

THE OFFICE OF RAIL REGULATION’S DETERMINATION OF THE APPEALS BY GB RAILFREIGHT LIMITED (“**GBRf**”) AND DB SCHENKER RAIL (UK) LIMITED (“**DBS**”) PURSUANT TO CONDITION J13.3 and Part M OF THE NETWORK CODE AGAINST DETERMINATION ADA05 OF THE ACCESS DISPUTE ADJUDICATION PANEL (the “**PANEL**”)

DETERMINATION: The Office of Rail Regulation determines the appeals in the manner set out in paragraphs I.67 to 91 below

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I. Introduction

1. This is the determination by the Office of Rail Regulation (“**ORR**”) of: (1) the appeal brought by GBRf on 26 April 2011; and (2) the appeal brought by DBS on 27 April 2011 (together the “**Appeals**”). The Appeals challenge the Panel’s determination of dispute reference ADA05 dated 11 April 2011 (the “**Determination**”).
2. The Panel’s Determination arose out of the issuance, by Network Rail Infrastructure Limited (“**NR**”), of a Third Party Failure to Use Notice to DBS (the “**DBS Failure to Use Notice**”). The DBS Failure to Use Notice required that DBS surrender quantum access rights from Trafford Park to Southampton, and associated train slots from Trafford Park to Wembley and to Southampton (the “**Train Slots**”) (collectively, the “**Rights**”).
3. NR had issued the **DBS** Failure to Use Notice in response to a Failure to Use: Third Party Notice Application submitted by GBRf. GBRf wished to make use of the Rights itself.
4. The Panel found in DBS’s favour on the basis that the DBS Failure to Use Notice was not effective. However, the Panel went on to find that, had that not been the case, DBS had failed to establish a Reasonable On-going Commercial Need. Had the DBS Failure to Use Notice been effective, DBS would have been required to surrender the Rights.

II. Background to the Appeals

5. On 23 December 2010 GBRf submitted to NR a Failure to Use: Third Party Notice Application for the Rights,¹ specifically:

Quantum Access Right	4A10 12:18 Trafford Park to Wembley EFOC
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¹ The Failure to Use: Third Party Application was submitted pursuant to Condition J5 of the Network Code.

Train Slot	4A10 12:18 MO Trafford Park to Wembley EFOC
Train Slot	4026 12:18 SX Trafford Park to Southampton Western Docks between Trafford Park (Stannox 33033 and Nuneaton (Stannox 69021) only

6. In that application, GBRf asserted that there had been a Failure to Use² by DBS with respect to the Train Slots. [26 April 2011 Notice of Appeal (the “GBRf Notice of Appeal”) ¶1.1]
7. Trains had not run in the Train Slots between 12 February 2009 and 8 March 2011. [Determination ¶5.2]
8. DBS is the owner and operator of the Trafford Park terminal. In or about mid-February 2010 DBS closed the Trafford Park terminal. This was a temporary measure and stated to be in response to *“the Global economic recession which has led to unprecedented falls in trade and the movement of freight.”* [Determination ¶5.2.5]
9. NR issued a Third Party Failure to Use Notice to DBS on 6 January 2011. The DBS Failure to Use Notice was issued pursuant to Condition J5.3 of the Network Code. [Determination ¶¶1.1, 1.2]
10. On 20 January 2011 DBS issued a Third Party Counter Notice pursuant to Condition J5.4 of the Network Code. In it, DBS objected to the loss of the Rights. The grounds for the objection were that DBS had a *“Reasonable*

² Failure to Use is defined in Condition J4.2.1 of the Network Code. Failure to Use Notice means a notice given by Network Rail to a Train Operator under Condition J4.5(a). Counter Notice means a notice given by the Train Operator to Network Rail under Condition J4.9; J5.4(b), J6.2.5 or J8.3.2.

On-going Commercial Need”, pursuant to Part J (Condition J4.10.2(b)) of the Network Code, for the Rights.³ [Determination ¶1.3]

11. On 26 January 2011 NR advised that it did not believe that DBS had established a “Reasonable On-going Commercial Need”. NR relied on guidance published by ORR entitled “Part J (Changes to Access Rights) of the Network Code Criteria for Interpreting the Expression “Reasonable On-going Commercial Need” (the “**Criteria**”)”. [26 January 2011 NR Letter to DBS] NR referred the dispute for determination in accordance with the Access Dispute Resolution Rules (the “**ADR Rules**”) pursuant to Condition J13.1(c) of the Network Code. [Determination ¶1.4]
12. On 9 February 2011, a Procedure Agreement between NR and DBS for the hearing of the dispute was agreed. GBRf declared itself to be an interested party. [Determination ¶1.5]
13. In early March 2011 the Trafford Park terminal re-opened for Southampton traffic. An incoming train service, utilising the Rights, ran on 7 March 2011 and the first train out was on 8 March 2011.⁴ [Determination ¶5.2.9] [26 May 2011 Statement of Detail and Reasons in response to the Cessation of Use Appeal (“**DBS Response**”) ¶2.5]
14. A hearing was held on 10 March 2011. [Determination ¶1.6]

³ The Counter Notice was based on the following information: (1) DBS had a “reasonable on-going commercial need” for the Rights as it was in the process of introducing a service within 90 days from Trafford Park to Southampton ; (2) evidence comprising of letters of support from customers planning to use that service along with a letter from a director of DBS confirming the introduction of the service within 90 days and that the necessary resources have been committed; (3) NR was made aware of this service in October 2010; and (4) DBS had not been able to use the Rights because the terminal at Trafford Park had been closed but, now that it had been reopened, coupled with the imminent introduction of W10 gauge capability between Southampton and the West Midlands, DBS could operate the service. [DBS Response ¶2.3]

⁴ The Determination notes that, at the hearing, “DBS sought to assure the Panel that, with the knowledge of NR, the resumption of the service in March 2011 was planned as from 2 October 2010 and that a lead time of several months was not unusual.” [Determination ¶5.3]

15. DBS challenged the Notice on the basis that it had a Reasonable On-going Commercial Need to use the Rights. It stated that it had met all four criteria to establish a Reasonable On-going Commercial Need. Its Failure to Use, it argued, arose out of the temporary closure of its Trafford Park terminal due to the global economic circumstances as well as the awaited introduction of W10 gauge enhancement by NR on the relevant routes. Further, DBS stated that it had, on 8 March 2011, begun to once again use the Rights and therefore there was not a Failure to Use pursuant to Condition J4.6. [Determination ¶¶4.2; 5.12]
16. NR asserted that DBS had not met one of the four criteria to establish a Reasonable On-going Commercial Need, namely an acceptable reason for a Failure to Use. Here, DBS' failure to use arose because it closed its Trafford Park terminal for economic reasons. NR submitted that this decision, which was wholly within the control of DBS did not, and could not, amount to an acceptable reason for a Failure to Use. [Determination ¶¶4.1, 5.4] Similarly, GBRf submitted that DBS had failed to satisfy the criteria to establish Reasonable On-going Commercial Use. [Determination ¶¶4.3; 5.5]
17. NR also submitted that Condition J4.6 ceased to apply once a Failure to Use Notice was given. [Determination ¶5.7]

III. The Panel's Determination

18. The Panel noted that, in considering the parties' submissions, it was mindful that it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis." [Determination ¶1.7; Rule A5].

Cessation of Use

19. The Panel initially considered whether the fact that DBS had run a train on 8 March 2011 meant that the DBS Failure to Use Notice was invalid because, pursuant to Condition J4.6, the Failure to Use had ceased on that day.

20. The Determination provides:

6.5 *The language of J4.6 seems to us to be quite clear and provides that the “alleged” failure to use shall cease to be continuing if the operator makes use of a relevant Train Slot such that the Use Quota is met.*

6.6 *We must infer that J4.6 was intended to have some effect and purpose.*

6.7 *The scheme does not expressly state what the consequence is if a failure to use shall cease to be continuing. We infer that if NR accepts that the failure to use has ceased to exist, the Failure to Use Notice becomes otiose and is in effect deemed withdrawn or of no effect. We conclude this because the loss of Rights is potentially a serious matter for an operator. J4.6 appears to serve to give to the operator one last chance to resume using the Rights, in the knowledge that if it fails to take advantage of the “warning shot” consequences will flow. The loss of Rights only arises at the conclusion of the process when the ORR is given formal notification of the events which have occurred. It seems to us that this is consistent with the “Use it or Lose it” approach. Moreover, there is nothing in the scheme to suggest that the Rights are suspended or to be treated in any different way during the course of any dispute process.”*

21. The Panel went on to note that the mischief that Part J was designed to address, namely that unused Rights should pass to another operator, is addressed if the original operator begins again to make use of them.

[Determination ¶6.8]

22. The Panel rejected NR’s submission that the Condition J4.6 ceased to operate once a Failure to Use Notice was given. Rather, it argued that Condition J4.6 can be used to bring a Failure to Use to an end at any time up until the date when surrender of the Rights takes effect, broadly the date of notification to ORR. [Determination ¶6.11]

23. The Panel held:

“6.13 In the present case it was not in dispute that on 8 March 2011 DBS made use of a Train Slot such that the Use Quota for the Quantum Firm Right for 4A10 was met. This train ran with the knowledge, approval and cooperation of NR. In these circumstances the Panel is of the view that DBS has established the requirements of J4.6. As a result the failure to use complained of ceased for the purposes of J4.5 such that the failure to use is no longer continuing. In consequence the subject Third Party Failure to Use Notice ceased to be of effect and is to be set aside.”

Reasonable On-going Commercial Need

24. While recognising that the finding in paragraph 23 above was sufficient to dispose of the issue, the Panel went on to consider the issue of Reasonable On-going Commercial Need in the event it was in error as to the Cessation of Use.
25. The Panel summarised the relevant portions of the Network Code, namely that:
- A train operator can serve a Counter Notice demonstrating that it has a Reasonable On-going Commercial Need for rights which have been the subject of a Failure to Use Notice;
 - Condition J12.1 of the Network Code provides that the expression “Reasonable On-going Commercial Need” shall be interpreted in line with guidance published by ORR; and
 - ORR has published relevant guidance (outlined at paragraph 45 below). The guidance sets forth an obligation on the train operator to satisfy four criteria: commitment; acceptable reasons for failure to use; committed resources; and reasonable on-going prospect of use. [Determination ¶¶6.15 to 6.18]
26. The Panel noted that there was only one issue between the parties with respect to Reasonable On-going Commercial Need, which was whether or not DBS had demonstrated an acceptable reason for a Failure to Use. [Determination ¶6.20]
27. The Panel noted the reasons relied on by DBS:

“6.22 The Panel notes DBS’ submission that the grounds relied upon relate to the period of the closure of the Trafford Park terminal, and the reasons therefore, coupled with the re-opening of the terminal and the imminent introduction of W10 gauge capability. The Panel accepts DBS’ submission that the ORR’s published set of criteria is not prescriptive in that it lists and highlights examples of matters which may amount to an acceptable reason. The Panel concludes that additional or other matters might in context also amount to an Acceptable reason.”

28. The Panel then considered the relevant guidance:

“6.23 The Panel notes that the examples cited in the criteria are all matters which are outside the control of the operator; matters akin to force majeure. Thus the Panel concludes that when preparing the criteria the ORR (and by definition the industry) had in mind that there was to be excluded matters which were in the control of the operator. The logic appears to be that an operator was to be excused from the obligation to use its Rights if some non-economic outside force prevented it from doing so but was not to be so excused if it could have exercised its Rights but chose not to do so. Thus if an operator took a course of action which had the inevitable consequence that it would not be able to exercise its Rights such course of action would not amount to an Acceptable reason for doing so.”

29. Applying this interpretation of the guidance, the Panel held:

“6.24 In the present case the course of action taken by DBS which had the consequence of preventing it using the subject Rights was its decision to close Trafford Park terminal. It was not in dispute that this course of action was taken for economic reasons. There was no evidence before the Panel as to DBS’ financial position and as to the reasonableness or otherwise of the decision to close the terminal. The Panel was told that staff were made redundant or laid off and this would not have occurred if the situation had not been serious. How serious or how dire the situation was and whether it was justified on an objective basis we simply do not know. What alternative courses of action were considered and rejected we do not know.

6.25 We conclude that whatever the financial position of DBS might have been, the decision to close the terminal was that of DBS and the closure was not forced upon it by a non-economic outside event over which DBS had no control.

6.26 The Panel was not persuaded that the issue of W10 gauge capability was a compelling reason for not using the train slots. The evidence before us was that the decision to close the terminal was taken on economic grounds, as were DBS’ decisions as to what size of fleet of low platform container wagons it should own and how it should deploy them to best advantage. The Panel accepts that the new availability of W10 gauge capability makes renewed use of the terminal a more attractive option, but does not consider that it was relevant to the decision

not to use Train Slots that related to rights to W8 capability. In these circumstances we find that the absence of W10 gauge capability was not part of an acceptable reason for DBS' failure to Use the subject Train Slots.

6.27 *The Panel concludes that DBS has failed to establish the failure to use was due to an Acceptable reason. In consequence DBS has failed to establish all four criteria required to show reasonable on-going commercial need."*

30. The Panel:

- declared the DBS Failure to Use Notice invalid; and
- held that DBS has not made out its ground of objection of Reasonable On-going Commercial need. [Determination ¶7]

IV. Conduct of the Appeals Before the ORR

31. GBRf issued its Notice of Appeal⁵ on 26 April 2011 under Part M (Appeals) and Condition J 13.3 of the Code. GBRf appealed the Panel's decision with respect to Cessation of Use (the "**Cessation of Use Appeal**").

32. In its Notice of Appeal, GBRf requested that ORR issue an interim order under Condition M7(c) to direct the re-timing of the 4O26 Trafford Park to Southampton Train Slot. GBRf sought the order to facilitate a later departure for the DBS service to release the 12:18 Train Slot from the Trafford Park terminal. GBRf asserted that this could be achieved by an alteration to a Freightliner Limited Service. [26 April 2011 GBRf Letter to ORR]

⁵ DBS has noted that the Cessation of Use Appeal was not brought by NR, but instead by GBRf which was an interested party in the dispute before the Panel. [DBS Response ¶¶1.2 – 1.3.] ORR notes that DBS did not raise any challenge when ORR initially asked for any reasons why it should not accept the GBRf appeal. ORR also notes that Condition J13.3 contemplates an appeal to the ORR from a decision of the ADRR by either NR, the Train Operator or the Incumbent. In ORR's view, GBRf therefore has the right to bring the appeal.

33. DBS issued its Notice of Appeal on 27 April 2011 under Part M (Appeals) and Condition J13.3 of the Code (the “**DBS Notice of Appeal**”). DBS appealed the portion of the Determination which found that DBS had not demonstrated that it has a “Reasonable On-going Commercial Need” (the “**Commercial Need Appeal**”). [DBS Appeal ¶13.3]
34. Brian Kogan was initially appointed by ORR as deputy-director in charge of the Appeals. Subsequently, due to his unavailability through circumstances beyond his control and so as not to delay unduly the issuing of this determination, Juliet Lazarus was appointed as director in charge in place of Mr Kogan.
35. Following receipt of both Notices of Appeal, by letter on 12 May 2011 ORR sought representations from the parties on the key issues it had to decide at that initial stage: whether ORR should hear the Appeals, and, if so, if both the Cessation of Use Appeal and Commercial Need Appeal should be heard together and expedited. In this letter ORR also stated that it was, at that point, not minded to consider making the interim order requested by GBRf on the basis that: (1) it was not clear that the departure time for the re-timed service would be within DBS’ contractual access rights; (2) ORR did not have the power under M7(c) to make an interim order with respect to Freightliner Limited, who was not a party to the Appeals; and (3) the usual timetabling processes under Part D of the Network Code provide a mechanism for dealing with such a matter, and ORR expected the parties to pursue it accordingly.
36. DBS and NR replied to this request on 16 May 2011, confirming they were content for the Appeals to be heard together and with the proposed timetable. DBS indicated that it was supportive of ORR’s statement that it was not minded to make an interim order. GBRf also replied on 16 May

2011. In its response, GBRf challenged DBS' compliance with the time limit for appeals⁶, but made no comment on the question of the interim order.

37. Having considered the representations received, ORR decided to hear the Appeals on the basis that the issues raised were of sufficient importance to the industry to warrant determination on appeal by ORR. ORR also decided to hear the Appeals together, and on the expedited timetable proposed in its earlier letter. These decisions were communicated to NR, GBRf and DBS by way of letter dated 17 May 2011, with responses therefore due from the parties by 26 May 2011.
38. Following submission of their responses on 26 May, the parties were invited by way of letter dated 1 June 2011 to provide any further submissions in reply by 7 June 2011.

V. The Relevant Provisions of the Network Code

39. The relevant portions of the Network Code are contained in Part J, and are set out in full in Annex 1 to this Determination.
40. However, in summary Part J of the Network Code provides a number of mechanisms by which a train operator's access rights can be changed, and in particular Part J5 provides for third party applications for Failure to Use Notices.
41. A Third Party Failure to Use is issued pursuant to Condition 5.1 which provides:

⁶ GBRf challenged the basis on which ORR agreed to hear the Commercial Need Appeal, on the basis that DBS served its Notice of Appeal on the eleventh Working Day after the Determination. In its letter to the parties of 17 May 2011, ORR confirmed its position that the ten working days commenced one clear day after publication of the Determination, meaning that here the ten working days ran from 12 April 2011. Therefore, ORR decided that the DBS Notice of Appeal was submitted within the correct timescale.

“5.1 Third Party Failure to Use Notices

If:

- (a) Network Rail receives an application from a Train Operator (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 Train Operator (the “Incumbent”); and*
 - (iii) is one in respect of which there is a continuing Failure to Use by the Incumbent*

then within 10 Working Days following receipt of the Applicant’s application Network Rail shall serve a Third Party Failure to Use Notice on the Incumbent and send a copy of the notice to the Office of Rail Regulation. 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.”

42. Condition 5.2 provides:

“Cessation of Failure to Use

For the purposes of Condition J5.1(b)(iii), whether a Failure to Use has ceased to be continuing shall be determined in accordance with Condition J4.6.”

43. Condition J4.6 itself refers back to Condition J4.5 (concerning service of a Failure to Use Notice by NR where the application does not arise from a third party) and Condition J4.2 (which sets out when a Failure to Use actually occurs). Condition J4.6 provides:

“Cessation of Failure to Use

A Failure to Use shall cease to be continuing for the purpose of Condition J4.5 if:

- (a) in relation to a Failure to Use under Condition J4.2.1(a):*

- (i) *the Train Operator Bids for a Train Slot in respect of the relevant Quantum Access Rights before the compilation of a subsequent First Working Timetable; and*
- (ii) *Network Rail has not served a Failure to Use Notice before the Bid under Condition J4.6(a)(i) is made; and*

(b) in relation to a Failure to Use under Condition J4.2.1(b), the Train Operator makes use of a relevant Train Slot such that the Use Quota is met.”

- 44. For the purposes of these Appeals, the relevant part of Condition J4.6 is sub-paragraph (b).
- 45. Following receipt of a Failure to Use Notice, the incumbent train operator has the right to serve a counter notice on various grounds, including that it considers the Failure to Use Notice to be invalid or that there are grounds for objection, which may include that it has a Reasonable On-going Commercial Need for the rights which are the subject of the Failure to Use Notice (Conditions J4.9 and J4.10).
- 46. Condition J12 provides for criteria to be published by Network Rail, subject always to approval by ORR, setting out how the expression “Reasonable On-going Commercial Need” shall be interpreted (the “**Criteria**”)⁷. The Criteria provide:

“In order to demonstrate:

(a) that it has a “reasonable on-going commercial need” in respect of any of the Rights Subject to Surrender specified in a Failure to Use Notice;

(b)

a Train Operator must be able to show all of the following:

(i) Commitment – ...

(ii) Acceptable reasons for failure to use – May include:

⁷ The Criteria refer to demonstrating Reasonable On-going Commercial Need for the purposes of Condition J4.10.2(b). However, it is accepted in these Appeals that this is also relevant to Third Party Failure to Use Notices under Condition J5.

- *Seasonal factors, e.g. commodities for which demand varies during the course of the year.*
 - *Non-economic issues beyond the train operator's control (such as a fire).*
 - *A strike or other industrial action.*
- (iii) *Committed resources ...*
- (iv) *Reasonable on-going prospect of use...."*

VI. The Parties' Submissions

Cessation of Use

47. GBRf challenged the Panel's finding, at paragraph 7.1 of the Determination, that the DBS Failure to Use Notice was no longer valid because DBS had used the Train Slots on 8 March 2011. The specific grounds of challenge were that only events prior to 26 January 2011 (the date of the referral to the Panel) should be considered by the Panel when considering the validity of the DBS Failure to Use Notice. If this were not the case, a train operator would be able to frustrate any Failure to Use Notice by simply running a service. [GBRf Notice of Appeal ¶¶1.12; 1.14]⁸
48. In its response dated 26 May 2010 (the "NR Response") NR concurred with GBRf that Condition J4.6 "*should not be interpreted in such a way as to apply during the later stages of the Failure to Use process resulting in the ability to defeat a Failure to Use long after a dispute has been registered.*" [NR Response ¶2] NR relied in part on policy concerns, and pointed to the example given in ¶6.12 of the Determination of a train operator being able to cease a Failure to Use even after the conclusion of an adjudication hearing. [NR Response ¶3]

⁸ In its Response, GBRf did not revisit the Cessation of Use issue, beyond noting that DBS had failed to advise the parties of its intention to run the 8 March 2011 train in its Statement of Defence. [GBRf Response ¶4.17]

49. NR highlighted the relationship between Condition J4.6 and J4.5. Condition J4.6 provides when a Failure to Use shall cease to be continuing for the purposes of J4.5. Condition J4.5, in turn, is the “*Service of a Failure to Use Notice.*”⁹ [NR Response ¶4] NR pointed out that “*Conditions J4 and J5 are processes in which each step is given a maximum period of time to be actioned.*” In the case of J5.1, NR has 10 days to serve a Third Party Failure to Use Notice once an application for the same has been received. There is no requirement for the applicant for a Third Party Failure to Use Notice to serve it on the incumbent. Thus, NR has this 10-day window to test the application and consider if there is a Failure to Use. [NR Response ¶¶5-6] By implication, then, NR argues that this is only relevant period in which to consider the question of use.
50. NR further submits that Condition J4.5 restricts NR’s ability to serve a Failure to Use Notice to “*where the Failure to Use is continuing when the Notice is served.*” However, if the Failure to Use ceases before the Notice of Failure to Use is served, that Notice can not be served. [NR Response ¶¶7-8]
51. NR offers the following interpretation of Condition J4.6:
- “8. Network Rail is of the view that the purpose of Condition 4.6 is to recognise that whilst the Failure to Use may be continuing at the date upon which the Application is received by Network Rail, it is entirely possible that in the (maximum) ten day period allowed to serve the Third Party Failure to Use Notice that the Incumbent may actually use the Train Slot subject to the Application. In such circumstances the Incumbent would meet the Use Quota for the Rights Subject to Surrender unaware of the existence of the Application and would therefore be using the Rights Subject to Surrender in good faith. Condition J4.6 provides that where the Use Quota is met prior to the service of the Third Party Failure to Use Notice the Incumbent is not penalised by the loss of the Rights Subject to Surrender that it is legitimately seeking to use. The corollary position is that once the Notice has been served the Incumbent cannot simply use the Rights Subject to Surrender so as to defeat the Notice and penalise the Applicant.”* [NR Response ¶8]

⁹ The analogous provision with respect to Third Party Notices is Condition J5.1.

52. NR also notes that its understanding of Condition J4.6 is supported by the flowcharts at Appendices 2-3 of Part J (recognising that these do not form part of the Network Code). [NR Response ¶9]
53. In its Response, DBS initially highlighted the relevant provisions, namely Condition J5.2 and Condition J4.6 of the Network Code. DBS supported the reasoning of the Panel on this point. [DBS Response ¶¶3.5-3.9]
54. Next, DBS considered previous remarks of ORR commenting on a proposed deletion of former Condition J4.6(b)(ii).¹⁰ The remarks were published as part of the approved Proposal for Change 38 approved by ORR on 5 October 2006, changing the 2004 version of Part J. The 2004 version of Condition J4.6 read:

“4.6 Cessation of Failure to Use

A Failure to Use shall cease to be continuing for the purpose of Condition J4.5 if:

(a) in relation to a Failure to Use under Condition J4.2.1(a):

(i) the Train Operator Bids for a Train Slot in respect of the relevant Quantum Firm Right before the compilation of a subsequent First Working Timetable; and

(ii) Network Rail has not served a Failure to Use Notice before the Bid under Condition J4.6(a)(i) is made; and

(b) in relation to a Failure to Use under Condition 4.2.1(b):

(i) the Train Operator makes use of a relevant Train Slot such that the Use Quota is met; and

(ii) Network Rail has not served a Failure to Use Notice within 20 Working Days of the condition in Condition J4.6(b)(i) being satisfied in whole.”

55. The comments in relation to the proposed change read:

¹⁰ While these remarks were not raised in the DBS Notice of Appeal, ORR has considered and responded to them at paragraphs 78-80 below.

“The proposal removes an original provision (J4.6(b)(ii)) which is considered irrelevant. Even if Network Rail was to issue a Failure to Use notice in respect of a unused Train Slot, the subsequent use of that Train Slot would invalidate such a Failure to Use Notice.”

56. Although it did not raise them before the Panel, DBS’ Response as part of these Appeals relied on these comments as support for its interpretation of Condition 4.6 that a use can invalidate a Failure to Use until the point in time where the relevant rights are de-vested. [DBS Response ¶3.10]
57. DBS disagreed with GBRf that the 8 March 2011 use of the Train Slot should be seen as irrelevant. Rather, DBS argued that until it is de-vested of the Rights, the Rights remain subject to its track access contract and the provisions of the Network Code. [DBS Response ¶4.2; 4.12]
58. Finally, in response to the policy concerns raised by GBRf that a Train Slot could be used simply for the purposes of defeating a Failure to Use Notice, DBS pointed out that ORR’s Notice of Determination of the Use Quota and Use Period makes clear that a train movement shall not count toward the Use Quota if it is made with the sole purpose of achieving the Use Quota for that train. [DBS Response ¶4.8] DBS also submitted that it would be difficult, practically speaking, in the absence of a real commercial need to find, in a short space of time, a customer whose needs matched the rights at issue so that the train operator could actually run a “blocking” Train Slot. [DBS Response ¶4.10]

Reasonable On-going Commercial Need

59. DBS submitted to ORR that the four elements identified in the Criteria considering Reasonable On-going Commercial Need should be considered together, rather than individually. [DBS Notice of Appeal ¶4.3] It argued that if *“Reasonable On-going Commercial Need was considered*

as a whole”, DBS had a “*clear commercial need*” for the Rights. [DBS Notice of Appeal ¶4.17]

60. DBS also submitted that acceptable reasons for Failure to Use should not be limited to non-economic reasons. The grounds advanced for this were (1) if that was what was meant the drafter could have simply said that; and (2) the Criteria include examples of economic factors both within and without the operator’s control (e.g. strikes, seasonal changes in demand for commodities). [DBS Notice of Appeal ¶4.7] On this basis, DBS challenged the Panel’s conclusion. [DBS Notice of Appeal ¶4.8]
61. Further, DBS argued that even accepting the Panel’s interpretation of acceptable reasons for Failure to Use, its reason, the closure of the Trafford Park terminal, was due to an economic factor outside the control of DBS (“*the unprecedented global recession*”). [DBS Notice of Appeal ¶4.12]
62. DBS challenged the Panel’s finding that the absence of W10 gauge capability was not an acceptable reason for the Failure to Use, given the evidence presented of the value to customers of this feature. [DBS Notice of Appeal ¶4.14]
63. Finally, DBS argued that the Panel applied the Criteria punitively and without reference to commercial need, and therefore inconsistently with the objective of the Network Code. [DBS Appeal ¶4.18]
64. As to Reasonable On-going Commercial Need, NR submitted that all four tests in the Criteria must be satisfied to establish Reasonable On-Going Commercial Need. NR stated its support for the Panel’s decision that the closure of the Trafford Park terminal was not an acceptable reason for a Failure to Use. [NR Response ¶¶13-14]

65. In its Response received 24 May 2011, GBRf submitted that the Panel had correctly interpreted and applied the Criteria (“**GBRf Response**”). As DBS’ decision to close the Trafford Park terminal was within its control, it was not an acceptable reason for Failure to Use. GBRf submitted that there were four separate factors to test if a party has a Reasonable On-going Commercial Need; these must all be satisfied. Because DBS’ Failure to Use resulted from its own commercial decisions, GBRf submitted that it had failed to demonstrate an acceptable reason for the Failure to Use. [GBRf Response ¶¶4.3, 4.7, 4.10, 4.14]
66. Finally, GBRf again noted the commercial use it could make of the Rights. [GBRf Response ¶4.18]

VII. ORR’s Consideration of the Appeals

67. While certain parts of the submissions and evidence will specifically be referred to in the course of this determination, ORR has taken into account all the parties’ written submissions and the relevant parts of the Network Code in reaching its decision.
68. In particular, ORR has considered each of the grounds set out in the Notices of Appeal.
69. ORR determines that the following is the correct interpretation of the relevant parts of Part J of the Network Code.

Ground (i) – Cessation of Use

70. The Panel found that the use of the Rights two days before the appeal hearing invalidated the DBS Failure to Use Notice. [Determination ¶6.13] In so doing, the Panel relied upon the language of Condition J4.6 which, in its view, provided that “*the ‘alleged’ failure to use shall cease to be*

continuing if the operator makes use of a relevant Train Slot such that the Use Quota is met.” [Determination ¶6.5] After noting that the “scheme does not expressly state what the consequence is if a failure to use shall cease to be continuing”, the Panel “infer[s] that if NR accepts that the failure to use has ceased to exist, the Failure to Use Notice becomes otiose and is in effect deemed withdrawn or of no effect.” [Determination ¶6.7]

71. Essentially, the Panel held that a subsequent use so as to satisfy the Use Quota¹¹ can render ineffective a properly issued Failure to Use Notice.
72. It is ORR’s view that the wording of Condition J4.6 does not support this interpretation.
73. Rather, Condition J5.1 governs service of a Third Party Failure to Use Notice, and provides that such a notice can only be served by NR where there is a Failure to Use¹² which is continuing. The question of whether the Failure to Use is continuing is only asked for the purpose of Condition J5.1(b)(iii), to establish if it is continuing in the period before NR serves that notice. If the Failure to Use ceases before NR has given that notice, then the Failure to Use Notice may no longer be given – it is too late. This is the case even where the Failure to Use had been continuing at the time the Train Operator asked NR to issue a Third Party Failure to Use Notice. The relevance of Condition J4.6 (Cessation of Failure to Use) to this process is to clarify when the Failure to Use ceases so that Network Rail can no longer issue a Failure to Use Notice.

¹¹ Use Quota is defined in Part J as “the minimum expected quota for use of a Train Slot, as published by Network Rail in accordance with Condition J4.3.”

¹² A Failure to Use is defined in Condition 4.2.1 as occurring where: “(a) in any First Working Timetable (as defined in Part D) established by Network Rail after the Commencement Date, the Train Operator fails to secure one or more Train Slots in respect of that Quantum Access Right; or (b) the Train Operator fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right. Condition 4.2.3 goes on to provide that, “[f]or the purposes of Condition J4.2.1(b), the Train Operator 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.” Condition 4.3 deals with Use Quotas and Use Periods.

74. Part J does not contemplate that, once properly issued, the Failure to Use Notice can be revisited. The issuing of the notice triggers the rest of the Part J process, which must be followed in accordance with its terms. It follows, then, that a subsequent use can not invalidate a properly issued Failure to Use Notice.
75. The Panel refers to the fact that Condition J4.6 provides that a Failure to Use is to cease once a train slot is used as support for the proposition that a Failure to Use Notice must itself be vulnerable to becoming ineffective once a train slot is used.
76. Importantly, J4.6 refers to a “Failure to Use” ceasing to be continuing, rather than a “Failure to Use Notice”. ORR considers that the purpose of Condition 4.6 is to provide assurance to train operators that Failure to Use Notices can not be issued for past episodes of non-use. As set forth above, once there is a use, there is no longer a valid Failure to Use and therefore the necessary state of affairs for issuance of a Failure to Use Notice does not exist. Because Condition J4.6 does not say that the Failure to Use Notice is invalid once the use ceases to be continuing, and indeed does not speak to the Notice at all, ORR does not consider it to be determinative of the question of the effect of the use of the related rights once a Failure to Use Notice has been issued.
77. Rights which are the subject of a Failure to Use Notice remain vested with the train operator until surrendered. But once a Failure to Use Notice has been issued, the focus moves to any challenge the train operator may make through service of a counter notice, including that it has grounds for objection. If the Failure to Use Notice is upheld (either following an ADRR Determination or appeal to ORR) a surrender will follow. Of

course, the train operator can continue to make use of the Rights during the interim period until any dispute is finally determined.¹³

78. ORR notes the comments made by DBS regarding the history of Condition J4.6 set forth in paragraphs 54-56 above, which were comments on the deletion of provision J4.6(b)(ii) from the 2004 version of Part J made in October 2006.¹⁴
79. ORR acknowledges that it is unfortunate that, with hindsight, those comments are not as clear as they could be. However, ORR does not consider that these comments in relation to the deletion of an earlier provision can be taken as a definitive guide to how the current Condition J4.6 operates going forward where they are apparently inconsistent with the surviving clear text.
80. ORR must interpret the Network Code pursuant to ordinary principles of contractual interpretation. Extrinsic evidence cannot override the clear terms of a written contract. Where words are unclear, such evidence can assist in assigning a definitive meaning to terms. However, it is ORR's view that the terms of Condition J4.6 of the Network Code are sufficiently clear that there is no scope for taking into account any extrinsic documentation.
81. We note the Panel's request for guidance on the interpretation and implications of Part J. [Determination ¶¶6.12; 7.3] ORR is currently considering the responses received to the Review of Part J of the Network Code consultation, and will have regard to these Appeals as part of that

¹³ In appropriate circumstances, ORR could issue an interim order pursuant to Part M7(c) of the Network Code directing the use of the relevant rights by the parties pending final resolution of the matter.

¹⁴ A further change to J4.6 was made in October 2007 to reflect clarification of quantum access rights, but this is not material to the current Appeals. The version of the Network Code Part J which governs these Appeals was introduced in August 2010, although it has since been replaced by a new version in April 2011 – again, the changes set out in those amendments are immaterial to these Appeals.

Review. We expect to publish final conclusions in July 2011 and at the same time provide the industry with an opportunity to comment on our draft proposals for changing the Network Code. Subject to any comments received we will look to submit the formal proposal for change in October 2011.

Ground (ii) – Reasonable On-going Commercial Need

82. Recourse to the Criteria on how to interpret Reasonable On-going Commercial Need is stipulated by Condition J12.1. Initially, ORR agrees with the Panel that the four elements of Reasonable On-going Commercial Need specified in the Criteria must be independently satisfied. The Criteria state that *“a Train Operator must be able to show all of the following”*. This language, and specifically the word *“all”*, quite clearly contemplates a standard whereby each of the four elements must be independently considered and satisfied. ORR does not accept DBS’ argument to the contrary, which is inconsistent with the clear wording of the Criteria, and would apply the Criteria in an unclear manner.
83. The Criteria include a non-exclusive list of examples of *“acceptable reasons for failure to use”* which may include seasonal factors, e.g. commodities for which demand varies during the course of the year; non-economic issues beyond the train operator’s control (such as a fire); and a strike or other industrial action.
84. The examples given in the Criteria as acceptable reasons for a Failure to Use all revolve around a factor which is quite clearly outside the control of the train operator – a commodities fluctuation, a fire, a strike. In these cases, the cessation of use follows directly from a decision or action which was taken by someone other than the train operator. This is the common characteristic of all the examples given, and though the list is non-

exhaustive we consider it would be wrong, having regard to the intention of Part J, to allow reasons which do not share that characteristic. It logically follows then, that a Failure to Use which flows from an action taken by the train operator and which is within its control is not an acceptable reason for a Failure to Use.

85. In ORR's view, a Failure to Use arising out of the decision (taken here for economic reasons) to close the Trafford Park terminal is a classic example of a decision within the control of the operator. As such it is not an acceptable reason for a Failure to Use. The economic nature of the decision is not the decisive factor in considering acceptable reasons for a Failure to Use.
86. Here, DBS's decision to close the Trafford Park terminal was plainly directly within DBS' control. Further, the Panel found that the rights were unused for approximately one year prior to closure of that terminal. [Determination ¶¶5.2.2; 5.2.5]¹⁵ On these facts, there was not an acceptable reason for a Failure to Use.
87. ORR also agrees with the Panel that the issue of W10 gauge capability was not a compelling reason for not using the Rights (see Determination ¶¶6.26). Indeed, if this capability was of commercial importance to DBS, it could have made arrangements to use low platform wagons to carry larger containers on the W8 gauge tracks.
88. Finally, ORR does not accept that by requiring an acceptable reason for a Failure to Use when considering a Reasonable On-going Commercial Need, it is penalising train operators who do not make use of their rights. It is inevitable that there will be conflicting interests between the

¹⁵ This fact was stated to be "not in dispute" by the Panel and was not challenged by DBS in its Notice of Appeal. [Determination ¶5.2] However, ORR has not placed significant weight on this fact; rather its decision is based largely on its analysis of the decision to close the Trafford Park terminal.

incumbent train operator and a new applicant, but there must be a balance struck between the two (which does not mean one is being penalised in favour of the other) - the structure in place in Part J of the Network Code ensures that capacity is utilised fairly and appropriately.

VIII. Conclusion

89. ORR upholds the GBRf (Cessation of Use) Appeal for the reasons set out in paragraphs 70-81.
90. ORR upholds the decision of the Panel with respect to the Commercial Use Appeal for the reasons set out in paragraphs 82-88. Therefore, the DBS Appeal is dismissed.
91. With effect from the date of this determination, the Rights shall be surrendered by DBS and removed from its access agreement in accordance with J4.12.1.



Juliet Lazarus
Duly Authorised for the Office of Rail Regulation
5 July 2011

ANNEX 1 – RELEVANT PORTIONS OF THE NETWORK CODE (AUGUST 2010)

Explanatory Note

- A. Part J provides a number of mechanisms by which a Train Operator's track access rights can be changed, either at the Train Operator's instigation or in circumstances where the Train Operator would prefer to retain the rights concerned. The processes relating to each mechanism are illustrated in the flow charts appended to this Explanatory Note. Before any of the mechanisms are activated, parties are encouraged to enter into informed discussions to consider the most appropriate manner to address specific issues.

...

- D. Conditions J4 and J5 form the use it or lose it (UIOLI) mechanism in Part J. Condition J4 empowers Network Rail to initiate a process leading to the loss of a Train Operator's rights, but does not require Network Rail to do so. Condition J5 deals with circumstances where a third party Train Operator wishes to use capacity on the Network which it considers the Train Operator is not using and where the third party Train Operator cannot otherwise gain the access it wishes.

4. Failure to Use

4.1 Application of Conditions J4 and J5

Conditions J4 and J5 shall apply to a Failure to Use where the condition in Condition J4.2.1 is satisfied in whole or in part before the date on which these Conditions take effect.

4.2 Failure to Use

Subject to Conditions J4.2.2, J4.2.3 and J4.4, a Failure to Use in relation to a Quantum Access Right occurs if:

- (a) in any First Working Timetable (as defined in Part D) established by Network Rail after the Commencement Date, the Train Operator fails to secure one or more Train Slots in respect of that Quantum Access Right;
or
- (b) the Train Operator fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right.

- 4.2.2 Condition J4.2.1(a) shall not apply to Level Two Rights, Contingent Rights or Level Three Rights where Network Rail has been unable to accommodate the Train Operator's Bid into the First Working Timetable.
- 4.2.3 For the purposes of Condition J4.2.1(b), the Train Operator 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.
- 4.3 Use Quota and Use Period
- 4.3.1 The Use Quota and Use Period:
- (a) shall be as determined, and revised from time to time, by the Office of Rail Regulation for the purpose of this Condition J4.3 following such consultation as the Office of Rail Regulation may consider appropriate; and
 - (b) following such determination or revision, shall be published by Network Rail in its network statement, and on its website.
- 4.3.2 The Office of Rail Regulation may:
- (a) determine different Use Quotas and/or different Use Periods for different categories of services for the carriage of:
 - (i) passengers by railway; and
 - (ii) goods by railway;
 - (c) specify the characteristics of train movements that will count or will not count, as applicable, toward any Use Quota; and
 - (d) specify such other matters as the Office of Rail Regulation considers are necessary or expedient to give effect to any Use Quota and any Use Period.
- 4.4 Certain periods to be disregarded
- Any period of non-use shall be disregarded for the purpose of determining whether a Failure to Use has occurred under Condition J4.2.1(a) or (b) if, and to the extent that, such non-use is attributable to non-economic reasons beyond the Train Operator's control.
- 4.5 Service of Failure to Use Notice
- If Network Rail considers there is a Failure to Use by a Train Operator and that Failure to Use is continuing:

- (a) it may serve a Failure to Use Notice on the Train Operator requiring the Train Operator to surrender Rights Subject to Surrender; and
- (b) if it does so, it shall send a copy of the notice of the Office of Rail Regulation.

4.6 Cessation of Failure to Use

A Failure to Use shall cease to be continuing for the purpose of Condition J4.5 if:

- (a) in relation to a Failure to Use under Condition J4.2.1(a):
 - (i) the Train Operator Bids for a Train Slot in respect of the relevant Quantum Access Right before the compilation of a subsequent First Working Timetable; and
 - (ii) Network Rail has not served a Failure to Use Notice before the Bid under Condition J4.6(a)(i) is made; and
- (b) in relation to a Failure to Use under Condition J4.2.1(b), the Train Operator makes use of a relevant Train Slot such that the Use Quota is met.

4.7 Contents of a Failure to Use Notice

A Failure to Use Notice shall specify:

- (a) the Failure to Use which Network Rail considers has occurred; and
- (b) the Rights Subject to Surrender which Network Rail requires the Train Operator to surrender.

4.8 Acceptance of surrender

If the Train Operator agrees to the surrender specified in the Failure to Use Notice then:

- (a) it shall, within 10 Working Days, give notice to that effect to Network Rail and the Office of Rail Regulation;
- (b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J4.8(c); and
- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Train Operator's Access Agreement no more than 10 Working Days after the date on which the Train Operator agrees to the surrender pursuant to Condition J4.8(a).

4.9 Counter Notice

4.9.1 The Train Operator 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 that the Failure to Use was not continuing at the date of the service of the Failure to Use Notice; 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 Train Operator following the surrender of the relevant Quantum Access Right; and/or

(d) there are Grounds for Objection to the proposed surrender within Condition J4.10, detailing the Grounds for Objection on which it relies,

and must provide evidence with the Counter Notice in support of its contentions. The Train Operator shall send a copy of any Counter Notice and such evidence to the Office of Rail Regulation.

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

(a) the Train Operator will be deemed to have agreed to the surrender specified in the Failure to Use Notice;

(b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J4.9.2(c); and

(c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Train Operator's Access Agreement no more than 10 Working Days after the date on which the Train Operator is deemed to have agreed to the surrender pursuant to Condition J4.9.2(a).

4.10 Grounds for Objection

4.10.1 The Train Operator may object to a surrender specified in a Failure to Use Notice relating to services for the carriage of passengers by railway on the grounds that:

- (a) the Rights Subject to Surrender are essential for the fulfilment of the Train Operator's Franchised Services; or
 - (b) the Rights Subject to Surrender relate to an enhancement of the Network for which the Train Operator is contracted to pay through access charges.
- 4.10.2 The Train Operator may object to a surrender specified in a Failure to Use Notice relating to services for the carriage of goods by railway on the grounds:
 - (a) set out in Condition J4.10.1(b); or
 - (b) that it has a reasonable on-going commercial need in respect of any or all of the Rights Subject to Surrender.
- 4.11 Cessation of notice

If the Train Operator and Network Rail agree or it is Determined:

 - (a) that the matters set out in Condition J4.9.1(a), (b) or (c) have been substantiated; or
 - (b) that the Train Operator's Grounds for Objection have been substantiated in respect of any or all of the Rights Subject to Surrender,

the Failure to Use Notice shall cease to have effect to the extent so agreed or Determined.
- 4.12 Surrender of Access Rights
 - 4.12.1 If it is Determined that the Train Operator has no Grounds for Objection in respect of all or any of the Rights Subject to Surrender, then the rights that are to be surrendered will be surrendered, and removed in their entirety from the Train Operator's Access Agreement, from the date:
 - (a) on which notice is given to the Office of Rail Regulation pursuant to Condition J4.12.2, in the event of an ADRR Determination; or
 - (b) specified in the Office of Rail Regulation Determination, if applicable.
 - 4.12.2 In the event of an ADRR Determination in accordance with Condition J4.12.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Train Operator's Access Agreement no more than 10 Working Days after the date of that ADRR Determination and shall include a copy of the relevant ADRR Determination with such notice.
- 4.13 Bids

Where any Rights Subject to Surrender surrendered under this Condition J4 include the surrender of a Bid, Network Rail's obligations under Condition D4.7.1 shall cease to have effect in respect of that Bid as from the date the surrender takes effect in accordance with this Condition J4.

5 Failure to Use: third party application

5.1 Third Party Failure to Use Notices

If:

(a) Network Rail receives an application from a Train Operator (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 Train Operator (the "Incumbent"); and

(iii) is one in respect of which there is a continuing Failure to Use by the Incumbent,

then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a Third Party Failure to Use Notice on the Incumbent and send a copy of the notice to the Office of Rail Regulation. 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

For the purposes of Condition J5.1(b)(iii), whether a Failure to Use has ceased to be continuing shall be determined in accordance with Condition J4.6.

5.3 Contents of a Third Party Failure to Use Notice

A Third Party 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 Incumbent to surrender; and

(c) the date on which the surrender is intended to take effect.

5.4 Application of Conditions

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

- (a) J4.8 (Acceptance of surrender);
- (b) J4.9 (Counter Notice);
- (c) J4.11 (Cessation of notice);
- (d) J4.12 (Surrender of Access Rights), where in respect of this Condition J5, 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;
- (e) J4.13 (Bids), as if that Condition referred to a surrender under this Condition J5.

5.5 Counter Notice

Subject to the redaction of any commercially sensitive information, the Incumbent shall send a copy of any Counter Notice issued under Condition 5.4(b) to the Applicant.

12 Reasonable on-going commercial need

12.1 In this Part J, the phrase 'reasonable on-going commercial need' shall be interpreted in accordance with rules or criteria (if any) determined and revised from time to time in accordance with this Condition J12 which, subject to Condition J12.4:

- (a) follow consultation by Network Rail with the appropriate franchising authority and Train Operators providing services for the carriage of goods by railway; and
- (b) have been approved by the Office of Rail Regulation.

12.2 If Network Rail wishes to revise the rules or criteria published pursuant to Condition J.12, it shall submit the revised rules or criteria to the Office of Rail Regulation for approval. The revised rules or criteria shall have effect only with the Office of Rail Regulation's consent.

- 12.3 If:
- (a) The Office of Rail Regulation does not give its approval to the revised rules or criteria described in Condition J12.2; or
 - (b) the Office of Rail Regulation considers that the rules or criteria published pursuant to Condition J12.1 should be revised, the Office of Rail Regulation may issue a notice requiring Network Rail to publish the revised rules or criteria specified in the notice and Network Rail shall comply with any such requirements. If Network Rail fails to comply with any such requirements of the Office of Rail Regulation within the time specified in the notice from the Office of Rail Regulation, the Office of Rail Regulation may publish the revised rules and criteria itself.
- 12.4 The revised rules or criteria shall be published by Network Rail in its network statement, and on its website.
- 12.5 No notice of the Office of Rail Regulation under Condition J12.3 shall have effect unless the Office of Rail Regulation has:
- (a) consulted Network Rail, the appropriate franchising authority and Train Operators providing services for the carriage of goods by railway in relation to the issues specified in the notice;
 - (b) taken into account any representations made by the parties in response to the consultation under Condition J12.5(a); and
 - (c) notified Network Rail, the appropriate franchising authority and those Train Operators as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions.
- 12.6 The rules or criteria published in accordance with this Condition J12 may differentiate between the use of the phrase 'reasonable on-going commercial need' in the context of:
- (a) Rights Subject to Surrender; and
 - (b) a Cordon Cap Reduction.

13 Dispute Resolution

- 13.1 If within 5 Working Days of:

- (a) receipt by the Train Operator of a Relevant Response under Condition J2.2;
- (b) receipt by Network Rail of a Counter Notice under Condition J4.9.1;
- (c) receipt by Network Rail of a Counter Notice under Condition J5.4(b);
- (d) receipt by Network Rail of a Counter Notice under Condition J6.2.5;
- (e) receipt by Network Rail of a Third Party Counter Notice under Condition J7.6.1;
- (f) receipt by Network Rail of a Third Party Counter Notice under Condition J8.2.5;
- (g) receipt by Network Rail of a Counter Notice under Condition J8.3.2; or
- (h) the end of the Rights Review Meeting under Condition J9,

Network Rail and the Train Operator or the Incumbent (as the case may be) have failed to reach agreement on whether the Specified Relevant Adjustment, Specified Relevant Surrender or Cordon Cap reduction (as the case may be) shall have effect, the Train Operator, in the case of a Relevant Response received by the Train Operator under Condition J2, or either party, in all other cases, may refer the matter for determination in accordance with the ADRR.

- 13.2 In determining matters in accordance with the ADRR referred under Condition J2, due regard is to be given to any criteria which the Office of Rail Regulation has most recently published (and identified as such) in relation to the surrender or adjustment of Access Rights.
- 13.3 If either Network Rail, the Train Operator or the Incumbent is dissatisfied with any decision made in accordance with the relevant ADRR in relation to any matter referred to it under Condition J13.1(a)-(e) or (h), that party may, within 10 Working Days of receipt of that determination, refer the matter to the Office of Rail Regulation for Determination under Part M. This right of appeal shall be automatically incorporated into and cannot be excluded from, any procedure agreement agreed by the parties or applied to the dispute in accordance with the ADRR.