
ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA34

(following a hearing held at 1 Eversholt Street, London NW1 on 23 March 2018)

Present:

The appointed Adjudication Panel (the "Panel")

Hearing Chair: John Hewitt

Industry Advisors: Martin Shrubsole
Christopher Geldard

The Parties

For First Transpennine Ltd ("TPE")

Chris Hassall Head of Commercial Contracts
Ian Tucker Partner, Burges Salmon LLP
Chris Nutton Major Projects Director
Nick Sworowski Commercial Engineer – Depots and Infrastructure

For West Coast Railway Company Ltd ("WCR")

James Shuttleworth Commercial Manager

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Carew Satchwell Lead Strategic Planner, LNW Route
Dan Coles Customer Manager
Jeremy Jackson Local Operations Manager, Scarborough

Interested parties

For DB Cargo (UK) Ltd

Nigel Oatway Access Manager
Quentin Hedderly Network Capacity Manager

For Arriva Rail North Ltd

Georgia Ehrmann Track Access Manager

In attendance

Tony Skilton Secretary
Stenographer from Ubiquis

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1 Introduction and procedural history of the dispute

- 1.1 The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

"ADA" means Access Dispute Adjudication
"Rule" refers to the Access Dispute Resolution Rules ("ADRR")
"Secretary" is the Committee Secretary of the Access Disputes Committee
"SPAD" means Signal Passed at Danger
- 1.2 This dispute arises in relation to an objection made by WCR (a charter passenger train operator) to a Network Change proposal sponsored by TPE (a franchise passenger train operator) for the conversion of an area of network sidings at Scarborough known as the "Oil Sidings" into a Light Maintenance Depot ("LMD") of which TPE would be the Depot Facility Owner.
- 1.3 The purpose of the LMD was to provide a stabling, cleaning and fuelling facility to support the introduction of new passenger trains which TPE would be operating using Mark 5a coaching stock and Class 68 locomotives. Locating the LMD in Scarborough is in fulfilment of a commitment made in TPE's recently negotiated Franchise Agreement.
- 1.4 On behalf of TPE (the Sponsor), under Network Code Condition G3.3, Network Rail commenced the Network Change consultation process on 11 September 2017, indicating a response date of 13 November 2017. Network Rail left it for TPE, as the Sponsor, to deal with any issues arising out of the consultation and various points and objections were raised by several operators which use Scarborough. Through discussion and clarification nearly all of the issues raised were disposed of by agreement. By 24 January 2018 the only remaining objection was that from WCR and TPE issued a Notice of Dispute with WCR, proposing that the matter be considered by an ADA. The resulting Procedure Agreement between TPE and WCR is dated 30 January 2018.
- 1.5 In the knowledge that TPE and WCR intended to proceed to an ADA, I was appointed as Hearing Chair on 26 January 2018 and I endorsed the timescales which the Secretary then indicated to TPE and WCR that day regarding the dates by which their various documents were to be served. After consultation between the Secretary and TPE and WCR, 23 March 2018 was subsequently set as a convenient hearing date.
- 1.6 Upon potentially interested parties being informed on the hearing arrangements, DB Cargo and Arriva Rail North expressed the wish to attend the hearing.
- 1.7 TPE served its Statement of Claim on 8 February 2018.
- 1.8 After reading TPE's Statement of Claim, DB Cargo observed as a matter of process that the procedure in Condition G4.1 seemed to indicate that Network Rail should be the Defendant in this matter, perhaps with WCR as a co-Defendant. I asked that WCR address this process point in its Statement of Defence and that TPE address it in its Response Statement; this was advised to all concerned on 15 February 2018 along with encouragement that Network Rail decide to take a meaningful part in the proceedings and indication that I would be willing to accept Network Rail as a Dispute Party.
- 1.9 WCR served its response to TPE's Statement of Claim on 19 February 2018. Regarding the procedural aspect of Network Code Part G, WCR expressed the view that TPE had been incorrect in serving a Notice of Dispute upon WCR and that TPE's dispute was properly with Network Rail; WCR considered that TPE's dispute against WCR should be struck out.
- 1.10 On 16 February 2018 Network Rail advised the Secretary that it would be represented at the hearing in the capacity of 'observer'. On 20 February 2018 the Secretary responded pointing out that the Rules did not provide for any party to attend as an 'observer' and suggesting that Network Rail attend as an 'interested party'. Later that same day Network Rail agreed that this should be the case.

- 1.11 Having noted the remarks made regarding the proper parties to the dispute situation, on 23 February 2018 TPE served a Notice of Dispute upon Network Rail as a co-Defendant. TPE did not consider that there was any necessity to amend the substantive material in the Statement of Claim served on 8 February 2018 and was also content that the Defence served by WCR on 19 February 2018 could stand in this new situation. On 26 February 2018 all concerned were informed of my satisfaction that Network Rail could be designated as second Defendant without registering a new dispute and directions were given amending dates for service of further Statements of Case and any legal submissions whilst maintaining the planned hearing date of 23 March 2018. These directions were accompanied by a list of questions which the Panel wished the Dispute Parties to address in the hope of clarifying certain matters in advance of the hearing.
- 1.12 Network Rail served a Statement of Defence on 6 March 2018 and all further information was received from the Dispute Parties on 12 March 2018, with TPE then serving a Reply Statement on 16 March 2018.
- 1.13 On 20 March 2018 the Dispute Parties and interested parties were informed that I had not identified any pure points of law as arising from the issues in the dispute, but that if identity of the Dispute Parties or whether TPE was entitled to initiate a dispute and/or cite WCR as Defendant were still live issues at the hearing, they would be determined on the basis of the proper construction of the relevant Rules. Further, regarding the substantive dispute between TPE and WCR, this would be determined on the basis of the proper construction of the material provisions of Part G of the Network Code and the evidence presented to the Panel and the facts found by the Panel.
- 1.14 In view of the potential complexity of exchanges during the hearing, I directed (as provided in Rule G44) that a full transcript should be taken to assist the Panel's subsequent consideration of the issues.
- 1.15 The hearing took place on Friday 23 March 2018. TPE and WCR both gave opening statements but Network Rail chose not to do so. Thereafter the Dispute Parties responded to questioning by the Panel and the interested parties contributed information where it was thought to be of assistance.
- 1.16 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarised in the course of this determination.
- 1.17 In my consideration of the parties' submissions and my hearing of the dispute, I was mindful that, as provided for in Rule A5, I should reach my determination "on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

2 Jurisdiction

- 2.1 I am satisfied that this dispute properly falls within the jurisdiction of an Access Dispute Adjudication. None of the parties involved contended to the contrary.

3 Outcomes sought by the parties

- 3.1 In its Statements of Claim, TPE was seeking that the ADA would determine that:
 - 3.1.1 WCR's objections do not amount to grounds for objection under Network Code Conditions G4.1.1(ii) or G4.1.1(iv) to prevent the introduction of the proposed Network Change; and
 - 3.1.2 TPE is entitled to instruct Network Rail to implement the proposed Network Change in accordance with Condition G10.2.1; and

3..1.3 Network Rail is entitled to implement the Network Change as the objections raised by WCR do not satisfy the grounds for objection in Part G.

3.2 In its Statement of Defence, WCR was seeking that the ADA would:-

3.2.1 Strike out the dispute by TPE against WCR as being brought against the incorrect industry party under the arrangements set out in Part G of the Network Code, this then leaving WCR's objection to the Network Change proposal extant; and

3.2.2 Determine that WCR's objection to the Network Change proposal is upheld and the Network Change shall not proceed in the present form.

3.3 In its Statement of Defence, Network Rail did not seek any decisions from the ADA on its own behalf.

4 Relevant provisions of the Network Code

4.1 The provisions of the Network Code particularly relevant to this dispute are the Part G Definitions and Conditions G3, G4, G10 and G11 (12 July 2017 edition). Relevant extracts are provided in Annex "A" to this determination and also reproduced as appropriate within this determination.

5 Process issues

5.1 At this point it may be convenient to deal with the process point. During the course of the ADA it had been suggested that the industry generally would appreciate guidance on the operation of the relevant part of Network Code – Part G.

5.2 First and to recap, I set out the chronology by reference to the material provisions of Part G:

Step 1 By letter dated 22 August 2017 TPE, an Access Beneficiary, as the Sponsor, submitted to Network Rail a proposal for a Network Change (**G3.1.(a)**) and gave permission for Network Rail to consult in accordance with **G3.1 (b)**.

Step 2 Network Rail carried out an evaluation of the proposal and consulted within the 30-day time limit and set out its position in respect of certain prescribed matters (**G3.3.1 (a), (b) and (c)**). This step was achieved by way of a letter issued by Network Rail and dated 11 September 2017. The letter specified that: *"We invite you to consider the proposed scheme and forward your comments to us by **Monday 13th November 2017**"* No party took any point that Monday 13 November 2017 was not an appropriate 'response date' within the meaning of Part G. But, the expression adopted was imprecise and capable of different interpretations. Did it mean that comments had to be received 'by' or 'no later than' 13 November 2017? Or did it mean that if comments were to be 'forwarded' by post using Royal Mail, they could be put into the postal system on or before Monday 13 November 2017 and that the date of receipt was not material?

By letter dated 4 October 2017, WCR provided a response to Network Rail and objected to the proposed Network Change. Two grounds were relied upon:

1. If implemented, it would result in a material deterioration in the operation of its trains on the Network for which it could not adequately be compensated under G4 (**G4.1.1(a)(iii)**); and
2. The proposed change does not adequately take account of WCR's reasonable expectations as to the future use of the material part of the network (**G4.1.1(a)(iv)**).

A document attached to the letter set out WCR's reasons in support of the two grounds relied upon.

Step 3 Network Rail is obliged to provide a response to the Sponsor (**G4.1**). The response is to identify if it (or any Access Beneficiary) considers or is of the opinion that any one or more of specified conditions has been met and or that any Access Beneficiary has given notice that it considers it should be entitled to compensation pursuant to the framework set out in G3.

By letter dated 14 November 2017 Network Rail provided a response to the proposal. It recorded brief details of objections by GB Railfreight, DB Cargo and WCR and stated that whilst it (Network Rail) was supportive of the proposed Network Change, it was unable to formally accept it and confirm establishment until the specified objections are fully resolved. Network Rail invited TPE to resolve each of the objections with the objectors direct. The letter also recorded that if the Network Change were still to go ahead, the objectors considered that they were entitled to compensation within the framework of G3.

There was some discussion regarding the date by which Network Rail was to provide to TPE its response under G4.1. A reading of the definition of 'relevant response date' adopted on page G10 of the Network Code suggests that it might be the same date as the response date set out in the consultation letter. If that is right it gives rise to practical difficulties. We have already identified imprecision with the time/date by which responses are to be 'forwarded' to Network Rail. If a response were received by Network Rail within the specified period, but towards the very end of it, Network Rail would require a reasonable period of time in which to consider and evaluate the comments made before it would be in a position to prepare its response document. In the subject case no point was formally taken that the Network Rail G4.1 response was late, but if the working of Part G of the Network Code were under review this is a point that might usefully be considered.

Step 4 Condition G10.2 makes provisions for the implementation of a Sponsor proposed Network Change. By G10.2.1 the Sponsor is entitled to instruct Network Rail to implement the change if, amongst other things *"(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."*

To tease out whether or not there are any unresolved disputes there are provisions in G10.2.2 and G10.2.3 which enable the Sponsor to instruct Network Rail to give a notice to specified affected Access Beneficiaries requiring that within 21 days they state whether they dispute the Sponsor's entitlement to require Network Rail to implement the change.

G10.2.4(a) provides that where an Access Beneficiary has given such a notice of dispute and if the Sponsor disagrees with it, the Sponsor may refer the matter for determination in accordance with the ADRR and the provisions of Condition G11 are to apply.

Although not provided to us it appears that TPE required Network Rail to give a notice pursuant to G10.2.1 and that Network Rail did so by an email dated 17 November 2017 and timed at 15:13. Although in error in that email reference was made to *"Condition G9.2.1"* instead of G10.2.1, WCR was plainly not misled by the error because by email dated 17 November 2017 and timed at 18:17, WCR gave notice that it would object to the notice and in fact it did so by letter dated 21 November 2017, in which it expressly stated its view that G10.2.1 has not been satisfied because objections raised by WCR remain in dispute and unresolved.

- 5.3 The Panel is satisfied on the facts that TPE, as the Sponsor, instructed Network Rail to issue a notice pursuant to G10.2.2 and that Network Rail did so. In response, WCR gave notice pursuant to G10.2.3(b) disputing TPE's entitlement to require Network Rail to implement the Network Change. The Panel is also satisfied on the facts that TPE

did not agree with the dispute notice given by WCR such that, pursuant to G10.2.4(a) it sought to refer the dispute for determination in accordance with the ADRR and Condition G11.

- 5.4 Following the issue of the Notice of Dispute by TPE pursuant to G11.1, TPE and WCR entered into the Procedure Agreement dated 30 January 2018. No issue was taken in that document that TPE was not entitled to issue the Notice of Dispute. The Procedure Agreement does not state that it was entered into without prejudice to WCR's contention that TPE was not entitled to issue the Notice of Dispute.
- 5.5 In its Response Statement dated 19 February 2018, WCR challenged the right of TPE to issue the Notice of Dispute, arguing that the Notice of Dispute should have been served on Network Rail, as System Operator, and that it was for Network Rail to determine whether sufficient progress had been made to allow the proposed Network Change to go ahead. WCR also argued that as regards a proposed change under G3, Network Rail must remain neutral and unless there are compelling reasons for the change to go ahead, it should maintain the status quo. At the hearing, Mr Shuttleworth of WCR did not wish to develop that argument further.
- 5.6 The Panel concludes that on the proper construction of G10, WCR gave a notice disputing TPE's entitlement to require Network Rail to implement the proposed change, TPE did not agree with that dispute notice and therefore TPE is entitled to exercise the right set out in G10.2.4 (a) that the dispute be determined in accordance with ADRR. The dispute is directly between the Sponsor and the party giving a notice disputing the Sponsor's entitlement to require Network Rail to implement the change. We find that the ordinary meaning of the words in G10 is clear and unambiguous.
- 5.7 We are reinforced in our conclusion by the explanatory notes K(v) and (vi) on page G6 of the Network Code. The Panel considers that K(v) and (vi) clearly contemplate it was envisaged that where an Access Beneficiary objects to a proposed Network Change, it is for the Sponsor to try to resolve matters directly with the Access Beneficiary. If an agreement cannot be reached the Sponsor may refer the dispute for determination in accordance with ADRR or abandon its proposal.
- 5.8 The Panel therefore rejects the arguments advanced by WCR that TPE was not entitled to issue the subject Notice of Dispute. We find that the Notice of Dispute was a valid notice and that the ADRR process was correctly commenced.
- 5.9 Going forward the Panel makes the observation that where a party takes issue with the right of another party to issue a Notice of Dispute, that ought to be highlighted in any Procedure Agreement that the parties enter into. That would avoid any ambiguity or estoppel issues arising and may also identify any preliminary issues that might usefully be determined at an early stage.

6 The substantive issues

- 6.1 At the hearing it became clear that the substantive issue between the parties was whether WCR had made out a case that the proposed Network Change:
 - (a) If implemented, would result in a material deterioration in the operation of its trains on the Network for which it could not adequately compensated under Condition G4 (G4.1.1(a)(iii)); and
 - (b) does not adequately take account of WCR's reasonable expectations as to the future use of the relevant part of the Network (G4.1.1(a)(iv)).
- 6.2 At the hearing it was not in dispute that the burden of proof lay with WCR to make out a prima facie case.
- 6.3 At an early stage in the process WCR had raised a number of practical and technical concerns it had about the possible impact of the proposed change on its business as

a charter operator. In the ensuing weeks a number of these concerns were discussed, modifications were made to several of them and a position on them acceptable to all concerned was agreed. The Panel need not go into the details of the matters which were agreed. Our focus was on the remaining issues in dispute.

- 6.4 At the commencement of the hearing, Mr Shuttleworth of WCR identified two substantive areas of dispute. These were:
- (a) The potential for a SPAD-trap; and
 - (b) The use of platform 1 as the head-shunt into the proposed LMD required that approximately half the available length of Platform 1 needed to be unoccupied at any time when a movement of a TPE train in or out of the LMD was scheduled. This in turn implied that any full length WCR charter train (e.g. 12 or 13 coaches) could not be accommodated in Platform 1 during such times. This in turn meant that the facility that WCR has previously enjoyed of stabling the occasional charter train overnight in platform 1 would be inhibited or prevented. WCR contended that as a consequence the proposed change does not adequately take account of its reasonable expectations as to the future use of the relevant part of the Network (G4.1.1(a)(iv)).
- 6.5 In his opening statement, Mr Shuttleworth raised the possibility of WCR's concerns about the potential SPAD-trap being overcome. The hearing adjourned to enable the parties, and their technical representatives, to have further discussions. The Panel was informed that an outcome satisfactory to all concerned had been arrived at. Mr Shuttleworth confirmed that this point was no longer a ground of objection by WCR.
- 6.6 Thus the only outstanding ground of objection concerned the occasional overnight stabling on platform 1 and cost implications arising if and when that cannot be accommodated.

7 Oral exchanges at the hearing

- 7.1 At the hearing the Parties' respective representatives verbally provided further evidence and made a number of submissions and observations in the course of various exchanges.
- 7.2 Whilst the issue of overnight stabling was important to WCR it was an event that would arise only occasionally. Evidently in 2017 it had occurred only once. Mr Shuttleworth was unable to say how often it might occur in 2018 and suggested perhaps 2 or 3 times at most. Mr Shuttleworth explained that WCR runs its own trains and trains on behalf of third parties and thus tends to be reactive and flexible – a business model it has been operating for over 20 years.
- 7.3 Mr Shuttleworth said, and the Panel accepts, that overnight stabling by WCR is particularly convenient to WCR in that it enables WCR's staff and suppliers to load the provisions into the train safely and also that it provides improved security for the train.
- 7.4 During the course of the hearing it became clear how the capabilities of the current track and signalling layout at Scarborough defined the options for accommodating both scheduled and charter services after the opening of the proposed LMD, and forced the following conclusions:
- * Between the morning departure of the last TPE train from the LMD and the arrival in Platform 1 of the first TPE train destined for the LMD, access to platform 1 (and thus the turntable and excursion sidings) for charter trains is restricted only by the occupation of the station throat by scheduled services;
 - * A complete charter train can only be accommodated during the night hours in platform 1 between the arrival of the last TPE train destined for the LMD and the first departure next morning;

* Whilst it is possible to devise palliative measures where the charter train's occupation of platform 1 might, for example, be brought forward to allow early morning victualling and departure, this could only be achieved by re-arrangement of the TPE movements, which would demand changed or extra train-crew assignments:

* Whilst it is possible to contemplate providing overnight platform side accommodation for a charter train by splitting into two portions (stabled in platforms 1 and 2) such an arrangement brings with it technical risks associated with breaking the integrity of the train, and safety risks affecting those staff involved in any coupling or uncoupling operations. In this respect number 1 platform road, bordered on each side by a platform, was a particular challenge;

* Any future overnight occupation by a charter train of platform 1 will be either time constrained to a limited period, and or will require the collaboration of TPE and possible other operators in the performance of bespoke re-scheduling; and

* Options for timetable flexibility, stabling steam locomotives by the turntable, overnight manning of steam locomotives, and the ability to modify crew diagrams where possible were all likely to have some cost implications.

7.5 Mr Shuttleworth was also critical of TPE and complained that he did not consider TPE had given adequate consideration to alternative sites for the LMD. Whilst Mr Shuttleworth mentioned two other sites that might be considered, he did not adduce any evidence to support their suitability or outline the cost implications.

8 Analysis and consideration of issues and submissions

8.1 Scarborough is favoured by WCR as a destination for its charter services. In 2010 re-signaling work carried out at Scarborough by which access to and from the turntable and Down Sidings was simplified by creating a direct access to and from platform 1; previously this involved traversing the station throat. As an operator, WCR had input into that project.

8.2 WCR has occasionally stabled trains overnight in platform 1. Evidently it has done so on an informal basis, as a matter of convenience and in the absence of any objections.

8.3 WCR has concerns that the proposed Network Change might impact upon this arrangement with the result that it might suffer some inconvenience and incur increased costs. We find those concerns were established in general terms. If the current arrangements at Scarborough for WCR overnight stabling in platform 1 cease to be available to WCR it is inevitable that whatever alternative arrangement is put in place will result in WCR incurring some additional costs. Whilst the Panel makes this finding, we make no finding as to what legal or contractual rights WCR may or may not have to require overnight stabling.

8.4 It was accepted by all concerned that any such additional costs could not be quantified in advance for several good reasons and that they could only properly be assessed as and when they might be incurred on a case by case basis. There were a number of variables to take into account.

8.5 At the hearing TPE made clear that it accepted WCR had given a valid notice under Condition G4.1 as regards to compensation and that any claims WCR may make to compensation would fall to be considered within the relevant provisions of Part G.

9 Determination

Having considered carefully the submissions and evidence as set out in sections 6 and 7, and based on my analysis of the legal and contractual issues as set out in section 8,

I DETERMINE that:

- 9.1 The Panel finds that the construction and operation, by TPE, of the LMD proposed in this Network Change will have the effect that access to platform 1 and the excursion sidings will become, at certain times, constricted as compared with the current situation. In particular, whilst WCR will not be precluded from operating charter services that require to be stabled overnight in Scarborough, such arrangements would involve WCR in making changes from past practice and a risk of some additional costs as a result.
- 9.2 The Panel has taken into account both the likelihood and the scale of this risk. The Panel finds that the severity of the risk does not fall within the criteria as set out in Condition G4.1.1(a)(iii) because implementation of the proposed change would not have a material adverse effect which cannot adequately be compensated under Condition G4.
- 9.3 The Panel also finds that WCR has failed to make out a case that the proposed change does not adequately take into account the reasonable expectations of WCR as to its future use of the relevant part of the Network within the meaning of Condition G4.1.1(a)(iv).
- 9.4 In consequence, in the absence of any valid objections TPE, as Sponsor, is entitled to instruct Network Rail to implement the proposed Network Change pursuant to Condition G10.2.3.

I confirm that, so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



John Hewitt
Hearing Chair

26 April 2018

ANNEX "A"

Extracts from Part G of the Network Code (17 July 2017)

Definitions

- "change" Includes:
(a) improvement or deterioration, enlargement or reduction; and
(b) for the purposes of paragraph (b) of the definition of Network Change, a series of changes
- "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" 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
- "Sponsor" means, in relation to a proposal for a Network Change under Condition G3.1, the Access Beneficiary which has made the proposal

CONDITION GA1 – 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.

CONDITION G3 - NETWORK CHANGE PROPOSAL BY ACCESS BENEFICIARY

3.1 *Notice of proposal*

An Access Beneficiary shall, if it wishes Network Rail wishes 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 may reasonably be 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 the 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 proposed 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 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 G3.42, 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).

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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 a 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 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

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CONDITION G10 - ESTABLISHMENT AND IMPLEMENTATION

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 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);

...

that Access Party may refer the matter for determination in accordance with the ADRR.