order for the citation or attendance of witnesses.

In addition, in making his determination on Costs the determining expert may take any failure to attend into account;

- (iii) factual or expert witnesses who give oral evidence will not be required to provide their evidence in full orally. The parties may cross-examine witnesses on oath or affirmation to the extent permitted by the determining expert;
  - (iv) the parties may make oral closing submissions;
  - (v) the parties may be legally represented; and
  - (vi) the determining expert shall be entitled to receive such evidence as he shall consider relevant, whether or not such evidence would have been admissible in a Court; and
- (g) the determining expert shall deliver to the parties a reasoned award within 21 days of the end of the hearing.

#### *Proposed amendments*

- 16 Immediately after his appointment, the determining expert shall require each Dispute Party to propose directions to him or to inform him of any amendments to the procedure or the time limits set out in Rule 115 which it considers appropriate (whether because more than two parties will be involved or otherwise). Each party shall send promptly any proposed directions or amendments to the determining expert and each other party. Before responding and ordering any amendments, the determining expert may require the parties to meet him.

#### *References to the ORR*

- 17 The determining expert may, on the application of any party or on his own motion, elect to refer any issue or issues to which Rule C3 applies, to the ORR in accordance with Chapter C. Before making any such reference the determining expert shall:
- (a) seek submissions from all Dispute Parties on whether a reference should be made and if so the wording of such a reference; and
  - (b) determine the wording of any reference to be made with due regard to such submissions.

#### *Supplemental*

- 18 If he considers it appropriate for the just and expeditious determination of the proceedings, the determining expert shall be entitled to appoint one or more advisers or assessors on any matter (including matters of law) to report to him on any specific issue. The costs of any such person shall be subject to the provisions of Rule 128. The determining expert shall provide to the parties the terms of

reference, qualifications and experience of any adviser or assessor appointed. Where the determining expert receives a report from any such person, he shall disclose the report to the parties and afford them an opportunity to comment on it.

19 In relation to the production of Documents:

- (a) the determining expert may, on the application of a party, require the production of such specific identified Documents or class of Documents or data or information as are within the possession, custody or control of any other party or any third party which the determining expert considers relevant. The parties to the proceedings shall be given the opportunity to inspect and to comment upon any Document so produced;
- (b) if any Document is not supplied to the determining expert and all other Dispute Parties within such time as the determining expert shall prescribe, the determining expert may:
  - (i) proceed with the expert determination on the basis of the Documents already before him;
  - (ii) apply to the court for an order to produce the Documents; or
  - (iii) strike out (in Scotland, dismiss) the part of the claim or defence to which the Document relates,

and in making his award the determining expert shall be entitled to draw such inferences as he may think fit for the failure to supply the Document. In addition, in making his determination on Costs the determining expert may take any failure to supply a Document at any stage in the proceedings into account;

- (c) no party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts;
- (d) Unless otherwise ordered by the determining expert, an application by a party to the determining expert pursuant to sub-paragraph (a) above shall be made not later than 35 days after the appointment of the determining expert; a party in receipt of a request from the determining expert to produce a Document shall comply with such a request within 14 days;

20 Without prejudice to the powers in Rule A16 and in addition to them, the determining expert shall have power to strike out (in Scotland, dismiss) part or all of any claim or defence made in the proceedings on any one or more of the following grounds:

- (a) wilful breach of these Rules;
- (b) deliberate non-compliance by a party with any order of the determining expert; or
- (c) inordinate or inexcusable delay on the part of any party, where such act or omission has, in the opinion of the determining expert, given rise to a substantial risk that a fair determination of the dispute will not be possible, or which is such as to cause or to have caused serious prejudice to the other party.

- 21 Without prejudice to the powers in Rule A16 and in addition to them, the determining expert shall have power to strike out (in Scotland, dismiss) part or all of any claim or defence made in the proceedings if he is satisfied that the claim or defence or any part of it is scandalous, frivolous or vexatious.
- 22 Without prejudice to the powers in Rule A16 and in addition to them, if any party fails to serve a Statement of Case within the period allowed under these Rules or by order of the determining expert, and fails to remedy his default within 14 days after despatch to him by the determining expert or any other Dispute Party to the dispute of notice of that default, the determining expert shall be entitled to rule that he shall be treated as having abandoned his claim or defence (as the case may be) and, having made such a ruling, the determining expert shall be entitled to proceed with the reference on a without notice basis.
- 23 Any party who becomes aware that any provision or requirement of these Rules has not been complied with and who fails to state an objection to that failure within a reasonable time shall be deemed to have waived the right to object.

### **Determination**

#### *Final and binding*

- 24 The determining expert's determination shall be final and binding save
- (a) where it is so clearly erroneous on its face that it would be unconscionable for it to stand; or
  - (b) to the extent that a further right of appeal or reference to another dispute resolution process is provided for in the Underlying Contract, Access Conditions or Procedure Agreement.
- 25 If any further dispute resolution process is provided for in the Procedure Agreement then any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the Secretary of its intention to refer the matter to such further dispute resolution process within 28 days of the determining expert's determination, the determination shall be deemed to have been accepted by all parties.

#### *Power to make orders*

- 26 Subject to any other provision of the Access Conditions and Underlying Contract, the determining expert may make such orders in his determination as he considers necessary to resolve the dispute, including, without limitation, that:
- (a) one Dispute Party shall pay an amount of money (including damages) to another Dispute Party, whether that amount is specified in the determination or calculated in accordance with such procedure as the determining expert shall specify;
  - (b) one Dispute Party should take or not take specified action;
  - (c) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination;



- (d) any Document, certificate, invoice, report or record be amended or reissued in a manner specified in the determination; or
- (e) any principal sum the determining expert may order one party to pay to another shall carry interest at such rate and over such period as he shall determine.

*Issue of expert determination*

- 27 The determining expert shall send a copy of his determination to the parties, the Allocation Chair and the Secretary.

**Costs**

*Discretion to order payment of Costs*

- 28 Whether or not the expert determination reaches the stage of a final determination, the determining expert may order any party to pay some or a specified proportion of any party's Costs incurred in the expert determination, assessed in such manner as the determining expert shall determine. The determining expert may make such an order without limitation following any interim or final award.

*Joint and several liability of parties to Determining Experts for fees and expenses*

- 29 The Dispute Parties are jointly and severally liable to pay the determining expert's reasonable fees and expenses.

**Confidentiality**

- 30 Subject to Rule C and Rules I31, I32 and G68, all Documents produced or disclosed in the course of an expert determination including all awards shall be treated as confidential by the determining expert, the Allocation Chair, the Secretary and all parties and shall not be published.

- 31 Unless otherwise agreed by all parties, all Documents produced or disclosed in the course of an expert determination including all awards shall only be used:

- (a) for the purposes of the expert determination, including any appeal against the determination (or, in Scotland, any application under Section 3 of the Administration of Justice (Scotland) Act 1972), or for judicial review, in respect of the award or any subsequent stages of the determination procedure;
- (b) for enforcing the determination; or
- (c) in support of a plea of estoppel (or, for determinations taking place in Scotland, of res judicata) in any subsequent proceedings.

- 32 The confidentiality obligations under Rule I30 shall not apply to Documents which are:

- (a) agreed in writing by all the Dispute Parties to be disclosed (including in any Underlying Contract between them);
- (b) made available to the advisers or financial associates of the party in question, upon obtaining an undertaking of strict confidentiality from such persons;
- (c) disclosed on a confidential basis to the ORR or the appropriate franchising authority in the normal course of business; or

- (d) required to be disclosed pursuant to the order of a court of competent jurisdiction.

### **Communications**

- 33 Communications for the purposes of the expert determination may be by telephone or email (or such other means as is appropriate) and where by telephone shall be confirmed in writing wherever possible.

### **Exclusion of liability**

- 34 None of the Allocation Chair, the Secretary or any determining expert shall be liable to any party for any act or omission (including negligence) in connection with any expert determination under these Rules unless the act or omission is shown to have been in bad faith.

### **Jurisdiction and governing law**

- 35 Expert determinations shall take place in England or Wales and be subject to English law, except where the Underlying Contract in respect of which the dispute has arisen confers permission to use railway assets situated entirely in Scotland or the Underlying Contract in question is governed by Scottish law, in which case the expert determination shall take place in Scotland and be subject to Scottish law. In either case the determining expert may order otherwise. For the purposes of this Rule, where a single access agreement confers permission to use track in both Scotland and England, the railway assets in question shall be treated as being situated partly in Scotland and partly in England.

### **Interim relief granted by the Court**

- 36 In an appropriate case, a party to a dispute which has been or may be submitted to expert determination may apply to the Court for interim relief (whether negative or positive), notwithstanding that the relief sought may overlap with the interim relief which is, or may be, claimed in the expert determination.

## **CHAPTER J – CONSTITUTION, GOVERNANCE AND FUNDING**

- 1 This section establishes the Committee to oversee the operation of the disputes processes set out in these Rules, handle funding and procure delivery of the disputes service and deal with appointment and termination of consultants. It sets out the Committee's constitution and role as well as the roles of other consultants required by these Rules. It also deals with the funding arrangements for the Committee.
- 2 The Committee is established by this Rule J2.
- 3 The purpose of the Committee is to exercise management and administrative oversight of the disputes processes set out in these Rules. In particular it shall:
  - (a) appoint and remove the Allocation Chair;
  - (b) appoint and remove the Secretary and any staff of the Secretariat;
  - (c) appoint and remove any Hearing Chairs and Industry Advisors;
  - (d) produce and oversee any guideline standard terms for retaining arbitrators, evaluators, determining experts and mediators;
  - (e) determine and collect levies, costs or charges from each Resolution Service Party in accordance with Rules G52 and J51;
  - (f) supervise and allocate funding for the work of the Committee (including ADA and TTP processes);
  - (g) monitor and report at least annually to the Resolution Service Parties upon the work of the Committee;
  - (h) satisfy itself that the Principles are being observed in the way in which disputes are being managed and determined and (if they are not) require the Allocation Chair to take all necessary action to correct that position;
  - (i) fulfil the functions and obligations it is required to undertake as specified in CAHA, including but not limited to the appointment and supervision of the CAHA Registrar; the consideration and approval of the CAHA Registrar's annual estimate of costs and expenses; and
  - (j) take any other step reasonably required in connection with its management and oversight role.
- 4 The Committee shall not:
  - (a) determine any dispute; or
  - (b) involve itself in the merits or conduct of any dispute prior to the determination of that dispute by the appropriate Forum; or
  - (c) interpret or advise upon the legal effect of these Rules.
- 5 The Committee shall consist of the Committee Members from whom it shall elect one to be the Committee Chair.
- 6 The Committee Members (each of whom shall be employed by a relevant Resolution Service Party) shall be appointed by the following Bands and Classes:

- (a) one member by each of the three Bands of the Franchised Passenger Class;
- (b) one member by each of the two Bands of the Non-Passenger Class; and
- (c) one member by the Non-Franchised Passenger Class,

by the method used to appoint members of the Class Representative Committee under Part C of the Network Code

together with

- (d) two members appointed by Network Rail.

- 7 If the numbers of individuals nominated for election under Rule J6 exceeds the numbers specified then one or more election(s) shall be held as required, in each case in accordance with the relevant provisions of Part C of the Network Code.
- 8 The quorum for meetings of the Committee shall be 5 Committee Members. Any Committee Member may participate in a meeting of the Committee by means of conference telephone or similar communications equipment whereby all persons participating in the meeting can hear each other. Any Committee Member participating in a meeting in this manner shall be deemed to be present in person at such meeting.
- 9 Any Committee Member who has or may have a Conflict of Interest in respect of any matter, decision or issue shall declare such Conflict of Interest to the Committee and shall take no part in any discussions, decisions, negotiation or votes relating to such matter, decision or issue. Where any Committee Member or Members who are present at a meeting have declared a Conflict of Interest such Committee Members shall be counted in the quorum required for such matter, decision or issue.
- 10 If the Committee Chair is unable to be present at a meeting or is present and has declared a Conflict of Interest, the Committee Members present shall elect one of their number to chair that meeting or part of the meeting as appropriate.
- 11 If the Committee cannot reach agreement on any issue then that issue may be decided by vote. Subject to any express requirement in these Rules governing the size of the required majority or of unanimity, the vote shall be decided by simple majority. The Committee Chair may vote but will not additionally have a casting vote.
- 12 The Committee may decide an issue by correspondence. Such correspondence must be sent to all members of the Committee. If agreement to any proposal in such correspondence is endorsed by the signature of at least five Committee Members then it shall be treated as if it was a decision of the Committee made at a Committee meeting.
- 13 The secretary to the Committee shall, as soon as reasonably practicable following the appointment of a new member, notify all other Committee Members of that appointment.
- 14 Subject to Rules J15 and 16, unless he shall have been re-elected, a Committee Member shall be treated as having ceased to hold office on the 1 April which is nearest to the date which is two years after the date of his appointment.
- 15 A Committee Member appointed in accordance with Rules J6(a) to J6(c):

- (a) may be removed from office and a replacement member appointed in his place by a majority in number of members of the relevant Class or Band (as the case may be) present (whether in person or by proxy) and voting at the relevant meeting called for the purpose of such removal and substitute appointment; and
- (b) shall be treated as having resigned from office if he dies or becomes of unsound mind, or suffers any physical or mental incapacity which prevents him from discharging his duties for a period of three months or longer;
- (c) shall be treated as having resigned from office if he becomes bankrupt or compounds with his creditors; and
- (d) shall be treated as having resigned from office if he ceases to be employed by a company within the Band to which he is appointed.

If appointed by Network Rail, a Committee Member:

- (e) may be removed from office and a replacement member appointed in his place through Network Rail informing the secretary in writing; and
- (f) shall be treated as having resigned from office if he dies or becomes of unsound mind, or suffers any physical or mental incapacity which prevents him from discharging his duties for a period of three months or longer;
- (g) shall be treated as having resigned from office if he becomes bankrupt or compounds with his creditors; and
- (h) shall be treated as having resigned from office if he ceases to be employed by Network Rail.

16 Notwithstanding Rule J15, Committee Members appointed in accordance with Rules J6(a) to J6(c) shall retire in rotation on 1 April in each year in the following order:

- (a) on 1 April in odd numbered years:
  - (i) the member appointed by the Band of the Franchised Passenger Class which is highest by value of relevant annual Track Charges payable by the Bands of that Class at the relevant time;
  - (ii) the member appointed by the Band of the Non-Passenger Class which is the higher of the two by value of relevant annual Track Charges payable by them at the relevant time; and
  - (iii) the member appointed by the Band of the Non-Franchised Passenger Class.
- (b) on 1 April in even numbered years, the Committee Members appointed in accordance with Rules J6(a) to J6(c) who shall not have retired pursuant to Rule J16(a).

17 The Committee may, where reasonable to do so, delegate the performance of any of its functions to the Committee Chair or to the secretary to the Committee but such delegation shall not affect the obligations and responsibilities of the Committee set out in this Chapter J.

### **Committee Chair**

- 18 The role of the Committee Chair is to ensure that the business of the Committee is dealt with effectively and that the purpose of the Committee is discharged.
- 19 At the first meeting after 1 April in every year the Committee Members shall elect from amongst their number a Committee Chair who shall remain as Committee Chair for the ensuing year unless he retires in accordance with Rules J15 and 16, or is otherwise unable to perform the role of Committee Chair in which case the Committee Members may elect one of their number as a replacement Committee Chair either temporarily for the circumstances described in Rule J10 or permanently until the meeting following the next 1 April.

### **Appointment of the Allocation Chair**

- 20 The Committee shall appoint the Allocation Chair who shall:
- (a) preferably have suitable experience of the railway industry;
  - (b) not, during his term of office, be employed by or be otherwise connected with any party entitled to use these Rules or receive any benefit from any such party in return for services provided to it, in either case in a way which may compromise his impartiality;
  - (c) preferably have qualified as a lawyer and mediator (or have experience as a mediator) and shall have extensive professional and practical experience (at a senior level) of significant commercial disputes and commercial disputes processes but shall not be required to hold a current practising certificate; and
  - (d) in addition to his role as set out in these Rules, determine any disputes arising in relation to relevant decisions of the CAHA Registrar.
- 21 The appointment and any re-appointment of the Allocation Chair shall be made by unanimous resolution.
- 22 The Allocation Chair shall upon appointment, declare to the Secretary any relevant connection which he has or has had with the railway industry, and, subject to Rule J20(b), shall during his term of office promptly disclose any new connection of that kind. The Secretary shall provide a copy of any disclosure made under this Rule to each Committee Member and to any Resolution Service Party which requests it.
- 23 In the event that the Allocation Chair has or may have any Conflict of Interest in respect of any dispute he shall identify such Conflict of Interest to the Secretary who shall nominate a Hearing Chair from the pool referred to in Rule J29 to act as Allocation Chair for that dispute.
- 24 The Allocation Chair shall hold office on such terms as the Committee shall determine. Where the terms on which he holds office include provision for the payment to him of any allowances or expenses, the rate at which those allowances and expenses are paid shall be determined by the Committee.
- 25 The terms on which the Allocation Chair holds office may, in addition to providing for his remuneration, include provision for the payment of such pensions, allowances or gratuities to or in respect of him, or such contributions or payments towards provision for such pensions, allowances or gratuities, as may be determined by the Committee.

- 26 The Allocation Chair shall be appointed (as a consultant) for a term of two years, and may be reappointed. The Committee may terminate the appointment on the motion of any Committee Member, provided that at least two weeks' written notice of the intention to table such a motion has been given to all members of the Committee and to the Allocation Chair.
- 27 A resolution to terminate the appointment of the Allocation Chair shall be passed on the positive resolution of at least five Committee Members acting at their discretion and without the need to provide reasons for their decision.
- 28 If, within 60 days of the termination (for whatever reason) of the appointment of the Allocation Chair, the Committee shall have failed to appoint a new Allocation Chair pursuant to Rules J20 and 21, the Committee shall:
- (a) by unanimous resolution, determine a list of three candidates for the role of Allocation Chair;
  - (b) send the list to the ORR and provide such information in relation to the candidates and the preferences of the Committee Members as the ORR may request; and
  - (c) be deemed to have appointed as Allocation Chair the candidate then selected by the ORR.

#### **Hearing Chairs and Industry Advisors**

- 29 The Committee shall (in addition to the appointment of the Allocation Chair) appoint (as consultants) a pool of Hearing Chairs to sit on Timetabling Panels and ADAs and a pool of Industry Advisors to sit on ADAs as appropriate.
- 30 Hearing Chairs shall:
- (a) preferably have suitable experience of the railway industry;
  - (b) not, during their terms of office, be employed by or be otherwise connected with any party entitled to use these Rules or receive any benefit from any such party in return for services provided to it, in either case in a way which may compromise impartiality;
  - (c) preferably have qualified as a lawyer or hold a similar professional background and shall have professional and practical experience (at a senior level) of significant commercial disputes and commercial disputes processes but shall not be required to hold a current practising certificate (where Hearing Chairs are not legally qualified the Rules provide for assessors to be appointed as required);
  - (d) be appointed and be liable to termination of appointment in the same way as the Allocation Chair;
  - (e) have such skills and experience as are deemed necessary by the Committee to discharge effectively the role for which the appointment is intended; and
  - (f) chair TTP or ADA hearings or discharge any other function otherwise falling within these Rules as directed by the Allocation Chair or Secretary or under any Procedure Agreement under Chapter B.

- 31 In the event that any Hearing Chair is appointed in respect of any dispute and has or may have any Conflict of Interest in respect of that dispute he shall identify such Conflict of Interest to the Secretary who shall nominate an alternative Hearing Chair from the pool to act as Hearing Chair for that dispute.
- 32 Industry Advisors shall:
- (a) have such skills, experience and qualifications as are deemed necessary by the Committee to discharge effectively the role for which the appointment is intended;
  - (b) not, during their terms of appointment, be employed by or be otherwise connected with any party entitled to use these Rules or receive any benefit from any such party in return for services provided to it, in either case in a way which may compromise impartiality;
  - (c) be appointed and be liable to termination of appointment in the same way as the Allocation Chair;
  - (d) participate in ADA hearings or discharge any other function otherwise falling within these Rules as directed by the Allocation Chair.
- 33 In the event that any Industry Advisor is appointed in respect of any dispute and has or may have any Conflict of Interest in respect of that dispute he shall identify such Conflict of Interest to the Secretary who shall nominate an alternative Industry Advisor from the pool to take part in that dispute.

#### **The Secretary**

- 34 The Committee shall appoint the Secretary (as a consultant) to discharge the following separate and distinct roles:
- (a) secretary to the Committee;
  - (b) the Secretary for the purposes of these Rules;
  - (c) secretary to an ADA;
  - (d) secretary to a Timetabling Panel; and
  - (e) secretary for the administration of the RIDR Rules.
- 35 Subject to Rule J34 the Committee shall specify the Secretary's remit and terms of appointment in such terms as it shall (from time to time) think fit but such remit shall include the following tasks:
- (a) facilitating the work of the Committee and ensuring the efficient administration of its business;
  - (b) running the Secretariat efficiently and cost effectively;
  - (c) communicating with Dispute Parties conducting a dispute under these Rules and effecting the appointment of suitable and appropriately qualified mediators, evaluators, arbitrators or determining experts as required;
  - (d) implementing efficiently any instruction given to the Secretary by the Allocation Chair or any Hearing Chair;



- (e) liaising with the secretary of the Class Representative Committee as necessary and appropriate;
- (f) appointing an appropriate ADA and Timetabling Panel in each relevant dispute;
- (g) ensuring that the access disputes website is up to date, accurate and accessible;
- (h) maintaining a register of persons who are suitably qualified, willing and able to act as mediators, arbitrators, experts, evaluators, assessors and of organisations which are qualified to suggest such persons;
- (i) sourcing external legal advice as requested or directed by the Committee, the Committee Chair, the Allocation Chair or a Hearing Chair;
- (j) administering the Committee's finances and bank account on behalf of the Committee;
- (k) determine and collect levies from each Resolution Service Party in accordance with Rule J51; and
- (l) liaising with the CAHA Registrar.

36 The Secretary may:

- (a) delegate the performance of any of his functions to any member of the Secretariat but such delegation shall not affect his responsibilities to ensure that all matters falling within his remit are properly discharged;
- (b) in the discharge of his tasks, duties and obligations under these Rules seek guidance from the Committee Chair or the Allocation Chair (as appropriate) at any time and in relation to any matter, issue or question, as he sees fit, prior to taking (or not taking) any relevant action;
- (c) be removed from office by the Committee in the same manner as the Allocation Chair.

37 The Secretary shall not be a Member of the Committee, the Allocation Chair, a Hearing Chair, an Industry Advisor, arbitrator, mediator, determining expert or evaluator or a member of any Timetabling Panel.

38 The Secretary shall be appointed upon such terms as the Committee shall determine. Where the terms on which the Secretary is appointed include provision for the payment of any allowances or expenses, the rate at which those allowances and expenses are paid shall be determined by the Committee.

#### **The Secretariat**

39 The Committee may appoint additional consultants to assist the Secretary to discharge his duties (together, from time to time, the "Secretariat").

40 The Secretariat shall be appointed upon such terms as the Committee shall determine.

41 The terms upon which the Secretariat are retained may, in addition to providing for remuneration, include provision for the payment of such pensions, allowances or gratuities or such contributions or payments towards provision for such pensions, allowances or gratuities, as may be determined by the Committee.

## **The Agency Company**

42 Without prejudice to the generality of Rule J3(i), the Committee shall have power:

- (a) to promote and register in England a company limited by guarantee and not having a share capital (the "Agency Company") to act as its agent and/or nominee;
- (b) to decide, subject to the provisions of Rules J44 to J47, the terms of the constitution of the Agency Company from time to time; and
- (c) to make agreements and arrangements pursuant to which the Agency Company acts as the agent and/or nominee of the Committee for the discharge of administrative functions and the provision of administrative services (including, without limitation, the provision of goods and services and the holding of property) on such terms as it may in its discretion determine.

43 For the avoidance of doubt:

- (a) the agreements and arrangements referred to in Rule J42(c) may include contracts under which officers and staff of the Secretariat (including the Secretary) are engaged by the Agency Company as agent of the Committee;
- (b) the Committee or the Committee Members may, under agreements and arrangements referred to in Rule J42(c), appoint the Agency Company as agent to make any appointment or otherwise exercise the powers under this Chapter J and references in Rules J59, J61 and J62 to the Committee or Committee Members acting on behalf of Resolution Service Parties or entering into a contract of appointment or contract of employment on behalf of Resolution Service Parties shall be construed accordingly; and
- (c) Committee Members will be liable under contracts made by, and for acts and omissions of, the Agency Company acting within the scope of its authority as agent under agreements and arrangements referred to in Rule J42(c).

44 Each of the Committee Members is required to be a member of the Agency Company. With a view to giving effect to that requirement, each Committee Member shall, on his appointment as such, make application to be admitted as a member of the Agency Company in accordance with the terms of its constitution from time to time and agree to be bound by the provisions of agreements and arrangements made under Rule J42(c) prior to the date of his admission and of all contracts entered into by the Agency Company prior to the date of his admission pursuant to those agreements and arrangements. Without prejudice to the provisions of Rules J15 and J16, a Committee Member shall be treated as having resigned from office if he fails to comply with the provisions of this Rule J44 within 60 days after his appointment.

45 No person other than a Committee Member may be a member of the Agency Company.

46 The Secretary shall be a director of the Agency Company ex officio. The Committee may appoint all or any Committee Members to be directors of the

Agency Company and no person other than a Committee Member may be an alternate director of the Agency Company.

- 47 No person other than a Committee Member or the Secretary may be a director of the Agency Company.

### **Funding**

- 48 The Committee's financial year shall commence on 1 April.

- 49 The work of the Committee shall be funded by payments from the Resolution Service Parties. In respect of its funding and financial position the Committee shall be run as a going concern.

- 50 The required payments from the Resolution Service Parties shall be calculated in respect of each financial year and (subject to Rules G52 and J49) shall reflect the estimated costs and expenses of the Committee (including ADA and TTP) together with appropriate allowance for contingencies and for meeting cashflow requirements into the ensuing year. In abnormal circumstances additional payments may be required during a financial year to meet unplanned or unexpected costs.

- 51 The Resolution Service Parties shall make payments as follows:

- (a) any Resolution Service Party which does not pay the Railway Safety Levy shall make a payment in an amount to be assessed by the Committee which shall be fair and reasonable taking into account such factors as the Committee in its discretion believes to be appropriate which may include the turnover of the Resolution Service Party in relation to the mainline railway in Great Britain and the need to allow potential access parties and others reasonable access to the dispute resolution service;
- (b) where incorporation of these Access Dispute Resolution Rules or RIDR Rules into a contractual arrangement is a matter of commercial choice and not a requirement of a regulated contract, and the parties are not already Resolution Service Parties, the parties to that contractual arrangement shall become Resolution Service Parties upon agreement with the Committee of the payment to be made by them in each financial year which shall be fair and reasonable to all Resolution Service Parties;
- (c) the remaining funding in addition to those sums paid under (a) and (b) above which is required by the Committee in accordance with J49 and 50 shall be paid by those Resolution Service Parties which pay the Railway Safety Levy. Each such Resolution Service Party shall pay a proportion of the remaining funding equal to the proportion which the amount of Railway Safety Levy most recently determined as payable by it (subject to such rebate as the Committee chooses to apply in its absolute discretion to take account of a Resolution Service Party's business and operations which do not relate to matters subject to these Rules) bears to the aggregate Railway Safety Levy payable by all Resolution Service Parties (as adjusted to take account of the Resolution Service Parties' business and operations which do not relate to matters subject to these Rules);
- (d) in each financial year the Committee shall, for that financial year, assess the payments to be made by any party which does not fall within the above provisions and which, in that financial year, becomes or remains in a dispute registered with the Secretary and such party shall make such payments upon

request from the Secretary; the amount of which (in any one financial year) shall not be less than £1,000.

- 52 The Committee may from time to time publish and/or amend a statement of the additional charges it will require Dispute Parties to pay in relation to the services provided in connection with disputes which have been referred for resolution under these Rules and may require Dispute Parties to pay such charges (including as a precondition to releasing determinations).
- 53 The Secretary shall receive and hold amounts paid pursuant to these Rules on behalf of the Committee and shall be entitled to exercise all relevant legal rights in respect of entitlement to, ownership of, or control of those amounts including to make demands and bring actions in his own name or that of the Committee in relation to them.
- 54 Any request for payment from the Secretary shall be settled within 30 days.
- 55 Without prejudice to any other rights available to the Secretary and/or the Committee under this Chapter J including the right to enforce such payments as a debt, in the event that any party fails to pay to the Secretary the required amount pursuant to Rule J51 within 30 days of being requested to do so by the Secretary, that party shall pay interest (incurred daily and compounded monthly) on the required amount from the due date to the date of actual payment at the rate 8% above the base lending rate of Barclays Bank plc as varied from time to time during the period in which the required amount remains unpaid. Any such interest due may be invoiced as an addition to the amount payable by the relevant party in the following year.
- 56 The Committee shall manage its finances such that funds are held to meet all reasonably foreseeable liabilities including building up funds for payments of property charges including dilapidations and in accordance with Rule J49. To the extent that the actual costs and expenses of the Committee shall have been underestimated by the Committee in respect of any period, the amount of the difference may be carried over to the following year and added to the amounts payable by the Resolution Service Parties in that following year. To the extent that the actual costs and expenses shall have been significantly overestimated in respect of any period, the amount of the difference shall be carried over to the following year and shall be deducted from the amounts payable by the Resolution Service Parties in that following year.
- 57 Any Resolution Service Party shall be entitled to require the Secretary to provide him with a certificate from a firm of chartered accountants in relation to the costs and expenses of the Committee in respect of any financial year. The Secretary shall promptly comply with any such request.
- 58 The Committee shall review and approve its accounts annually. The Committee may at any stage commission such additional audit examination as may be considered appropriate.

### **Capacity of Committee to enter into Contracts**

- 59 In making any appointment or otherwise exercising the powers under this Chapter J the Committee Members are authorised to act on behalf of the Resolution Service Parties.

60 None of the Allocation Chair, any Hearing Chair, any Industry Advisor, the Secretary or any member of the Secretariat shall by virtue of his office be an employee of the Committee or any person.

61 A Resolution Service Party, on becoming such, shall indemnify those who are already Resolution Service Parties ("the Existing Resolution Service Parties") against its share of any liability which arises:

- (a) while it is a Resolution Service Party; and
- (b) under any contract of appointment and or other contract that is entered into by the Committee Members on behalf of the Existing Resolution Service Parties (or some of them, and whether or not with others) before it became a Resolution Service Party.

A Resolution Service Party's share shall be the appropriate proportion of the liability calculated in accordance with Rule J51(d), applied to the Resolution Service Parties at the time the liability arises.

62 A Resolution Service Party that ceases to be such shall be indemnified by the Resolution Service Parties which remain against any liability which arises:

- (a) after it ceases to be a Resolution Service Party; and
- (b) under a contract of appointment and or other contract entered into by the Committee on behalf of it (with other Resolution Service Parties) while it was a Resolution Service Party,

such that the Resolution Service Parties as at the date the liability arises shall bear it in the proportion applied to them as set out in Rule J51.

#### **Publication of Information**

63 The Committee shall require the Secretary to ensure that the access disputes website shall be maintained. It shall be up to date at all times so as to contain, by means of conspicuous and easily accessible links:

- (a) the identity and telephone contact number for the Secretary, all Committee Members and members of the Timetabling Pool;
- (b) copies of the approved minutes of every meeting of the Committee;
- (c) copies of the annual report and any other reports of the Committee, and of all other general communications to Resolution Service Parties in relation to its affairs;
- (d) subject to determinations of commercial confidentiality, copies of every reference to the ORR under these Rules and all responses from the ORR; and
- (e) all other Documents including determinations and awards as specified for publication on the access disputes website in these Rules.

#### **Liability of Committee Members, Panel Members and officers**

64 Subject to Rule J65 none of the Committee Members, the Committee, Panel Members (TTP or ADA), Committee Chair, the Allocation Chair, any Hearing Chair, Industry Advisors and the Secretary or any member of the Secretariat shall be liable

- in contract or tort or otherwise to any party for any act or omission (including negligence) in connection with any Committee proceedings or dispute determined by a Timetabling Panel or by a Hearing Chair under these Rules except in respect of any act or omission shown to constitute bad faith and/or dishonest conduct.
- 65 The exclusion of liability in Rule J64 does not extend to the obligations of the Committee Chair, the Allocation Chair, any Hearing Chair, Industry Advisors and the Secretary, or member of the Secretariat contained in any contract of appointment.
- 66 The Resolution Service Parties shall (subject to Rule J67) jointly and severally indemnify, and keep indemnified, the Committee Members, Committee Chair, the Allocation Chair, any Hearing Chair, Panel Members (TTP or ADA), Industry Advisors, the Secretary and any member of the Secretariat against any liability incurred (or alleged to have been incurred) by them to any Dispute Party or any third party in connection with any of their duties under these Rules except in respect of any act or omission which is shown to constitute bad faith and/or dishonest conduct or which would be a breach of any obligation contained in any contract of appointment.
- 67 The indemnity obligation of a specific Resolution Service Party under Rule J66 shall exclude any individual who is an appointed officer of that Resolution Service Party or of any affiliate if (and only to the extent that) such indemnity would be precluded under the Companies Acts. For the avoidance of doubt such exclusion shall not however affect:
- (a) the joint and several obligation of that Resolution Service Party under Rule J66 to indemnify other relevant individuals;
  - (b) the joint and several obligation of all other Resolution Service Parties to indemnify any individual not entitled to an indemnity from any Resolution Service Party by virtue of a directorship; and
  - (c) any lawful right of contribution by indemnifying Resolution Service Parties against a Resolution Service Party not required to indemnify by reason of this Rule J67.

#### **Other Administrative Issues**

- 68 These Rules may be amended in accordance with the provisions of Part C of the Network Code.
- 69 No amendment of these Rules shall have effect unless approved by the ORR.
- 70 Any dispute arising out of the operation or interpretation of these Rules including this Chapter J shall be referred to the ORR for determination in accordance with such process as the ORR shall specify. In the event that the ORR determines that a reference made to it under this Rule J70 does not relate to the operation or interpretation of these Rules, it shall decline to hear the reference.
- 71 These Rules are subject to English law except as otherwise provided as being subject to Scottish law.
- 72 These Rules form part of the Network Code.