

Determination in respect of reference ADP23

(following a Hearing held at Central House, Euston on 7th August 2007)

The Panel

John Boon: appointed representative of Network Rail
Tony Deighan: elected representative for Non-Franchised Passenger Class
Nick Gibbons: elected representative for Non-Passenger Class, Band 1
Mike Price: elected representative for Franchised Passenger Class, Band 1

Panel Chairman: **Sir Anthony Holland**

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, in a joint reference from English, Welsh and Scottish Railway ("EWS") and Network Rail Infrastructure Limited ("Network Rail") to determine, under the provisions of Network Code Part J,
 - 1.1. in respect of the operation of Part J7 "**Freight Transfer mechanism**", whether or not
 - 1.1.1. Network Rail was entitled to transfer the Firm Rights set out in Service Group 2309, and relating to the transport of coal from Bristol Portbury Docks to Rugeley Power Station, from EWS (the "Incumbent"/ most recent operator), to Freightliner Heavy Haul ("FHH": the "Applicant"), together with the associated Train Slots;
 - 1.1.2. Network Rail was entitled to transfer the Firm Rights set out in Service Group 2309, and relating to the transport of coal from other Originating Points to Rugeley Power Station, from EWS (the "Incumbent"/ most recent operator), to Freightliner Heavy Haul ("FHH": the "Applicant"), together with the associated Train Slots;
 - 1.1.3. EWS was entitled to retain some Firm Rights and associated Train Slots between Bristol Portbury Docks and Rugeley Power Station, on the grounds of a demonstrable "Reasonable Ongoing Commercial Need"; and
 - 1.2. in respect of the operation of Part J8 "**Cordon Cap Reduction (transfer)**", whether or not
 - 1.2.1. Network Rail was entitled to make the changes it had proposed for reducing the Cordon Caps for EWS at the three locations, Bristol Stapleton Road, Bristol Parkway, and Cheltenham Spa;
 - 1.2.2. EWS was right when it questioned Network Rail's calculation of its revised allocation to operators of the Cordon Cap at the three locations, Bristol Stapleton Road, Bristol Parkway, and Cheltenham Spa, on the grounds of both a demonstrable "*reasonable ongoing commercial need*" and an inappropriate interpretation of the provisions of Part J8; and

- 1.2.3. Network Rail was entitled to make the changes it had proposed to increase the Cordon Caps for FHH at the three locations, Bristol Stapleton Road, Bristol Parkway, and Cheltenham Spa.
2. Within the terms of the general provisions of Network Code Parts J7, J8, and J13, the prescribed method of Dispute Resolution is by reference to *"the relevant ADRR Panel"*. In the current case, which arises because of Network Rail's challenge to the content of a Third Party Counter Notice, served by EWS in accordance with Condition J7.6, Network Rail is the Claimant, and EWS the Respondent. Given the standing of FHH as the Applicant in the Case, the Panel Chairman had directed that Network Rail should be entitled to call FHH as a witness, to substantiate the conditions behind Network Rail's initiation of the J7 and J8 proceedings.

Some preliminary issues of definition

3. It should be noted in this determination that there is a lack of definition as well as clarity in Part J of the Network Code which has caused the Panel concern, as well as difficulty, in arriving at its conclusions. It therefore makes the request that this Part be revisited in the near future, paying particular attention to clarifying in some detail many of the terms used.
4. Condition J7 "Freight Transfer Mechanism" is glossed in the (non-binding) explanatory Note F as *"The purpose of the mechanism is to ensure the smooth transfer of rights where a Train Operator wins existing freight traffic from an incumbent freight Train Operator."* This is defined more precisely in J7.1.2 ; *"This Condition J7 applies only to an application from the Applicant which requests a Quantum Firm Right for the provision of transport services to a third party that the Applicant will replace the Incumbent in providing"*. This form of words also forms a duty on the Applicant, who is required by Condition J7.3(b)(ii) to specify *"that the Quantum Firm Right sought is for the provision of transport services to a third party that the Applicant will replace the Incumbent in providing"*.
5. *"Applicant"* and *"Incumbent"* are nominally defined terms in Part J, as is *"Quantum Firm Right"*, although in the submission from the parties this last term is used in a variety of ways. By contrast, the lack of defined meanings, within Part J7, of *"provision of transport services"*, *"third party"* and *"replace"*, has required the Panel to do the best it can to interpret the provisions of Parts J7 and J8, taking into account the facts of the specific case, and the normal operation of the Timetabling provisions of Part D of the Network Code.
6. For the avoidance of ambiguity, this determination has adopted the following usage of certain key terms:
 - 6.1. *"Quantum Firm Right"* is defined, in Condition J, as: *" a Firm 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 Firm Right"*. In this case
 - 6.1.1. the disputed Quantum Firm Right relates to the right to move Coal trains to Rugeley Power Station, from a variety of sources, including Bristol Portbury Docks, as expressed in Service Group 2309 of the EWS Track Access Contract (dated 9th February 2006, and commencing on June 1st 2007); and
 - 6.1.2. the *"number (or quantum) of Train Slots in any specified period"* for Service Group 2309 is not defined for any individual source point: instead it is subject to the following: *"\$\$\$NOTE: The Overall maximum EWS Level 1 plus*

level 2 rights to Rugeley from all sources is 5 per day” (Schedule 5 Rights Table).

6.1.3. “5 per day” derives from the fact that the number of unloading slots available at Rugeley Power Station is limited, and 5 is the maximum number allocated for EWS’ use. The remaining unloading slots were allocated to Freightliner Heavy Haul (“FHH”).

6.2. “Train Slot” is defined in Condition D as “a train movement or 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”. In this case

6.2.1. the principal interest resides in the Train Slots incorporated into the (December 2006) Working Timetable (“WTT”) for services from Bristol Portbury Docks to Rugeley Power Station;

6.2.2. the actual slots are

		Rugeley Power Station					
Discharge Slot (start time)		06:30	<i>No discharge slot for EWS</i>	09:30	12:30	15:30	18:30
Arrival Time		06:36		09:32	12:31	15:30	18:29
		↑	↗	↑	↑	↑	↑
Train Reporting Number		6M10	6M12	6M08	6M13	6M18	6M04
Departure Time		21:00	23:00	01:00	03:00	07:00	09:00
Loading Slot (finish time)		21:00	23:00	01:00	03:00	07:00	09:00
		Bristol Portbury Docks					

6.3. “Rights Subject to Surrender”: is defined in Part J, and in the context of Condition J7 is the statement by Network Rail in the Third Party Notice of “the Quantum Firm Right to which such notice refers and...any Train Slots or part of it in the Working Timetable which relates to that Quantum Firm Right...”. In this case,

6.3.1. the Third Party Notice was first formulated as relating solely to Train Slots from Bristol Portbury Docks to Rugeley Power Station, associated with the full quantum of 5 trains per day. This Notice was subsequently amplified to include the right to move coal from all the sources listed in Service Group 2309;

6.3.2. the practical effect of a transfer of Rights Subject to Surrender on the Incumbent is that any rights as to sources can only be used if the quantum transferred is less than the full Quantum Firm Right, and that portion of the quantum is not otherwise subject to surrender under a Failure to Use notice under Conditions J4 or J5.

- 6.4. "Y" path: a term in common railway use, signifying where two (or more) Train Slots incorporated into the WTT share a common portion of route and timings, but serve different sources, and/or destinations. By definition, on any one day, only one of the combined Train Slots can be used. The extent to which the Bristol Portbury Docks to Rugeley Power Station Train Slots above are combined with others in "Y" paths is illustrated in the annex to this determination.
- 6.5. *"third party"*: The meaning to be attributed to this term was initially a cause of contention. However, through the medium of directions issued before the hearing, the parties have accepted that, in this instance, *"third party"* shall be understood as
 - 6.5.1. *"a single directing mind which determines, in the name of the power station, how much coal should be transported to the station, and from which points of origin"*. And therefore is
 - 6.5.2. not, necessarily, a carriage paying party because *"the identity of the carriage paying third party may change, but is generally a matter of indifference to Network Rail, and thus to the operation of Part D of the Network Code."*
 - 6.5.3. the owner of Rugeley Power Station, International Power (IP)
7. By contrast, the meanings of *"provision of transport services"*, and *"replace"* are disputed by the parties, and are material to the formulation of the final determination.

The Panel's findings in respect of facts

8. According to International Power IP the annual coal burn at the Station could be 2.4M tonnes, but the demand placed on Rugeley Power Station is inversely proportional to the price of gas, and any resultant switching between gas and coal fired generating stations. Week by week demand for movement of coal can also be influenced by shipping considerations, the balance of home produced and imported coal, and by the requirements for seasonal stocking.
9. EWS has transported Coal to Rugeley Power Station for a variety of carriage paying parties, including IP, and at varying volumes. Where, in 2007 coal moved from Bristol Portbury Docks, IP was the carriage paying party, and the traffic was moved under EWS' General Conditions of Carriage, and NOT under any specified contractual terms stipulating, or guaranteeing, any weekly tonnage. The Panel therefore found that there was no existing specific long term contract between EWS and IP.
10. Rugeley Power Station, during the same period, also received coal from other sources, transported by services operated by FHH.
11. The Panel was supplied with copies of e-mails which suggested that there had been dialogue between IP and EWS as to the volume of coal to be transported from Bristol Portbury Docks to Rugeley Power Station, with requests for volumes of variously 13,000 tonnes per week ("flat programme") to future amounts in excess of 20,000 tonnes per week. At a nominal train size of 1470 tonnes payload, this would imply regular weekly programmes of two to three trains per day.
12. No movement of Coal from Bristol Portbury Docks to Rugeley Power Station was made by EWS after February 2007.
 - 12.1. On 19th February 2007, IP advised EWS that it would *"suspend despatches from Bristol after this week for approximately 6 months. This action is aimed solely at enabling Rugeley to create sufficient stocking space for the Indonesian coal to be used for our FGD installation"*.

- 12.2. On 23rd March 2007, IP advised EWS by letter that it had "*decided to cease using EWS as its rail haulier from Bristol/Portbury with effect from today.*"
13. EWS, in response to a direction, presented evidence that in 2007 it had operated the following services to Rugeley Power Station under the terms of the QFR for Service Group 2309:
- 13.1. During January 2007 EWS moved 58 trains from Bristol Portbury Docks to Rugeley Power Station (plus 5 from Avonmouth West Wharf), with a further 11 trains from Chalmerston. In February the train numbers were 19 from Bristol Portbury Docks, 2 from Avonmouth and 19 from Chalmerston, and in March, just 25 trains from Chalmerston.
- 13.2. As regards movements just from the Bristol area, during January and February EWS made some use of all six loading slots at Portbury Docks, all six Train Slots, and all five discharging slots at Rugeley Power Station. Network Rail's evidence in response to the same question differed in detail
14. At a tri-partite meeting with Network Rail and FHH on 19th February 2007, EWS requested no changes to Service Group 2309 or its associated Train Slots in respect of the Level 2 rights between Portbury and Rugeley Power Station.
15. On 5th April 2007, FHH wrote to Network Rail to advise that FHH "*has secured firm contracts for the provision of transport services to Rugeley Power Station which are currently operated by EWS. This transfer of business will mean that FHH is the sole provider of Rail Haulage to Rugeley Power Station. It is therefore our understanding that the situation contemplated by paragraph J7.3 (b) (ii) has arisen*". FHH went on to ask Network Rail
- 15.1. to transfer to it, in accordance with the provisions of Condition J7, all the Level 1 and 2 rights on a list which corresponded to Service Group 2309 in the EWS Track Access Contract; and
- 15.2. to make adjustments, in accordance with the provisions of Condition J8 to the three Cordon Caps at Bristol Stapleton Road, Bristol Parkway and Cheltenham Spa station, in each case reducing the EWS Cordon Cap by 4 in each direction, and increasing that of FHH by the same number.
16. On 23rd April 2007 Network Rail sent EWS a Network Code Part J Section 7 Third Party Notice-, seeking EWS' agreement that
- 16.1. all of the rights in Service Group 2309 should be deemed "Rights Subject to Surrender", to be transferred to the Applicant's Track Access Contract with effect from 3rd June 2007; and
- 16.2. that the Cordon Caps at Bristol Stapleton Road, Bristol Parkway and Cheltenham Spa station should each be reduced by 4 Train Slots in each direction.
17. On 10th May 2007, EWS sent a Third Party Counter Notice to Network Rail in which EWS questioned the content of Network Rail's Third Party Notice, specifically in relation to
- 17.1. the rights (and Train Slots) sought in respect of traffic to Rugeley Power Station other than from Bristol Portbury Docks;
- 17.2. the precise definition and extent of the traffic from Bristol Portbury Docks to Rugeley Power Station for which the Applicant would be **replacing** the Incumbent in providing; and

- 17.3. the proposed reductions in the three Cordon Caps.
18. EWS counter-proposed that
- 18.1. the only rights and Train Slots to be subject to transfer, should be for traffic from Bristol Portbury Docks to Rugeley Power Station, because it had not been demonstrated that the Applicant was **replacing** EWS in respect of other movements to Rugeley;
 - 18.2. the number of Train Slots should be calculated solely by reference to the numbers of trains that EWS had actually moved from Bristol Portbury Docks to Rugeley Power Station during the 2006/7 financial year (381 trains), and for which IP, was the carriage paying party, and that therefore it should only surrender 2 Train Slots;
 - 18.3. any Cordon Cap reduction should relate solely to a transfer of 2 Train Slots between Bristol Portbury Docks and Rugeley Power Station and therefore should not be a reduction of more than 2 Train Slots at any location; and that
 - 18.4. EWS had a "*reasonable ongoing commercial need*" for the other Train Slots between Bristol Portbury Docks and Rugeley Power Station, and for the contested reduction in the Cordon Cap. That said
 - 18.5. EWS was prepared under Condition J2, whether or not through the mechanism of a Rights Review meeting convened under the provisions of Condition J9, to surrender rights for which it no longer had need. Indeed EWS had already surrendered a number of Train Slots relating to Service Group 2309 through the Part D timetabling process, but that this preparedness did not mean that such rights could fall to be transferred under Condition J7.
19. a letter of 16th May 2007 between IP and Network Rail, headed 'Freightliner/EWS services from Port of Bristol', stated that "*IPFC has secured a haulage agreement with FLHH for the transportation of coal and has dispensed with the need to use EWS for any deliveries into Rugeley*", and stated that "*In accordance with the terms of the stevedoring agreement between IPFC and The Bristol Port Company ("BPC") IPFC has the right and the options to bring certain quantities of coal per year through the Bristol Port. These volumes of coal equate to an equivalent requirement of up to four trains per day*".
20. Directions issued by the Disputes Chairman on the 18th and 24th of July, sought clarification of some of the matters of fact, in particular as they relate to EWS' representations in respect of "*Reasonable Ongoing Commercial Need*" and to Network Rail's interpretation of the Office of Rail Regulation's "Criteria for interpreting the expression "*Reasonable Ongoing Commercial Need*".
21. The responses to the directions from both parties, provided the Panel with clarification as to
- 21.1. the extent to which parts of the Train Slots corresponding to the rights in Service Group 2309 between Bristol Portbury Docks and Rugeley Power Station are also incorporated, on a "Y" path basis, into other Train Slots corresponding to rights in other Service Groups, or to Spot Bids; (see annexe)
 - 21.2. Network Rail's understanding of the Cordon Cap reduction calculation, and
 - 21.3. the extent to which EWS' case for "*reasonable ongoing commercial need*" for both rights and Cordon Cap was based upon an interest in the provision of transport services to Rugeley, or upon protecting "Y" path Train Slots serving other destinations and Service Groups.

22. There was continued correspondence, and a tripartite meeting between Port of Bristol, EWS and FHH (on 19th July), about a possible allocation of loading slots at Bristol Portbury Docks as between the two train operators, and about which the parties do not agree as to whether or not it was held on a “without prejudice” basis. (see below at paragraph 34).

The Contentions of the Parties

23. Although Network Rail is the Claimant in this case, it is right at this point for the Panel to remind itself that most of Network Rail’s arguments are driven by the need to respond to points made by EWS in its Third Party Counter Notice. Thus EWS’ arguments lead it to ask the Panel to determine that

“6.2 *In respect of the QFRs requested in the Third Party Notice (with the exception of those relating to Portbury to Rugeley Power Station), EWS requests the Panel to determine that EWS has met the requirements of the transfer mechanism in agreeing to transfer only those QFRs/Rights Subject to Surrender that were used by EWS to convey coal to Rugeley on behalf of International Power (i.e. the third party that the Applicant has replaced EWS in providing transport services for).*

6.3 *In respect of the QFRs concerning coal services from Portbury to Rugeley Power Station, EWS requests the Panel to determine that EWS has met the requirements of the transfer mechanism in agreeing to transfer QFRs equating to 2 rather than 4 trains per day from Portbury to Rugeley Power Station.*

6.4 *However, should the Panel not find in favour of EWS in respect of paragraph 6.3 above, EWS requests the Panel to determine that EWS has demonstrated a reasonable on-going commercial need in accordance with the transfer mechanism for the retention of QFRs for Train Slots relating to the 23.00 and 01.00 departure slots at Portbury.*

6.5 *In respect of the requested Cordon Cap Reductions, EWS requests the Panel to determine that, to meet the relevant requirements of Condition J8 of the Network Code, any proposed Cordon Cap Reduction should be quantified by Network Rail in accordance with the relevant formula contained within the ‘Criteria for Interpreting the Expression ‘Reasonable On-going Commercial Need’.*”

24. For its part

6.1 *Network Rail requests that the Panel Determines that:*

(a) The Applicant has replaced EWS in the provision of transport services to a Third Party, and therefore the circumstances contemplated by Condition J7.3 (b) (ii) have been satisfied.

(b) in accordance with Condition J7.6.1 EWS has not demonstrated it has a reasonable ongoing commercial need in that it has not provided evidence in support of its objection to the transfer of these rights, associated Train Slots and Cordon Cap adjustments.

(c) in accordance with Condition J.7.8.1 that EWS has no reasonable ongoing commercial need for all of the Rights Subject to Surrender, i.e. those which are contained in SG 2309 of the EWS Track Access Contract dated 9 February 2006, and that such rights shall in due course be granted to the Applicant pursuant to Condition J7.9.

(d) in accordance with Condition J8.2.9 the following adjustments to Cordon Caps are made in the EWS Track Access Contract: Bristol Parkway Station reducing from 9 to 5 in each direction, Cheltenham Spa Station reducing from 8 to 4 in each direction and Stapleton Road Station reducing from 6 to 4 in each direction. Network Rail notes that any Determined adjustments to Cordon Caps are subject to ORR consent in accordance with Condition J8.4.

(e) the associated Train Slots, as identified in Appendix B of the Third Party Notice dated 23 April 2007 also transfer to the Applicant.

The Panel's findings in respect of entitlements

Quantum Firm Right

25. The Panel noted that the granting /approving of Firm Rights is exclusively the responsibility of the Office of Rail Regulation; it follows, therefore, that Condition J7 can achieve the transfer of all, or part of a QFR, but cannot result in an outcome where either the quantum has been increased, or the qualitative content of Firm Rights has been changed, and that this is also a material constraint upon the Panel's determination.
26. The Panel took the view that changing the rights of an operator was a serious step, which placed a significant duty of care on all involved to not step beyond that which was allowed by the processes in Part J of the Network Code.
27. Condition 7.1.2 imposes a precondition on transfer of rights. The rights can only be transferred where those rights are requested "for the provision of transport services to a third party that the Applicant will replace the Incumbent in providing"
 - 27.1. EWS contend that their ad hoc agreements with International Power required no specific capacity to be provided and that in practice the traffic they were being replaced in providing was no more than could be moved by two trains a day between Portbury and Rugely and that they were not providing a service from the other locations for which transfer of rights to move coal to Rugely was requested.
 - 27.2. Network Rail, supported by FHH, confirmed that that FHH had secured a firm contract with I P that required all of the slots between Portbury and Rugely because International Power wished to increase coal movements from Portbury to Rugely to 4 trains per day. Network Rail also confirmed that the other rights currently held by EWS to Rugely were required to enable FHH, if requested, to satisfy non exclusive options in its contract with IP.

- 27.3. If condition J 7.1.2 is satisfied an applicant may notify Network Rail that it requires the rights currently held by that operator to replace that operator. The J7 and J8 processes are set in motion when, as in Condition J7.2, "*Network Rail receives an application from a Train Operator (the "Applicant") requesting a Quantum Firm Right that is substantially similar to an existing Quantum Firm Right of another Train Operator (the "Incumbent")*".
- 27.4. The panel noted that FHH were requesting rights that were virtually identical to those held by EWS.
- 27.5. While EWS had used those rights, and associated Train Slots, to provide flexibility to operate trains for IP at different times of the day, FHH was intending to use those same rights to increase the number of movements made for IP.
- 27.6. Even if that were not the case, but given that condition 7.1.2 appears to be a condition precedent, it became clear to the panel from what was stated at the hearing that the intention of FHH in the services that it would provide would be in excess of that provided historically by EWS so that it would be straining credulity to consider that the proposed service "replaced" the one that EWS had provided as is set out in J 7.1.2
28. EWS' Quantum Firm Right had been translated into 6 Train Slots permitting the operation of 5 trains daily between Bristol Portbury Docks and Rugeley Power Station. In practice, although EWS' evidence suggested that in January some use had been made of all the Train Slots, this had been to achieve a programme of no more than 58 trains, broadly equivalent to 2 trains per day;
- 28.1. FHH was seeking the transfer of the Quantum Firm Right in order to have Train Slots sufficient to run up to 4 trains per day from Bristol Portbury Docks to Rugeley Power Station;
- 28.2. EWS was running no trains following IP's cancellation of the programme in February 2007, nor did it have any form of contract in relation to any past or future tonnage;
- 28.3. FHH advised that they have a definite contract to take over the transport of all coal to Rugeley Power Station, and have the benefit of confirmation from IP that such is the case.
- 28.4. It is difficult to see any real resemblance between these two sets of circumstances. This is because, in effect, EWS was running on average two trains a day on the basis of an *ad hoc* arrangement, whereas FHH wished to run up to 4 trains a day on the basis of a firm contract. This cannot be regarded as a straight replacement of the EWS service as J7.1.2 of the code requires.
29. EWS concedes that, for the purposes of moving coal from Bristol Portbury Docks to Rugeley Power Station, it has been "*replaced*" by FHH, but argues that that "*replace[ment]*" relates only to the 381 trains from Bristol Portbury Docks to Rugeley Power Station for which IP was the carriage paying party, a tonnage that requires no more than 2 Train Slots per day, and that therefore any transfer should only affect two Train Slots.
30. Network Rail, and FHH, contend that
- 30.1. FHH is planning, on the basis of contractual commitments from IP, to move a volume of business that requires the number of Train Slots, and therefore the Quantum of Rights, that were previously accorded to EWS;

- 30.2. the calculation used by EWS to support a transfer of no more than 2 Train Slots and related rights, is not one recognised by the terms of the Track Access Contract, or by Condition J7;
- 30.3. the only grounds that EWS may advance for not surrendering all the Quantum Firm Right for Service Group 2309, are as set out in Condition J7.6.1, which requires it to demonstrate *“a reasonable on-going commercial need for all or any of the rights subject to surrender: and provide “evidence in support of its objection”*.
31. The Panel having heard the parties concludes that
 - 31.1. the number of trains that FHH aspires to run on behalf of IP is sufficiently more than previously operated by EWS that what is being sought goes beyond replacing the service provided by EWS.
 - 31.2. Network Rail was required to administer this Condition J7 process with the application of judgement, and not just mechanically, in particular bearing in mind that any transfer of rights:
 - 31.2.1. cannot create rights different from any previously approved by Office of Rail Regulation;
 - 31.2.2. should have *“Service Characteristics in substantially the same form as the Rights Subject to Surrender”* (Condition J7.9(b)), whilst also taking account of the principle
 - 31.2.3. should *“Provide for efficient scarce capacity decisions that recognise industry net benefits”* (ORR Criteria for interpreting *“Reasonable Ongoing Commercial Need”*).
32. The Panel concluded that while the Applicant was replacing the Incumbent in providing a service it was also acquiring further business and the rights requested were not only to be used for replacing the Incumbent but also for expanding the business subject to different contractual terms. The Panel held that the rights transferred should be no more than those required to enable the Applicant to replace the Incumbent.
33. The Panel noted
 - 33.1. EWS’s theoretical calculation that the service could be provided using no more than 2 Train Slots per day, and that
 - 33.2. EWS had used the flexibility and contingency that additional Train Slots provided to meet the needs of IP;
 - 33.3. the service which the Applicant was contracted to provide goes beyond that operated by EWS, and that therefore
 - 33.4. the request for all of the rights currently held by EWS appeared excessive.
34. The Panel considered that an application for rights to 3 slots per day between Portbury and Rugely to be transferred to the Applicant would have been a reasonable request, enabling the Applicant to ensure that it could provide the transport service previously provided by EWS, and to have adequate flexibility to meet the needs of the Third Party.
35. Under Part J7.7 of the Network Code rights, even where applied for appropriately, cannot be transferred where the Incumbent has demonstrated a *“reasonable ongoing commercial need”* for the rights. The ORR Criteria for interpreting *“reasonable ongoing commercial need”* require that the Incumbent must *“demonstrate in respect of each of such rights that*

they are required to continue to convey traffic for other customers which is also being conveyed using the rights in question". The Panel therefore found that

- 35.1. EWS contends that it has a "*reasonable ongoing commercial need*" for the Train Slot,s because of the use it makes of the alternative "Y" paths in some of those Train Slots
 - 35.2. whilst some of the "Y" paths are also level 2 rights, some are only level 3 rights, and, as such, are not covered by Part J7
 - 35.3. the QFR requested relates solely to rights to Train Slots to Rugeley Power Station;
 - 35.4. it had been confirmed that there was no immediate prospect of EWS operating trains to Rugeley Power Station;
 - 35.5. Condition J7 only applies to those Train Slots that relate to the QFR in question in the Third Party Notice.
 - 35.6. each of the Train Slots combined as a "Y" path potentially satisfies the definition as a separate Train Slot and can therefore be transferred to another Train Operator without affecting the other. Therefore arguments about "Y" paths are not sufficient to establish "*reasonable ongoing commercial need*" because such rights are not "*required to continue to convey traffic for other customers which is also being conveyed using the rights in question*".
 - 35.7. many of the arguments for "*reasonable ongoing commercial need*" in respect of certain of the "*Rights Subject to Surrender*" relate to Train Slots associated with specific loading slots at Bristol Portbury Docks, and EWS was explicitly arguing to retain certain Train Slots in order to retain the corresponding loading Slot, for the benefit of a Train Slot to a different destination (see annexe); Therefore
 - 35.8. EWS had not demonstrated a "*reasonable ongoing commercial need*" for the QFR or any of the associated Train Slots in the timetable. More specifically, EWS had not made the case in respect of Service group 2309 "*for the retention of QFRs for Train Slots relating to the 23.00 and 01.00 departure slots at Portbury*".
36. The Panel therefore concluded that
- 36.1. the Applicant had not satisfied the requirements of clause 7.1.2 as, on the evidence available to the Panel, no more than three Train Slots appear to be necessary to provide the transport service provided by the Incumbent.
 - 36.2. were the Applicant to have made a request for the transfer of rights for 3 Train Slots, the Incumbent has not demonstrated a "*reasonable ongoing commercial need*" which would have prevented the transfer of those rights and the associated Train Slots.
37. In the event that, as a result of a transfer of the Firm Rights in question, Network Rail is faced with deciding how to disentangle established "Y" paths, the Panel would expect Network Rail to apply consistent principles that take account of
- 37.1. the Decision Criteria in Condition D6 of the Network Code, and
 - 37.2. Network Rail's responsibility to carry out a Rights Review process in accordance with Condition J9. and
 - 37.3. the need for a Train Operator wishing to make use of a particular Train Slot to secure access to a relevant loading slot at Bristol Portbury Docks, in compliance with Clause 6.4 of the Model Freight Track Access Contract.

38. The Panel noted that discussions towards resolving the allocation of loading slots at Portbury had so far been inconclusive and this would affect Network Rail's ability to determine which Slots it was appropriate to transfer. However the panel hoped that its conclusions would help resolve this issue.
39. In respect of this last point, the Panel noted that a meeting had been held involving both the Applicant and the Incumbent, together with the Port of Bristol, on 19th July 2007 regarding the possible allocation of loading slots at Bristol Portbury Docks. It was urged upon the Panel by the Claimant that the meeting concerned had been held on a "without prejudice" basis. This was challenged by the respondent to the appeal (i.e EWS), who maintained its legal advisers had indicated that the meeting should not take place on such a basis. The Chairman ruled that without hearing the evidence of all those attending (since not all were present at the hearing) the Panel was not in a position to make a factual determination on that issue but that:-
 - 39.1. there was clearly a misunderstanding by those attending, and disagreement as to the intentions of the parties involved in that meeting;
 - 39.2. one party however had taken clear legal advice demonstrating that it had addressed the issue before the meeting and acted accordingly; and
 - 39.3. there was no evidence in contemporaneous written form as to the use of the phrase "without prejudice"
 - 39.4. accordingly the Panel found that in so far as the notes of the meeting were relevant they were admissible.
40. In the event the Panel felt it did not need to place any relevance on the context of what took place at the meeting having regard to its other findings contained in this decision.

Cordon Caps

41. The Applicant has also requested an allocation of paths through Cordon Cap locations. Network Rail has made a determination of revised Cordon Caps which EWS rejects as it did not apply the calculation prescribed by the Office of Rail Regulation for such changes.. Network Rail acknowledged that this specific calculation was not undertaken but contended its decision was reasonable in the circumstances.
42. The Panel noted that proposals for adjustments to the Cordon Cap should be advised to the Incumbent as part of the Third Party Notice in respect of the transfer of Rights. It follows therefore that, should the scale of the rights to be transferred be amended (as, for example, by this determination), this would require a corresponding reassessment of the Cordon Cap proposals.
43. While Network Rail must abide by the Criteria prescribed by the Office of Rail Regulation, it may, at the same time, exercise discretion in relation to an increase in Cordon Caps for the Applicant: Network Rail's attention is drawn to the following,
 - 43.1. Condition J8 does not require that the combined effect of a Cordon Cap increase and a reduction should be a zero sum;
 - 43.2. Condition J8.3 empowers Network Rail to propose whatever is reasonable and practicable by way of a Cordon Cap for the Applicant, by implication the proposal to be made on its own merits, subject to the approval of the Office of Rail Regulation; and
 - 43.3. Condition J8.2.9 means that the Applicant has no right of appeal against any determination of a Cordon Cap.

The Panel's Determination:

44. The Panel is faced with some difficulties, given the imprecise definitions, some of which have been noted, used in Part J of the Network Code, the need for urgency in terms of a speedy decision during the holiday season, and the clear intermingling of the Quantum Firm Right for Service Group 2309 with "Y" path Train Slots. However, doing the best that it can in those circumstances it determines as follows:
 - 44.1. given the absence of a firm contract of service between IP and EWS, for whatever reason, the Panel considers that it is more difficult to determine the extent of the service provided by EWS, in order to establish a benchmark for assessing the scale of transfer of rights
 - 44.2. in such circumstances the nature of the service should be determined by taking a conservative view based on a reasonably representative sample of the past history of the service provided.
 - 44.3. In this case, the evidence presented appears to demonstrate that the Applicant should not require more than rights to three Train Slots in order to replace the Incumbent.
 - 44.4. In respect of Condition J7.1.2 and J7.3, the Applicant has replaced EWS in the provision of transport services for the movement of coal to Rugeley Power Station from Bristol Portbury Docks in the broad brush sense that IP will not, for the foreseeable future, be engaging EWS to transport coal to that destination from Bristol Portbury Docks, or indeed from any other source. However:
 - 44.5. Network Rail has not assessed appropriately the share of the Quantum Firm Right, and associated Train Slots that should be transferred from EWS to FHH as a consequence of that decision by IP.
 - 44.6. Network Rail should have sought evidence from the Applicant that the Applicant has satisfied the requirements of Condition J7.3, and in particular Condition J7.3(b)(ii) so as to ensure that no more slots were requested than were required to replace the service provided by EWS.
 - 44.7. EWS's contention that no more than 2 Train Slots are required is not reasonable. When it possessed the additional Train Slots EWS enjoyed considerable flexibility to meet the needs of the Third Party and it is reasonable that the Applicant should have the flexibility needed to continue that service.
 - 44.8. no Train Slots for movements other than three from Bristol Portbury Docks, to Rugeley Power Station should have been included in the Applicant's request for a transfer of rights.
 - 44.9. EWS' arguments for "*reasonable ongoing commercial need*" are based primarily on the fact that, in the current Working Timetable, some of the Train Slots deriving from the "*Rights Subject to Surrender*" are combined, on a "Y" basis, with Train Slots bid to provide transport services to other "third parties".
 - 44.10. EWS has not presented any evidence that the Firm Rights or Train Slots in question (as opposed to any part of any "Y" path Train Slots) have ever been used other than for the movement of coal to Rugeley Power Station. For the avoidance of doubt, the Panel does not therefore accept that EWS has demonstrated a "*reasonable ongoing commercial need*" in accordance with the transfer mechanism for the retention of QFRs in Service Group 2309 or for any associated Train Slots.

- 44.11. Network Rail should reassess the proposed Cordon Cap Reductions, taking into account the finding of this Panel that
- 44.11.1. only three of the Train Slots from Bristol Portbury Docks to Rugeley Power Station should be transferred to the Applicant; and that
 - 44.11.2. it is not mandatory that the extent of any reduction to the Incumbent's Cordon Cap should be equal to the increase in the Cordon Cap for the Applicant.
- 44.12. Network Rail should serve notice upon the Applicant, relying on the principle of Condition J7.7, to the effect that the Applicant's application has failed in part, the reason for such failure being that the Panel has adjudged that it would be inappropriate to transfer more than the Rights to three Train Slots daily between Bristol Portbury Docks and Rugeley Power Station.
- 44.13. Network Rail and EWS should review the future of those Rights not subject to transfer as a result of this determination, using, as appropriate, the provisions of Conditions J2, J4 and J9.
45. The Panel notes that the Applicant has commenced some movement between Portbury and Rugeley Power Station, but that the route being used does not correspond to the Train Slots and routing in the current WTT. The Panel concedes that such alternative routing is consistent with the terms of the *Rights Subject to Surrender* in Service Group 2309, but may have a consequential impact upon any re-adjustment of Train Slots, and Cordon Caps
46. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form, subject only to the limitations identified in paragraph 45 above.



Sir Anthony Holland
Panel Chairman

Annexe: "ADP23: Schematic representation of LOADED Train Paths "Subject to Surrender" (Service Group 2309) and associated "Y paths" in other Service Groups

ADP23: Schematic representation of LOADED Train Paths "Subject to Surrender" (Service Group 2309) and associated "Y paths" in other Service Groups

